

**EASTLEIGH BOROUGH COUNCIL**  
as Employer

and

**[CONSULTANT]**  
as Consultant

**Deed of Appointment for S106 – SIX No. Off Site Highways Detail  
Design and Lead Designer Services**  
in respect of the design and construction of **[ADDRESS OF PROJECT]**

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## **TEMPLATE - SUBJECT TO CONTRACT**

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# Agreement

## Dated

## Between

- (1) **EASTLEIGH BOROUGH COUNCIL** whose registered office is at Eastleigh House, Upper Market Street, Eastleigh, Hampshire SO50 9YN (the **Employer**, which expression shall include its successors in title and permitted assignees); and
- (2) **[CONSULTANT]** (registered number **[●]**) whose registered office is at **[REGISTERED ADDRESS]** (the **Consultant**).

## Background

- (A) The Employer wishes to carry out the Project (defined below).
- (B) For the purposes of carrying out the Project, the Employer has agreed to appoint the Consultant to provide professional services on the terms set out in this Agreement, the Contract Details and the other Schedules, each of which are incorporated herein.

**Now it is hereby agreed** as follows:

## 1 Definitions and Interpretation

- 1.1 In this Agreement, the following words and expressions shall have the following meanings:
  - (a) **Additional Fee** means the fees calculated in accordance with Clause 12 (Additional Services) and payable to the Consultant for the performance of the Additional Services;
  - (b) **Additional Services** means any additional services outside the scope of the Basic Services provided by the Consultant in accordance with Clause 12 (Additional Services);
  - (c) **Adjudicator** means any individual appointed pursuant to Clause 26 (Adjudication);
  - (d) **Affiliate** means, in respect of any person, any company which is a subsidiary undertaking (whether immediate or otherwise) of that person or of which that person is a subsidiary undertaking or which has the same parent undertaking (whether immediate or otherwise) as that person;
  - (e) **Basic Services** means the services as described in Schedule 2 ( Basic Services) and other services reasonably incidental thereto;
  - (f) **BIM Protocol** means the document described in paragraph 12 (BIM) of the Contract Details;
  - (g) **Budget** means the document referred to in paragraph 1 (Project Brief, Budget and Design Responsibility Matrix) of the Contract Details or if no such document is so specified any budget for the Project provided to the Consultant by the Employer, including but not limited to the project cost plan and building contract sum, which in each case (without prejudice to the operation of Clause 12 (Additional Services)) may be amended at the Employer's sole discretion from time to time;

- (h) **Building Contract(s)** mean a building contract or building contracts executed by the Employer and Contractor(s) for the design and construction of the Project;
- (i) **CDE (common data environment)** means the web system for the Project to collect, manage and share Materials and all project information and which contains secure and clearly identifiable file structures for shared, published and archived information;
- (j) **CDM Regulations** means the Construction (Design and Management) Regulations 2015 or any remaking thereof and any amendments thereto;
- (k) **Commencement Date** means the earlier of the date of execution of this Agreement or the date on which the Consultant, upon receipt of an instruction from the Employer, commenced the Services in part or in whole, if such date is before the date of execution of this Agreement;
- (l) **Consultant's Persons** means the persons referred to in paragraph 2 (Consultant's Persons) of the Contract Details with responsibility for the overall management, supervision and co-ordination of the provision of the Services and such other persons as shall be appointed by the Consultant to provide the Services, as notified and introduced to the Employer;
- (m) **Construction Products Regulations** means the Construction Products Regulations 2013 (SI 2013/1387), the Construction Products Regulation (305/2011/EU), the Construction Products Regulations 1991 (SI 1991/1620) and the Construction Products Directive (89/109/EC) or any remaking of, amendments to, or replacement of them;
- (n) **Contract Details** means the details set out in Schedule 1 (Contract Details);
- (o) **Contractor(s)** means the person or persons engaged under the Building Contract(s);
- (p) **Design Responsibility Matrix** means the document referred to in paragraph 1 (Project Brief, Budget and Design Responsibility Matrix) of the Contract Details or if no such document is so specified any design responsibility matrix for the Project provided to the Consultant by the Employer, which in each case (without prejudice to the operation of Clause 12 (Additional Services)) may be amended at the Employer's sole discretion from time to time;
- (q) **Employer's Policies** means all policies, protocols, guidance and requirements of the Employer or prepared on its behalf and listed at paragraph 3 (Employer's Policies) of the Contract Details (which are available to the Consultant upon request) and any other policies, protocols, guidance and requirements notified to the Consultant (of which copies have been supplied by the Employer) as amended from time to time;
- (r) **Employer's Representative** means the party referred to at paragraph 4 (Employer's Representative) of the Contract Details as the Employer's representative and such other persons as shall be appointed by the Employer in place of the Employer's Representative, as notified to the Consultant;
- (s) **Fee** means the fee specified in paragraph 5 (Fee) of the Contract Details and payable to the Consultant in accordance with this Agreement in respect of the Basic Services, as the same may be adjusted in accordance with this Agreement;

