

# Deed of Collateral Warranty

Dated

20[●]

BETWEEN:

- (1) [SUB CONTRACTOR] (registered number [●]) whose registered office is at [REGISTERED ADDRESS] (the **Sub-Contractor**);
- (2) [CONTRACTOR] (registered number [●]) whose registered office is at [REGISTERED ADDRESS] (the **Contractor**); and
- (3) [PURCHASER/TENANT/LANDLORD/FUND/OTHER] (registered number [●]) whose registered office is at [REGISTERED ADDRESS] (the **Beneficiary**)

## BACKGROUND

- (A) The Beneficiary has entered into the Agreement (as defined below) conditionally upon the Sub-Contractor (inter alia) entering into direct obligations towards the Beneficiary on the terms set out in this Deed.
- (B) The Sub-Contractor has been engaged to carry out and complete the Sub-Contract Works (as defined below) in connection with the Project (as defined below) and this deed of collateral warranty is provided to the Beneficiary in respect of such matters as lie within the scope of the Sub-Contractor's obligations and responsibilities pursuant to the terms of the Sub-Contract (as defined below) in relation to the Project.

In consideration of the sum of ten pounds £10.00 (receipt of which is acknowledged by the Sub-Contractor).

**THIS DEED WITNESSES** as follows:-

## 1 Definitions and Interpretation

- 1.1 In this Deed, the following words and expressions shall have the following meanings:
  - (a) **Agreement** means an agreement dated [DATE] whereby the Beneficiary has agreed with the Client to [provide finance for] [purchase a freehold/leasehold interest in] [a part of] [DESCRIPTION OF OTHER INTEREST IN PROJECT] the Project;
  - (b) **Client** means [INSERT NAME OF EMPLOYER]; IN FUND, PURCHASER, TENANT OR OTHER COLLATERAL WARRANTY ONLY]
  - (c) **Contract** means the building contract dated [DATE] and made between the Client and the Contractor for the design, construction and completion of the Project;
  - (d) **Documents** has the meaning give to it in Clause **Error! Reference source not found.**;
  - (e) **Fund** means any Funder (as defined in the Contract) provided with a collateral warranty or in whom third party rights have vested in respect of the Contractor in accordance with the Contract;

- (f) **Project** means [DESCRIPTION OF PROJECT] at [ADDRESS] as detailed in the Contract;
- (g) **Sub-Contract** means the agreement dated [DATE] made between the Contractor and the Sub-Contractor in respect of the carrying out of the Sub-Contract Works; and
- (h) **Sub-Contract Works** means [INSERT DESCRIPTION OF WORKS] all as detailed in the Sub-Contract.

1.2 In this Deed, unless the context otherwise requires:

- (a) references to Clauses are to Clauses of this Deed;
- (b) unless the context otherwise requires, words denoting the singular number include the plural and vice versa;
- (c) references to persons include reference to a natural person, corporate or unincorporated body (whether or not having separate legal personality); and
- (d) references to statutes or statutory instruments include references to any consolidation, modification, extension, amendment, replacement or re-enactment of them from time to time and any subordinate legislation under it from time to time.

## 2 **Duty of Care**

2.1 The Sub-Contractor warrants and undertakes to the Beneficiary that:

2.1.1 in carrying out and completing the design of the Sub-Contract Works (including any design of the Sub-Contract Works carried out prior to the date of the Sub-Contract and/or this Deed), it has exercised and will continue to exercise all the reasonable skill, care and diligence to be expected of a properly qualified and competent designer (in each of the disciplines to which the design of the Sub-Contract Works relate) experienced in the provision of like services for projects of a similar size, type, scope, complexity and value to the Project; and

2.1.2 it has performed and will continue properly and diligently to perform all of its obligations under the Sub-Contract (including any obligations carried out prior to the date of the Sub-Contract and/or this Deed) and will owe the same contractual duties (including without limitation duties of care) to the Beneficiary as those owed by the Sub-Contractor to the Contractor under the Sub-Contract.

