

BCP Council

Minor Works Building Contract with Contractor Design

MWD 2016 Edition

Schedule of Amendments

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The proposed contract set out in the Invitation to Tender is let under the terms of the JCT Minor Works Building Contract with Contractor's Design (MWD 2016 Edition) subject to the following amendments below. Where a Recital, Article or Condition is not referred to below, the unamended term in the MWD 2016 shall apply.

On the issue of the Award Letter (as after defined), the terms set out in this document shall have full force and effect.

Recitals

First - Add after final paragraph:-

The Employer by Contract Notice has advertised the required works and the Contractor has submitted the Tender. The Employer has accepted the Tender by issuing the Award Letter.

Articles

ADD after Article 7 the following additional NEW Articles:-

"Article 9: Effect of Approval

Notwithstanding any other provision of this Contract, the Contractor shall not be relieved from his obligations under this Contract nor shall such obligations be removed, restricted, limited or qualified in any way by the presence of the Employer or the Architect/Contract Administrator or his agents or representatives on the site of the Works or the carrying out of tests on the instructions of the Employer or the Architect/Contract Administrator or by any instruction, direction, admission, consent, approval, confirmation, sanction, acknowledgment, advice or inspection made or given by or on behalf of the Employer or the Architect/Contract Administrator.

Article 10: Incorporation of Schedule of Amendments

The Articles of Agreement and Conditions shall be amended in accordance with the Schedule of Amendments annexed hereto at Appendix 1 which shall take precedence over the printed text of the JCT Minor Works Building Contract with Contractor's Design (MWD 2016 Edition).

Article 11: Contractor's Parent Company Guarantee

Where stated in the Employer Requirements or elsewhere that a Parent Company Guarantee is required from the Contractor, the Contractor shall, no later than the date of this Contract, procure the execution and delivery of a parent company guarantee in favour of the Employer in the form attached at Schedule 2. The parent company guarantee shall be executed and delivered by the parent company of the Contractor, or if more than one parent company, the parent company as determined by the Employer. If the Contractor does not procure execution and delivery of the parent company guarantee, then, notwithstanding any other term of this Contract, the Employer may deduct 10% from the sums that would otherwise be due to the Contractor under this Contract.

Article 12: Performance Bond

Where stated in the Employer Requirements or elsewhere that a Performance Bond is required from the Contractor, the Contractor shall, no later than the date of this Contract, procure the execution and delivery of a bond in favour of the Employer in the form attached at Schedule 3. The bond amount shall be no less than 10% of the Contract Sum. The bond shall be executed and delivered by a surety approved by the

Employer, acting reasonably. If the Contractor does not procure execution and delivery of the bond, then, notwithstanding any other term of this Contract, the Employer may deduct 10% from the sums that would otherwise be due to the Contractor under this Contract.

CONDITIONS

Section 1: Definitions and Interpretations

Definitions

Clause 1.1. **AMEND** the definitions as follows:

DELETE the definition text of "Agreement" and **SUBSTITUTE** with:

"the Articles of Agreement consisting of the Recitals, the Articles, the Contract Particulars and Conditions each as amended by the Schedule of Amendments".

At the end of the definition of "CDM Regulations" **INSERT**:

"and the related Approved Code of Practice together with any guidance requirements issued by the Health and Safety Executive from time to time".

ADD to the end of the definition of "Conditions", before the full stop: "each as amended by the Schedule of Amendments".

ADD to the end of the definition of "Contract Particulars", before the full stop:

"and as amended (if applicable) by the Schedule of Amendments".

DELETE the definition and the associated text of: "Fluctuations Option"

ADD these new definitions:

"Deleterious: materials or equipment that are generally accepted, or generally suspected, in the construction industry at the relevant time as posing a threat to the health and safety of any person; or posing a threat to the structural stability, performance or physical integrity of the Works or any part or component of the Works; or reducing, or possibly reducing, the normal life expectancy of the Works or any part or component of the Works; or not being in accordance with any relevant British Standard or equivalent European Standard or any publications of the Building Research Establishment related to the specification of products or materials, relevant code of practice, good building practice or any applicable agreement certificate issued by the British Board of Agreement."

"Employer: the person named as Employer in the Agreement, his successors in title and permitted assignees."

"Environmental Information Regulations: the Environmental Information Regulations 2004 together with any guidance and/or codes of practice used by the Information Commissioner or relevant Government Department in relation to such legislation."

"FOIA: the Freedom of Information Act 2000 and any subordinate legislation made under this Act from time to time together with any guidance any/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such legislation."

"Information: has the meaning given to it under section 84 of the Freedom of Information Act 2000."

"Funder: a person that has provided, or is to provide, finance in connection with the whole or any part of the Works or the completed Works; or the site of the Works, whether that person acts on its own account, as agent for a syndicate of other parties or otherwise."

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

"Permitted Uses: the design, construction, completion, reconstruction, modification, refurbishment, development, maintenance, funding, disposal, letting, fitting-out, advertisement, demolition, reinstatement, extension and repair of the Works (and the completed Works)."

"Request for Information: a request for information or any apparent request under the Code of Practice on Access to Government Information, FOIA or the Environmental Information Regulations."

"Sub-Contractors: those sub-contractors identified as such in the Contract Particulars."

Clause 1.2 **INSERT** after "override or modify": "the Schedule of Amendments,".

Clause 2.1 **INSERT** at the end of sub-clause 2.1.2 before the full stop:

"and such materials and standards of workmanship shall be new, of satisfactory quality or proper and workmanlike (as the case may be)".

ADD a new sub-clause 2.1.5:

"The Contractor shall not specify or use any products or materials in the Works, which, at the time of specification or use, are Deleterious."

ADD a new sub-clause 2.1.6:

"The Contractor shall not knowingly use or suffer or permit the use in the Works of any products or materials, which, at the time of use, are Deleterious. If in the performance of his duties under this Contract, the Contractor becomes aware that he or any person specified, approved or used any such products or materials, the Contractor shall immediately give written notice to the Architect/Contract Administrator of the same. This clause 2.1.6 does not create any additional duty for the Contractor to inspect or check the work of others which is not otherwise required by this Contract."

ADD a new sub-clause 2.1.7:

"Notwithstanding any other provision of this Contract, the term 'approval' when used in the context of any approval to be given by the Employer or the Architect/Contract Administrator shall have the meaning 'acceptance of general principles only', and no such approval or any consent given by the Employer or the Architect/Contract Administrator nor any inspection of or failure to inspect the Works shall diminish or relieve the Contractor from any of his obligations or liabilities under this Contract. No comments made nor the fact that no comments are made shall be construed as acceptance or approval nor shall the Employer or the Architect/Contract Administrator be responsible for any work done on the basis of them and the Contractor shall remain fully responsible for the adequacy of the design of the CDP Works".

Clause 2.8 **Extension of Time**

INSERT after "instructions that are not occasioned by a default of the Contractor" the following:

"but not to the extent that such instructions are reasonable."

ADD a new sentence at the end of clause 2.8:

"The Contractor's entitlement to an extension of time shall be reduced to the extent that any act or omission of the Contractor, his servants or agents or any Sub-Contractor or supplier or their servants or agents may have contributed to the delay."

Clause 2.9.3 **Damages for Non Completion**

DELETE sub-clause 2.9.3

Clause 2.12 **Certificate for Making Good**

ADD to the end of clause 2.12:

"Provided that the Architect / Contract Administrator shall not be required to issue any certificate of making good earlier than the expiry of the Rectification Period."