- (t) **Fund** means such bank, financial institution or other person, firm or company as may provide finance for the execution of the whole or any part of the Project and/or having or acquiring security over the Project;
- (u) **H&SW Act** means the Health and Safety at Work etc Act 1974 and the Management of Health and Safety at Work Regulations 1999 etc., any codes of practice, guidelines, recommendations or safety procedures published by the Health and Safety Executive or approved by the Health and Safety Commission or any remaking thereof and any amendments thereto;
- (v) **Lead Designer** means the party identified in paragraph 7.1 (Other Consultants and Lead Designer) of the Contract Details as performing the lead designer function for the Project;
- (w) **Landlord** any and all persons who have or acquire a superior freehold or leasehold interest to the Employer in the Project or any part thereof;
- (x) **Materials** means all designs, drawings, diagrams, models, plans, specifications, design details, bills of quantities, budgets, calculations, data, databases, schedules, programmes, photographs, brochures, reports, notes of meetings formally issued for general circulation, CAD materials or any other similar materials whether stored electronically or otherwise produced for the purposes of this Agreement for and in relation to the Project (whether in existence or to be made) and all updates, amendments, additions and revisions to them and any works, designs or inventions of the Consultant and/or others incorporated or referred to in them;
- (y) **Other Consultants** means the Employer's Representative and the professional consultants listed in paragraph 7 (Other Consultants and Lead Designer) of the Contract Details and/or such other persons as shall be appointed from time to time to provide services for the Project;
- (z) **Practical Completion** means the date on which the whole of the Project is certified as achieving practical completion under the Building Contract(s);
- (aa) **Principal Contractor** means the Contractor or such other person as shall be appointed to act as the principal contractor for the Project and as defined in the CDM Regulations;
- (bb) **Principal Designer** means the party identified as the principal designer in paragraph 14 (CDM Regulations – Principal Designer) of the Contract Details or such other person as shall be appointed to act as the principal designer for the Project and as defined in the CDM Regulations;
- (cc) **Programme** means the overall programme for the carrying out of the Project including (but not limited to) the programme for outline design, detailed design, and the constructing work and commissioning contained in the documents referred to in paragraph 1 of the Contract Details or, if no such document is so specified, the programme for the Project provided to the Consultant by the Employer (without prejudice to the operation of Clause 12 (Additional Services)) as may be amended at the Employer's sole discretion from time to time;
- (dd) **Project** means the proposed redevelopment of the Property as described in paragraph 1 (Project, Budget and Design Responsibility Matrix) of the Contract Details;