2.2 Notwithstanding the foregoing of this Clause **Error! Reference source not found.**, the Sub-Contractor owes to the Beneficiary the same duty of care in respect of its duties as aforesaid as it owes to the Contractor, provided always that the Sub-Contractor shall have no greater liability to the Beneficiary under this Deed than it had to the Contractor under the Sub-Contract and shall be entitled to rely on the same defenses and rights of counter-claim as it would have had if the Beneficiary had been named as joint employer under the Sub-Contract, always excluding any rights of set-off or deduction.

## 3 **Insurance**

3.1 The Sub-Contractor warrants that it currently maintains and shall continue to maintain professional indemnity insurance from the date of the Sub-Contract

until 12 (twelve) years after practical completion of the Project with a limit of indemnity of not less than [AMOUNT IN WORDS] million pounds (£[AMOUNT IN FIGURES]) for any one occurrence or series of occurrences arising out of any one event, provided that such insurance is generally available in the market at commercially reasonable rates and terms. The Sub-Contractor shall maintain such professional indemnity insurance with a well-established and reputable insurance office or underwriter of repute carrying on business in the United Kingdom on customary and usual terms and conditions prevailing for the time being in the insurance market.

- 3.2 As and when reasonably requested by the Beneficiary, the Sub-Contractor shall provide documentary evidence that such insurance is being maintained.

#### **4 Intellectual Property Rights**

- 4.1 The intellectual property rights in the documents prepared pursuant to the Sub-Contract and any designs contained in such documents for any purpose connected to the Project (the Documents) shall remain vested in the Sub-Contractor. The Sub-Contractor hereby grants to the Beneficiary (and its nominees) an irrevocable, perpetual, non-terminable, worldwide, royalty-free licence to use and reproduce the Documents for all purposes relating to the Project including, but without limitation, the construction, completion, modification, maintenance, advertisement, reinstatement, repair, reconstruction, refurbishment, redevelopment, use, letting, marketing, promotion and sale of the Project and to copy and use (but not to reproduce any designs contained therein) the Documents for an extension to the Project. The Beneficiary shall also be entitled to grant sub-licences to others and these shall be transferable to third parties without the prior consent of the Sub-Contractor.

- 4.2 The Sub-Contractor shall not be liable for any such use by the Beneficiary or its nominees of any Documents for any purpose other than that for which the same were prepared or provided and such purposes as are reasonably foreseeable as at the date the relevant parts of the Sub-Contract Works are performed.

- 4.3 The Sub-Contractor shall, at the request of the Beneficiary, provide to the Beneficiary such copies of the Documents (in hard copy or electronic form) as the Beneficiary may reasonably require in connection with the Project.

#### **5 Assignment**

The Beneficiary may assign to any person with an interest in the Project the benefit of the terms of this Deed twice without the Sub-Contractor's consent, always providing that the assignment of the benefit of the terms of this Deed by way of security (and redemption of the same) and/or to any corporate entity within the same group shall not be so limited.

#### **[CLAUSE 6 IN CLIENT AND FUND WARRANTY ONLY]**

#### **6 Termination of the Contract**

- 6.1 The Sub-Contractor warrants to the Beneficiary that the Sub-Contractor shall not exercise or seek to exercise any right to terminate or treat as terminated the Sub-Contract or discontinue or suspend performance of any obligations thereunder without first giving to the Beneficiary not less than 28 (twenty-eight) days' prior written notice of its intention to do so, specifying the Sub-

Contractor's grounds for termination, discontinuance or suspension and full particulars of any amounts owed by the Contractor to the Sub-Contractor under the Sub-Contract.

