**DATED**

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Consultant's collateral warranty

relating to a project at

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This deed is dated [DATE]

BACKGROUND

1. The Client has engaged the Consultant to perform the Services in relation to the Project.
2. The Beneficiary, as Main Contractor, has an interest in the Project.
3. The Client requires the Consultant to enter into a collateral warranty in favour of the Beneficiary.
4. The Consultant has agreed to enter into this agreement with the Client and the Beneficiary, for the benefit of the Beneficiary.
5. The Beneficiary has paid £1 to the Consultant and the Client as consideration under this agreement.

Agreed terms

1. Interpretation

The following definitions and rules of interpretation apply in this agreement.

* 1. Definitions:

Business Day: a day other than a Saturday, Sunday or public holiday in England when banks in London are open for business.

CDM Regulations: the Construction (Design and Management) Regulations 2015 (SI 2015/51).

Client:

Construction Products Regulations: the Construction Products Regulations 2013 (SI 2013/1387), the Construction Products Regulation (305/2011/EU), the Construction Products Regulations 1991 (SI 1991/1620) and the Construction Products Directive (89/109/EC).

Deleterious: materials, equipment, products or kits that are generally accepted, or generally suspected, in the construction industry at the relevant time as:

1. posing a threat to the health and safety of any person; or
2. posing a threat to the structural stability, performance or physical integrity of the Project or any part or component of the Project; or
3. reducing, or possibly reducing, the normal life expectancy of the Project or any part or component of the Project; or
4. not being in accordance with any relevant British Standard, relevant code of practice, good building practice or any applicable agrément certificate issued by the British Board of Agrément; or
5. having been supplied or placed on the market in breach of the Construction Products Regulations.

Material: all designs, drawings, models, plans, specifications, design details, photographs, brochures, reports, notes of meetings, CAD materials, calculations, data, databases, schedules, programmes, bills of quantities, budgets and any other materials provided in connection with the Project and all updates, amendments, additions and revisions to them and any works, designs, or inventions incorporated or referred to in them for any purpose relating to the Project.

Permitted Uses: the design, construction, completion, reconstruction, modification, refurbishment, development, maintenance, facilities management, funding, disposal, letting, fitting-out, advertisement, decommissioning, demolition, reinstatement[, extension], building information modelling and repair of the Property and the Project.

Professional Appointment: an agreement in writing dated [DATE] between the Consultant and the Client.

Programme: the programme, as defined in the Professional Appointment.

Project:

Required Standard: all the reasonable skill, care and diligence to be expected of a qualified and experienced member of the Consultant's profession undertaking the Services on works similar in scope and character to the Project.

Services: the services referred to in the Professional Appointment, performed by or on behalf of the Consultant under the Professional Appointment.

Third Party Agreement: any agreement between the Client and a third party relating to the Project and of which:

1. a copy, or relevant extract, is attached to the Professional Appointment; or
2. the Client notifies the Consultant in writing after the date of the Professional Appointment enclosing a copy or relevant extracts.
   1. Clause headings shall not affect the interpretation of this agreement.
   2. A person includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).
   3. A reference to a company includes any company, corporation or other body corporate, wherever and however incorporated or established.
   4. Unless the context otherwise requires, words in the singular shall include the plural and in the plural include the singular.
   5. Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.
   6. This agreement shall be binding on, and enure to the benefit of, the parties to this agreement and their respective personal representatives, successors and permitted assigns, and references to any party shall include that party's personal representatives, successors and permitted assigns.
   7. A reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time.
   8. A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision.
   9. Any obligation on a party not to do something includes an obligation not to allow that thing to be done.
   10. A reference to writing or written includes fax and email.
   11. A reference to a document is a reference to that document as varied or novated (in each case, other than in breach of this agreement) at any time.
   12. References to clauses are to the clauses of this agreement.
   13. Any words following the terms including, include, in particular, for example or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.
3. Comply with Professional Appointment
   1. The Consultant warrants to the Beneficiary that:
      1. it has complied, and shall continue to comply, with its obligations under the Professional Appointment, including its obligations to:
         1. carry out and fulfil, in all respects, the duties of a designer under the CDM Regulations;
         2. not, without the Client's written consent, make any material change to the designs or specifications for the Project after they have been settled or approved; and
         3. act fairly and impartially when exercising its power to issue certificates and award extensions of time under any building contract relating to the Project.
      2. it has exercised and shall continue to exercise the Required Standard:
         1. when performing the Services;
         2. not to specify for use anything in the Project, which is Deleterious at the time of specification or use;
         3. to comply with (and ensure the completed Project complies with) any Act of Parliament and any instrument, rule or order made under any Act of Parliament;
         4. to comply with (and ensure the completed Project complies with) any regulation or bye-law of any local authority, statutory undertaker or public or private utility or undertaking that has any jurisdiction over the Project or with whose systems or property the Project is or will be connected;
         5. to perform the Services and prepare all Material for those elements of the Project for which the Consultant is responsible according to the Programme or, in the absence of a Programme, in sufficient time to facilitate the efficient progress of the Project;
         6. to ensure that the Project complies with all planning agreements, permissions and conditions; and
         7. not to cause or contribute to any breach by the Client of any Third Party Agreement provided that, where the Client notifies the Consultant of a Third Party Agreement after the date of the Professional Appointment, the Consultant is not required to act in any way that may increase its liability in excess of that which was reasonably foreseeable at the date of the Professional Appointment.
   2. In proceedings for breach of this clause 2., the Consultant may:
      1. rely on any limit of liability or other term of the Professional Appointment; and
      2. raise equivalent rights of defence as it would have had if the Beneficiary had been named as a joint client, with the Client, under the Professional Appointment (for this purpose not taking into account any set-off or counterclaim against the actual client under the Professional Appointment).
   3. The Consultant's duties or liabilities under this agreement shall not be negated or diminished by:
      1. any approval or inspection of:
         1. the Property; or
         2. the Project; or
         3. any designs or specifications for the Property or the Project; or
      2. any testing of any work, goods, materials, plant or equipment; or
      3. any omission to approve, inspect or test,

by or on behalf of the Beneficiary or the Client.

* 1. This agreement shall not negate or diminish any other duty or liability otherwise owed to the Beneficiary by the Consultant.

1. Step-in rights: Consultant may not terminate or discontinue
   1. The Consultant shall not exercise, or seek to exercise, any right to:
      1. terminate its employment under the Professional Appointment; or
      2. discontinue performance of the Services,

for any reason (including any breach on the part of the Client) without giving the Beneficiary at least 20 Business Days' written notice of its intention to do so. Any notice from the Consultant shall specify the grounds for the Consultant's proposed termination or discontinuance.

* 1. If the Professional Appointment allows the Consultant a shorter notice period for the exercise of a right referred to in clause 3.1, the notice period in the Professional Appointment shall be extended to take account of the notice period required under clause 3.1.
  2. The Consultant's right to terminate its employment under the Professional Appointment, or to discontinue performance of the Services, shall cease if, within the period referred to in clause 3.1, the Beneficiary gives notice to the Consultant, copied to the Client:
     1. requiring the Consultant not to terminate its employment or not to discontinue performance of the Services under the Professional Appointment;
     2. acknowledging that the Beneficiary (or its nominee) will assume all the Client's obligations under the Professional Appointment; and
     3. undertaking that the Beneficiary or its nominee will pay to the Consultant:
        1. any sums due and payable to the Consultant under the Professional Appointment in future; and
        2. any sums then due and payable to the Consultant under the Professional Appointment that are unpaid.
  3. If the Beneficiary (or its nominee) serves notice on the Consultant under clause 3.3, then, from the date of service of the notice, the Professional Appointment shall continue in full force and effect, as if it had been entered into between the Consultant and the Beneficiary (to the exclusion of the Client).
  4. In complying with this clause 3., the Consultant:
     1. does not waive any breach of the Professional Appointment or default under the Professional Appointment by the Client; and
     2. may exercise its right to terminate its employment under the Professional Appointment, or discontinue performance of the Services, after the expiry of the notice period referred to in clause 3.1, unless the Consultant's right to terminate or discontinue has ceased under clause 3.3.