- (ee) **Project Brief** means the Employer's requirements for the Project set out in the documents referred to in paragraph 1 (Project, Budget and Design Responsibility Matrix) of the Contract Details or, if no such document is so specified, the project brief for the Project provided to the Consultant by the Employer and (without prejudice to the operation of Clause 12 (Additional Services)) as may be amended at the Employer's sole discretion from time to time;
- (ff) **Property** means as described in paragraph 1 (Project, Budget and Design Responsibility Matrix) of the Contract Details;
- (gg) **Purchaser** means any and all purchasers (other than of an individual residential unit) who have acquired, are acquiring or are to acquire a long leasehold or freehold interest in the whole or any part of the Project;
- (hh) **Reimbursable Costs** means the costs set out in paragraph 8 (Reimbursable Costs) of the Contract Details and calculated in accordance therewith, wholly and necessarily incurred by the Consultant in connection with the Project;
- (ii) **Schedule(s)** means any one or more of the schedules attached to this Agreement;
- (jj) **Services** means the Basic Services and the Additional Services (if any);
- (kk) **Statutory Requirements** means any of the following which relate to the Project or the Services:
  - (i) any directly applicable provisions of the Treaty on the functioning of and/or the United Kingdom's relationship with the European Union;
  - (ii) any directly applicable European Union Directive;
  - (iii) any Act of Parliament, including without limitation, the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Hazardous Substances) Act 1990, the Planning (Consequential Provisions) Act 1990, the Access to Neighbouring Land Act 1992, the Party Wall Act 1996, the Occupiers Liability Act 1957, the Control of Pollution Act 1974, the Environmental Protection Act 1990 and the Environment Act 1995 or any remaking thereof and any amendments thereto);
  - (iv) the Building Act 1984, the Building Regulations 2010 or any remaking thereof and any amendments thereto;
  - (v) planning permissions, approval of reserved matters or details pursuant thereto, building regulations approval, fire officer approval and any other permissions, approvals, certificates and licences that may be necessary for the carrying out of the Project; and
  - (vi) any instrument, rule or order made under any of the same or any regulation, by-law or decision of any local authority or of any statutory undertaking, public body or company (whether present or future), which has any jurisdiction with regard to the Project or with whose systems the same are or will be connected;

(ll) **Tenant** means any and all persons who have acquired, are acquiring or are to acquire a leasehold interest in the whole or any part of the Project (other than in an individual residential unit);

(mm) **Third Parties** means any of the following third parties:

- (i) any Affiliate of the Employer;
- (ii) any Fund;
- (iii) any Purchaser;
- (iv) any Tenant;
- (v) any Contractor;
- (vi) any Landlord;
- (vii) any registered social landlord taking an interest in the Project;
- (viii) any management company as is granted an interest in the Project; and
- (ix) any other third parties set out in paragraph 9 of the Contract Details.

(nn) **Third Party Agreements** means:

- (i) those agreements (or relevant extracts of the same) listed in paragraph 10 (Third Party Agreements) of the Contract Details; and
- (ii) any other agreements (or relevant extracts of such agreements) entered into by the Employer and/or an Affiliate of the Employer from time to time and (without prejudice to the operation of Clause 12 (Additional Services)) disclosed to the Consultant (whether before or after the date of this Agreement),

in each case including any executed versions of such agreements substantially in the same form as a draft of the same previously disclosed to the Consultant; and

(oo) **Third Party Rights** means the rights of the Third Parties described in Clause 16 (Third Party Rights) and set out in Schedule 3 (Third Party Rights).

1.2 In this Agreement unless the context otherwise requires:

- (a) clause headings are inserted for convenience only and shall not affect the construction and interpretation of this Agreement;
- (b) references to Clauses, Sub-clauses, or Schedules are to Clauses and Sub-clauses of, and Schedules to, this Agreement and references to paragraphs are to paragraphs of the relevant Schedule;
- (c) unless the context otherwise requires, words denoting the singular number include the plural and vice versa;
- (d) references to persons include reference to a natural person, corporate or unincorporated body (whether or not having separate legal personality);
- (e) references to companies shall include any company, corporation or other body corporate, wherever and however incorporate or established;

