

DATED

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**FORM OF AGREEMENT FOR AN NEC3 PROFESSIONAL SERVICES CONTRACT**

for consultancy services in connection with

**THE DESIGN AND CONSTRUCTION OF A NEW LEISURE FACILITY IN  
WINCHESTER, INCLUDING A 50 METRE SWIMMING POOL**

between

**WINCHESTER CITY COUNCIL**

and

[ ]<sup>1</sup>



One Central Square  
Cardiff  
CF10 1FS

**[www.blakemorgan.co.uk](http://www.blakemorgan.co.uk)**

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<sup>1</sup> Name of Consultant to be inserted

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**THIS DEED** is dated

## **PARTIES**

- (1) **WINCHESTER CITY COUNCIL** of City Offices, Colebrook Street, Winchester, Hampshire SO23 9LJ (**Employer**, which expression includes its permitted successors in title and assigns).
- (2) [ ]<sup>2</sup> incorporated and registered in England and Wales with company number [ ]<sup>3</sup> whose registered office is at [ ]<sup>4</sup> (**Consultant**).

## **BACKGROUND**

- (A) The *Employer* has conducted a procurement process in accordance with the Public Contracts Regulations 2015 in respect of its requirements for consultancy services in connection with the design and construction a new leisure facility in Winchester, which is to include a 50 metre swimming pool ("**the Project**"):
- (a) On [ ]<sup>5</sup>, the *Employer* placed an advertisement in the Official Journal of the EU ("**OJEU Notice**").
- (b) On [ ]<sup>6</sup>, the *Employer* issued an Invitation to Tender ("**ITT**") for the *services*.
- (c) On [ ]<sup>7</sup>, the *Consultant* submitted a tender for the *services*.
- (d) On [ ]<sup>8</sup> the *Employer* notified the *Consultant* that its tender was successful.
- (B) The *Employer* wishes to appoint the *Consultant* to Provide the Services in accordance with the terms of this Agreement.
- (C) The *Consultant* has agreed to Provide the Services in accordance with the *conditions of contract* and other contract documents specified in clause 4 of this Agreement.

## **AGREED TERMS**

### **1. INTERPRETATION**

Unless the context otherwise requires:

- (a) any term used with initial capital letters has the meaning given to it in the *conditions of contract*; and
- (b) any italicised term has the meaning given to it in the Contract Data.

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<sup>2</sup> Name of Consultant to be inserted

<sup>3</sup> Company number of Consultant to be inserted

<sup>4</sup> Address of Consultant to be inserted

<sup>5</sup> Insert date of OJEU Notice

<sup>6</sup> Insert date of ITT

<sup>7</sup> Insert date of Consultant's tender

<sup>8</sup> Insert date on which Consultant notified its tender was accepted.

**2. CONSULTANT'S RESPONSIBILITIES**

The *Consultant* will Provide the Services in accordance with the *conditions of contract* and other contract documents specified in clause 4 below.

**3. EMPLOYER'S RESPONSIBILITIES**

The *Employer* will pay the *Consultant* for the *services* and carry out his other duties in relation to the contract in accordance with the *conditions of contract* and other contract documents specified in clause 4 below.

**4. CONTRACT FOR THE SERVICES**

The contract for the *services* comprises:

- (a) the *conditions of contract* in the form of the NEC3 Professional Services Contract, April 2013 edition, incorporating the following options:
  - (i) Option A;
  - (ii) Dispute resolution Option W2;
  - (iii) Options X8, X10, X11, Y(UK)2, Y(UK)3 and Z; and
- (b) the *additional conditions of contract* annexed to this Agreement at Annex 2,

together with the Scope, the Activity Schedule, the completed Contract Data, Annex 5 and this Agreement.

**5. CONTRACT DATA**

A copy of the completed Contract Data is annexed to this Agreement at Annex 1.

**6. ADDITIONAL CONDITIONS OF CONTRACT**

A copy of the *additional conditions of contract* is annexed to this Agreement at Annex 2.

**7. PRIORITY OF DOCUMENTS**

If there is any ambiguity or inconsistency in or between the documents comprising this contract, the priority of the documents is in accordance with the following sequence:

- (a) this Agreement;
- (b) the completed Contract Data,
- (c) the *additional conditions of contract*;
- (d) the Scope;
- (e) the other *conditions of contract*; and
- (f) any other document forming part of the contract.

**8. PRIOR AGREEMENTS**

This Agreement supersedes any previous agreement between the Parties in relation to the *services*.

**9. VARIATION**

The terms of this Agreement may only be varied by an express written agreement to that effect executed as a Deed by the *Employer* and the *Consultant*. No waiver, estoppel, acceptance, or other ground on which the *Employer* may be said to have lost its right to insist on its strict rights under this Agreement, shall have such effect unless expressly so executed as a variation to this Agreement as stated above.

**10. JOINT AND SEVERAL LIABILITY (WHERE THE *CONSULTANT* IS A PARTNERSHIP)**

The *Consultant's* obligations are the joint and several obligations of all the partners of the *Consultant* whether or not they have executed this Agreement and the partners of the *Consultant* who have executed this Agreement jointly and severally warrant that in executing this deed they have the power to bind under seal all the partners of the *Consultant* jointly and severally.

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

**EXECUTED AS A DEED by WINCHESTER CITY COUNCIL**

By affixing hereto its common seal in the presence of

Signed .....

Name .....

Job title.....

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]

## Annex 1      Completed Contract Data

### Part one – Data provided by the *Employer*

#### General

The *conditions of contract* are the core clauses and the clauses for main Option A, dispute resolution Option W2 and secondary Options X8, X10, X11, Y(UK)2, Y(UK)3 and Z of the NEC3 Professional Services Contract (April 2013), as supplemented and amended by the *additional conditions of contract*.

The *Employer* is

Name: **Winchester City Council**

Address: **City Offices, Colebrook Street, Winchester, Hampshire SO23 9LJ**

The *Adjudicator* is **to be nominated by the *Adjudicator nominating body***.

The *services* are **architectural design, lead designer and Principal Designer (as defined by the Construction (Design and Management) Regulations 2015) services in respect of the design and construction of a new leisure facility in Winchester (including a 50 metre swimming pool), as more particularly described in the Scope.**

The Scope is **in Annex 3.**

The *language of this contract* is **English.**

The *law of the contract* is the law of **England and Wales.**

The *period for reply* is **2 weeks.**

The *period for retention* is **12 years following Completion or earlier termination of this contract.**

The *Adjudicator nominating body* is **the Royal Institution of Chartered Surveyors.**

The *tribunal* is **litigation in the Courts of England and Wales.**

The following matters will be included in the Risk Register

[ ]<sup>9</sup>.

**The Parties' main responsibilities** The *Employer* provides access to the following persons, places and things:

access to *access date*  
*Employer's Agent* **Contract Date**  
[named representative  
of Council<sup>10</sup>] **Contract Date**

**Time** The *starting date* is the **Contract Date**.

The Consultant submits revised programmes at intervals of no longer than **4 weeks**.

**Quality** The quality policy statement and quality plan are provided within **4 weeks** of the Contract Date.

The *defects date* is **52** weeks after Completion of the whole of the *services*.

**Payment** The *assessment interval* is **one calendar month**.

The *currency of this contract* is **Pounds Sterling (£)**.

The *interest rate* is **5%**<sup>11</sup> per annum above the **base rate in force from time to time of the Bank of England**.

**Indemnity insurance and liability** The amounts of insurance and the periods for which the *Consultant* maintains insurance are

Event	cover	period following Completion of the whole of the <i>services</i> or earlier termination of this contract

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<sup>9</sup> Insert any agreed risks to be included in the Risk Register

<sup>10</sup> Insert name

<sup>11</sup> 5% recommended to avoid any risk of the Late Payment of Commercial Debts (Interest) Act applying by default



failure of <i>Consultant</i> to use the level of skill and care required by this contract	<b>£10,000,000.00</b> <b>(Ten Million Pounds)</b> in respect of each claim without limit to the number of claims.	<b>12 years</b>
death of or bodily injury to a person (not an employee of the <i>Consultant</i> ) or loss of or damage to property resulting from an action or failure to take action by the <i>Consultant</i>	<b>£10,000,000.00</b> <b>(Ten Million Pounds)</b> in respect of each claim without limit to the number of claims.	<b>12 months</b>
death of or bodily injury to employees of the <i>Consultant</i> arising out of and in the course of their employment in connection with this contract	<b>£10,000,000.00</b> <b>(Ten Million Pounds)</b> in respect of each claim without limit to the number of claims.	<b>12 months</b>

The *Employer* provides the following insurances: **None**

The *Consultant's* liability to the *Employer* for all matters arising under or in connection with this contract, other than the excluded matters, is limited to **£10,000,000.00 (Ten Million Pounds)** for each and every claim with no limit on the number of claims.

#### Optional Statements

The *completion date* for the whole of the *services* is **52 weeks after practical completion of the Project.**

The *Consultant* is to submit a first programme for acceptance within **4 weeks** of the Contract Date.

The *key dates* and *conditions* to be met are:

*condition to be met* *key date*<sup>12</sup>

1.....	.....
2.....	.....
3.....	.....

If Y(UK)2 is used and the final date for payment is not 14 days after the date when payment is due:

- The period for payment is **23 days after the date when payment is due**<sup>13</sup>.

The *Consultant* prepares forecasts of the total *expenses* at intervals of no longer than **4 weeks**.

#### Option X8

The *collateral warranty agreements* are **those required under clause Z5**

#### Option X10

The *Employer's Agent* is

Name: **Mace Limited**

Address: **Anglo St James House, 39A Southgate Street, Winchester SO23 9EH**

**Save to the extent that the *Employer* may otherwise specify by notice to the *Consultant*, the *Employer's Agent* shall have full authority to receive and issue applications, invoices, consents, instructions, notices, requests, quotations or statements and otherwise to act for the *Employer* under any of the *conditions of contract*.**

#### Option Y(UK)3

Term	person or organisation
The following clauses of this contract may be relied upon directly by the persons or organisations referenced in this table: 1 (General), 2 (the Parties' main responsibilities), 4 (Quality), 7 (Rights to material), 8 (Indemnity, insurance and liability), Y(UK)3 and Option Z ( <i>additional conditions of contract</i> )	Any Funder. In the alternative (at the Funder's discretion) the Funder may require a collateral warranty from the <i>Consultant</i> in the form set out in Annex 5.  Any Purchaser, Tenant or Operator. In the alternative (at the Purchaser, Tenant or Operator's discretion), the Purchaser, Tenant or Operator may require a collateral

<sup>12</sup> If any key dates are to be met by the *Consultant* (e.g. completion of stage, or completion of a particular deliverable) insert details here.