1. Step-in rights: Beneficiary may step-in
   1. Without affecting clause 3.1, if the Beneficiary serves a notice on the Consultant, copied to the Client, that:
      1. confirms that the Beneficiary wishes to step-in to the Professional Appointment; and
      2. complies with the requirements for a Beneficiary's notice under clause 3.3,

then, from the date of service of the notice, the Professional Appointment shall continue in full force and effect, as if it had been entered into between the Consultant and the Beneficiary (or its nominee), to the exclusion of the Client.

* 1. The Consultant shall assume that, between the Client and the Beneficiary, the Beneficiary may give a notice under clause 4.1. The Consultant shall not enquire whether the Beneficiary may give that notice.
  2. In complying with this clause 4. the Consultant does not waive any breach of the Professional Appointment or default under the Professional Appointment by the Client.

1. Step-in rights: Consultant's position and Client's consent
   1. The Consultant shall not incur any liability to the Client by acting in accordance with clause 3. or clause 4.
   2. The Client has entered into this agreement to confirm its consent to the agreement.
2. No instructions to Consultant by Beneficiary

Unless the Beneficiary has stepped-in under clause 3. or clause 4., the Beneficiary may not give instructions to the Consultant under this agreement.

1. Copyright
   1. The Consultant grants to the Beneficiary, with immediate effect, an irrevocable, non-exclusive, non-terminable, royalty-free licence to copy and make full use of any Material prepared by, or on behalf of, the Consultant for any purpose relating to the Project and the Property, including any of the Permitted Uses.
   2. This licence carries the right to grant sub-licences and is transferable to third parties without the consent of the Consultant.
   3. The Consultant shall not be liable for use of the Material for any purpose other than that for which it was prepared and/or provided.
   4. The Beneficiary may request a copy (or copies) of some or all of the Material from the Consultant. On the Beneficiary's payment of the Consultant's reasonable charges for providing the copy (or copies), the Consultant shall provide the copy (or copies) to the Beneficiary.
2. Professional indemnity insurance
   1. The Consultant shall maintain professional indemnity insurance for an amount of at least £[SUM] [for any one occurrence, or series of occurrences, arising out of any one event for a period beginning on the date of this agreement and ending 12 years after the date of making good of defects of the Project, provided that such insurance is available at commercially reasonable rates and terms. The Consultant shall maintain that professional indemnity insurance:
      1. with reputable insurers lawfully carrying on insurance business in the UK or EU;
      2. on customary and usual terms and conditions prevailing for the time being in the insurance market; and
      3. on terms that:
         1. do not require the Consultant to discharge any liability before being entitled to recover from the insurers; and
         2. would not adversely affect the rights of any person to recover from the insurers under the Third Parties (Rights Against Insurers) Act 2010.
   2. Any increased or additional premium required by insurers because of the Consultant's claims record or other acts, omissions, matters or things particular to the Consultant shall be deemed to be within commercially reasonable rates.
   3. The Consultant shall not, without the Beneficiary's written consent:
      1. settle or compromise any claim with the insurers that relates to a claim by the Beneficiary against the Consultant; or
      2. by any act or omission lose or affect the Consultant's right to make, or proceed with, that claim against the insurers.
   4. The Consultant shall immediately inform the Beneficiary if the Consultant's required professional indemnity insurance ceases to be available at commercially reasonable rates [and terms], so that the Consultant and the Beneficiary can discuss how best to protect the respective positions of the Beneficiary and the Consultant regarding the Project and the Property, without that insurance.
   5. The Consultant shall fully co-operate with any measures reasonably required by the Beneficiary, including:
      1. completing any proposals for insurance and associated documents; or
      2. maintaining insurance at rates above commercially reasonable rates, if the Beneficiary reimburses the Consultant for the net cost of that insurance above commercially reasonable rates.
   6. Whenever the Beneficiary reasonably requests, the Consultant shall send the Beneficiary evidence that the Consultant's professional indemnity insurance is in force, including, if required by the Beneficiary, an original letter from the Consultant's insurers or brokers confirming:
      1. the Consultant's then current professional indemnity insurance; and
      2. that the premiums for that insurance have been paid in full at the date of that letter.
3. Liability period

The Beneficiary may not commence any legal action against the Consultant under this agreement after 12 years from the date of making good of defects of all of the Project.