- (f) references to statutes or statutory instruments include references to any consolidation, modification, extension, amendment, replacement or re-enactment of them from time to time and any subordinate legislation under it from time to time; and
  - (g) where this Agreement requires an act to be done within a specified period after or from a specified date, the period begins immediately after that date. Where the period would include Christmas Day, Good Friday or a day, which under the Banking and Financial Dealings Act 1971 is a bank holiday in England and Wales, that day shall be excluded.
- 1.3 The documents forming part of this Agreement are to be taken as mutually explanatory of one another. In the event of any conflict or discrepancy between the content of the Agreement, the Contract Details and the Schedules, the priority of the documents shall be in accordance with the following sequence:
- 1.3.1 the terms of Agreement;
  - 1.3.2 the Contract Details; and
  - 1.3.3 Schedule 2 (Basic Services) to Schedule 5 (Form of Deed of Novation).

## **2 Consultant's Obligations**

- 2.1 The Consultant shall perform the Services subject to and in accordance with the terms of this Agreement and the Employer's reasonable instructions.
- 2.2 The terms of this Agreement shall govern the rights and obligations between the Employer and the Consultant from the Commencement Date. For the avoidance of doubt, where the Consultant has carried out any work or services in any way related to the Project prior to the Commencement Date, the terms and conditions of this Agreement shall apply in respect thereof.
- 2.3 The Consultant has been authorised to perform the Basic Services as identified in paragraph 12 (Authorised Basic Services) of the Contract Details. The Consultant shall obtain the Employer's prior written authority before initiating any other Basic Services in relation to the Project and the Consultant shall notify the Employer if at any time it considers it necessary or appropriate to perform Basic Services that have not yet been authorised by the Employer. Any authorisation to perform Basic Services shall, once given, form part of and be governed by this Agreement.
- 2.4 The Employer shall be under no obligation to the Consultant (including for payment of the relevant portion of the Fee) in respect of Basic Services in relation to which it has not provided authorisation to progress with the same pursuant to Clause 2.3.
- 2.5 The Consultant warrants to the Employer that it has exercised and will continue to exercise in the performance of the Services all the reasonable skill, care and diligence to be expected of a properly qualified and competent consultant (in each of the disciplines to which the Services relate) experienced in the provision of like services for projects of a similar size, type, scope, complexity and value to the Project.
- 2.6 The Consultant acknowledges that the details of the Employer's requirements for the Project as specified in the Project Brief, the Budget, the Programme and Design Responsibility Matrix are reasonable and attainable. Without excluding the exercise of the Consultant's independent judgment, the Consultant shall exercise the duty of care required by Clause 2.5 to perform the Services in accordance with such requirements.



- 2.7 The Consultant shall make all reasonable enquiries into any information provided to the Consultant arising out of or in connection with the Project and request such information from the Employer as the Consultant may reasonably require for the proper performance of the Services and its obligations under this Agreement in a timely fashion and shall promptly notify the Employer of any discrepancies contained therein.
- 2.8 The Consultant warrants that in the performance of the Services the Consultant shall comply with the Statutory Requirements.
- 2.9 In performing the Services, the Contractor shall use best endeavours not to prolong, disrupt and/or otherwise impede the works of the Other Consultants.
- 2.10 The Consultant hereby confirms that it is acting on its own behalf and not for the benefit of any other person.

### **3 Prohibited Materials**

- 3.1 The Consultant undertakes and warrants to the Employer that it has exercised, and undertakes that it shall continue to exercise, the duty of care required by Clause 2.5 (Consultant's Obligations), so as not to specify for use, or within the scope of its inspection duties permit to be used, any goods, materials, substances or products generally known about at the time the Consultant commences its Services and up to the time of Practical Completion to be deleterious to health or safety or the durability of the Project (in the circumstances in which they are used) and/or that are otherwise not in accordance with:
- (a) good building practice or techniques or any other materials or substances used in the design and construction of the Project;
  - (b) Statutory Requirements, current British Standards or Codes of Practice or the European Union equivalent (if applicable) and/or the Construction Products Regulations; and/or
  - (c) the relevant recommendations in The British Council for Offices' publication entitled "Good Practice in the Selection of Construction Materials 2011".