<sup>13</sup> Invoices are "due" 7 days after receipt, so a final date for payment 23 days after the due date equates to a requirement to pay invoices 30 days after receipt.

	<p>warranty from the <i>Consultant</i> in the form set out in Annex 5.</p> <p>Any Contractor engaged by the <i>Employer</i> to carry out and complete the design and construction of the Project.</p>
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## Option Z

The *additional conditions of contract* are **set out in Annex 2**.

## Part two – Data provided by the *Consultant*

The *Consultant* is

Name: [ ]<sup>14</sup>

Address: [ ]<sup>15</sup>

The *key people* are:

(1) Name: [ ]<sup>16</sup>

Job: [ ]

Responsibilities: [ ]

Qualifications: [ ]

Experience: [ ]

(2) Name: [ ]

Job: [ ]

Responsibilities: [ ]

Qualifications: [ ]

Experience: [ ]

The *staff rates* are:

name/designation

rate

[ ]

[ ]<sup>17</sup>

The following matters will be included in the Risk Register

[ ]<sup>18</sup>

<sup>14</sup> Insert name of Consultant

<sup>15</sup> Insert address of Consultant

<sup>16</sup> Insert details of key personnel to be used by the Consultant in providing the services, as stated in the Consultant's tender

<sup>17</sup> Insert tendered staff rates (to be used for pricing additional work)

<sup>18</sup> Insert any agreed risks to be included in the Risk Register

The *expenses* stated by the *Consultant* are:

item	amount
[REDACTED]	[REDACTED] <sup>19</sup>

- The *activity schedule* is **in Annex 4**
- The tendered total of the Prices is £[REDACTED]<sup>20</sup>

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<sup>19</sup> Insert details of any chargeable expenses

<sup>20</sup> Insert the Consultant's tendered fee

## **Annex 2      *additional conditions of contract***

The *additional conditions of contract* are part of this contract and are set out below:

### **PART A: Amendments to the conditions of contract:**

The *conditions of contract* are amended as set out below:

Delete clause 11.2(4) and replace as follows:

- “11.2(4)      The Contract Date is the date of execution of the form of Agreement between the Parties to which this Contract Data is appended or (if earlier) the date when the *Consultant* first begins to Provide the Services”

Amend clause 11.2(15) to delete the words “which would delay immediately following work”

Add a new clause 11.2(19) as follows:

- “11.2(19)      Change in Control means –
- (a)      there is a change of control of the *Consultant* within the meaning of section 1124 of the Corporation Tax Act; or
  - (b)      any event analogous to the above in a jurisdiction other than England and Wales.”

Add a new clause 11.2(20) as follows:

- “11.2(20)      Purchaser means any person, firm, company or entity having legal capacity to whom the *Employer*
- transfers or agrees to transfer its interest in all or part of the site on which the Project is being carried out or
  - transfers or agrees to transfer its interest in all or part of the completed Project.”

Add a new clause 11.2(21) as follows:

- “11.2(21)      Tenant means any person, firm, company or entity having legal capacity to whom the *Employer*
- grants or agrees to grant a leasehold interest in all or a substantial part of the site of the Project or
  - grants or agrees to grant a leasehold interest in all or a substantial part of the completed Project.”

Add a new clause 11.2(22) as follows:

- “11.2(22)      Operator means such person, firm, company or entity having legal capacity as may enter into an agreement with the *Employer* for the operation and/or management of the whole or any substantial part of the completed Project.”

Add a new clause 11.2(23) as follows:

- “11.2(23) Contractor means such firm, company or entity having legal capacity as may enter into an agreement with the *Employer* to carry out and complete the design and construction of the Project.”

Add a new clause 11.2(24) as follows:

- “11.2(24) Funder means a person, firm, company or entity having legal capacity that has provided, or is to provide, finance in connection with the whole or any part of the Project or the completed Project, or in connection with the site of the Project, whether acting on its own account, as agent for a syndicate of other parties or otherwise.”

Delete clause 12.1 and replace as follows:

- “12.1 In this contract, except where the context shows otherwise:
- words in the singular also mean in the plural and the other way round,
  - words in the masculine also mean in the feminine and neuter and the other way round,
  - references to a document include any revision made to it in accordance with this contract,
  - references to a statute or statutory instrument include any amendment or re-enactment of it from time to time and any subordinate legislation or code of practice made under it and
  - references to a standard include any current relevant standard that replaces it.”

Add a new clause 12.5 as follows:

- “12.5 The *Consultant* shall not assign this contract without the written consent of the *Employer*. The *Employer* may assign or transfer its rights under this contract to any third party without the consent of the *Consultant* being required.”

Insert a new clause 13.9 as follows:

- “13.9 If the *Consultant* does not reply to a communication from the *Employer* or the *Employer's Agent* within the *period for reply* or does not provide any document or deliverable required by the applicable deadline stated in the Accepted Programme the *Consultant* shall be liable for any direct costs, losses or expenses that the *Employer* reasonably and properly incurs by reason of the *Consultant's* failure. The *Employer* may set off or deduct such amounts from the amount due to the *Consultant* at the next assessment date.”

Delete clause 14.1 and replace as follows:

- “14.1 The Parties agree that neither:
- (a) any communication from the *Employer*; nor

- (b) any acceptance by the *Employer* of a communication from the *Consultant*; nor
- (c) any inspection, test or acceptance by the *Employer*

changes the *Consultant's* obligations under this contract (including the *Consultant's* responsibility to Provide the Services, and its liability for Defects and its design)."

Add the following bullet point after the first bullet point in clause 15.1:

- "increase the overall cost of the Project"

Delete clause 18.

Add the following words to the end of clause 21.1:

"and in compliance with all statutes, statutory instruments, regulations, rules and orders made under any statute or directive having the force of law which affect the *services* or performance of any of the *Consultant's* obligations under this contract."

Delete clause 21.2 and replace as follows:

"The *Consultant's* obligation is to use all the reasonable skill and care normally used by a competent Architect experienced in carrying out services similar to the *services* in relation to developments of a similar size, nature, value, scope and complexity to the Project."

Insert a new clause 21.4 as follows:

- "21.4 Where and to the extent that the *Consultant* is responsible for the specification of work, goods or materials or for the inspection of work as a part of the *services*, the *Consultant* does not specify or authorise for use or permit to be used:
- (a) products, goods or materials generally accepted, or generally suspected, in the construction industry at the time of specification to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used; and/or
  - (b) products, goods or materials which do not accord with British or European Union Standards and/or Codes of Practice and/or any applicable agrément certificate issued by the British Board of Agrément current at the time of specification or such equivalent standards or requirements and good building practice; and/or
  - (c) products, goods or materials which do not accord with the guidelines contained in the edition of the publication "Good Practice in the Selection of Construction Materials" (British Council for Offices) current at the time of specification or use; and/or

- (d) products, goods or materials which have been supplied or placed on the market in breach of 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) (or any amendment, modification, consolidation or re-enactment thereof current at the date of specification or use).

The *Consultant* shall inform the *Employer* immediately if the *Consultant* becomes aware whilst performing the *services* that any of the items referred to in this clause 21.4 have been specified for use or used provided always that this clause does not create any additional obligation or duty for the *Consultant* to check the work of others that is not part of the *services*."

In clause 22.1 replace the words "each *key person*" with:

"each of the *key people*"

Insert the following as a new final sentence in clause 22.1:

"An alternative reason for not accepting the person may be based upon the *Employer's* previous experience of the proposed replacement."

In clause 22.2 after "employed by the *Consultant*" add:

"or by any Subconsultant"

In clause 22.2 after "arranges" insert:

"at no cost to the *Employer*".

Delete clause 24.2 and replace as follows:

"The *Consultant* submits the name of any proposed Subconsultant to the *Employer* for acceptance. A reason for not accepting the Subconsultant is that this appointment will not allow the *Consultant* to Provide the Services, the *Employer* is concerned (on reasonable grounds) with the financial standing or expertise or experience or insurance cover of the proposed Subconsultant, or the *Employer* requires a collateral warranty and the Subconsultant is unable to provide a collateral warranty to the *Employer* in a form which is acceptable to the *Employer*.

The *Consultant* does not appoint a proposed Subconsultant until the *Employer* has accepted such Subconsultant. The *Consultant* does not suspend or terminate the appointment of any accepted Subconsultant without the *Employer's* prior written consent."

Delete the following bullet point in clause 24.3:

- "an NEC contract is proposed or"

Add the following bullet point before the last bullet point in clause 24.3:



- “they limit rights under any collateral warranty to be provided by the Subconsultant to a greater extent than the rights under this contract in relation to the relevant subcontracted *services*.”

Add the following new clause 24.4:

“The *Consultant* ensures that every Subconsultant is appointed on subcontract terms which are consistent in all material respects with the terms of this contract (including, but not limited to, terms relating to payment) and which pass down all relevant obligations under this contract to the Subconsultant, as applicable.”

Add a new clause 25.5 as follows:

- “25.5 The *Consultant* complies with:
- (a) any rules, regulations, policies and procedures (including health and safety policies and quality assurance procedures) issued by the *Employer*; and
  - (b) any planning permissions notified by the *Employer* to the *Consultant*.”

Insert new clauses 30.4 and 30.5 as follows:

- “30.4 If the *Consultant* considers that it has been or is likely to be delayed in the performance of the whole or any part of its obligations then (without prejudice to the *Consultant's* obligations under section 6 of this contract) it shall immediately inform the *Employer* in writing and shall specify:
- (a) the cause of the delay;
  - (b) the likely effect on progress; and
  - (c) such actions as it believes are required to remedy the delay or problem.
- 30.5 The *Consultant* uses all reasonable endeavours to mitigate the effects of any delay in the performance of its obligations.”