INSERT new clause 2.13:

2.13 **Site Conditions**

The Contractor has had an opportunity of inspecting the physical conditions (including the sub-surface conditions) and other conditions of or affecting the site of the Works and shall be deemed to be fully acquainted with the same before the date of this Contract and to have obtained all necessary information as to risks, contingencies and all other circumstances which may influence or affect the execution of the Works. Notwithstanding any other provision of this Contract, no failure on the part of the Contractor to discover or foresee any such condition, risk, contingency or circumstance shall entitle the Contractor to any additional payment (whether by way of an addition to the Contract Sum or otherwise). As between the Contractor and the Employer, the Contractor shall not and shall not be entitled to rely upon any survey, report or other document prepared by or on behalf of the Employer regarding any such matter as is referred to in this clause 2.13 and the Employer makes no representation or warranty as to the accuracy or completeness of any such survey, report or document. The Employer shall have no liability arising out of or in relation to any such survey, report or document or from any representation or statement, whether negligently or otherwise made, contained in such survey, report or other document."

Clause 2.14 INSERT a new clause 2.14:

"Confidentiality and Publicity

2.14.1 The Contractor shall not, without the prior written approval of the Employer, take or permit to be taken any photographs of the Works for use in any publicity or advertising

2.14.2 The Contractor shall ensure that similar provisions are included in his Contracts with Sub-Contractors and Consultants and shall enforce such provisions."

Clause 2.15 **INSERT** a new clause 2.15:

2.15.1 The Contractor acknowledges that the Employer is subject to the requirements of the FOIA and the Environmental Information Regulations and shall assist and co-operate with the Employer to enable the Employer to comply with its Information disclosure obligations.

2.15.2 The Contractor shall and shall procure that its Sub-Contractors shall, at the Contractor's expense:

2.15.2.1 transfer to the Employer all Requests for Information that it receives as soon as practicable and in any event within two Working Days of receiving a Request for Information;

- 2.15.2.2 provide the Employer with a copy of all Information in its possession or power in the form that the Employer requires within five Working Days (or such other period as the Employer may specify) of the Employer's Request; and
- 2.15.2.3 provide all necessary assistance as reasonably requested by the Employer to enable the Employer to respond to the Request for Information within the time for compliance as set out in section 10 of the FOIA or regulation 5 of the Environmental Information Regulations.
- 2.15.3 The Employer shall be responsible for determining in its absolute discretion and notwithstanding any other provision in these Conditions or in any other agreement whether the Commercially Sensitive Information and/or any other Information is exempt from disclosure in accordance with the provisions of the FOIA or the Environmental Information Regulations.
- 2.15.4 In no event shall the Contractor respond directly to a Request for Information unless expressly authorised to do so by the Employer.
- 2.15.5 The Contractor acknowledges that the Employer may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of the Functions of the Public Authorities under Part 1 of the Freedom of Information Act 2000 ("the Code") be obliged under the FOIA, or the Environmental Information Regulations to disclose information concerning the Contractor or the Works without consulting the Contractor.
- 2.15.6 The Contractor shall ensure that all Information is retained for disclosure and shall permit the Employer to inspect such records as requested from time to time.
- 2.15.7 The Contractor acknowledges that the Commercially Sensitive Information listed in schedule 5 is of indicative value only and that the Employer may be obliged to disclose it in accordance with this clause 2.14.

Clause 3.1 **DELETE** clause 3.1 and **SUBSTITUTE** "

- .1 The Employer may, assign or otherwise transfer the benefit of this Contract to any person. In this Contract the term "Employer" shall all be construed accordingly.
- .2 Without prejudice to clause 3.1.1, the Employer may charge, or assign by way of security, the benefit of this Contract to any Funder (and the Funder may reassign the benefit of this Contract to the Employer on redemption of that security).
- .3 The Employer shall notify the Contractor of any assignment. If the Employer fails to notify the Contractor, the assignment shall still be valid.
- .4 The Contractor shall not contend that any person to whom the benefit of this agreement is assigned under this clause 3.1 may not recover any sum under this Contract because that person is an assignee and not a named party to this Contract.
- .5 The Contractor shall not assign or charge the benefit of this Contract or any right arising under it without the prior written consent of the Employer, which the Employer may withhold at its absolute discretion."

Clause 3.3 **INSERT** a new sub-clause 3.3.4:

"3.3.4 Where the Architect/Contract Administrator has consented to the subcontracting of the whole or any part of the Works, the Contractor shall obtain the Employer's written consent to the form of a Sub-Contract for any person, firm or company to be employed in such sub-contracting before any such Sub-Contract is entered into and shall not afterwards terminate the employment of, or substitute, any such person, firm or company, retained in respect of such sub-contracting without the prior written consent of the Employer (such consent shall not be unreasonably withheld or delayed)."

INSERT a new sub-clause 3.3.5

“3.3.5 Within 7 days of entering into a sub-contract the Contractor shall provide the Employer with a certified copy of the relevant Sub-Contract and shall not alter, waive, vary or depart from any terms of the relevant Sub-Contract without the Employer’s prior written consent.”

Clause 3.9 Clause 3.9A **INSERT** a new clause 3.9A: “Construction Phase Plan 3.9A Where it is the Contractor’s responsibility to prepare the Construction Phase Plan then:

3.9A.1 if as a result of the Construction Phase Plan not being ready construction of the works cannot start on the Date of Possession, the Contractor shall not be entitled to any addition to the Contract Sum as a result of the Contractor not being able to commence the construction of the Works on the Date of Possession; and

3.9A.2 if the Construction Phase Plan has to be varied or supplemented during the execution of the Works, the Contractor shall not be entitled to any addition to the Contract Sum as a result of the varying or supplementing of the Construction Phase Plan and the Contractor shall reimburse the Employer in respect of any loss or additional expense which the Employer suffers or incurs as a result of the varying or supplementing of the Construction Phase Plan.”

Clause 3.10 **ADD** new clause 3.10 "Project Meetings

The Contractor shall attend project meetings convened by the Architect/Contract Administrator upon reasonable notice and at reasonable intervals and representatives of the Employer and the Employer's professional consultants and any other persons authorised by the Architect/Contractor Administrator shall be permitted to attend such meetings."

Clause 4.3 In clause 4.3 **INSERT** at the beginning of the clause: "Subject always to Article 11, Article 12 and clause 6.7,"

Clause 4.3 In the last line of clause 4.3 **DELETE**: "14 days" and **INSERT** "28 days"

Clause 5.1 In clause 5.1 after "caused by the carrying out of the Works"

INSERT: "or of any other obligation pursuant to Section 2 of the Conditions".

Clause 5.2 Line 5, after “Works” **INSERT** “or in the performance of the Contractor’s obligations under clause 2.10.”

Clause 5.3 After clause 5.3 **INSERT** a new clause 5.3A:

“Trespass and Nuisance

5.3A.1 The Contractor shall at all times take reasonable measures to prevent any trespass, public or private nuisance (including, without limitation, any nuisance caused by noxious fumes, noisy working operations or the deposit of any materials or debris on the public highway) or other interference with the rights and activities of any adjoining or neighbouring land owner, tenant or occupier or any statutory undertaker arising out of the carrying out of the Works and shall assist the Employer in defending any relevant action or proceedings which may be instituted.

5.3A.2 The Contractor shall be responsible for and shall indemnify the Employer from and against any and all expenses, liabilities, losses claims and proceedings whatsoever resulting from any such trespass, nuisance or interference, except only where such trespass, nuisance or interference is the consequence of a Variation or other instruction by or on behalf of the Employer (which is itself not the result of any negligence, default or breach of contract by or on behalf of the Contractor or any of the Contractor’s Persons and has not been avoided despite the Contractor using all reasonable and practical means to avoid the same).

5.3A.3 The Architect/Contract Administrator may issue to the Contractor such instructions as he considers necessary if any injunction is granted or Court order is made in consequence of any such trespass, nuisance or interference, but (except as described above) the Contractor shall not be entitled to any additional payment (whether by way of any addition to the Contract Sum or otherwise) by reason of any such instruction."