- 6.2 Within 28 (twenty-eight) days of receipt of such notice from the Sub-Contractor pursuant to Clause **Error! Reference source not found.** or if the Beneficiary is entitled to and exercises its rights to forfeit or terminate the Contract, the Beneficiary may give written notice to the Sub-Contractor that the Beneficiary or its nominee shall thenceforth be treated as the contractor under the Sub-Contract. From the date of the notice, the Sub-Contract shall continue in full force and effect as if it had been entered into between the Sub-Contractor and the Beneficiary.
- 6.3 Any notice served by the Sub-Contractor or the Beneficiary pursuant to Clauses **Error! Reference source not found.** and **Error! Reference source not found.** shall be served simultaneously upon both the Fund and/or (where relevant) the Client.
- 6.4 In the event that both the Fund and (where relevant) the Client serve notices equivalent to the notice required by Clause **Error! Reference source not found.**, the Sub-Contractor and the Beneficiary acknowledge and agree that the notice of the Fund shall take priority over that of the Client.
- 6.5 Following the full exercise of the Beneficiary's rights and compliance with its obligations under Clause **Error! Reference source not found.**, the Sub-Contractor shall comply with all reasonable instructions of the Beneficiary (or its nominee) to formalise the contractual position between the Beneficiary and the Sub-Contractor.
- 6.6 The Contractor confirms its concurrence with any arrangements required, made and/or contemplated by the provisions of this Clause **Error! Reference source not found.** and Clause 7 (**Third Party Rights or Collateral Warranties**).<sup>1</sup>

**1** *CLAUSE 7 (AND RELATED ANNEXURES) IN CLIENT COLLATERAL WARRANTY ONLY*

**7 Third Party Rights or Collateral Warranties**

- 7.1 The Sub-Contractor agrees that, pursuant to the Contracts (Rights of Third Parties) Act 1999 (the Act), the provisions of Annexure 1 of this Deed shall vest in and may be relied upon by any Third Party (as defined in the Contract and without prejudice to the operation of Clause 7.3) for whom a validly served third party rights notice (in the form set out in Annexure 2 of this Deed together with such amendments that are reasonably necessary to permit its intended effect) has been issued by the Beneficiary to the Sub-Contractor.
- 7.2 Notwithstanding the requirement for consent of any Third Party under Section 2 of the Act, the Contractor and the Sub-Contractor shall (without prejudice to paragraph **8** of Annexure 1 of this Deed) be entitled to agree any amendment, variation, waiver or release under or arising from or in respect of the Sub-Contract, and to terminate the Sub-Contract without the consent of any Third Party being required.
- 7.3 As an alternative to the exercise by the Beneficiary of its rights in Clause 7.1 only and at the Beneficiary's sole option and discretion, the Sub-Contractor shall, within 14 (fourteen) days of the Beneficiary providing an engrossment

copy of the same, execute and deliver to the Beneficiary a deed of collateral warranty in favour of the Third Party containing substantially the same terms as set out in the Schedule (with such amendments as the Third Party shall reasonably require) with the maximum number of Third Parties in whom such rights may vest and/or executed collateral warranty may be delivered under an in accordance with this cause 7 being limited to 7 (seven) in number. **I**

**8 Liability**

No action or proceedings for any breach by the Sub-Contractor under or relating to this Deed shall be commenced against the Sub-Contractor after the expiration of 12 (twelve) years from the date of practical completion of the Project.

**9 Variation**

The Sub-Contractor agrees with the Beneficiary not to vary or agree to vary or waive the terms of the Sub-Contract without the prior written consent of the Beneficiary (such consent not to be unreasonably withheld or delayed).

**10 Notices**

Any notice provided for in this Deed shall be in writing, either delivered personally or sent by first class recorded delivery post and addressed to the persons at the addresses stated in the Sub-Contract or such other addresses as shall be notified by each party to the other from time to time. Such notice shall be deemed to have been delivered:

- (a) if delivered by hand, on the same day; and
- (b) if by post, two days after the same shall have been posted.

**11 Adjudication**

Any adjudication under the Housing Grants Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009) shall be carried out in accordance with the TeCSA Adjudication Rules in force from time to time and either party may apply to the Chairman of TeCSA for nomination of an Adjudicator within the time limits required by the 1996 Act as amended.