Add the following additional bullet point to clause 31.3:

- “it is more onerous on the *Employer* or Others”

Add a new clause 42 as follows:

- “42 Nothing in clause 41 affects any other right or remedy under the contract or at law, including the *Employer's* right to claim damages for a Defect as a breach of contract.”

Delete clause 60.1(11).

Amend the final paragraph of clause 61.3 to read as follows:

“The *Consultant's* notification of a compensation event is submitted to the *Employer's Agent* and copied to the *Employer*. If the *Consultant* does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date.”

Delete the first bullet point of clause 61.4 and replace as follows:

- “arises by reason of any act, omission, breach or default of the *Consultant*, any Subconsultant or supplier, or any other person for whom the *Consultant* is responsible”

In clause 61.4, delete the words:

“A failure by the *Employer* to reply within two weeks of this notification is treated as acceptance by the *Employer* that the event is a compensation event and an instruction to submit quotations”

And replace with the words:

"The *Consultant's* notification is submitted to the *Employer's Agent* and copied to the *Employer*."

Add the following words to the end of clause 62.1:

"The *Consultant's* quotations and the other information required under this clause are submitted to the *Employer's Agent* and copied to the *Employer*."

Add the following words to the end of the first sentence of clause 62.3:

"The *Consultant's* quotations are submitted to the *Employer's Agent* and copied to the *Employer*."

Add the following words to the end of clause 62.4:

"The *Consultant's* revised quotation is submitted to the *Employer's Agent* and copied to the *Employer*."

In clause 62.6, delete the words:

“If the *Employer* does not reply to the notification within two weeks and, unless the quotation is for a proposed instruction or a proposed changed decision, the *Consultant's* notification is treated as acceptance of the quotation by the *Employer*”

And replace with the words:

"The *Consultant's* notification is submitted to the *Employer's Agent* and copied to the *Employer*."

Add a new clause 63.15 as follows:

“Where a compensation event or its effect is in part attributable to the *Consultant's* fault (including any fault on the part of any Subconsultant or other person for whom the *Consultant* is responsible), the Prices, the Completion Date and Key Dates are not changed to the extent attributable to the *Consultant's* fault.”

In clause 64.4, delete the words:

“If the *Employer* does not reply within two weeks of this notification the notification is treated as acceptance of the *Consultant's* quotation by the *Employer*”

And replace with the words:

"The *Consultant's* notification is submitted to the *Employer's Agent* and copied to the *Employer*."

In clause 65.1, delete the word “or” from the end of the second bullet point and delete the last bullet point.

Delete clause 70.1 and replace as follows:

“70.1 The *Consultant* grants to the *Employer*, with immediate effect, an irrevocable, non-exclusive, royalty-free licence to copy and make full use of all materials prepared by or on behalf of the *Consultant* for the *services* for any purpose relating to the *services* and/or the Project. The *Employer’s* licence carries the right to grant sub-licences and is transferable to third parties without the consent of the *Consultant* and survives termination (for any reason) of the *Consultant’s* employment under this contract. The *Consultant* obtains from a Subconsultant equivalent rights to use material prepared by a Subconsultant. The *Employer* shall be entitled to utilise and copy documents comprising the aforementioned materials for an extension of the *services* and/or the Project but the *Employer* shall not be entitled to reproduce the designs contained in the aforementioned materials for any such extension. The *Consultant* shall not be liable for any use of the aforementioned materials for any purpose other than that for which they were originally prepared and provided.”

Add the following words to the start of clause 70.2

“The copyright in all documents prepared by the *Employer* is and remains the property of the *Employer*.”

In the Insurance Table at clause 81.1, delete

"Liability of the *Consultant* for claims made against him arising out of his failure to use the skill and care normally used by professionals providing services similar to the *services*"

and replace with

"Liability of the *Consultant* for claims made against him arising out of his failure to use the level of skill and care required by this contract"

Delete clause 81.2 and replace as follows:

“81.2 As and when reasonably required by the *Employer*, the *Consultant* produces for inspection satisfactory documentary evidence that the insurances required by this contract are in force and that the premiums due under them are fully paid.”

Add the following new bullet point to clause 82.1:

- “loss of or damage to any property owned or occupied by the *Employer* (other than the property which is the subject of the *services*)”

Delete clause 82.2.

Amend the first bullet point of clause 90.3 by adding the words “or any part of them” to the end.

Add the following new bullet points to clause 90.3:

- “the *Consultant* breaches clause Z4.1 or Z4.2;
- the *Consultant* breaches clause 24.2 or 24.3;
- there is a Change in Control of the *Consultant*;
- the contract has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 72(9) of the Public Contracts Regulations 2015;
- the *Consultant* has, at the time of contract award, been in one of the situations referred to in regulation 57(1) of the Public Contracts Regulations 2015, including as a result of the application of regulation 57(2) of the Public Contracts Regulations 2015, and should therefore have been excluded from the procurement procedure; or
- the contract should not have been awarded to the *Consultant* in view of a serious infringement of the obligations under the Treaties and the Public Contracts Directive that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of the Treaty on the Functioning of the European Union”.

Add a new clause 90.5 as follows:

"90.5 Any termination of the *Consultant's* engagement under this contract is without prejudice to the Parties' rights and remedies accrued up to the date of termination, which shall survive such termination."

Delete the final sentence of clause 91.1 (after "After the final payment has been made....") and replace as follows:

"Upon termination for whatever reason, the *Consultant* gives to the *Employer* all hard copy and electronic data (including material prepared by any Subconsultant) obtained or prepared by or on behalf of the *Consultant* under this contract. The *Employer* has the right to use such material for completion of the *services* and the Project."

Add new clauses 91.2 and 91.3 as follows:

"91.2 Upon termination of this contract (howsoever terminated) the *Consultant*:

- promptly takes all necessary steps to stop performance of the *services* in an orderly manner and with reasonable speed and economy and
- delivers to the *Employer* all documents belonging to the *Employer* that shall for the time being be under the control of the *Consultant* or any Subconsultant and
- ceases to access any of the *Employer's* property or computer systems to which it previously had access.

91.3 The *Consultant* complies at its own cost with the reasonable requirements of the *Employer* to ensure the orderly hand over of the *services* to any incoming substitute consultant."

Delete the words "A final payment" from the start of clause 92.1 and replace as follows:

“Subject to clause 92.2, a final payment”

Add the following words to the end of clause 92.1:

“The *Employer* shall not be liable to the *Consultant* for any other costs, expenses, disbursements or losses (including any indirect or consequential losses such as loss of profit) which may arise as a result of the termination of the contract.”

Delete clause 92.2 and replace as follows:

- “92.2        If the *Employer* terminates
- because of the insolvency of the *Consultant*; or
  - because the *Consultant* breaches clause 24.2 or 24.3; or
  - because of a substantial failure of the *Consultant* to comply with his obligations; or
  - because of the *Consultant*’s breach of clause Z4.1 or Z4.2
- the *Employer* shall be entitled to be paid any loss or costs incurred by the *Employer* as a result of such termination including the additional cost to the *Employer* of completing the whole of the *services* and after termination the *Employer* shall not be obliged to make any further payment to the *Consultant* until the full extent of loss or costs can be fully ascertained. In the event that such loss or cost exceeds the amount otherwise payable to the *Consultant* in accordance with this contract, without prejudice to any other right or remedy of the *Employer*, the *Employer* may recover such excess from the *Consultant* as a debt.”

Delete the following words from the first bullet point in clause W2.3(4):

“and alter a quotation which has been treated as having been accepted”

Add the following new clause W2.5:

**“W2.5        Dispute avoidance**

- W2.5(1)        The *Consultant* and the *Employer* will endeavour to notify each other of any anticipated dispute under this contract so that it can be avoided by negotiation between them.
- W2.5(2)        The *Employer* and the *Consultant* will endeavour to resolve any dispute under this contract which does arise by direct negotiation in good faith between senior executives. Each of them will give serious consideration to any request by the other to refer the dispute to mediation if it cannot be resolved by direct negotiation.”

In Option Y(UK)2, delete clause Y2.3 and replace as follows:

“If the *Employer* intends to pay less than the notified sum, he notifies the *Consultant* of the amount which the *Employer* considers to be due not later than one day (the prescribed period) before the final date for payment. The *Employer*’s notification states the basis on which the amount is calculated and includes details of the calculation. The *Employer* pays the notified sum unless he has notified his intention to pay less than the notified sum. If the *Employer* issues a notification pursuant to this clause the *Consultant* submits a revised invoice to the *Employer* for the reduced sum notified by the *Employer*. Subject to receipt of the *Consultant*’s revised invoice, the *Employer* pays the sum stated in the *Employer*’s notice of intention to pay less by the final date for payment”

**PART B: additional conditions of contract:**

The *conditions of contract* are supplemented by the following additional conditions of contract as set out below:

**“Z1 Confidentiality and Freedom of Information Act**

**Definitions**

In this clause Z1, the following defined terms shall bear the following meanings:

“**Code of Practice**” means any code of practice or guidance issued under or in connection with the FOIA and the EIR by the relevant governmental or statutory body and as the same may be amended, updated or replaced from time to time;

“**Confidential Information**” means information, data and material of any nature which either Party may receive or obtain in connection with the operation of the contract and:

- (i) which comprises Personal Data or Sensitive Personal Data (as both terms are defined in the Data Protection Act 1998)
- (ii) the release of which is likely to prejudice the commercial interests of the *Employer* or the *Consultant* respectively; or
- (iii) which is a trade secret;

“**EIR**” means the Environmental Information Regulations;

“**FOIA**” means the Freedom of Information Act 2000; and

“**Personal Data**” bears the meaning given in the Data Protection Act 1998.

Z1.1 In respect of any Confidential Information it may receive from the other Party (the “Discloser”) and subject always to the remainder of this clause Z1, each Party (the “Recipient”) undertakes to keep secret and strictly confidential and shall not disclose any such Confidential Information to any third party without the Discloser's prior written consent provided that:

Z1.1.1 the Recipient shall not be prevented from using any general knowledge, experience or skills which were in its possession prior to the commencement of the contract;

Z1.1.2 the provisions of this clause Z1 shall not apply to any Confidential Information which:

- (a) is in or enters the public domain other than by breach of the contract or other act or omissions of the Recipient;
- (b) is obtained by a third party who is lawfully authorised to disclose it;
- (c) is authorised for release by the prior written consent of the Discloser; or
- (d) the disclosure of which is required to ensure the compliance of the *Employer* with the FOIA and the EIR and/or any applicable Codes of Practice.