### **4 Building Contract and Third Party Agreements**

- 4.1 The Consultant shall exercise the duty of care required by Clause 2.5 (Consultant's Obligations) to perform the Services in such a manner and at such times so that no act, omission or default of the Consultant shall cause or contribute to any breach of the Employer's undertakings and/or obligations under the Building Contract.
- 4.2 The Consultant shall have regard to all obligations on the part of the Employer in any of the Third Party Agreements and the Consultant warrants and undertakes to the Employer that the Consultant has (exercising the duty of care required by Clause 2.5 (Consultant's Obligations)) performed, and will continue to perform, the Services and its obligations under this Agreement in such a manner and at such times that no act, omission or default of the Consultant shall cause or contribute to any breach by the Employer of any of its obligations under the Third Party Agreements. Without prejudice to the foregoing of this Clause 4, the Consultant is to:
- 4.2.1 provide reasonable assistance to the party responsible for the issue of certificates as to the state of completion or readiness of the Project for completion or as to other similar matters under such Third Party Agreements; and

- 4.2.2 comply with procedures laid down in such Third Party Agreements for drawdown of funding, for (approval of) changes in design, specification or materials, for the inspection of the Project prior to Practical Completion or in connection with the making good of defects under any Building Contract(s), and for other matters relating to the design and construction of the Project.

## **5 Time for Performance**

- 5.1 The Consultant shall perform the Services efficiently and proceed with them regularly and diligently. The Consultant shall use the duty of care required by Clause 2.5 (Consultant's Obligations) to complete the Services in accordance with the Programme.
- 5.2 If at any time the Consultant is prevented or delayed, or is likely to be prevented or delayed, in the performance of the Services for any reason, it shall promptly notify the Employer giving specific reason for the delay or prevention, together with its best estimate of the effect on the Programme and shall use all reasonable endeavours to resume and expedite the Services as soon as reasonably possible.

## **6 Lead Designer**

- 6.1 If the Consultant is not the Lead Designer, then this Clause 6.1 shall apply, in which case the Lead Designer shall act as lead designer for the Project and the Consultant shall liaise with and fully co-operate in the integration by the Lead Designer of the design prepared by the Consultant, the Other Consultants, the Contractor (and its subcontractors) and the Lead Designer. The Consultant shall at all times keep the Lead Designer fully and properly informed on all aspects of the Services and shall provide the Lead Designer with all such information in regard to the Project as he may from time to time reasonably require.
- 6.2 If the Consultant is identified as the Lead Designer, then this Clause 6.2 shall apply, in which case the Consultant shall (without prejudice to its obligations under this Agreement) exercise the duty of care required by Clause 2.5 (Consultant's Obligations) to fully co-ordinate with the Services all design services and the production of design information by the Other Consultants, the Contractor (and its sub-contractors) so that:
- 6.2.1 the design of the Project is fully co-ordinated and integrated;
- 6.2.2 the Project is able to proceed with all reasonable speed and economy in accordance with the Programme; and
- 6.2.3 the cost of executing each element of the Project will not exceed the respective financial limit stated in the Budget.

## **7 BIM and Design Document Management**

- 7.1 Where paragraph 13 (BIM) of the Contract Details is stated to apply, the Employer intends to use building information modelling for the Project for the purposes set out in the BIM Protocol and the following provisions shall apply.
- 7.1.1 The Employer and the Consultant acknowledge that on or before the date of this Agreement, the BIM Protocol has been settled to their mutual satisfaction. The BIM Protocol shall be subject to amendment at the discretion of the Employer only but in consultation with the Consultant and any revised version will be issued to the Consultant by uploading it to the CDE.

