

**FORM OF COLLATERAL WARRANTY FROM
SUB CONSULTANT**

[1]

and

[2]

and

Bournemouth, Christchurch and Poole Council

Relating to:

[]

at

[]

Parties (each a Party)

- (1) [COMPANY NAME] (Company No.) whose registered address is [COMPANY ADDRESS] (the **Sub Consultant**);
- (2) [COMPANY NAME] (Company No.) whose registered address is [COMPANY ADDRESS] (the **Contractor**); and
- (3) Bournemouth, Christchurch and Poole Council whose principal address is Town Hall, Bourne Avenue, Bournemouth, BH6 2DY (the **Employer**).

Introduction

- A. The Employer has procured or proposes to procure the carrying out of the Development at the Site (as defined below)
- B. The Contractor has been appointed by the Employer to act for the Employer in connection with the Development and to undertake the Services upon the terms and conditions contained in the Agreement (as defined below)
- C. The Sub Consultant has been appointed by the Contractor and to undertake the services upon the terms and conditions contained in the Appointment (as defined below)
- D. The Sub Consultant has agreed to enter into this warranty (the **Warranty**) in favour of the Employer

AGREED TERMS**1. INTERPRETATION AND DEFINITIONS**

- 1.1. In this warranty the following terms have the following meanings unless inconsistent with the context:

Agreement means the Agreement between the Employer and the Contractor dated [DATE OF CONTRACT] in the form of [JCT / NEC / AGREEMENT].

Appointment means the terms of the Appointment entered into between the Contractor and the Sub Consultant dated [DATE OF CONTRACT] 20[] by which the Contractor appointed the Sub Consultant to contribute to mechanical and electrical consultancy services.

Building Contract means the Agreement entered into between the Employer and the Contractor for [DESCRIPTION OF WORKS].

Development means the Employer's Building Contract works and services at the Site and in connection with which the Employer is interested as freeholder

Documents means all drawings, details, plans, reports, calculations, specifications, bills of quantities and other documents of any nature whatsoever (including without limitation

any such items retained on or in any computer software or other electronic medium) and any designs contained in them (and any works executed from them) provided by or on behalf of the Sub Consultant or Contractor in the course of performing its obligations under the Appointment.

Minimum PI Cover means [£ (words)FIGURE TO BE CONFIRMED] for each and every claim or series of claims arising from the same original cause or event and in the aggregate annually in respect of pollution and contamination related claims.

Practical Completion means the date of practical completion of the whole of the works being carried out pursuant to the Building Contract.

Relevant Period means the period of 12 years from the date of Practical Completion (as defined in the Building Contract) or if earlier 12 years from the termination of the provision of services under the Sub Consultant's Appointment.

Services means the services which the Contractor has been retained to carry out under the Agreement.

Site means [SITE ADDRESS]

Working Day means any day from Monday to Friday (inclusive) which is not Christmas Day, Good Friday or a statutory bank holiday in England.

- 1.2. The clause headings in this Warranty are for convenience only and do not affect its interpretation.
- 1.3. Words importing the singular meaning include where the context so allow the plural meaning and vice versa.
- 1.4. Words of one gender include the feminine and neuter genders and words denoting natural person include firms and companies and all are to be construed interchangeably in that manner.
- 1.5. A reference to any statute or statutory instrument shall include a reference to any modification extension or re-enactment of it.
- 1.6. Unless advised to the contrary, references in this Warranty to numbered clauses are references to the relevant clause in this Warranty.

2. CONSIDERATION

In consideration of the payment of £1.00 (one pound) by the Employer to the Sub Consultant (receipt of which is hereby acknowledged) the Sub Consultant covenants with the Employer as set out in this Warranty.

3. EXERCISE OF SKILL AND CARE

- 3.1. The Sub Consultant warrants and undertakes to the Employer that it has not breached and will not breach any of its obligations under the Appointment and that in all services

performed and to be performed pursuant to the Appointment the Sub Consultant has exercised and will continue to exercise such reasonable skill care and diligence as is to be expected of a properly qualified and competent member of the relevant profession, experienced in carrying out work such as its duties under the Sub Consultant Appointment in relation to projects of a similar size scope nature and complexity to the Development.