Z1.2 Nothing in this clause Z1 shall prevent the Recipient from disclosing Confidential Information where it is required to do so by judicial administrative, governmental

or regulatory process in connection with any action, suit, proceedings or claim or otherwise by applicable law or, where the *Consultant* is the Recipient, to the *Consultant's* immediate or ultimate holding company provided that the *Consultant* procures that such holding company complies with this clause Z1 as if any reference to the *Consultant* in this clause Z1 were a reference to such holding company.

- Z1.3 The *Consultant* acknowledges that the *Employer* is subject to the FOIA and the EIR. The *Consultant* notes and acknowledges the FOIA and the EIR and the applicable Codes of Practice. The *Consultant* will act (and will provide reasonable assistance to the *Employer* to enable it to act) in accordance with the FOIA and the EIR and the Codes of Practice to the extent that they apply to the *Consultant's* performance under the contract.
- Z1.4 The *Consultant* agrees that:
- Z1.4.1 without prejudice to the generality of clause Z1.2, the provisions of this clause Z1 are subject to the respective obligations and commitments of the *Employer* under the FOIA and the EIR and the Codes of Practice;
- Z1.4.2 subject to clause Z1.5, the decision on whether any exemption applies to a request for disclosure of information is a decision solely for the *Employer*.
- Z1.4.3 where the *Employer* is managing a request for information the *Consultant* shall co-operate with the *Employer* and shall respond within five (5) working days of any request by the *Employer* for assistance in determining how to respond to a request for disclosure.
- Z1.5 The *Employer* will consult the *Consultant* in relation to any request for disclosure of the *Consultant's* Confidential Information in accordance with the Codes of Practice.
- Z1.6 This clause Z.1 shall remain in force without limit in time in respect of Confidential Information which comprises Personal Data. Save as aforesaid, this clause Z1 shall remain in force for a period of three (3) years after the termination or expiry of this Contract.”

## **“Z2 Copyright**

- Z2.1 The *Consultant* shall be liable to the *Employer* in respect of all costs, claims, damages, proceedings and expenses suffered or incurred by the *Employer* arising out of any breach of copyright or other intellectual property right by the *Consultant* or its Subconsultants.”

## **“Z3 Information provided by the Employer**

- Z3.1 The *Consultant* acknowledges that the *Employer* does not warrant or give any representation on the accuracy or completeness of any data or information provided to the *Consultant* by the *Employer*. The *Consultant* must rely on its own enquiries and carry out such further investigations or surveys as it considers appropriate.”

## **“Z4 Corrupt practices**

- Z4.1 The *Consultant* warrants that he has not done and will not do any of the following:
- offer or give to any person in the service of the *Employer* any gift or consideration of any kind as an inducement or reward in relation to the obtaining or execution of this contract or any other contract with the

*Employer* or for showing favour or disfavour to any person in relation to this contract or any other contract with the *Employer*, or

- enter into this contract or any other contract with the *Employer* if, in connection with this contract or any such other contract, commission has been paid or an agreement for the payment of commission has been made by him or on his behalf or to his knowledge.

Z4.2 The *Consultant* warrants that in entering into this contract he has not:

- communicated to any person other than the *Employer*, or a person duly authorised by the *Employer*, the amount or approximate amount of the tender or submission, or proposed tender or submission, leading to this contract except where the disclosure, in confidence, of the approximate amount of the tender or submission was necessary to obtain insurance premium quotations required for the preparation of the tender or submission; or
- entered into any agreement or arrangement with any person, or requested of any person, that he or they shall refrain from tendering or competing, that he or they shall withdraw any tender or submission once offered or that he or they will vary the amount of any tender or submission to be submitted.”

#### **“Z5 Collateral warranties and third party rights**

Z5.1 If required by any Funder, Purchaser, Tenant or Operator, the *Consultant* shall deliver collateral warranties in the form of the Consultant collateral warranty set out in **Annex 5** in favour of such Funder, Purchaser, Tenant or Operator within 14 days of the *Employer's* request. A copy of the *Consultant's* up to date verification of professional indemnity insurance shall also be delivered to the relevant beneficiary.

Z5.2 The *Consultant* shall procure and deliver collateral warranties in the forms of the collateral warranties set out in **Annex 5** in favour of

- the *Employer* and
- any Funder, Purchaser, Tenant or Operator

from each Subconsultant engaged by the *Consultant*. A certified copy of each Subconsultant's appointment shall also be provided together with a copy of the Subconsultant's up to date verification of professional indemnity insurance. Collateral warranties in favour of the *Employer* shall be procured and delivered to the *Employer* within 14 days of each Subconsultant's appointment. Collateral warranties in favour of any Funder, Purchaser, Tenant or Operator shall be procured and delivered to the *Employer* within 14 days of the *Employer's* request. In the alternative (if agreed by the relevant beneficiary in its absolute discretion) the Consultant shall procure in favour of:

- the *Employer* and
- any Funder, Purchaser, Tenant or Operator

the benefit of third party rights in respect of each Subconsultant's appointment provided always that such rights are no less beneficial than the terms of the forms of collateral warranty set out in **Annex 5**.

Z5.3 If the *Consultant* defaults in the delivery of any collateral warranty or third party rights required under this clause Z5 then, in addition to any other right which the *Employer* may have, the *Employer* may withhold payment of any sum due to the *Consultant* under this contract until the *Consultant* has remedied its default.”

#### **“Z6 Records and audit**

Z6.1 The *Consultant* shall keep and maintain until twelve (12) years after the date of termination or expiry (whichever is the earlier) of this contract (or as long a period



as may be agreed between the Parties), full and accurate records and accounts of the operation of this contract.

Z6.2 The *Consultant* shall keep the records and accounts referred to in clause Z6.1 above in accordance with good accountancy practice.

Z6.2 The *Consultant* shall afford the *Employer* and/or any auditor engaged or authorised by the *Employer* such access to such records and accounts as may be required from time to time."

**"Z7 Building Information Modeling ("BIM")**

Z7.1 The requirement for BIM (or any updated version or replacement of BIM in use from time to time) is set out in the Scope."

### Annex 3      Scope

The Scope comprises the following documents:

- The ITT, comprising the following documents:
  - [LIST]
- The *Consultant's* tender dated [ ], excluding any clarifications or qualifications to the *conditions of contract* contained therein.

## **Annex 4      Activity Schedule**

**[INSERT ACTIVITY SCHEDULE]**

## Forms of collateral warranty

**DATED**

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## SUBCONSULTANT'S DEED OF WARRANTY TO WINCHESTER CITY COUNCIL

for consultancy services in connection with

# THE DESIGN AND CONSTRUCTION OF A NEW LEISURE FACILITY IN WINCHESTER INCLUDING A 50 METRE SWIMMING POOL

between

[ 21 ]

and

# WINCHESTER CITY COUNCIL

and

[ 22 ]



One Central Square  
Cardiff  
CF10 1FS  
**[www.blakemorgan.co.uk](http://www.blakemorgan.co.uk)**

<sup>21</sup> Insert name of the Sub-Consultant

<sup>22</sup> Insert name of the Consultant

THIS AGREEMENT is made the                      day of                      20[                      ]

**BETWEEN:-**

1. [All the Partners/Designated Members in]<sup>23</sup> [INSERT NAME OF SUB-CONSULTANT] [(all of whom have executed this Deed)]<sup>24</sup> [registered in England and Wales under Company Registration Number [                      ]whose registered office<sup>25</sup>] [whose trading address]<sup>26</sup> is at [                      ] (“the Sub-Consultant”); and
2. **WINCHESTER CITY COUNCIL** of City Offices, Colebrook Street, Winchester, Hampshire SO23 9LJ (“the Beneficiary”, which term shall include its permitted assignees under this Agreement); and
3. [INSERT NAME OF CONSULTANT] registered in England and Wales under Company Registration Number [                      ] whose registered office is at [                      ] (“the Consultant”)

**WHEREAS:-**

- A The Beneficiary has appointed the Consultant under a contract (“the Contract”, which term shall include any enforceable agreements reached between the Beneficiary and the Consultant which arise out of and relate to the same) dated [INSERT DATE OF THE CONTRACT] to carry out the consultancy services described in the Contract in connection with the design and construction of a new leisure facility in Winchester, including a 50 metre swimming pool (“the Project”)
- B The Consultant has appointed the Sub-Consultant under a contract (“the Appointment”, which term shall include any enforceable agreements reached between the Consultant and the Sub-Consultant which arise out of and relate to the same) dated [INSERT DATE OF THE APPOINTMENT] to carry out consultancy services as [INSERT SUB-CONSULTANT’S ROLE E.G. ARCHITECT, STRUCTURAL ENGINEER] (“the Services”) in connection with the Project.

In consideration of the payment of one pound (£1.00) by the Beneficiary to the Sub-Consultant receipt of which the Sub-Consultant acknowledges and without prejudice to the rights and obligations of the parties to this Agreement under any other contract **IT IS HEREBY AGREED** as follows:-

1.
  - 1.1 The Sub-Consultant warrants to the Beneficiary that :-
    - 1.1.1 in respect of all Services performed and to be performed by the Sub-Consultant in connection with the Appointment and the Project it has exercised and will continue to exercise all the reasonable skill, care, and diligence to be expected of a properly qualified professional [insert details of the Sub-Consultant’s role e.g. Architect, Structural Engineer], who is where

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<sup>23</sup> Delete if Sub-Consultant is a company or sole trader

<sup>24</sup> Delete if Sub-Consultant is a company or sole trader

<sup>25</sup> Delete if Sub-Consultant is not a company

<sup>26</sup> Delete if Sub-Consultant is a company

necessary a specialist and experienced in carrying out services similar to the Services for projects of a similar size, scope, nature, complexity and value to the Project; and

- 1.1.2 it has complied and will continue to comply with the terms of the Appointment and has fulfilled and will continue to fulfil its duties and obligations under the Appointment.
- 1.2 Insofar as the Sub-Consultant has performed a part of the Services before the date of the Appointment, the obligations and liabilities of the Sub-Consultant under this Agreement shall take effect in all respects as if the Appointment had been dated prior to the commencement of that part of the Services by the Sub-Consultant.
- 1.3 The Sub-Consultant acknowledges that breach of the Appointment may cause the Beneficiary to suffer and incur loss damage and expense and the Sub-Consultant accepts that any such loss damage and expense (whether direct or indirect and whether or not purely economic in nature) is within the contemplation of the parties as being damage which flows naturally from such breach.