**12 Governing Law and Jurisdiction**

The terms of this Deed and any dispute or claim arising out of it or in connection with it or its subject matter shall be governed by and construed in accordance with the law of England and Wales. The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Deed or its subject matter.

**13 Counterparts**

This Deed may be executed in any number of counterparts, each of which when executed and delivered shall constitute a duplicate original, and any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute the one agreement and a full original of this Deed for all purposes.

## Annexure 1 – Third Party Rights

The Client and Contractor agree that:

### 1 Interpretation

In this Schedule, unless the context otherwise requires, words defined in the Deed shall have the same meaning. In addition:

- (a) **Beneficiary** means the Third Party granted the rights under this Schedule pursuant to Clause 8 (Third Party Rights or Collateral Warranties) of the Deed; and
- (b) **Deed** means the deed of collateral between the Sub-Contractor, Contractor and a beneficiary to which this Schedule is annexed.

### 2 Duty of Care

2.1 The Sub-Contractor warrants and undertakes to the Beneficiary that:

- (a) in carrying out and completing the design of the Works (including any design of the Sub-Contract Works carried out prior to the date of the Sub-Contract and/or this Schedule), it has exercised and will continue to exercise all the reasonable skill, care and diligence to be expected of a properly qualified and competent designer (in each of the disciplines to which the design of the Sub-Contract Works relate) experienced in the provision of like services for projects of a similar size, type, scope, complexity and value to the Project; and
- (b) it has performed and will continue properly and diligently to perform all of its obligations under the Sub-Contract (including any obligations carried out prior to the date of the Sub-Contract and/or this Deed) and will owe the same contractual duties (including without limitation duties of care) to the Beneficiary as those owed by the Sub-Contractor to the Contractor under the Sub-Contract.

2.2 Notwithstanding the foregoing of this paragraph **Error! Reference source not found.** of this Schedule, the Sub-Contractor owes to the Beneficiary the same duty of care in respect of its duties as aforesaid as it owes to the Contractor, provided always that the Sub-Contractor shall have no greater liability to the Beneficiary under this Schedule than it had to the Contractor under the Sub-Contract and shall be entitled to rely on the same defenses and rights of counter-claim as it would have had if the Beneficiary had been named as joint employer under the Sub-Contract, always excluding any rights of set-off or deduction.

### 3 Insurance

3.1 The Sub-Contractor warrants that it currently maintains and shall continue to maintain professional indemnity insurance from the date of the Sub-Contract until 12 (twelve) years after practical completion of the Project with a limit of indemnity of not less than [AMOUNT IN WORDS] million pounds (£[AMOUNT IN FIGURES]) for any one occurrence or series of occurrences arising out of any one event, provided that such insurance is generally available in the market at commercially reasonable rates and terms. The Sub-Contractor shall maintain such professional indemnity insurance with a well-established and reputable insurance office or underwriter of repute carrying on business

in the United Kingdom on customary and usual terms and conditions prevailing for the time being in the insurance market.

- 3.2 As and when reasonably requested by the Beneficiary, the Sub-Contractor shall provide documentary evidence that such insurance is being maintained.

#### 4 **Intellectual Property Rights**

- 4.1 The intellectual property rights in the documents prepared pursuant to the Contract and any designs contained in such documents for any purpose connected to the Project (the **Documents**) shall remain vested in the Sub-Contractor. The Sub-Contractor hereby grants to the Beneficiary (and its nominees) an irrevocable, perpetual, non-terminable, worldwide, royalty-free licence to use and reproduce the Documents for all purposes relating to the Project including, but without limitation, the construction, completion, modification, maintenance, advertisement, reinstatement, repair, reconstruction, refurbishment, redevelopment, use, letting, marketing, promotion and sale of the Project and to copy and use (but not to reproduce any designs contained therein) the Documents for an extension to the Project. The Beneficiary shall also be entitled to grant sub-licences to others and these shall be transferable to third parties without the prior consent of the Sub-Contractor.