1. Assignment
   1. The Beneficiary may assign the benefit of this agreement:
      1. on two occasions to any person [with an interest in the Project]; and
      2. without counting as an assignment under clause 10.1(a) to and from subsidiary or other associated companies within the same group of companies as the Beneficiary so long as that assignee company remains within the same group of companies as the Beneficiary.
   2. The Beneficiary shall notify the Consultant of any assignment. If the Beneficiary fails to do this, the assignment shall still be valid.
   3. The Consultant shall not contend that any person to whom the benefit of this agreement is assigned under clause 10.1 may not recover any sum under this agreement because that person is an assignee and not a named party to this agreement.
2. Notices
   1. For the purposes of this clause, but subject to clause 11.7, notice includes any other communication.
   2. A notice given to a party under or in connection with this agreement:
      1. shall be in writing and in English;
      2. shall be signed by or on behalf of the party giving it;
      3. shall be sent to the party for the attention of the contact and at the address, fax listed in clause 11.3;
      4. shall be sent by a method listed in clause 11.5; and
      5. is deemed received as set out in clause 11.5 if prepared and sent in accordance with this clause.
   3. The parties' addresses and contacts are as set out in this table:

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* 1. A party may change its details given in the table in clause 11.3 by giving notice, the change taking effect for the party notified of the change at 9.00 am on the later of:
     1. the date, if any, specified in the notice as the effective date for the change; or
     2. the date five Business Days after deemed receipt of the notice.
  2. This table sets out:
     1. delivery methods for sending a notice to a party under this agreement; and
     2. for each delivery method, the corresponding delivery date and time when delivery of the notice is deemed to have taken place provided that all other requirements in this clause have been satisfied and subject to the provisions in clause 11.6:

|  |  |
| --- | --- |
| **Delivery method** | **Delivery date and time** |
| Delivery by hand. | On signature of a delivery receipt or at the time the notice is left at the address. |
| Pre-paid first class recorded delivery post or other next working day delivery service providing proof of postage **OR** proof of delivery. | 9.00 am on the second Business Day after posting or at the time recorded by the delivery service. |
| Fax. | At the time of transmission. |
| Document exchange (DX). | 9.00 am on the second Business Day after being put into the DX. |

* 1. For the purpose of clause 11.5 and calculating deemed receipt:
     1. all references to time are to local time in the place of deemed receipt; and
     2. if deemed receipt would occur in the place of deemed receipt on a Saturday or Sunday or a public holiday when banks are not open for business, deemed receipt is deemed to take place at 9.00 am on the day when business next starts in the place of receipt.
  2. This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.
  3. A notice given under or in connection with this agreement is not valid if sent by email.

1. Third party rights

A person who is not a party to this agreement shall not have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this agreement.

1. Governing law

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

1. Jurisdiction

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

This document has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.

Signature

|  |  |  |
| --- | --- | --- |
| Executed as a deed by |  | ....................  SIGNATURE OF FIRST DIRECTOR  Director  ....................  SIGNATURE OF SECOND DIRECTOR OR SECRETARY  Director OR Secretary |
|  | | |
| Executed as a deed by  acting by NAME OF FIRST DIRECTOR, a director and NAME OF SECOND DIRECTOR/SECRETARY, a director OR its secretary |  | ....................  SIGNATURE OF FIRST DIRECTOR  Director  ....................  SIGNATURE OF SECOND DIRECTOR OR SECRETARY  Director OR Secretary |
|  | | |
| Signed as a deed by |  | ....................  SIGNATURE OF Client |
| ....................  SIGNATURE OF WITNESS  NAME, ADDRESS AND OCCUPATION OF WITNESS |  |  |
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