2

- 2.1 Subject to the exercise of reasonable skill and care as required by clause 1, the Sub-Consultant further warrants that it has not specified and will not specify or authorise for use in the Project:
  - 2.1.1 products, goods or materials generally accepted, or generally suspected, in the construction industry at the time of specification to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used; and/or
  - 2.1.2 products, goods or materials which do not accord with British or European Union Standards and/or Codes of Practice and/or any applicable agrément certificate issued by the British Board of Agrément current at the time of specification or such equivalent standards or requirements and good building practice; and/or
  - 2.1.3 products, goods or materials which do not accord with the guidelines contained in the edition of the publication "Good Practice in the Selection of Construction Materials" (British Council for Offices) current at the time of specification or use; and/or
  - 2.1.4 products, goods or materials which have been supplied or placed on the market in breach of 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) (or any amendment, modification, consolidation or re-enactment thereof current at the date of specification or use).
- 2.2 If in the performance of its duties under the Appointment the Sub-Consultant becomes aware that it or any other person has specified or used, or authorised or

approved the specification or use by others of any such products or materials prohibited by clause 2.1 of this Agreement, the Sub-Consultant will notify the Beneficiary in writing forthwith. This clause does not create any additional duty for the Sub-Consultant to check the work of others which is not required by the Appointment.

3 The Beneficiary has no authority to issue any direction or instruction to the Sub-Consultant in relation to performance of the Services under the Appointment unless and until the Beneficiary has given notice under clause 5.

4 The Beneficiary has no liability to the Sub-Consultant in respect of fees and expenses under the Appointment unless and until the Beneficiary has given notice under clause 5.

5

5.1 The Sub-Consultant agrees that, in the event of the termination of the Contract or in the event of the Consultant becoming insolvent or having a liquidator, receiver, manager, administrator or administrative receiver appointed the Sub-Consultant will, if so required by notice in writing given by the Beneficiary to the Sub-Consultant, and subject to clause 5.4, accept the instructions of the Beneficiary or its appointee to the exclusion of the Consultant in respect of the Project and the Services upon the terms and conditions of the Appointment. The Consultant acknowledges that the Sub-Consultant shall be entitled to rely on a notice given to the Sub-Consultant by the Beneficiary under this clause 5 as conclusive evidence for the purposes of this Agreement of the termination of the Contract; and further acknowledges that such acceptance of the instructions of the Beneficiary to the exclusion of the Consultant shall not constitute any breach of the Sub-Consultant's obligations to the Consultant under the terms and conditions of the Appointment.

5.2 The Sub-Consultant further agrees that it will not without first giving the Beneficiary not less than twenty-eight (28) days' notice in writing exercise any right it may have to terminate the Appointment or to treat the same as having been repudiated by the Consultant or to discontinue or suspend the performance of any Services pursuant thereto. Such right to terminate the Appointment with the Consultant or to treat the same as having been repudiated or discontinue or suspend performance shall cease if, within such period of notice and subject to clause 5.4 the Beneficiary shall give notice in writing to the Sub-Consultant requiring the Sub-Consultant to accept the instructions of the Beneficiary or its appointee to the exclusion of the Consultant in respect of the Services upon the terms and conditions of the Appointment.

5.3 The Consultant acknowledges that the Sub-Consultant shall be entitled to rely on a notice given to the Sub-Consultant by the Beneficiary under clauses 5.1 or 5.2 and that acceptance by the Sub-Consultant of the instruction of the Beneficiary to the exclusion of the Consultant shall not constitute any breach of the Sub-Consultant's obligations to the Consultant under the Appointment. Provided that nothing in this clause 5 shall relieve the Sub-Consultant of any liability it may have to the Consultant for any breach by the Sub-Consultant of the terms and conditions of the Appointment or where the Sub-Consultant has wrongfully determined or suspended the Appointment or has wrongfully treated the Appointment as having been repudiated by the Consultant.

5.4 It shall be a condition of any notice given by the Beneficiary under clauses 5.1 or 5.2 that the Beneficiary accepts liability for payment of the fees and expenses properly

payable and due to the Sub-Consultant under the Appointment and for the performance of the Consultant's obligations thereunder including payment of any fees and expenses properly due and outstanding at the date of such notice.

- 5.5 Upon the issue of any notice by the Beneficiary under clauses 5.1 or 5.2 the Appointment shall continue in full force and effect as if no right of termination on the part of the Sub-Consultant has arisen and the Sub-Consultant shall be liable to the Beneficiary and its appointee under the Appointment in lieu of its liability to the Consultant.
- 5.6 If any notice given by the Beneficiary under clause 5.1 or 5.2 requires the Sub-Consultant to accept the instructions of the Beneficiary's appointee, the Beneficiary shall be liable to the Sub-Consultant as guarantor for the payment of all sums from time to time due to the Sub-Consultant from the Beneficiary's appointee.

## 6

- 6.1 The copyright in 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 and all updates, amendments, additions and revisions to them and any services, designs, or inventions incorporated or referred to in them (whether created or stored electronically or otherwise) prepared or under preparation by or on behalf of the Sub-Consultant in connection with the Appointment or the Services (together referred to in this clause 6 as “**the Documents**”) shall remain vested in the Sub-Consultant but the Sub-Consultant grants to the Beneficiary and its appointee an irrevocable royalty-free and non-exclusive licence to copy and use the Documents for any purpose related to the Services or to the Project including, but without limitation, the design, construction, completion, reconstruction, modification, refurbishment, development, maintenance, facilities management, funding, disposal, letting, fitting-out, advertisement, decommissioning, demolition, reinstatement, building information modelling and repair of the Project.
- 6.2 The licence granted under clause 6.1 includes the right for the Beneficiary to use the Documents in connection with any extension of the Project, but not to reproduce the designs contained in the Documents in any such extension. Such licence shall be transferable to third parties without the consent of the Sub-Consultant being required and shall include the right to grant sub-licences.
- 6.3 Subject to clause 6.4, the Sub-Consultant shall be liable to the Beneficiary for all costs claims damages and losses reasonably and properly incurred or suffered by the Beneficiary as a result of the infringement or alleged infringement of any copyright, patent or other industrial or intellectual property rights arising from the design of the Services or the copying and use of the Documents.
- 6.4 The Sub-Consultant shall not be liable for any use by the Beneficiary or its appointee of any of the Documents for any purpose other than that for which the same were prepared by or on behalf of the Sub-Consultant.



- 6.5 Where the copyright in any of the Documents is not vested in the Sub-Consultant, the Sub-Consultant shall procure that the person in whom the copyright is vested grants to the Beneficiary a licence similar to that granted in clause 6.1 (or the Sub-Consultant shall itself grant a sub-licence having the same effect, if it has the right to do so) in relation to all such Documents.
- 6.6 The Sub-Consultant shall provide to the Beneficiary upon request copies of the Documents, the Beneficiary paying to the Sub-Consultant the reasonable copying charges.

7

- 7.1 The Sub-Consultant shall from the date of the Appointment take out and maintain (promptly paying all premiums) professional indemnity insurance with well established insurers of good repute in an amount of [INSERT AMOUNT OF INSURANCE IN WORDS] (£[INSERT AMOUNT OF INSURANCE IN FIGURES]) for any one claim for a period of 12 years from the date of completion of the Project, provided always that at the date of this Agreement and thereafter such insurance is available at reasonable commercial rates.
- 7.2 The Sub-Consultant shall immediately inform the Beneficiary if professional indemnity insurance is not or ceases to be available at reasonable commercial rates in order that the Sub-Consultant and the Beneficiary can discuss the means of best protecting the Sub-Consultant and the Beneficiary in the absence of such insurance.
- 7.3 As and when it is reasonably requested to do so by the Beneficiary or its appointee, the Sub-Consultant shall produce for inspection documentary evidence (in the form of a letter from its insurance broker) that its professional indemnity insurance is being maintained.
- 7.4 Any increased or additional premium required by insurers because of the Sub-Consultant's claims record or other acts, omissions, matters or things particular to the Sub-Consultant shall be deemed to be within reasonable commercial rates.

8

- 8.1 This Agreement may be assigned twice by the Beneficiary by way of absolute legal assignment to any party without the consent of the Sub-Consultant being required and such assignment shall be effective upon written notice thereof being given to the Sub-Consultant. Any assignment thereafter shall require the Sub-Consultant's consent (such consent not to be unreasonably withheld or delayed).
- 8.2 The Sub-Consultant shall not contend or argue that any person to whom the benefit of this Agreement may be assigned or otherwise dealt with by the Beneficiary pursuant to clause 8.1 shall be precluded or prevented from recovering under this Agreement any loss or damage resulting from any breach of this Agreement by the Sub-Consultant (whenever it happens) by reason of the fact that such person is an assignee only or otherwise not the Beneficiary or because the loss or damage suffered has been suffered by such person only and not by the Beneficiary or because the loss or

damage suffered is not the same as or is different from that which has been or would have been suffered by the Beneficiary.