Clause 5.3B **ADD** new clause 5.3B after new clause 5.3A:

"Contractor to prevent trespass to neighbours

Without prejudice to clauses 5.1, 5.2 and 5.3A, the Contractor shall ensure that there is no trespass by the Contractor or the Contractor's Persons (including, without limitation, the oversailing of tower crane jibs) on or over any adjoining or neighbouring property arising out of the Works and shall take all reasonable safety and other measures to prevent damage or injury to any persons including, without limitation, the occupiers of adjoining or neighbouring property and members of the public. If carrying out the Works or any obligation pursuant to clause 2.10 would otherwise be an act of trespass, the Contractor shall, at no cost to the Employer, obtain the prior written agreement of the owners or occupiers of any adjoining or neighbouring to that act. That agreement shall be subject to the approval of the Employer before its completion, such agreement not to be unreasonably withheld or delayed. The Contractor shall comply, at no cost to the Employer, with any conditions contained in that agreement."

Clause 5.4A In sub-clause 5.4A.1 after "a Joint Names Policy for All Risks Insurance",

INSERT: "(with the names of the Employer and the Funder shown as additional insureds)".

Clause 5.4B after "effect and maintain" **INSERT**

"in the joint names of the Employer, the Contractor and the Funder"

INSERT a new clause 5.6:

"5.6. If the Contractor has not provided evidence of any policies required under this Contract to the Employer at tender stage, he will provide it immediately after the execution of this Contract. In the event that in the Employer's reasonable opinion those policies do not effect proper cover in accordance with this Contract, the Employer may require the Contractor to effect and the Contractor will effect such further insurance as the Employer may reasonable require."

Clause 6.11 **DELETE** sub-clause 6.11.2.3.

DELETE sub-clause 6.11.3 and **SUBSTITUTE** "Number not used."

Schedule 1 **DELETE** and **SUBSTITUTE** "Performance Bond."

Schedule 2 **DELETE** and **SUBSTITUTE** "Parent Company Guarantee."

Schedule 3 Applies

Schedule 4: Collateral Warranties/Third Party Rights/Deed of Novation

INSERT this Schedule of Amendments as new Appendix 1 – Schedule of Amendments

SCHEDULE 3 - SUB- CONTRACTOR /BENEFICIARY WARRANTY

This is dated [DATE]

PARTIES

(1)[FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] **(Sub-Contractor)**

(2)[FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] **(Beneficiary)**

BACKGROUND

(A) The Employer has engaged the Contractor to carry out [design and] construction work.

(B) The Contractor has engaged the Sub-Contractor to carry out part of that [design and] construction work.

(C) The Employer and the Contractor require the Sub-Contractor to enter into a collateral warranty in favour of the Beneficiary.

(D) The Sub-Contractor has agreed to enter into this agreement with the Beneficiary for the benefit of the Beneficiary.

(E) The Beneficiary has paid £1 to the Sub-Contractor as consideration under this agreement.

AGREED TERMS

1. INTERPRETATION

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

1.1 Definitions:

Building Contract: an agreement in writing dated [DATE] between the Employer and the Contractor.

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

Contractor: [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS].

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

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

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

Employer: [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS].

Funder: a person that has provided, or is to provide, finance in connection with:

- a. the whole or any part of the Works or the completed Works; or
- b. the site of the Works,

whether that person acts on its own account, as agent for a syndicate of other parties or otherwise.

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

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

Property: [DESCRIPTION OF PROPERTY].

Sub-Contract: an agreement in writing dated [DATE] between the Contractor and the Sub-Contractor.

Sub-Contract Works: the [design,] construction and completion of the building works referred to in the Sub-Contract, carried out by the Sub-Contractor under the Sub-Contract.

Works: the [design,] construction and completion of the building works referred to in the Building Contract, carried out by or on behalf of the Contractor under the Building Contract.

1.2 Clause headings shall not affect the interpretation of this agreement.

1.3 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).

1.4 A reference to a **company** shall include any company, corporation or other body corporate, wherever and however incorporated or established.

1.5 Unless the context otherwise requires, words in the singular shall include the plural and in the plural include the singular.

1.6 Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.

1.7 This agreement shall be binding on, and enure to the benefit of, the parties to this agreement and their respective personal representatives, successors and permitted assigns, and references to any party shall include that party's personal representatives, successors and permitted assigns.

1.8 A reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time.

1.9 A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision.

1.10 Any obligation on a party not to do something includes an obligation not to allow that thing to be done.

1.11 A reference to **writing** or **written** includes fax and email.

1.12 A reference to a document is a reference to that document as varied or novated (in each case, other than in breach of this agreement) at any time.

1.13 [Any reference to an English legal term for any action, remedy, method of judicial proceeding, legal document, legal status, court, official or any legal concept or thing shall, in respect of any jurisdiction other

than England, be deemed to include a reference to that which most nearly approximates to the English legal term in that jurisdiction.

1.14 References to clauses are to the clauses of this agreement.

1.15 [Unless otherwise expressly provided, the obligations and liabilities of the persons forming the] [PARTIES] under this agreement are joint and several.

1.16 Any words following the terms **including, include, in particular, for example** or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.

2. COMPLY WITH SUB-CONTRACT

2.1 The Sub-Contractor warrants to the Beneficiary that:

(a) it has complied, and shall continue to comply, with its obligations under the Sub-Contract, including its obligations to:

(i) carry out and complete the Sub-Contract Works properly; and

(ii) use workmanship and materials of the quality and standard specified in the Sub-Contract;

(b) [without affecting *Clause 2.1(a)*], and to the extent that it takes responsibility for the same under the Sub-Contract, it:

(i) has designed, or will design, the Sub-Contract Works; and

(ii) has selected, or will select, goods, materials, plant and equipment for incorporation in the Sub-Contract Works,

with all the reasonable skill, care and diligence to be expected of a qualified and experienced architect (or other appropriate professional designer) undertaking the design of works similar in scope and character to the Works; and

(c) it [has used all the reasonable skill, care and diligence to be expected of a qualified and experienced architect (or other appropriate professional designer) undertaking the design of works similar in scope and character to the Works to **OR** has not and will] not specify or use anything in the Sub-Contract Works, which, at the time of specification or use, is Deleterious.

2.2 In proceedings for breach of this *Clause 2*, the Sub-Contractor may:

(a) rely on any limit of liability or other term of the Sub-Contract; and

(b) raise equivalent rights of defence as it would have had, if the Beneficiary had been named as a joint employer, with the Contractor, under the Sub-Contract (for this purpose not taking into account any set-off or counterclaim against the actual contractor under the Sub-Contract).

2.3 Without affecting *Clause 2.2*, in proceedings for breach of this *Clause 2*, the Sub-Contractor's liability shall be limited to:

(a) the reasonable cost of repair, renewal and/or reinstatement of the Works and the Property, to the extent that:

(i) the Beneficiary incurs that cost; or

(ii) the Beneficiary is or will be liable for that cost, including (without limitation) under a service charge or other obligation to pay those costs, whether directly or indirectly

(b) [£[SUM]], for the Beneficiary's other costs and losses.

2.4 The Sub-Contractor's duties or liabilities under this agreement shall not be negated or diminished by:

(a) any approval or inspection of: **(i)** the Property; or **(ii)** the Works; or **(iii)** the Sub-Contract Works; or

- (iv) any designs or specifications for the Property or the Works; or
 - (b) any testing of any work, goods, materials, plant or equipment; or
 - (c) any omission to approve, inspect or test,
- by or on behalf of the Beneficiary or the Contractor.

2.5 This agreement shall not negate or diminish any duty or liability otherwise owed to the Beneficiary, the Employer by the Sub-Contractor.