- 3.2. The Sub Consultant further warrants and undertakes to the Employer that it has exercised and will exercise such skill care and diligence to see that:
 - 3.2.1. it has not and will not specify for use in relation to the Development any products or materials not in conformity with relevant British or European Standards or Codes of Practice (or where no such standards exist, do not conform with a British Board of Agreement Certificate) or which at the time of use are widely known within the Sub Consultant's profession in the United Kingdom to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used;
 - 3.2.2. it has not and will not authorise, cause or allow to be used in the Development any products or materials which are specifically prohibited under the Appointment; and
 - 3.2.3. it notifies the Employer in writing forthwith if in the performance of its duties under the Sub Consultant Appointment the Sub Consultant becomes aware that it or any other person has specified or used or authorised or approved the specification or use by others of any such products or materials provided that this Clause 3.2.3 does not create any additional duty for the Sub Consultant to inspect or check the work of others which is not required by the Sub Consultant Appointment.
- 3.3. To the extent that the Sub Consultant is responsible for the design of the Development its design will comply with all relevant legal requirements including without limitation the requirements of any relevant planning building regulations waste environmental or other authority or consent license or approval of which the Sub Consultant is or could reasonably be expected to be aware.
- 3.4. The Employer has no authority to issue any direction or instructions to the Sub Consultant in relation to the Appointment unless and until the Employer has given notice under clause 10.2.
- 3.5. The Sub Consultant warrants and undertakes to the Employer that he has complied and will continue to comply with the Appointment. In the event of any breach of this warranty:
 - 3.5.1. the Sub Consultant shall be liable for the reasonable costs of repair, renewal and/or reinstatement of any part of parts of the design works to the extent that the Employer incurs such costs and/or the Employer is or becomes liable either directly or by way of a financial contribution for such costs

4. LICENCE TO USE DOCUMENTS

- 4.1. Copyright and registered and unregistered design right in all Documents will remain vested in the Sub Consultant but the Sub Consultant now grants (or if such a grant cannot legally take place until a later date agrees to grant) to the Employer with effect from the date of this Warranty or in the case of Documents not yet in existence with effect from the date of their creation an irrevocable royalty free non-exclusive license (such license to remain in full force and effect notwithstanding the completion of the Sub Consultant's obligations or termination of its engagement under the Appointment or any dispute under the Appointment or this Warranty) to use and reproduce all Documents for any purpose whatsoever connected with the Development (including but without limitation the execution completion maintenance letting advertisement modification extension reinstatement and repair of the Development). Such license will carry the right to grant sub-licenses and will be transferable to third parties.
- 4.2. The licence referred to in clause 4.1 carries the right to grant sub-licences, shall be transferable to third parties and shall continue in force notwithstanding any termination of the Appointment and/or the Sub Consultant's employment under the Appointment.
- 4.3. The Sub Consultant will not be liable for any use the Employer may make of the Documents for any purpose other than that for which they were originally provided unless the Sub Consultant authorises such use and confirms that the Documents are suitable for it.
- 4.4. The Sub Consultant warrants that the Documents are and will be its own original work and that in any event their use in connection with the Development will not infringe the rights of any other person.
- 4.5. The Sub Consultant agrees that on the Employer's reasonable request at any time and following reasonable prior written notice it will give the Employer or those authorised by it access to the Documents and will provide copies of them (including copy negatives and/or CAD disks or other approved electronic versions) at the Employer's expense.
- 4.6. The Sub Consultant now waives absolutely and agrees to waive and not to assert all moral rights in the Documents under Chapter IV of Part 1 of the Copyright, Designs and Patents Act 1988.

5. INSURANCE

- 5.1. The Sub Consultant warrants to the Employer that it holds professional indemnity insurance which will cover its potential liabilities under this Warranty in an amount and on a basis at least equal to the Minimum PI Cover for each occurrence or series of occurrences arising out of each and every event.
- 5.2. The Sub-Consultant will maintain such insurance with reputable insurers carrying on business in the European Union throughout the Relevant Period provided that such insurance is generally available in the market to members of the Sub Consultant's profession at a commercially reasonable cost and on commercially reasonable terms (and if not so available then the Sub Consultant shall maintain such reduced level of or reasonable alternative insurance as is so available). For the avoidance of doubt payment of any increased or additional premiums required by insurers by reason of the Sub Consultant's own claims record or other acts omissions matters or things peculiar to it will be deemed to be within the Sub Consultant's obligations.