- 9 Any notice to be given by the Sub-Consultant hereunder shall be deemed to be duly given if it is delivered by hand at or sent by registered post or recorded delivery to the Beneficiary at the above address; and any notice given by the Beneficiary hereunder shall be deemed to be duly given if it is delivered by hand at or sent by registered post or recorded delivery to the above mentioned address of the Sub-Consultant or to the principal business address of the Sub-Consultant for the time being and, in the case of any such notices, the same shall if sent by registered post or recorded delivery be deemed to have been received forty eight hours after being posted.
- 10 The liability of the Sub-Consultant under this Agreement shall not be released diminished or in any other way affected by
  - 10.1 any independent enquiry, testing or investigation into any relevant matter which may be made or carried out by or on behalf of the Beneficiary or the failure to carry out any such independent enquiry, testing or investigation; and/or
  - 10.2 any approval, consent, perusal or endorsement given or made by or on behalf of the Beneficiary or the failure to give or make any such approval, consent, perusal or endorsement.
- 11 The provisions of this Agreement shall be without prejudice to any other right or remedy which the Beneficiary may have in tort or otherwise.
- 12 Save as expressly stated herein the Contracts (Rights of Third Parties) Act 1999 shall not operate to create rights in favour of anyone other than the parties to this Agreement.
- 13 The construction validity and performance of this Agreement shall be governed by the law of England and Wales and the parties agree to submit to the non-exclusive jurisdiction of the English and Welsh Courts.
- 14 The Sub-Consultant's obligations are the joint and several obligations of all of the partners of the Sub-Consultant whether or not they have executed this Agreement and the partners who have executed this Agreement jointly and severally warrant that in executing this deed they have the power to bind under seal all the partners of the Sub-Consultant jointly and severally.
- 15 The Sub-Consultant shall have no greater or longer lasting liability to the Beneficiary by virtue of this Agreement than it would have if the Beneficiary had been named as a joint employer with the Consultant under the terms of the Appointment and the Sub-Consultant shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation of liability in the Appointment and to raise equivalent rights in defence of liability (save for set off or counterclaim) as it would have against the Consultant under the Appointment.

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

**EXECUTED AS A DEED BY THE BENEFICIARY**

by affixing hereto its common seal in the presence of

Signed .....

Name .....

Job title .....

**EXECUTED AS A DEED BY THE SUB-CONSULTANT**

**EITHER**

acting by the following officers who have each signed their names:-

Director's signature .....

Director's name .....

Director's/Secretary's signature .....

Director's/Secretary's name .....

**OR**

acting by the following Partners/Designated members:-

Partner's/Designated Member's signature .....

Partner's/Designated Member's name .....

Partner's/Designated Member's signature<sup>27</sup> .....

Partner's/Designated Member's name .....

**EXECUTED AS A DEED BY THE CONSULTANT**

acting by the following officers who have each signed their names:-

Director's signature .....

Director's name .....

---

<sup>27</sup> Add further signature and name lines for every partner or designated member who is to sign

Director's/Secretary's signature .....

Director's/Secretary's name .....

DATED

-----

**SUBCONSULTANT'S DEED OF WARRANTY TO  
FUNDER/PURCHASER/TENANT/OPERATOR**

for consultancy services in connection with

**THE DESIGN AND CONSTRUCTION OF A NEW LEISURE FACILITY IN  
WINCHESTER, INCLUDING A 50 METRE SWIMMING POOL**

between

[ <sup>28</sup> ]

and

[ <sup>29</sup> ]

BLAKE   
MORGAN

One Central Square  
Cardiff  
CF10 1FS  
[www.blakemorgan.co.uk](http://www.blakemorgan.co.uk)

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<sup>28</sup> Insert name of the Sub-Consultant

<sup>29</sup> Insert name of the Beneficiary

THIS AGREEMENT is made the                      day of                      20[    ]

**BETWEEN:-**

1. [All the Partners/Designated Members in]<sup>30</sup> [INSERT NAME OF SUB-CONSULTANT] [(all of whom have executed this Deed)]<sup>31</sup> [registered in England and Wales under Company Registration Number [    ]whose registered office<sup>32</sup> [whose trading address]<sup>33</sup> is at [    ] (“the Sub-Consultant”); and
2. [INSERT NAME OF BENEFICIARY] registered in England and Wales under Company Registration Number [    ] whose registered office is at [    ] (“the Beneficiary”, which term shall include its permitted assignees under this Agreement)

**WHEREAS:-**

- A Winchester City Council of City Offices, Colebrook Street, Winchester, Hampshire SO23 9LJ (“the Employer”) has appointed [INSERT NAME OF CONSULTANT] registered in England and Wales under Company Registration Number [    ] whose registered office is at [    ] (“the Consultant”) under a contract (“the Contract”, which term shall include any enforceable agreements reached between the Employer and the Consultant which arise out of and relate to the same) dated [INSERT DATE OF THE CONTRACT] to carry out the consultancy services described in the Contract in connection with the design and construction of a new leisure facility including a 50 metre swimming pool (“the Project”)
- B The Consultant has appointed the Sub-Consultant under a contract (“the Appointment”, which term shall include any enforceable agreements reached between the Consultant and the Sub-Consultant which arise out of and relate to the same) dated [INSERT DATE OF THE APPOINTMENT] to carry out consultancy services as [INSERT SUB-CONSULTANT’S ROLE E.G. ARCHITECT, STRUCTURAL ENGINEER] (“the Services”) in connection with the Project.
- C The Employer has entered into [a funding agreement/an agreement for lease/an agreement for sale/a operating agreement] with the Beneficiary, pursuant to which the Beneficiary has an interest in the Project.

In consideration of the payment of one pound (£1.00) by the Beneficiary to the Sub-Consultant receipt of which the Sub-Consultant acknowledges and without prejudice to the rights and obligations of the parties to this Agreement under any other contract **IT IS HEREBY AGREED** as follows:-

1.
  - 1.1 The Sub-Consultant warrants to the Beneficiary that :-
    - 1.1.1 in respect of all Services performed and to be performed by the Sub-Consultant in connection with the Appointment and the Project it has

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<sup>30</sup> Delete if Sub-Consultant is a company or sole trader

<sup>31</sup> Delete if Sub-Consultant is a company or sole trader

<sup>32</sup> Delete if Sub-Consultant is not a company

<sup>33</sup> Delete if Sub-Consultant is a company

exercised and will continue to exercise all the reasonable skill, care, and diligence to be expected of a properly qualified professional [insert details of the Sub-Consultant's role e.g. Architect, Structural Engineer], who is where necessary a specialist and experienced in carrying out services similar to the Services for projects of a similar size, scope, nature, complexity and value to the Project; and

- 1.1.2 it has complied and will continue to comply with the terms of the Appointment and has fulfilled and will continue to fulfil its duties and obligations under the Appointment.
- 1.2 Insofar as the Sub-Consultant has performed a part of the Services before the date of the Appointment, the obligations and liabilities of the Sub-Consultant under this Agreement shall take effect in all respects as if the Appointment had been dated prior to the commencement of that part of the Services by the Sub-Consultant.
- 1.3 The Sub-Consultant acknowledges that breach of the Appointment may cause the Beneficiary to suffer and incur loss damage and expense and the Sub-Consultant accepts that any such loss damage and expense (whether direct or indirect and whether or not purely economic in nature) is within the contemplation of the parties as being damage which flows naturally from such breach.

2

- 2.1 Subject to the exercise of reasonable skill and care as required by clause 1, the Sub-Consultant further warrants that it has not specified and will not specify or authorise for use in the Project:
  - 2.1.1 products, goods or materials generally accepted, or generally suspected, in the construction industry at the time of specification to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used; and/or
  - 2.1.2 products, goods or materials which do not accord with British or European Union Standards and/or Codes of Practice and/or any applicable agrément certificate issued by the British Board of Agrément current at the time of specification or such equivalent standards or requirements and good building practice; and/or
  - 2.1.3 products, goods or materials which do not accord with the guidelines contained in the edition of the publication "Good Practice in the Selection of Construction Materials" (British Council for Offices) current at the time of specification or use; and/or
  - 2.1.4 products, goods or materials which have been supplied or placed on the market in breach of 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) (or any amendment, modification, consolidation or re-enactment thereof current at the date of specification or use).

- 2.2 If in the performance of its duties under the Appointment the Sub-Consultant becomes aware that it or any other person has specified or used, or authorised or approved the specification or use by others of any such products or materials prohibited by clause 2.1 of this Agreement, the Sub-Consultant will notify the Beneficiary in writing forthwith. This clause does not create any additional duty for the Sub-Consultant to check the work of others which is not required by the Appointment.
- 3 The Beneficiary has no authority to issue any direction or instruction to the Sub-Consultant in relation to performance of the Services under the Appointment.
- 4 The Beneficiary has no liability to the Sub-Consultant in respect of fees and expenses under the Appointment.
- 5
- 5.1 The copyright in 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 and all updates, amendments, additions and revisions to them and any services, designs, or inventions incorporated or referred to in them (whether created or stored electronically or otherwise) prepared or under preparation by or on behalf of the Sub-Consultant in connection with the Appointment or the Services (together referred to in this clause 5 as “**the Documents**”) shall remain vested in the Sub-Consultant but the Sub-Consultant grants to the Beneficiary and its appointee an irrevocable royalty-free and non-exclusive licence to copy and use the Documents for any purpose related to the Services or to the Project including, but without limitation, the design, construction, completion, reconstruction, modification, refurbishment, development, maintenance, facilities management, funding, disposal, letting, fitting-out, advertisement, decommissioning, demolition, reinstatement, building information modelling and repair of the Project.
- 5.2 The licence granted under clause 5.1 includes the right for the Beneficiary to use the Documents in connection with any extension of the Project, but not to reproduce the designs contained in the Documents in any such extension. Such licence shall be transferable to third parties without the consent of the Sub-Consultant being required and shall include the right to grant sub-licences.
- 5.3 Subject to clause 5.4, the Sub-Consultant shall be liable to the Beneficiary for all costs claims damages and losses reasonably and properly incurred or suffered by the Beneficiary as a result of the infringement or alleged infringement of any copyright, patent or other industrial or intellectual property rights arising from the design of the Services or the copying and use of the Documents.
- 5.4 The Sub-Consultant shall not be liable for any use by the Beneficiary or its appointee of any of the Documents for any purpose other than that for which the same were prepared by or on behalf of the Sub-Consultant.
- 5.5 Where the copyright in any of the Documents is not vested in the Sub-Consultant, the Sub-Consultant shall procure that the person in whom the copyright is vested grants to the Beneficiary a licence similar to that granted in clause 5.1 (or the Sub-Consultant shall itself grant a sub-licence having the same effect, if it has the right to do so) in relation to all such Documents.