3. NO INSTRUCTIONS TO SUB-CONTRACTOR BY BENEFICIARY

The Beneficiary may not give instructions to the Sub-Contractor under this agreement.

4. COPYRIGHT

4.1 The Sub-Contractor grants to the Beneficiary, with immediate effect, an irrevocable, non-exclusive, non-terminable, royalty-free licence to copy and make full use of any Material prepared by, or on behalf of, the Sub-Contractor for any purpose relating to the Works and the Property, including any of the Permitted Uses.

4.2 This licence allows the Beneficiary to use the Material in connection with any extension of the Project, but not to reproduce the designs contained in the Material in any such extension.

4.3 This licence carries the right to grant sub-licences[and is transferable to third parties without the consent of the Sub-Contractor.

4.4 The Sub-Contractor shall not be liable for use of the Material for any purpose other than that for which it was prepared and/or provided.

4.5 The Beneficiary may request a copy or copies of (some or all of) the Material from the Sub-Contractor. On the Beneficiary's payment of the Sub-Contractor's reasonable charges for providing the copy (or copies), the Sub-Contractor shall provide the copy (or copies) to the Beneficiary.

5. PROFESSIONAL INDEMNITY INSURANCE

5.1 The Sub-Contractor shall maintain professional indemnity insurance for an amount of at least £[SUM] [for any one occurrence or series of occurrences arising out of any one event **OR** in the annual aggregate] for a period beginning on the date of this agreement and ending [six **OR** 12] years after the date of [practical completion **OR** making good of defects] of the Works, provided that such insurance is available at commercially reasonable rates [and terms]. The Sub-Contractor shall maintain that professional indemnity insurance:

- (a) with reputable insurers lawfully carrying on insurance business in the UK;
- (b) on customary and usual terms and conditions prevailing for the time being in the insurance market; and
- (c) on terms that:
 - (i) do not require the Sub-Contractor to discharge any liability before being entitled to recover from the insurers; and
 - (ii) would not adversely affect the rights of any person to recover from the insurers under the Third Parties (Rights Against Insurers) Act 2010.

5.2 Any increased or additional premium required by insurers because of the Sub-Contractor's claims record or other acts, omissions, matters or things particular to the Sub-Contractor shall be deemed to be within commercially reasonable rates.

5.3 The Sub-Contractor shall immediately inform the Beneficiary if the Sub-Contractor's required professional indemnity insurance ceases to be available at commercially reasonable rates [and terms], so that the Sub-Contractor and the Beneficiary can discuss how best to protect the respective positions of the Beneficiary and the Sub-Contractor regarding the Works and the Property, without that insurance.

5.4 Whenever the Beneficiary reasonably requests, the Sub-Contractor shall send the Beneficiary evidence that the Sub-Contractor's professional indemnity insurance is in force, including, if required by the Beneficiary, an original letter from the Sub-Contractor's insurers or brokers confirming:

- (a) the Sub-Contractor's then current professional indemnity insurance; and
- (b) that the premiums for that insurance have been paid in full at the date of that letter.

6. LIABILITY PERIOD

The Beneficiary may not commence any legal action against the Sub-Contractor under this agreement after 12 years from the date of [practical completion **OR** making good of defects] of all of the Works.

7. ASSIGNMENT

7.1 The Beneficiary may assign the benefit of this agreement:

- (a) on two occasions to any person; and
- (b) without counting as an assignment under *Clause 7.1(a)*:
 - (i) by way of security to a Funder (including any reassignment on redemption of security); or
 - (ii) to and from subsidiary or other associated companies within the same group of companies as the Beneficiary

7.2 The Beneficiary shall notify the Sub-Contractor of any assignment. If the Beneficiary fails to do this, the assignment shall still be valid.

7.3 The Sub-Contractor shall not contend that any person to whom the benefit of this agreement is assigned under *Clause 7.1* may not recover any sum under this agreement because that person is an assignee and not a named party to this agreement.

8. NOTICES

8.1 For the purposes of this clause, but subject to *Clause 8.7*, notice includes any other communication.]

8.2 A notice given to a party under or in connection with this agreement:

- (a) shall be in writing and in English or accompanied by an accurate translation into English;
- (b) shall be signed by or on behalf of the party giving it;
- (c) shall be sent to the party for the attention of the contact and at the address[, fax or DX number] listed in *Clause 8.3*;
- (d) shall be sent by a method listed in *Clause 8.5*; and
- (e) unless proved otherwise is deemed received as set out in *Clause 8.5* if prepared and sent in accordance with this clause.

8.3 The parties' addresses and contacts are as set out in this table:

Party	Contact	Address	Fax number	DX number
Sub-Contractor	[POSITION OF CONTACT]	[ADDRESS]	[FAX NUMBER]	[DX NUMBER]
Beneficiary	[POSITION OF CONTACT]	[ADDRESS]	[FAX NUMBER]	[DX NUMBER]

8.4 A party may change its details given in the table in *Clause 8.3* by giving notice, the change taking effect for the party notified of the change at 9.00 am on the later of:

- (a) the date, if any, specified in the notice as the effective date for the change; or
- (b) the date five Business Days after deemed receipt of the notice.

8.5 This table sets out:

- (a) delivery methods for sending a notice to a party under this agreement; and
- (b) for each delivery method, the corresponding delivery date and time when delivery of the notice is deemed to have taken place provided that all other requirements in this clause have been satisfied and subject to the provisions in *Clause 8.6*:

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

8.6 For the purpose of *Clause 8.5* and calculating deemed receipt:

- (a) all references to time are to local time in the place of deemed receipt; and
- (b) if deemed receipt would occur in the place of deemed receipt on a Saturday or Sunday or a public holiday when banks are not open for business, deemed receipt is deemed to take place at 9.00 am on the day when business next starts in the place of receipt.

8.7 This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

8.8 A notice given under or in connection with this agreement is not valid if sent by email.

9. THIRD PARTY RIGHTS

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

10. GOVERNING LAW

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

11. JURISDICTION

Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to

settle any dispute or claim arising out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims).

Signed by [NAME OF DIRECTOR] for and on behalf
of [NAME OF SUB-CONTRACTOR]

.....

Director

OR

Executed as a deed by [NAME OF SUB-
CONTRACTOR]

.....

[SIGNATURE OF FIRST DIRECTOR]

Director

acting by [NAME OF FIRST DIRECTOR], a director
and [NAME OF SECOND DIRECTOR/SECRETARY], [a
director OR its secretary]

.....

[SIGNATURE OF SECOND DIRECTOR OR SECRETARY]

[Director OR Secretary]

OR

Executed as a deed by [NAME OF SUB-
CONTRACTOR]

.....

[SIGNATURE OF DIRECTOR]

Director

acting by [NAME OF DIRECTOR] a director, in the
presence of:

.....

[SIGNATURE OF WITNESS]

[NAME, ADDRESS [AND OCCUPATION] OF WITNESS]

Executed as a deed by [NAME OF BENEFICIARY]

.....

[SIGNATURE OF FIRST DIRECTOR]

Director

acting by [NAME OF FIRST DIRECTOR], a director
and [NAME OF SECOND DIRECTOR/SECRETARY], [a
director OR its secretary]

.....

[SIGNATURE OF SECOND DIRECTOR OR SECRETARY]

[Director OR Secretary]

OR

Executed as a deed by [NAME OF BENEFICIARY]
acting by [NAME OF DIRECTOR] a director, in the
presence of:

.....

[SIGNATURE OF WITNESS]

[NAME, ADDRESS [AND OCCUPATION] OF WITNESS]

.....