- 7.1.2 The Employer and the Consultant shall each comply with their respective obligations under the BIM Protocol.
- 7.1.3 The Consultant shall have due regard to the drawings and, having regard to the professional expertise of the Consultant and the scope of its responsibilities under this Agreement, may place reliance on the drawings, models and other information uploaded to the CDE by the Other Consultants in accordance with applied suitability defined in the CDE protocol and in accordance with uses defined in the Employer's information requirements (as appended to the BIM Protocol). This shall not derogate from the Consultant's duty to exercise independent professional judgement or release, diminish or in any other way affect the Consultant's duties and obligations under this Agreement. The Consultant shall not alter in any way any drawings, models or information contained in the CDE, which have not been produced or uploaded by the Consultant, unless this is permitted under the BIM Protocol.
- 7.1.4 The Consultant shall back up all of the BIM Models (as defined in the BIM Protocol) uploaded to the CDE and the Consultant shall provide copies of any of the BIM Models that have been backed up to the Employer on reasonable request.
- 7.1.5 In the event of any conflict or inconsistency between the terms of the BIM Protocol and this Agreement, the terms of this Agreement shall prevail unless the contrary is stated in writing in a document referring expressly to this Clause and signed by hand by an authorised signatory for the Employer and the Consultant.
- 7.2 Without prejudice to the foregoing of this Clause, the Consultant shall use electronic means for circulating all documentation and information required for the Project, save as referred to in Clause 25.1 (Communications). The Consultant shall comply with all requirements and procedures relating to the use of the document management system set up for the Project.
- 7.3 The Fee is inclusive of the Consultant's duties under this Clause 7.

## **8 Consultant's Authority**

- 8.1 The Consultant shall not (and nothing in this Agreement shall be construed as granting the Consultant with the authority to act on behalf of the Employer in relation to) without the Employer's prior written consent (or where expressly permitted by the Services):
- (a) accept any tender and/or appointment of any Other Consultant or Contractor, including any letter of intent or the execution of any document or any other agreement;
  - (b) enter into any contractual or other commitment on behalf of the Employer whether pursuant to a letter of intent or otherwise;
  - (c) issue any instruction or acceptance of any variation to the design or specification of the Project approved or agreed by the Employer;
  - (d) issue any instruction to the Contractor;
  - (e) settle, accept or agree any liability and/or quantum for loss and/or expense entitlements or any other claim from any Other Consultant or Contractor for the Project and/or agree to any waiver or release of any obligation of any Other Consultant or Contractor; or
  - (f) terminate the appointment of any person of any consultant or any contractor.

8.2 Notwithstanding the foregoing, the Employer may vary in writing the Consultant's authority.

8.3 No approval, comment or consent shall diminish or relieve the Consultant from any of its obligations or responsibilities under or in connection with this Agreement. Any omission on the part of the Employer to inspect, review or disapprove shall not diminish or relieve the Consultant from any of its obligations or responsibilities under or in connection with this Agreement.

## **9 Employer's Representative**

9.1 Where an Employer's Representative is identified in paragraph 4 (Employer's Representative) of the Contract Details, the following provisions of this Clause 9 shall apply.

9.1.1 The Employer has appointed the Employer's Representative with full authority to act on its behalf for all purposes in connection with the Project, including, but without limitation, for the purposes of giving all instructions, consent and decisions required under this Agreement and for receiving all advices, notices, invoices and other documentation and information from the Consultant under this Agreement.

9.1.2 The Employer may by further written notice to the Consultant revoke or amend the authority of the Employer's Representative or appoint a new Employer's Representative. The Employer's Representative shall have the authority to act on behalf of the Employer on all such matters in connection with this Agreement as provided in this Clause 9 or otherwise as shall be specified in such notice.