- 5.6 The Sub-Consultant shall provide to the Beneficiary upon request copies of the Documents, the Beneficiary paying to the Sub-Consultant the reasonable copying charges.

6

- 6.1 The Sub-Consultant shall from the date of the Appointment take out and maintain (promptly paying all premiums) professional indemnity insurance with well established insurers of good repute in an amount of [INSERT AMOUNT OF INSURANCE IN WORDS] (£[INSERT AMOUNT OF INSURANCE IN FIGURES]) for any one claim for a period of 12 years from the date of completion of the Project, provided always that at the date of this Agreement and thereafter such insurance is available at reasonable commercial rates.
- 6.2 The Sub-Consultant shall immediately inform the Beneficiary if professional indemnity insurance is not or ceases to be available at reasonable commercial rates in order that the Sub-Consultant and the Beneficiary can discuss the means of best protecting the Sub-Consultant and the Beneficiary in the absence of such insurance.
- 6.3 As and when it is reasonably requested to do so by the Beneficiary or its appointee, the Sub-Consultant shall produce for inspection documentary evidence (in the form of a letter from its insurance broker) that its professional indemnity insurance is being maintained.
- 6.4 Any increased or additional premium required by insurers because of the Sub-Consultant's claims record or other acts, omissions, matters or things particular to the Sub-Consultant shall be deemed to be within reasonable commercial rates.

7

- 7.1 This Agreement may be assigned twice by the Beneficiary by way of absolute legal assignment to any party without the consent of the Sub-Consultant being required and such assignment shall be effective upon written notice thereof being given to the Sub-Consultant. Any assignment thereafter shall require the Sub-Consultant's consent (such consent not to be unreasonably withheld or delayed).
- 7.2 The Sub-Consultant shall not contend or argue that any person to whom the benefit of this Agreement may be assigned or otherwise dealt with by the Beneficiary pursuant to clause 7.1 shall be precluded or prevented from recovering under this Agreement any loss or damage resulting from any breach of this Agreement by the Sub-Consultant (whenever it happens) by reason of the fact that such person is an assignee only or otherwise not the Beneficiary or because the loss or damage suffered has been suffered by such person only and not by the Beneficiary or because the loss or damage suffered is not the same as or is different from that which has been or would have been suffered by the Beneficiary.

- 8 Any notice to be given by the Sub-Consultant hereunder shall be deemed to be duly given if it is delivered by hand at or sent by registered post or recorded delivery to the Beneficiary at the above address; and any notice given by the Beneficiary hereunder shall be deemed to be duly

given if it is delivered by hand at or sent by registered post or recorded delivery to the above mentioned address of the Sub-Consultant or to the principal business address of the Sub-Consultant for the time being and, in the case of any such notices, the same shall if sent by registered post or recorded delivery be deemed to have been received forty eight hours after being posted.

- 9 The liability of the Sub-Consultant under this Agreement shall not be released diminished or in any other way affected by
  - 9.1 any independent enquiry, testing or investigation into any relevant matter which may be made or carried out by or on behalf of the Beneficiary or the failure to carry out any such independent enquiry, testing or investigation; and/or
  - 9.2 any approval, consent, perusal or endorsement given or made by or on behalf of the Beneficiary or the failure to give or make any such approval, consent, perusal or endorsement.
- 10 The provisions of this Agreement shall be without prejudice to any other right or remedy which the Beneficiary may have in tort or otherwise.
- 11 Save as expressly stated herein the Contracts (Rights of Third Parties) Act 1999 shall not operate to create rights in favour of anyone other than the parties to this Agreement.
- 12 The construction validity and performance of this Agreement shall be governed by the law of England and Wales and the parties agree to submit to the non-exclusive jurisdiction of the English and Welsh Courts.
- 13 The Sub-Consultant's obligations are the joint and several obligations of all of the partners of the Sub-Consultant whether or not they have executed this Agreement and the partners who have executed this Agreement jointly and severally warrant that in executing this deed they have the power to bind under seal all the partners of the Sub-Consultant jointly and severally.
- 14 The Sub-Consultant shall have no greater or longer lasting liability to the Beneficiary by virtue of this Agreement than it would have if the Beneficiary had been named as a joint employer with the Consultant under the terms of the Appointment and the Sub-Consultant shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation of liability in the Appointment and to raise equivalent rights in defence of liability (save for set off or counterclaim) as it would have against the Consultant under the Appointment.

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

**EXECUTED AS A DEED BY THE BENEFICIARY**

acting by the following officers who have each signed their names:-

Director's signature .....

Director's name .....

Director's/Secretary's signature .....

Director's/Secretary's name .....

**EXECUTED AS A DEED BY THE SUB-CONSULTANT**

**EITHER**

acting by the following officers who have each signed their names:-

Director's signature .....

Director's name .....

Director's/Secretary's signature .....

Director's/Secretary's name .....

**OR**

acting by the following Partners/Designated members:-

Partner's/Designated Member's signature .....

Partner's/Designated Member's name .....

Partner's/Designated Member's signature<sup>34</sup> .....

Partner's/Designated Member's name .....

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<sup>34</sup> Add further signature and name lines for every partner or designated member who is to sign

DATED

-----

**CONSULTANT'S DEED OF WARRANTY TO  
FUNDER/PURCHASER/TENANT/OPERATOR**

for consultancy services in connection with

**THE DESIGN AND CONSTRUCTION OF A NEW LEISURE FACILITY IN  
WINCHESTER, INCLUDING A 50 METRE SWIMMING POOL**

between

[ <sup>35</sup> ]

and

[ <sup>36</sup> ]

and

**WINCHESTER CITY COUNCIL**

BLAKE   
MORGAN

One Central Square  
Cardiff  
CF10 1FS  
**[www.blakemorgan.co.uk](http://www.blakemorgan.co.uk)**

---

<sup>35</sup> Insert name of the Consultant

<sup>36</sup> Insert name of the Beneficiary

THIS AGREEMENT is made the                      day of                      20[    ]

**BETWEEN:-**

1. [All the Partners/Designated Members in]<sup>37</sup> [INSERT NAME OF CONSULTANT] [(all of whom have executed this Deed)]<sup>38</sup> [registered in England and Wales under Company Registration Number [                      ]whose registered office<sup>39</sup> [whose trading address]<sup>40</sup> is at [                      ] (“the Consultant”); and
2. [INSERT NAME OF BENEFICIARY] registered in England and Wales under Company Registration Number [                      ] whose registered office is at [                      ] (“the Beneficiary”, which term shall include its permitted assignees under this Agreement); and
3. WINCHESTER CITY COUNCIL of City Offices, Colebrook Street, Winchester, Hampshire SO23 9LJ (“the Employer”)

**WHEREAS:-**

- A The Employer has appointed the Consultant under a contract (“the Appointment”, which term shall include any enforceable agreements reached between the Employer and the Consultant which arise out of and relate to the same) dated [INSERT DATE OF THE APPOINTMENT] to carry out consultancy services as [INSERT CONSULTANT’S ROLE E.G. ARCHITECT, STRUCTURAL ENGINEER] (“the Services”) in connection with the design and construction of a new leisure facility including a 50 metre swimming pool (“the Project”)
- B The Employer has entered into [a funding agreement ("the Funding Agreement")/an agreement for lease/an agreement for sale/a operating agreement] with the Beneficiary, pursuant to which the Beneficiary has an interest in the Project.

In consideration of the payment of one pound (£1.00) by the Beneficiary to the Consultant receipt of which the Consultant acknowledges and without prejudice to the rights and obligations of the parties to this Agreement under any other contract **IT IS HEREBY AGREED** as follows:-

1.
  - 1.1 The Consultant warrants to the Beneficiary that :-
    - 1.1.1 in respect of all Services performed and to be performed by the Consultant in connection with the Appointment and the Project it has exercised and will continue to exercise all the reasonable skill, care, and diligence to be expected of a properly qualified professional [insert details of the Consultant’s role e.g. Architect, Structural Engineer], who is where necessary a specialist and experienced in carrying out services similar to the Services for projects of a similar size, scope, nature, complexity and value to the Project; and

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<sup>37</sup> Delete if Consultant is a company or sole trader

<sup>38</sup> Delete if Consultant is a company or sole trader

<sup>39</sup> Delete if Consultant is not a company

<sup>40</sup> Delete if Consultant is a company

- 1.1.2 it has complied and will continue to comply with the terms of the Appointment and has fulfilled and will continue to fulfil its duties and obligations under the Appointment.
- 1.2 Insofar as the Consultant has performed a part of the Services before the date of the Appointment, the obligations and liabilities of the Consultant under this Agreement shall take effect in all respects as if the Appointment had been dated prior to the commencement of that part of the Services by the Consultant.
- 1.3 The Consultant acknowledges that breach of the Appointment may cause the Beneficiary to suffer and incur loss damage and expense and the Consultant accepts that any such loss damage and expense (whether direct or indirect and whether or not purely economic in nature) is within the contemplation of the parties as being damage which flows naturally from such breach.

## 2.

- 2.1 Subject to the exercise of reasonable skill and care as required by clause 1, the Consultant further warrants that it has not specified and will not specify or authorise for use in the Project:
  - 2.1.1 products, goods or materials generally accepted, or generally suspected, in the construction industry at the time of specification to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used; and/or
  - 2.1.2 products, goods or materials which do not accord with British or European Union Standards and/or Codes of Practice and/or any applicable agrément certificate issued by the British Board of Agrément current at the time of specification or such equivalent standards or requirements and good building practice; and/or
  - 2.1.3 products, goods or materials which do not accord with the guidelines contained in the edition of the publication "Good Practice in the Selection of Construction Materials" (British Council for Offices) current at the time of specification or use; and/or
  - 2.1.4 products, goods or materials which have been supplied or placed on the market in breach of 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) (or any amendment, modification, consolidation or re-enactment thereof current at the date of specification or use).
- 2.2 If in the performance of its duties under the Appointment the Consultant becomes aware that it or any other person has specified or used, or authorised or approved the specification or use by others of any such products or materials prohibited by clause 2.1 of this Agreement, the Consultant will notify the Beneficiary in writing forthwith. This clause does not create any additional duty for the Consultant to check the work of others which is not required by the Appointment.