[SIGNATURE OF DIRECTOR]

Director

SCHEDULE 3 – DEED OF NOVATION

DEED OF NOVATION [AND VARIATION]

OF

[WHICH] CONTRACT/Framework AGREEMENT

between

BOURNEMOUTH CHRISTCHURCH AND POOLE COUNCIL

and

OUTGOING PARTY

and

INCOMING PARTY

THIS AGREEMENT is made as a deed and dated

2019

Parties

- (1) **BOURNEMOUTH CHRISTCHURCH AND POOLE COUNCIL** of Town Hall Bourne Avenue Bournemouth BH2 6DY (**Continuing Party**); and
- (2) incorporated and registered in England and Wales with company number whose registered office is at (**Outgoing Party**); and
- (3) incorporated and registered in England and Wales with company number whose registered office is at (**Incoming Party**).

BACKGROUND

- (A) The Continuing Party and the Outgoing Party are party to a contract dated *insert date of contract* (**Contract**) for provision of *insert description of services* (details of which are set out in the Contract).
- (B) [As part of an internal reorganisation (*or insert other reason*) the Outgoing Party wishes to transfer all its rights, obligations and liabilities under the Contract to the Incoming Party].
- (C) The parties have agreed that the Outgoing Party's rights, obligations and liabilities under the Contract shall be novated to the Incoming Party on the terms of this agreement.
- (D) The parties have therefore agreed to novate the Outgoing Party's rights, obligations and liabilities under the Contract to the Incoming Party on the terms of this agreement with effect from the (**Transfer Date**).

AGREED TERMS

DEFINITIONS AND INTERPRETATION

Unless otherwise defined in this deed, the words and expressions defined in the Contract, together with the interpretation provisions therein, shall have the same meaning and effect as if set out in full in this deed.

NOVATION

1. With effect from the Transfer Date, the Outgoing Party transfers all its rights and obligations under the Contract to the Incoming Party. The Incoming Party shall enjoy all the rights and benefits of the Outgoing Party under the Contract, and all references to the Outgoing Party in the Contract shall be read and construed as reference to the Incoming Party.
2. With effect from the Transfer Date, the Incoming Party agrees to perform the Contract and be bound by its terms in every way as if it were the original party to it in place of the Outgoing Party.
3. With effect from the Transfer Date the Continuing Party agrees to perform the Contract and be bound by its terms in every way as if the Incoming Party were the original party to it in place of the Outgoing Party.

OBLIGATIONS AND LIABILITIES

1. With effect from the Transfer Date, the Continuing Party and the Outgoing Party release each other from all future obligations to the other under the Contract.
2. Each of the Outgoing Party and the Continuing Party release and discharge the other from all claims and demands under or in connection with the Contract arising after the Transfer Date.
3. Each of the Incoming Party and the Continuing Party will have the right to enforce the Contract and pursue any claims and demands under the Contract against the other with respect to matters arising before, on or after the Transfer Date as though the Incoming Party were the original party to the Contract instead of the Outgoing Party.

INDEMNITY

1. The Incoming Party shall indemnify the Outgoing Party against all liabilities, costs, expenses, damages and losses that the Outgoing Party suffers or incurs under or in connection with the Contract as a result of the Incoming Party's failure to perform or satisfy its assumed obligations under the Contract after the Transfer Date.
2. The Outgoing Party shall indemnify the Incoming Party against all liabilities, costs, expenses, damages and losses that the Incoming Party suffers or incurs under or in connection with the Contract as a result of the Outgoing Party's failure to perform or satisfy its obligations under the Contract before the Transfer Date.

[VARIATION TO THE CONTRACT]

With effect from the Transfer Date, the Contract shall be varied as follows:

ADD

Except as expressly set out in this clause 6, the Contract shall continue in full force and effect.]]¹

WARRANTIES AND REPRESENTATIONS

1. By executing this agreement, each of the parties warrants and undertakes that;
 - a. it has full power and authority to enter into this agreement and that all necessary approvals and consents have been obtained and are in full force and effect;
 - b. to the best of its knowledge, nothing will have, or is likely to have, a material adverse effect on its ability to give effect to this agreement.
2. Each party shall take such steps, execute all such documents, and do all such acts and things as may be reasonably required by the other party to give effect to any of the transactions contemplated by this Deed.
3. The Incoming Party and the Outgoing Party jointly and severally represent and warrant to each other and to the Continuing Party that there is no unremedied default or breach of the Contract.
4. Each party acknowledges that each other party has executed this deed and agreed to take part in the transactions that it contemplates in reliance on the representations and warranties that are made or repeated in this clause.

COSTS

Each party must bear its own costs and expenses incidental to the preparing and carrying into effect of this Deed.

NOTICES

Any notices referred to in this agreement shall be made in writing and given to the intended party by hand or delivered by prepaid first class post to the address set out in this agreement. Any notice shall be deemed to be received two working days after posting and at the time of delivery by hand.

GOVERNING LAW AND JURISDICTION

1. This deed and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.
2. The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of, or in connection with, this agreement or its subject matter or formation (including non-contractual disputes or claims).

¹ Consider if any amendments need to be made to the Contract. Please speak to Legal.

IN WITNESS WHEREOF the parties have executed this agreement as a deed on the date stated at the beginning of it.

Executed as a deed by **BOURNEMOUTH)**

CHRISTCHURCH AND POOLE COUNCIL)

by affixing the Common Seal)

in the presence of a duly

authorised signatory:)

EXECUTED AS A DEED BY)

)

by affixing the common seal in the presence of:

Signature of Director

Name of Director

Signature of Director/Company Secretary

Name of Director/Company Secretary

OR by acting by a director and its company secretary/two directors whose signature(s) are subscribed here:

Signature of Director

Name of Director

Signature of Director/Company Secretary

Name of Director/Company Secretary

OR by attested signature where single Director:

Signature of Director

Name of Director

Witness Signature

Witness Name

Witness Address

EXECUTED AS A DEED BY)
)

by affixing the common seal in the presence of a duly authorised signatory:

Signature of Director

Name of Director

Signature of Director/Company Secretary

Name of Director/Company Secretary

OR by acting by a director and its company secretary/two directors whose signature(s) are subscribed here:

Signature of Director

Name of Director

Signature of Director/Company Secretary

Name of Director/Company Secretary

OR by attested signature where single Director:

Signature of Director

Name of Director

Witness Signature

Witness Name

Witness Address

SCHEDULE 2 – PARENT COMPANY GUARANTEE

This deed is dated [DATE]

PARTIES

(1)[FULL **COMPANY** NAME] incorporated and registered in England and Wales with **company** number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (**Guarantor**)

(2)[FULL **COMPANY** NAME] incorporated and registered in England and Wales with **company** number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (**Employer**)

BACKGROUND

(A) By an agreement in writing dated [DATE] (**Building Contract**) and made between the Employer and [FULL **COMPANY** NAME] incorporated and registered in England and Wales with **company** number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (**Contractor**), the Contractor agreed to [design and construct **OR** complete the design of and construct **OR** construct] [WORKS] at [WORKS ADDRESS] (**Works**).

(B) The Guarantor (the ultimate **parent company** of the Contractor) has agreed to **guarantee** the Contractor's due performance of its duties or obligations under the Building Contract.

AGREED TERMS

1. INTERPRETATION

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

1.1 Definitions:

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

Insolvency Event: a party suffers an insolvency event if:

- a. it suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 as if the words "it is proved to the satisfaction of the court" did not appear in sections 123(1)(e) or 123(2) of the IA 1986;
- b. it commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with any of its creditors other than for the sole purpose of a scheme for a solvent amalgamation with one or more other companies or a solvent reconstruction;
- c. a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with its winding up other than for the sole purpose of a scheme for a solvent amalgamation with one or more other **companies** or a solvent reconstruction;
- d. an application is made to court, or an order is made, for the appointment of an administrator, or a notice of intention to appoint an administrator is given or an administrator is appointed, over it;
- e. the holder of a qualifying floating charge over its assets has become entitled to appoint or has appointed an administrative receiver;
- f. a person becomes entitled to appoint a receiver over all or any of its assets or a receiver is appointed over all or any of its assets;
- g. a creditor or encumbrancer of it attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of its assets and such attachment or process is not discharged within 14 days;

- h. any event occurs, or proceeding is taken, with respect to it in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in (a) to (g) (inclusive); or
- i. it suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business.