- 5.3. The Sub Consultant shall notify the Employer in writing from time to time of any change in its professional indemnity insurance arrangements as set out above and within seven days of the Employer's request at any time the Sub Consultant will produce for inspection documentary evidence as to compliance with this Clause 5 and that payment has been made in respect of the last premium payment due.
- 5.4. If the Sub Consultant fails to comply with its obligations under this Clause 5 the Employer may take out insurance to cover some or all of the loss or damage which could result from a breach of the Sub Consultant's obligations under this Warranty and may recover the costs and expenses of taking out such insurance from the Sub Consultant.
- 5.5. The Sub Consultant shall not compromise settle or waive any insurance claim it may have relating to any liability under this Warranty without the Employer's prior consent provided that nothing in this clause shall prevent the Sub Consultant's insurers from taking over (in the Sub Consultant's name) the defence of any claim made by the Employer under this Warranty and (in that capacity) from conducting and settling it as they see fit.

6. RELIANCE BY THE EMPLOYER

- 6.1. The Sub Consultant acknowledges that the Employer shall unless the contrary is clearly proved to be deemed to have relied upon the performance by the Sub Consultant of the Sub Consultant's obligations under the Sub Consultant Appointment.

7. ASSIGNMENT

- 7.1. The Sub Consultant may without the prior written consent of the Employer assign:
 - 7.1.1. the benefit of all or any of the Sub Consultant's obligations under this Warranty; and/or
 - 7.1.2. any benefit arising under or out of this Warranty.
- 7.2. The Sub Consultant will not contend that any permitted assignee is precluded from recovering any loss resulting from any breach of this Warranty (whatever the date of such breach) by reason only that that person is an assignee and not the original Employer under this Warranty or by reason that the original Employer or any intermediate Employer escaped any loss resulting from such breach by reason of the disposal of any interest in the Development or that the original Employer or any intermediate Employer has not suffered any the same or as much loss.

8. EXTENT OF LIABILITY

- 8.1. The rights and benefits conferred upon the Employer by this Warranty are in addition to any other rights and remedies the Employer may have against the Sub Consultant including without prejudice to the generality of the foregoing any remedies for negligence.
- 8.2. The Sub Consultant shall have no greater liability to the Employer under this Warranty than the Sub Consultant would have had if the Employer and the Contractor jointly had appointed the Sub Consultant under the Sub Consultant Appointment and in the event of

a claim brought against the Sub Consultant by the Employer the Sub Consultant shall be entitled to rely on any defence or limitation available to it under the terms of the Appointment but the Employer shall not be affected (unless it has approved it) by any subsequent variation of the Appointment or the waiver compromise or withdrawal of any claim made by the Contractor under it and the Sub Consultant shall not be entitled to set-off any fee payments from sums due to the Employer or to claim or counterclaim fees from the Employer under this clause 8.

- 8.3. The Sub Consultant's liabilities under this Warranty will not be in any way reduced or extinguished by reason of any inspection or approval of the Documents or attendance at site meetings or other enquiry or inspection that the Employer may make or procure to be made for its benefit or on its behalf.
- 8.4. The liability of the Sub Consultant under this Warranty shall cease on the expiry of the Relevant Period save in relation to any claims notified by the Employer to the Sub Consultant in writing before its expiry.
- 8.5. The Employer has no liability to the Sub Consultant in respect of amounts due under the Appointment unless and until the Employer has given notice under clause 10.2.
- 8.6. The obligations of the Sub Consultant under this Warranty shall not be released or diminished by the appointment of any person by the Employer to carry out any independent enquiry into any relevant matter.
- 8.7. The parties to this Warranty do not intend that any of its provisions shall be enforceable by any person by virtue of the Contracts (Rights of Third Parties) Act 1999.

9. NOTICES

- 9.1. Any notice to be given under this Warranty will be sufficiently served if sent by hand by facsimile transmission, by e-mail or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand will be deemed to be served on delivery on a Working Day and any notice sent by facsimile transmission or e-mail will be deemed to be served in full at the time properly recorded on the sender's facsimile report sheet or the header of the email provided that if any notice sent by hand, facsimile or e-mail is sent on a Working Day after 4.45 pm on any day it will be deemed to be served on the next day. Any notice sent by post will be deemed to have been duly served 48 hours after the time of posting if the end of that period falls before 4.45 pm and otherwise on the next day.
- 9.2. Notices must be served by the relevant Party to the following address and / or email address:
 - 9.2.1 The Sub Consultant Address: [ADDRESS]
Facsimile (marked for the attention of: []): [] E-mail : []
 - 9.2.2 The Contractor Address: [ADDRESS]
Facsimile (marked for the attention of: []): [] E-mail : []
 - 9.2.3 The Employer address: [ADDRESS]
Facsimile (marked for the attention of: [] and: [] E-mail : []

- 9.3. Each Party undertakes to notify the other Party in accordance with this clause 9 if the address or facsimile number specified in this clause 9 is no longer an appropriate address for the service of communications.