## **10 Health and Safety**

10.1 To the extent that the Consultant is responsible under this Agreement, the Consultant shall comply with the provisions of the H&SW Act and the CDM Regulations. In particular the Consultant shall:

10.1.1 comply with all the obligations, duties and prohibitions of a "designer" which are set out in the CDM Regulations;

10.1.2 liaise and co-operate fully with, the Principal Designer, the Principal Contractor, and all of the Other Consultants who are "designers" for the purposes of the CDM Regulations;

10.1.3 hereby warrant to the Employer that the Consultant has the skills, knowledge, experience and organisational capability to perform the obligations imposed by the CDM Regulations, and to perform the Services without contravening any prohibition contained in the CDM Regulations; and

10.1.4 perform the Services in such manner and at such time so that no act, omission or default of the Consultant shall cause or contribute to any breach of the Employer's obligations for and in relation to the Project under the CDM Regulations and/or cause the Employer to be prosecuted under the H&SW Act and the CDM Regulations.

10.2 Where the Consultant is the Principal Designer, the Consultant hereby agrees that it shall fulfil the role of 'principal designer' as set out in the CDM Regulations and shall co-operate with the 'principal contractor' appointed by the Employer in the performance in respect of the Project of their respective functions and duties under the CDM Regulations.

## 11 Remuneration

- 11.1 The Employer shall pay to the Consultant the Fee, the Additional Fees (if any) and the Reimbursable Costs (if any) as full remuneration for the proper performance of the Services in accordance with this Agreement at the times and in the manner specified in this Agreement.
- 11.2 For the avoidance of doubt, the Fee is exclusive of Value Added Tax. The Employer agrees to pay the total amount of Value Added Tax properly due thereon.
- 11.3 The Fee shall be paid to the Consultant by instalments in accordance with the stages set out in paragraph 5 (Fee) of the Contract Details. If not set out in paragraph 5 (Fee) of the Contract Details or otherwise agreed between the parties in writing, the Fee shall be paid at intervals of not less than one month beginning one month after the Consultant begins performing the Services. The amount due at each interval shall be a due proportion of the Fee applicable to the Services that have been properly performed by the Consultant at the date of the application for payment having regard to any relevant milestones. If the provision of the Services is postponed or delayed for any reason, then the Employer may at its sole option and discretion (but acting reasonably) adjust the dates of the stages set out in paragraph 5 (Fee) of the Contract Details and/or payment of the instalments to reflect the postponement or delay but the Consultant shall not be entitled to any Additional Fee solely due to the duration of the Services being extended.
- 11.4 The Employer shall reimburse to the Consultant the Reimbursable Costs incurred by the Consultant in the provision of the Services, provided always that the Employer shall not be obliged to reimburse to the Consultant under or pursuant to this Agreement any Reimbursable Cost incurred:
- (a) by reason of any negligence, omission or default on the part of the Consultant; or
  - (b) without the prior approval of the Employer.
- 11.5 The Consultant shall at all times keep full and accurate accounts of, and all vouchers, invoices and records relating to, amounts incurred in respect of Reimbursable Costs and shall make the same available for inspection and copying by the Employer or any person authorised by the Employer, whenever he is requested to do so.
- 11.6 The Consultant shall submit invoices to the Employer in respect of any of the Fee, any Additional Fees and any Reimbursable Costs properly due to the Consultant under this Agreement. All invoices submitted by the Consultant shall show amounts the Consultant considers to be due and the basis on which they have been calculated, amounts invoiced to date and any additional payments due under Clause 12 (Additional Services). Such invoices and accounts shall be supported by such documents, vouchers and receipts as may be reasonably required by the Employer and shall clearly display the relevant purchase numbers provided by the Employer.
- 11.7 The due date for payment shall be on the date stipulated in paragraph 5 (Fee) of the Contract Details. Should the Consultant fail to submit any invoice on or before the due date, the invoice shall be treated as having been submitted and received by the Employer on the next following due date.
- 11.8 The Employer shall notify the Consultant not later than 5 (five) days after receipt of any invoice under Clause 11.6 specifying the amount of the payment made or

proposed to be made by the Employer and the basis on which that amount is calculated (a **Payment Notice**). If the Employer does not give a Payment Notice in accordance with this Clause 11.8, then the amount of the instalment to be paid by the Employer shall, subject to any notice given under Clause 11.10, be the sum stated in the Consultant's invoice.