1.2 Clause headings shall not affect the interpretation of this deed.

1.3 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).

1.4 A reference to a **company** shall include any **company**, corporation or other body corporate, wherever and however incorporated or established.

1.5 Unless the context otherwise requires, words in the singular shall include the plural and in the plural include the singular.

1.6 Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.

1.7 This deed shall be binding on, and enure to the benefit of, the parties to this agreement and their respective personal representatives, successors and permitted assigns, and references to any party shall include that party's personal representatives, successors and permitted assigns.

1.8 A reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time.

1.9 A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision.

1.10 A reference to **writing** or **written** includes fax and email.

1.11 Any obligation on a party not to do something includes an obligation not to agree that thing to be done.

1.12 References to clauses are to the clauses of this deed.

1.13 A reference to **this deed** or to any other deed, agreement or document referred to in this deed is a reference to this deed or such other deed, agreement or document as varied or novated (in each case, other than in breach of the provisions of this deed) from time to time.

1.14 Any words following the terms **including**, **include**, **in particular**, **for example** or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.

2. GUARANTEE AND INDEMNITY

2.1 The Guarantor **guarantees** the due and punctual performance by the Contractor of all the Contractor's duties and obligations under the Building Contract.

2.2 If the Contractor fails to observe or perform any of its duties or obligations under the Building Contract, or if the Contractor fails to pay any sum, loss, debt, damage, interest, cost or expense due from the Contractor to the Employer under or in connection with the Building Contract, the Guarantor (as a separate and independent obligation and liability from its obligations and liabilities under *Clause 2.1*) shall indemnify the Employer against all loss, debt, damage, interest, payments, charges, cost and expense incurred by the Employer by reason of such failure or non-payment and shall, on first written demand, pay to the Employer, without any deduction or set-off, the amount of that loss, debt, damage, interest, payment, charges, cost and expense.

2.3 If the Contractor suffers an Insolvency Event, the Guarantor shall indemnify the Employer against all loss, debt, damage, interest, payments, charges, cost and expense incurred by the Employer by reason of

such Insolvency Event and shall, on first written demand, pay to the Employer without any deduction or set-off the amount of that loss, debt, damage, interest, payment, charges, cost and expense.

3. AMENDMENTS TO THE BUILDING CONTRACT

3.1 The Building Contract may be modified, amended or supplemented in any way without the Guarantor's consent. The Guarantor's liability under this deed (which includes the Contractor's duties, obligations and liabilities under the Building Contract as modified, amended or supplemented) shall not be released, reduced or adversely affected by any such modification, amendment or supplement.

3.2 The Guarantor's liability under this deed shall not be released, reduced or adversely affected by:

- (a)** any invalidity, avoidance or termination of the Building Contract;
- (b)** any waiver, concession, allowance, compromise or forbearance whether as to payment, time, performance or otherwise given to, or made with, the Contractor and the terms of this deed shall apply to the terms of any such compromise as they apply to the Building Contract; or
- (c)** any other act, event, omission or circumstance that, but for this provision, might operate to exonerate the Guarantor.

4. EMPLOYER DOES NOT HAVE TO PURSUE CONTRACTOR

The Employer does not have to pursue any remedy against the Contractor before proceeding against the Guarantor under this deed.

5. INSOLVENCY OF CONTRACTOR

Without affecting *Clause 2.3*, if the Contractor suffers an Insolvency Event that shall not release, reduce or adversely affect the Guarantor's liability under this deed.

6. PRIORITY OF CLAIMS AGAINST THE CONTRACTOR

As long as any liability incurred by the Contractor to the Employer guaranteed under this deed remains unsatisfied, the Guarantor shall not, in respect of any payment made or liability arising under this deed, effect (or try to effect) any recovery from the Contractor, whether by receipt of money, set-off, proof of debt, enforcement of security or otherwise.

7. LIMIT OF LIABILITY

The Employer may not recover any more under this deed in respect of any matter than the Employer would be entitled to recover from the Contractor in respect of that matter, net of any set off. The Employer may not start proceedings against the Guarantor under this deed in respect of any claim if any proceedings against the Contractor in respect of that claim would be statute-barred.

8. ASSIGNMENT

8.1 The Employer may assign or charge the benefit of this deed to any person to whom the Employer lawfully assigns or charges the benefit of the Building Contract.

8.2 The Guarantor and the Contractor may not assign or charge the benefit of this deed without the Employer's written consent.

8.3 The Employer shall notify the Guarantor of any assignment. If the Employer fails to do this, the assignment shall still be valid.

8.4 The Guarantor shall not contend that any person to whom the benefit of this deed is assigned under *Clause 8.1* may not recover any sum under this deed because that person is an assignee and not a named party to this deed.

9. NOTICES

9.1 For the purposes of this clause, but subject to *Clause 9.7*, notice includes any other communication.

9.2 A notice given to a party under or in connection with this deed:

(a) shall be in writing[and in English or accompanied by an accurate translation into English;

(b) shall be signed by or on behalf of the party giving it;

(c) shall be sent to the party for the attention of the contact and at the address, email address, fax or DX number listed in *Clause 9.3* or such other address, email address, fax or DX number as that party may notify in accordance with *Clause 9.4*;

(d) shall **OR** may be sent by a method listed in *Clause 9.5*; and

(e) unless proved otherwise is deemed received as set out in *Clause 9.5* if prepared and sent in accordance with this clause.

9.3 The parties' addresses, fax numbers, email addresses and DX numbers for service of notices are:

(a) Guarantor

(i) Address: [ADDRESS]

(ii) For the attention of: [POSITION OF CONTACT]

(iii) [Email address: [EMAIL ADDRESS]]

(iv) [Fax number: [FAX NUMBER]]

(v) [DX number: [DX NUMBER]]

(b) Employer

(i) Address: [ADDRESS]

(ii) For the attention of: [POSITION OF CONTACT]

(iii) [Email address: [EMAIL ADDRESS]]

(iv) [Fax number: [FAX NUMBER]]

(v) [DX number: [DX NUMBER]]

9.4 A party may change its details given in *Clause 9.3* by giving notice, the change taking effect for the party notified of the change at 9.00 am on the later of:

(a) the date, if any, specified in the notice as the effective date for the change; or

(b) the date five Business Days after deemed receipt of the notice.

9.5 This *Clause 9.5* sets out the delivery methods for sending a notice to a party under this deed and, for each delivery method, the date and time when the notice is deemed to have been received (provided that all other requirements of this clause have been satisfied and subject to the provisions in *Clause 9.6*):

(a) if delivered by hand, on signature of a delivery receipt or at the time the notice is left at the address];

(b) if sent by pre-paid first class post or other next working day delivery service providing proof of postage OR delivery at 9.00am on the second Business Day after posting or at the time recorded by the delivery service;

(c) if sent by pre-paid airmail providing proof of postage OR delivery, at 9.00am on the fifth Business Day after posting or at the time recorded by the delivery service

(d) if sent by document exchange (DX), at 9.00am on the second Business Day after being put into the DX.

9.6 If deemed receipt under *Clause 9.5* would occur outside business hours in the place of receipt, it shall

be deferred until business hours resume. In this *Clause 9.6*, business hours means 9.00am to 5.00pm Monday to Friday on a day that is not a public holiday in the place of receipt.

9.7 This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

9.8 A notice given under or in connection with this deed is not valid if sent by e-mail.

10. THIRD PARTY RIGHTS

10.1 Unless it expressly states otherwise, this deed does not give rise to any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this deed.