3. The Beneficiary has no authority to issue any direction or instruction to the Consultant in relation to performance of the Services under the Appointment [unless and until the Beneficiary has given notice under clause 5]<sup>41</sup>.

4. The Beneficiary has no liability to the Consultant in respect of fees and expenses under the Appointment [unless and until the Beneficiary has given notice under clause 5]<sup>42</sup>.

5.

[5.1 The Consultant agrees that, in the event of the termination of the Funding Agreement or in the event of the Employer becoming insolvent or having a liquidator, receiver, manager, administrator or administrative receiver appointed the Consultant will, if so required by notice in writing given by the Beneficiary to the Consultant, and subject to clause 5.4, accept the instructions of the Beneficiary or its appointee to the exclusion of the Employer in respect of the Project and the Services upon the terms and conditions of the Appointment. The Employer acknowledges that the Consultant shall be entitled to rely on a notice given to the Consultant by the Beneficiary under this clause 5 as conclusive evidence for the purposes of this Agreement of the termination of the Funding Agreement; and further acknowledges that such acceptance of the instructions of the Beneficiary to the exclusion of the Employer shall not constitute any breach of the Consultant's obligations to the Employer under the terms and conditions of the Appointment.

5.2 The Consultant further agrees that it will not without first giving the Beneficiary not less than twenty-eight (28) days' notice in writing exercise any right it may have to terminate the Appointment or to treat the same as having been repudiated by the Employer or to discontinue or suspend the performance of any Services pursuant thereto. Such right to terminate the Appointment with the Employer or to treat the same as having been repudiated or discontinue or suspend performance shall cease if, within such period of notice and subject to clause 5.4 the Beneficiary shall give notice in writing to the Consultant requiring the Consultant to accept the instructions of the Beneficiary or its appointee to the exclusion of the Employer in respect of the Services upon the terms and conditions of the Appointment.

5.3 The Employer acknowledges that the Consultant shall be entitled to rely on a notice given to the Consultant by the Beneficiary under clauses 5.1 or 5.2 and that acceptance by the Consultant of the instruction of the Beneficiary to the exclusion of the Employer shall not constitute any breach of the Consultant's obligations to the Employer under the Appointment. Provided that nothing in this clause 5 shall relieve the Consultant of any liability it may have to the Employer for any breach by the Consultant of the terms and conditions of the Appointment or where the Consultant has wrongfully determined or suspended the Appointment or has wrongfully treated the Appointment as having been repudiated by the Employer.

5.4 It shall be a condition of any notice given by the Beneficiary under clauses 5.1 or 5.2 that the Beneficiary accepts liability for payment of the fees and expenses properly payable and due to the Consultant under the Appointment and for the performance of the Employer's obligations thereunder including payment of any fees and expenses properly due and outstanding at the date of such notice.

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<sup>41</sup> In Funder warranty only

<sup>42</sup> In Funder warranty only

5.5 Upon the issue of any notice by the Beneficiary under clauses 5.1 or 5.2 the Appointment shall continue in full force and effect as if no right of termination on the part of the Consultant has arisen and the Consultant shall be liable to the Beneficiary and its appointee under the Appointment in lieu of its liability to the Employer.

5.6 If any notice given by the Beneficiary under clause 5.1 or 5.2 requires the Consultant to accept the instructions of the Beneficiary's appointee, the Beneficiary shall be liable to the Consultant as guarantor for the payment of all sums from time to time due to the Consultant from the Beneficiary's appointee.]<sup>43</sup>

6.

- 6.1 The copyright in 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 and all updates, amendments, additions and revisions to them and any services, designs, or inventions incorporated or referred to in them (whether created or stored electronically or otherwise) prepared or under preparation by or on behalf of the Consultant in connection with the Appointment or the Services (together referred to in this clause [5][6] as “**the Documents**”) shall remain vested in the Consultant but the Consultant grants to the Beneficiary and its appointee an irrevocable royalty-free and non-exclusive licence to copy and use the Documents for any purpose related to the Services or to the Project including, but without limitation, the design, construction, completion, reconstruction, modification, refurbishment, development, maintenance, facilities management, funding, disposal, letting, fitting-out, advertisement, decommissioning, demolition, reinstatement, building information modelling and repair of the Project.
- 6.2 The licence granted under clause [5.1][6.1] includes the right for the Beneficiary to use the Documents in connection with any extension of the Project, but not to reproduce the designs contained in the Documents in any such extension. Such licence shall be transferable to third parties without the consent of the Consultant being required and shall include the right to grant sub-licences.
- 6.3 Subject to clause [5.4][6.4], the Consultant shall be liable to the Beneficiary for all costs claims damages and losses reasonably and properly incurred or suffered by the Beneficiary as a result of the infringement or alleged infringement of any copyright, patent or other industrial or intellectual property rights arising from the design of the Services or the copying and use of the Documents.
- 6.4 The Consultant shall not be liable for any use by the Beneficiary or its appointee of any of the Documents for any purpose other than that for which the same were prepared by or on behalf of the Consultant.
- 6.5 Where the copyright in any of the Documents is not vested in the Consultant, the Consultant shall procure that the person in whom the copyright is vested grants to the Beneficiary a licence similar to that granted in clause [5.1][6.1] (or the Consultant shall itself grant a sub-licence having the same effect, if it has the right to do so) in relation to all such Documents.

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<sup>43</sup> In Funder warranty only



- 6.6 The Consultant shall provide to the Beneficiary upon request copies of the Documents, the Beneficiary paying to the Consultant the reasonable copying charges.
- 7.
- 7.1 The Consultant shall from the date of the Appointment take out and maintain (promptly paying all premiums) professional indemnity insurance with well established insurers of good repute in an amount of [INSERT AMOUNT OF INSURANCE IN WORDS] (£[INSERT AMOUNT OF INSURANCE IN FIGURES]) for any one claim for a period of 12 years from the date of completion of the Project, provided always that at the date of this Agreement and thereafter such insurance is available at reasonable commercial rates.
- 7.2 The Consultant shall immediately inform the Beneficiary if professional indemnity insurance is not or ceases to be available at reasonable commercial rates in order that the Consultant and the Beneficiary can discuss the means of best protecting the Consultant and the Beneficiary in the absence of such insurance.
- 7.3 As and when it is reasonably requested to do so by the Beneficiary or its appointee, the Consultant shall produce for inspection documentary evidence (in the form of a letter from its insurance broker) that its professional indemnity insurance is being maintained.
- 7.4 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 reasonable commercial rates.
- 8.
- 8.1 This Agreement may be assigned twice by the Beneficiary by way of absolute legal assignment to any party without the consent of the Consultant being required and such assignment shall be effective upon written notice thereof being given to the Consultant. Any assignment thereafter shall require the Consultant's consent (such consent not to be unreasonably withheld or delayed).
- 8.2 The Consultant shall not contend or argue that any person to whom the benefit of this Agreement may be assigned or otherwise dealt with by the Beneficiary pursuant to clause [7.1][8.1] shall be precluded or prevented from recovering under this Agreement any loss or damage resulting from any breach of this Agreement by the Consultant (whenever it happens) by reason of the fact that such person is an assignee only or otherwise not the Beneficiary or because the loss or damage suffered has been suffered by such person only and not by the Beneficiary or because the loss or damage suffered is not the same as or is different from that which has been or would have been suffered by the Beneficiary.
9. Any notice to be given by the Consultant hereunder shall be deemed to be duly given if it is delivered by hand at or sent by registered post or recorded delivery to the Beneficiary at the above address; and any notice given by the Beneficiary hereunder shall be deemed to be duly given if it is delivered by hand at or sent by registered post or recorded delivery to the above mentioned address of the Consultant or to the principal business address of the Consultant for the time being and, in the case of any such notices, the same shall if sent by registered post or recorded delivery be deemed to have been received forty eight hours after being posted.
10. The liability of the Consultant under this Agreement shall not be released diminished or in any other way affected by

- 10.1 any independent enquiry, testing or investigation into any relevant matter which may be made or carried out by or on behalf of the Beneficiary or the failure to carry out any such independent enquiry, testing or investigation; and/or
- 10.2 any approval, consent, perusal or endorsement given or made by or on behalf of the Beneficiary or the failure to give or make any such approval, consent, perusal or endorsement.
- 11. The provisions of this Agreement shall be without prejudice to any other right or remedy which the Beneficiary may have in tort or otherwise.
- 12. Save as expressly stated herein the Contracts (Rights of Third Parties) Act 1999 shall not operate to create rights in favour of anyone other than the parties to this Agreement.
- 13. The construction validity and performance of this Agreement shall be governed by the law of England and Wales and the parties agree to submit to the non-exclusive jurisdiction of the English and Welsh Courts.
- 14. The Consultant's obligations are the joint and several obligations of all of the partners of the Consultant whether or not they have executed this Agreement and the partners who have executed this Agreement jointly and severally warrant that in executing this deed they have the power to bind under seal all the partners of the Consultant jointly and severally.
- 15. The Consultant shall have no greater or longer lasting liability to the Beneficiary by virtue of this Agreement than it would have if the Beneficiary had been named as a joint employer with the Employer under the terms of the Appointment and the Consultant shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation of liability in the Appointment and to raise equivalent rights in defence of liability (save for set off or counterclaim) as it would have against the Employer under the Appointment.

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

#### **EXECUTED AS A DEED BY THE BENEFICIARY**

acting by the following officers who have each signed their names:-

Director's signature .....

Director's name .....

Director's/Secretary's signature .....

Director's/Secretary's name .....

#### **EXECUTED AS A DEED BY THE CONSULTANT**

##### **EITHER**

acting by the following officers who have each signed their names:-

Director's signature .....

Director's name .....

Director's/Secretary's signature .....

Director's/Secretary's name .....

**OR**

acting by the following Partners/Designated members:-

Partner's/Designated Member's signature .....

Partner's/Designated Member's name .....

Partner's/Designated Member's signature<sup>44</sup> .....

Partner's/Designated Member's name .....

**[EXECUTED AS A DEED BY THE EMPLOYER**

by affixing hereto its common seal in the presence of

Signed .....

Name .....

Job title .....<sup>45</sup> ]

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<sup>44</sup> Add further signature and name lines for every partner or designated member who is to sign

<sup>45</sup> In Funder warranty only