- 4.2 The Sub-Contractor shall not be liable for any such use by the Beneficiary or its nominees of any Documents for any purpose other than that for which the same were prepared or provided and such purposes as are reasonably foreseeable as at the date the relevant parts of the Sub-Contract Works are performed.

- 4.3 The Sub-Contractor shall, at the request of the Beneficiary, provide to the Beneficiary such copies of the Documents (in hard copy or electronic form) as the Beneficiary may reasonably require in connection with the Project.

#### 5 **Assignment**

The Beneficiary may assign to any person with an interest in the Project the benefit of the terms of this Schedule twice without the Sub-Contractor's consent, always providing that the assignment of the benefit of the terms of this Schedule by way of security (and redemption of the same) and/or to any corporate entity within the same group shall not be so limited.

#### 6 **Termination of the Contract**

- 6.1 The Sub-Contractor warrants to the Beneficiary that the Sub-Contractor shall not exercise or seek to exercise any right to terminate or treat as terminated the Sub-Contract or discontinue or suspend performance of any obligations thereunder without first giving to the Beneficiary not less than 28 (twenty-eight) days' prior written notice of its intention to do so, specifying the Sub-Contractor's grounds for termination, discontinuance or suspension and full particulars of any amounts owed by the Contractor to the Sub-Contractor under the Sub-Contract.

- 6.2 Within 28 (twenty-eight) days of receipt of such notice from the Sub-Contractor pursuant to paragraph **Error! Reference source not found.** of this Schedule or if the Beneficiary is entitled to and exercises its rights to forfeit or terminate the Contract, the Beneficiary may give written notice to the Sub-Contractor that the Beneficiary or its nominee shall thenceforth be



treated as the contractor under the Sub-Contract. From the date of the notice, the Sub-Contract shall continue in full force and effect as if it had been entered into between the Sub-Contractor and the Beneficiary.

- 6.3 Any notice served by the Sub-Contractor or the Beneficiary pursuant to paragraphs **Error! Reference source not found.** and **Error! Reference source not found.** of this Schedule shall be served simultaneously upon both the Fund and/or (where relevant) the Client.
- 6.4 In the event that both the Fund and (where relevant) the Client serve notices equivalent to the notice required by Clause **Error! Reference source not found.**, the Sub-Contractor and the Beneficiary acknowledge and agree that the notice of the Fund shall take priority over that of the Client.
- 6.5 Following the full exercise of the Beneficiary's rights and compliance with its obligations under paragraph **Error! Reference source not found.** of this Schedule, the Sub-Contractor shall comply with all reasonable instructions of the Beneficiary (or its nominee) to formalise the contractual position between the Beneficiary and the Sub-Contractor.
- 6.6 The Contractor confirms its concurrence with any arrangements required, made and/or contemplated by the provisions of this paragraph of this Schedule.

## 7 **Liability**

No action or proceedings for any breach by the Sub-Contractor under or relating to this Schedule shall be commenced against the Sub-Contractor after the expiration of 12 (twelve) years from the date of practical completion of the Project.

## 8 **Variation**

The Sub-Contractor agrees with the Beneficiary not to vary or agree to vary or waive the terms of this Schedule without the prior written consent of the Beneficiary (such consent not to be unreasonably withheld or delayed).

## 9 **Notices**

- 9.1 Any notice provided for in this Schedule shall be in writing, either delivered personally or sent by first class recorded delivery post and addressed to the persons at the addresses stated in the Sub-Contract or such other addresses as shall be notified by each party to the other from time to time. Such notice shall be deemed to have been delivered:

- (a) if delivered by hand, on the same day; and
- (b) if by post, two days after the same shall have been posted.