10.2 The rights of the parties to rescind or vary this agreement are not subject to the consent of any other person.

11. GOVERNING LAW

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

12. JURISDICTION

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

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

Executed as deed by [NAME OF **Guarantor**] acting by [NAME OF FIRST DIRECTOR], and [NAME OF SECOND DIRECTOR/SECRETARY]

.....

Director

.....

Director/Secretary

OR

Signed as deed by [NAME OF **Guarantor**] in the presence of [NAME OF WITNESS]

.....

[SIGNATURE OF **Guarantor**]

.....

[SIGNATURE OF WITNESS]

.....

.....

[ADDRESS OF WITNESS]

Signed as deed by [NAME OF **Guarantor**] in the presence of [NAME OF WITNESS]

.....

[SIGNATURE OF **Guarantor**]

.....

[SIGNATURE OF WITNESS]

.....

.....

[ADDRESS OF WITNESS]

Executed as deed by [NAME OF **Employer**] 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

OR

Executed as deed by [NAME OF **Employer**] acting by [NAME OF DIRECTOR] a director, in the presence of:

.....

[SIGNATURE OF DIRECTOR]

Director

.....

[SIGNATURE OF WITNESS]

[NAME, ADDRESS [AND OCCUPATION] OF WITNESS]

SCHEDULE 1 – PERFORMANCE BOND

This deed is dated [DATE]

PARTIES

(1)[FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (**Surety**)

(2)[FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (**Contractor**)

(3)[FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (**Employer**)

BACKGROUND

(A) By an agreement in writing dated [DATE] (**Building Contract**) and made between the Employer and the Contractor, the Contractor agreed to [design and construct OR complete the design of and construct OR construct] [WORKS] at [WORKS ADDRESS] (**Works**).

(B) The Employer requires the Contractor to provide a bond, in the form of this deed, to the Employer.

(C) The Surety has agreed to enter into this deed with the Employer and the Contractor for the benefit of the Employer.

AGREED TERMS

1. INTERPRETATION

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

1.1 Definitions:

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

Funder: a person that has provided, or is to provide, finance in connection with:

- a. the whole or any part of the Works or the completed Works; and/or
- b. the site of the Works

whether such person acts on its own account, as agent for a syndicate of other parties or otherwise.

Insolvency Event: a party suffers an insolvency event if:

- a. it suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 as if the words “it is proved to the satisfaction of the court” did not appear in sections 123(1)(e) or 123(2) of the IA 1986;
- b. it commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with any of its creditors other than for the sole purpose of a scheme for a solvent amalgamation with one or more other companies or a solvent reconstruction;
- c. a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with its winding up other than for the sole purpose of a scheme for a solvent amalgamation with one or more other companies or a solvent reconstruction;
- d. an application is made to court, or an order is made, for the appointment of an administrator, or a notice of intention to appoint an administrator is given or an administrator is appointed, over it;
- e. the holder of a qualifying floating charge over its assets has become entitled to appoint or has

appointed an administrative receiver;

- f. a person becomes entitled to appoint a receiver over all or any of its assets or a receiver is appointed over all or any of its assets;
- g. a creditor or encumbrancer of it attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of its assets and such attachment or process is not discharged within [14] days;
- h. any event occurs, or proceeding is taken, with respect to it in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in (a) to (g) (inclusive); or
- i. it suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business.

Maximum Amount: £[SUM][, subject to *Clause 2.3*, reducing to £[SUM] [one **OR** two **OR** three] calendar months after the issue of [a certificate (or certificates) of practical completion under the Building Contract for all the Works **OR** the Employer's written statement, under the Building Contract, that all the Works have reached practical completion]].

1.2 Clause and annex headings shall not affect the interpretation of this deed.

1.3 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).

1.4 [The annex forms part of this deed and shall have effect as if set out in full in the body of this deed. Any reference to this deed includes the annex.]

1.5 A reference to a **company** shall include any company, corporation or other body corporate, wherever and however incorporated or established.

1.6 Unless the context otherwise requires, words in the singular shall include the plural and in the plural shall include the singular.

1.7 Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.

1.8 This agreement shall be binding on, and enure to the benefit of, the parties to this agreement and their respective personal representatives, successors and permitted assigns, and references to any party shall include that party's personal representatives, successors and permitted assigns.

1.9 A reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time.

1.10 A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision.

1.11 A reference to **writing** or **written** includes fax and email.

1.12 Any obligation on a party not to do something includes an obligation not to agree that thing to be done.

1.13 Any reference to an English legal term for any action, remedy, method of judicial proceeding, legal document, legal status, court, official or any legal concept or thing shall, in respect of any jurisdiction other than England, be deemed to include a reference to that which most nearly approximates to the English legal term in that jurisdiction.

1.14 A reference to **this deed** or to any other deed, agreement or document referred to in this deed is a reference to this deed or such other deed, agreement or document as varied or novated (in each case, other than in breach of the provisions of this deed) from time to time.

1.15 References to clauses [or the annex] are to the clauses [or the annex] of this deed.

1.16 Any words following the terms **including, include, in particular, for example** or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.

2. PROMISE TO PAY UP TO MAXIMUM AMOUNT

2.1 If the Contractor fails to pay any sum that becomes due from it to the Employer under or in connection with the Building Contract (including any loss, debt, damage, interest, cost or expense), the Employer may give notice to the Surety requiring the Surety to pay that sum, up to the Maximum Amount, to the Employer. The Surety shall pay that sum to the Employer within 10 Business Days of receipt of the Employer's notice, which shall be in the form set out in *Annex A*.

2.2 The Employer may give different notices to the Surety on different occasions, each requiring the Surety to pay the sum referred to in *Clause 2.1*, but the Surety shall not be obliged to pay to the Employer more than the Maximum Amount in aggregate.

2.3 If the amount of the Maximum Amount reduces one calendar month after the issue of a certificate (or certificates) of practical completion under the Building Contract for all the Works **OR** the Employer's written statement, under the Building Contract, that all the Works have reached practical completion], references to the Maximum Amount in this deed are references to the Maximum Amount on the date of service of a notice given by the Employer under *Clause 2.1*.

3. AMENDMENTS TO BUILDING CONTRACT

3.1 The Building Contract or the Works may be modified, amended or supplemented in any way without the Surety's consent. The Surety's liability under this deed (which includes the Contractor's duties, obligations and liabilities under the Building Contract as modified, amended or supplemented) shall not be released, reduced or adversely affected by any such modification, amendment or supplement.

3.2 The Surety's liability under this deed shall not be released, reduced or adversely affected by:

(a) any invalidity, avoidance or termination of the Building Contract (or the Contractor's employment under the Building Contract).

(b) any waiver, concession, allowance, compromise or forbearance whether as to payment, time, performance or otherwise given to, or made with, the Contractor and the terms of this deed shall apply to the terms of any such waiver, concession, allowance, compromise or forbearance as they apply to the Building Contract.

(c) any other act, event, omission or circumstance that, but for this provision, might operate to exonerate the Surety.

4. PRIORITY OF CLAIMS AGAINST THE CONTRACTOR

4.1 Until the Employer has recovered all sums due to it under or in connection with the Building Contract, the Surety shall not:

(a) in respect of any payment made or liability under this deed, claim, rank or vote as a creditor in the liquidation of the Contractor in competition with the Employer; or

(b) enforce any security over the assets of the Contractor in respect of any such payment or liability in competition with the Employer.

This *Clause 4* shall not limit or restrict the exercise or enforcement by the Surety of its rights against any other person.

4.2 If the Surety recovers any sums in breach of *Clause 4.1*, the Surety shall hold such sums on trust:

(a) to pay to the Employer any sums due from the Contractor to the Employer under or in connection with the Building Contract; and

(b) subject to *Clause 4.2(a)*, for the benefit of the Surety.