10. STEP IN RIGHTS

- 10.1. The Sub Consultant covenants that it shall not:

- 10.1.1. exercise any right to terminate the Appointment or its engagement under it;
- 10.1.2. treat the Appointment or its engagement under it as having been terminated or repudiated;
- 10.1.3. discontinue or suspend the performance of any of its obligations under the Appointment;

before giving to the Employer 28 days' prior written notice (7 days' in the case of suspension for non-payment). The notice shall give particulars of any alleged breach of the Sub Consultant Appointment by the Contractor.

- 10.2. The Employer:

- 10.2.1. upon a breach (other than a breach by the Employer) of the Agreement; or
- 10.2.2. informs the Sub Consultant that the Agreement has been terminated for any reason; or
- 10.2.3. within the 28-day notice period referred to in Clause 10.1 (within 28 days of the notice in the case of suspension or non-payment)

may give notice to the Sub Consultant that the Sub Consultant is to accept the instructions of the Employer or its nominee instead of the Contractor under the Appointment and may require the Sub Consultant to continue with the performance of its obligations under the Appointment.

- 10.3. Upon the Sub Consultant's receipt of the notice referred to in Clause 10.2:

- 10.3.1. the Sub Consultant shall comply with it and shall not do any of the things referred to in Clauses 10.1.1, 10.1.2 or 10.1.3;
- 10.3.2. the Appointment shall continue in full force and effect as if none of the rights of the Sub Consultant referred to in Clause 10.1 had arisen but the Sub Consultant shall be liable to the Employer and or its nominee (if any) under the Appointment in lieu of its liability to the Contractor;
- 10.3.3. the Employer or its nominee shall as soon as practicable remedy any breach of the Appointment by the Contractor which is capable of remedy by them and in particular shall pay any sums outstanding under the Appointment (but where notice was given under Clause 10.1 excluding any which were not clearly notified

to the Employer as being outstanding prior to the service of notice by the Employer under Clause 10.2); but

provided that this shall not affect or derogate from any right of action the Contractor may have against the Sub Consultant in respect of any breach of duty by the Sub Consultant under or in connection with the Appointment occurring prior to the date of service of the notice by the Employer under clause 10.2 or where the Sub Consultant has wrongfully terminated or treated as terminated or discontinued or suspended performance of its obligations under the Appointment or its employment under it or has wrongfully treated it as having been terminated or repudiated by the Contractor.

- 10.4. If any notice given by the Employer under Clause 10.2 requires the Sub Consultant to accept the instructions of the Employer's nominee the Employer shall be liable to the Sub Consultant as guarantor for the payment of all sums from time to time due to the Sub Consultant from the Employer's nominee.
- 10.5. Any notice which is given under Clause 10.1 or 10.2 shall be copied concurrently to the Contractor.
- 10.6. The Contractor and the Employer and the Sub Consultant acknowledge that the Sub Consultant shall:
 - 10.6.1. rely upon and shall not question a notice which the Employer gives to it under Clause 11.2 as conclusive evidence (for the purpose of Clause 10.2 only) of a breach of the Agreement;
 - 10.6.2. not breach the Appointment if the Sub Consultant complies with this Clause 10.
- 10.7. Any notice which the Sub Consultant gives under Clause 10.1 shall not constitute a waiver of any of its rights under the Appointment.

11. CONTINUING EFFECT

- 11.1 Notwithstanding the completion of the Development or any part of the Development this Warranty shall continue to have effect.

12. GOVERNING LAW

- 12.1. This Warranty 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) will be governed by and construed in accordance with English Law and the parties shall submit to the non-exclusive jurisdiction of the English Courts.

13. EXECUTION AND DELIVERY

- 13.1 This document is executed as a deed and is delivered on the date stated at the beginning of this Warranty.

EXECUTED AS A DEED

for and on behalf of

[SUB CONSULTANT]

by

.....
Signature

.....
Full Name (Block Capitals) and Title

In the presence of:

.....
Witness Signature

Name of Witness:

Occupation of Witness:

Address of Witness:

EXECUTED AS A DEED

for and on behalf of

[CONTRACTOR]

.....
Signature

.....
Full Name (Block Capitals) and Title

In the presence of:

.....
Witness Signature

Name of Witness:

Occupation of Witness:

Address of Witness:

EXECUTED as a DEED
by affixing THE COMMON SEAL of
BOURNEMOUTH, CHRISTCHURCH
AND POOLE COUNCIL

In the presence of:

.....
Monitoring Officer / Deputy Monitoring Officer