## 10 **Adjudication**

Any adjudication under the Housing Grants Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009) shall be carried out in accordance with the TeCSA Adjudication Rules in force from time to time and either party may apply to the Chairman of TeCSA for nomination of an Adjudicator within the time limits required by the 1996 Act as amended.

## 11 **Governing Law and Jurisdiction**



The terms of this Schedule and any dispute or claim arising out of it or in connection with it or its subject matter shall be governed by and construed in accordance with the law of England and Wales. The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Schedule or its subject matter.

## Annexure 2 – Notice of Third Party Rights

SUB-CONTRACTOR  
SUB-CONTRACTOR'S ADDRESS FOR NOTICES

DATE

Dear Sirs

You have entered into a deed of collateral warranty with BENEFICIARY (Beneficiary) dated DATE in respect of your Sub-Contract Works for the DESCRIPTION OF MAIN WORKS at SITE ADDRESS (Deed). Unless otherwise specified in this notice, all capitalised terms in this letter shall have the meaning set out in the Deed.

Annexure 1 of the Deed sets out the benefits and rights which may vest in and be enforced by a Third Party on the issue of this notice to you.

On behalf of the Beneficiary we hereby nominate THIRD PARTY (registered number •) whose registered office is at ADDRESS as a Third Party entitled to enforce the benefits and rights set out in Schedule 1 of the Deed as from the date of this notice.

We confirm that the Beneficiary MAY/MAY NOT exercise the rights under paragraph 6 of Annexure 1 to the Deed.

Yours faithfully

For and on behalf of  
BENEFICIARY UNDER DEED

In witness of which this document has been **executed** as a **Deed** and is delivered on the date stated at the beginning of this Deed.

Executed as a Deed by  
**[SUB-CONTRACTOR]**  
acting by:

)  
)  
)  
)

sign here:

\_\_\_\_\_  
Director/Member

\_\_\_\_\_  
print name

\_\_\_\_\_  
sign here

\_\_\_\_\_  
Director/Company Secretary/Member

\_\_\_\_\_  
print name:

**[OR]**

**Executed** as a **Deed** by  
**[SUB-CONTRACTOR]**  
acting by:

)  
)  
)  
)

\_\_\_\_\_  
sign here:

\_\_\_\_\_  
Director/Member

\_\_\_\_\_  
print name:

In the presence of:

Witness signature:

\_\_\_\_\_  
Witness sign here:

Witness name:

\_\_\_\_\_  
print name:

Witness address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Witness occupation:

\_\_\_\_\_  
\_\_\_\_\_

Executed as a Deed by  
**[CONTRACTOR]**  
acting by:

)  
)  
)  
)

sign here:

\_\_\_\_\_  
Director/Member

\_\_\_\_\_  
print name

sign here

\_\_\_\_\_  
Director/Company Secretary/Member

\_\_\_\_\_  
print name:

**[OR]**

Executed as a Deed by  
**[CONTRACTOR]**  
acting by:

)  
)  
)  
)

sign here:

\_\_\_\_\_  
Director/Member

\_\_\_\_\_  
print name:

In the presence of:

Witness signature:

\_\_\_\_\_  
Witness sign here:

Witness name:

\_\_\_\_\_  
print name:

Witness address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Executed as a Deed by  
**[BENEFICIARY]**  
acting by:

)  
)  
)  
)

sign here:

\_\_\_\_\_  
Director**[/Member]**

\_\_\_\_\_  
print name

sign here

\_\_\_\_\_  
Director / Company Secretary **[/Member]**

\_\_\_\_\_  
print name:

**[OR]**

Executed as a Deed by  
**[BENEFICIARY]**  
acting by:

)  
)  
)  
)

sign here:

\_\_\_\_\_  
Director**[/Member]**

\_\_\_\_\_  
print name:

In the presence of:

Witness signature:

\_\_\_\_\_  
Witness sign here:

Witness name:

\_\_\_\_\_  
print name:

Witness address:

\_\_\_\_\_  
\_\_\_\_\_  
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