4.3 The Employer may enforce this *Clause 4* to keep itself, or to put itself, in the position it would be in if the Surety had no rights of recourse against the Contractor or the Contractor's assets in respect of:

(a) any payment made by the Surety; or

(b) any liability of the Surety under this deed

but no further.

5. CONCLUSIVE LIABILITY AND EXTENT OF LIABILITY

5.1 For the purposes of this deed:

(a) any adjudicator's decision, judgment or arbitral award against the Contractor in favour of the Employer; or

(b) any written acknowledgment by the Contractor that it has failed to pay a sum due from it to the Employer,

under or in connection with the Building Contract, shall be conclusive evidence of any liability of the Contractor to which that decision, judgment, award or acknowledgment relates.

5.2 Subject to *Clause 5.1*, the Employer may not recover any more under this deed in respect of any matter than the Employer would be entitled to recover from the Contractor in respect of that matter under the Building Contract).

5.3 If the Contractor suffers an Insolvency Event, this will not adversely affect, release or reduce the liability of the Surety under this deed.

5.4 The Employer shall not be obliged to pursue any means of recourse against the Contractor before being entitled to enforce this deed against the Surety.

5.5 The Employer may compromise, release, waive or neglect any security as it sees fit, without impairing its rights under this deed.

6. EXPIRY

6.1 Subject to *Clause 6.2*, this deed shall expire three calendar months after the issue of a certificate or certificates of making good of defects under the Building Contract for all the Works.

6.2 If the Employer has given any notice under *Clause 2.1* before the end of the three calendar months referred to in *Clause 6.1*, *Clause 6.1* shall not affect that notice and the Employer may continue its claim under that notice.

7. ASSIGNMENT

7.1 The Employer may assign or charge the benefit of this deed, without the consent of the Surety or of the Contractor, to any Funder, or to any person to whom the Employer assigns the benefit of the Building Contract.

7.2 The Employer shall notify the Surety and the Contractor of any assignment. If the Employer fails to do this, the assignment shall still be valid.

7.3 The Contractor and the Surety shall not contend that any person to whom the benefit of this deed is assigned may not recover any sum (including any debt, damages, interest or costs) under this deed because that person is an assignee and not a named party to this deed.

8. NOTICES

8.1 For the purposes of this clause, but subject to *Clause 8.7*, notice includes any other communication.

8.2 A notice given to a party under or in connection with this deed:

- (a) shall be in writing and in English or accompanied by an accurate translation into English;
- (b) shall be signed by or on behalf of the party giving it;
- (c) shall be sent to the party for the attention of the contact and at the address, email address, fax or DX number as that party may notify in accordance with *Clause 8.4*;
- (d) shall **OR** may be sent by a method listed in *Clause 8.5*; and
- (e) unless proved otherwise is deemed received as set out in *Clause 8.5* if prepared and sent in accordance with this clause.

8.3 The parties' addresses, fax numbers, email addresses and DX numbers] for service of notices are:

(a) Surety

(i) Address: [ADDRESS]

(ii) For the attention of: [POSITION OF CONTACT]

(iii) [Email address: [EMAIL ADDRESS]]

(iv) [Fax number: [FAX NUMBER]]

(v) [DX number: [DX NUMBER]]

(b) Contractor

(i) Address: [ADDRESS]

(ii) For the attention of: [POSITION OF CONTACT]

(iii) [Email address: [EMAIL ADDRESS]]

(iv) [Fax number: [FAX NUMBER]]

(v) [DX number: [DX NUMBER]]

(c) Employer

(i) Address: [ADDRESS]

(ii) For the attention of: [POSITION OF CONTACT]

(iii) [Email address: [EMAIL ADDRESS]]

(iv) [Fax number: [FAX NUMBER]]

(v) [DX number: [DX NUMBER]]

8.4 A party may change its details given in *Clause 8.3* by giving notice, the change taking effect for the party notified of the change at 9.00 am on the later of:

- (a) the date, if any, specified in the notice as the effective date for the change; or
- (b) the date five Business Days after deemed receipt of the notice.

8.5 This *Clause 8.5* sets out the delivery methods for sending a notice to a party under this deed and, for

each delivery method, the date and time when the notice is deemed to have been received (provided that all other requirements of this clause have been satisfied and subject to the provisions in *Clause 8.6*).

(a) if delivered by hand, on signature of a delivery receipt;

(b) if sent by pre-paid first class post or other next working day delivery service providing proof of postage OR delivery at 9.00am on the second Business Day after posting[or at the time recorded by the delivery service;

(c) if sent by pre-paid airmail providing proof of postage OR delivery, at 9.00am on the fifth Business Day after posting or at the time recorded by the delivery service;

(d) if sent by document exchange (DX), at 9.00am on the second Business Day after being put into the DX.

8.6 If deemed receipt under *Clause 8.5* would occur outside business hours in the place of receipt, it shall be deferred until business hours resume. In this *Clause 8.6*, business hours means 9.00am to 5.00pm Monday to Friday on a day that is not a public holiday in the place of receipt.

8.7 This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

8.8 A notice given under or in connection with this deed is not valid if sent by email.

9. THIRD PARTY RIGHTS

9.1 Unless it expressly states otherwise, this deed does not give rise to any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this deed.

9.2 The rights of the parties to rescind or vary this agreement are not subject to the consent of any other person.

10. GOVERNING LAW

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

11. JURISDICTION

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

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

Executed as deed by [NAME OF **Surety**] 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

OR

Executed as deed by [NAME OF **Surety**] acting by [NAME OF DIRECTOR] a director, in the presence of:

.....

[SIGNATURE OF WITNESS]

[NAME, ADDRESS [AND OCCUPATION] OF WITNESS]

.....

[SIGNATURE OF DIRECTOR]

Director

Executed as deed by [NAME OF **Contractor**] 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

OR

Executed as deed by [NAME OF **Contractor**] acting by [NAME OF DIRECTOR] a director, in the presence of:

.....

[SIGNATURE OF WITNESS]

[NAME, ADDRESS [AND OCCUPATION] OF WITNESS]

.....

[SIGNATURE OF DIRECTOR]

Director

Executed as deed by [NAME OF **Employer**] 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

OR

Executed as deed by [NAME OF **Employer**] acting by [NAME OF
DIRECTOR] a director, in the presence of:

.....
[SIGNATURE OF DIRECTOR]
Director

.....
[SIGNATURE OF WITNESS]
[NAME, ADDRESS [AND OCCUPATION] OF WITNESS]

ANNEX

FORM OF NOTICE

Referred to in *Clause 2.1*.

From: [EMPLOYER'S ADDRESS: see *Clause 8*]

To: [SURETY'S ADDRESS: see *Clause 8*]

CC: [CONTRACTOR'S ADDRESS: see *Clause 8*]

Sent by [METHOD OF SERVICE].

Dear [SURETY]

Demand under a bond dated [DATE] (Bond) relating to [SHORT DESCRIPTION OF PROJECT OR WORKS]

This letter is a notice under the Bond. Defined terms used in this letter have the same meanings as in the Bond.

[We are the assignee of the benefit of the Bond by a [deed of assignment **OR** an assignment agreement] dated [DATE] between [PARTY] and [PARTY].]

[The Works have not reached completion of making good defects. **OR** Completion of making good defects of the Works occurred on [DATE].]

The Contractor has failed to properly pay a sum due to us under or in connection with the Building Contract. We require you to pay to us £[SUM][, the Maximum Amount] within 10 Business Days.

The sum due to us from the Contractor is summarised in the attachment to this notice.

Please make payment to [PAYMENT DETAILS].

Yours faithfully

[SIGNED]

For and on behalf of the Employer

Enclosure.