11.9 The Employer shall pay invoices, or the part of the invoices, which are correctly submitted in accordance with this Clause 11 on or before the final date for payment, which shall be no later than 28 (twenty-eight) days after the due date.

11.10 The Employer shall notify the Consultant not later than 1 (one) day before the final date for payment pursuant to Clause 11.9 if the Employer is to pay less than the sum stated as due in the Payment Notice or the Consultant's invoice. Such notice (a **Pay Less Notice**) shall specify:

- (a) the sum it considers to be due to the Consultant or to the Employer; and
- (b) the basis on which that sum has been calculated.

If the Employer issues a Pay Less Notice, then the Consultant shall submit a revised tax invoice showing the correct amount of Value Added Tax due.

11.11 If the Employer fails to pay an amount due to the Consultant by the final date for payment pursuant to Clause 11.9 and no Pay Less Notice has been issued pursuant to Clause 11.10 then:

11.11.1 simple interest shall be added to the unpaid sum from the final date for payment until the actual date of payment. This shall be calculated on a daily basis at the annual rate of 3% (three per cent.) above the Bank of England base rate, and both parties acknowledge that the Employer's liability under this Clause 11.11 is a substantial remedy for the purposes of section 9(1) of the Late Payment of Commercial Debts (Interest) Act 1998; and

11.11.2 the Consultant shall be entitled (without prejudice to any other right or remedy) to suspend performance of its obligations under this Agreement by giving the Employer not less than 14 (fourteen) days' notice stating the ground or grounds on which it intends to suspend performance. The right to suspend performance shall cease when the Employer makes payment in full of the amount due.

11.12 Where the Consultant exercises its right of suspension under Clause 11.11.2, it shall be entitled to payment of a reasonable amount in respect of costs and expenses reasonably incurred by it as a result of exercising that right. Any period during which performance is suspended shall be disregarded in computing, for the purposes of any contractual time limit, the time taken by the Consultant to complete any of the Services.

11.13 Notwithstanding any other provision of this Agreement, the Employer may deduct and/or set off against any amounts due from the Employer to the Consultant any amounts due from the Consultant to the Employer under this Agreement.

## 12 **Additional Services**

12.1 If the nature and scope of the Project or of the Services is materially altered in accordance with the Employer's requirements, the Employer and the Consultant agree that as a result the Consultant may be required to perform Additional Services in accordance with the provisions of this Clause 12.

- 12.2 Immediately upon it becoming reasonably apparent that Additional Services are or are likely to be required, the Consultant shall give written notice to the Employer specifying the circumstances and, as soon as possible thereafter, shall submit full and detailed particulars of such Additional Services to the Employer. The Employer may (at its discretion) at any time instruct the Consultant in writing to perform Additional Services. The Consultant shall not perform any Additional Services unless and until so instructed by the Employer in writing.
- 12.3 Prior to complying with an instruction from the Employer for Additional Services (except in the case of emergency instructions which require immediate action), the Consultant shall notify the Employer within 5 (five) working days of receipt of the instruction to perform Additional Services where it believes an Additional Fee is due, and provide to the Employer an estimate of the Additional Fee. Following receipt by the Employer of the estimate of the Additional Fee, the Employer shall give written notification to the Consultant to confirm, withdraw or amend any such instruction to perform Additional Services and the amount of any payment of an Additional Fee (if any).
- 12.4 It is a condition precedent to the Consultant's right to payment of any Additional Fees under Clause 12.3 that, prior to commencing any Additional Services, that the Consultant has complied with the notice requirements therein and that the Employer has issued an instruction confirming the Additional Fee.
- 12.5 Notwithstanding Clause 12.3, the Employer may (at its discretion) instruct the Consultant to commence any Additional Services notified in accordance with Clause 12.1 for an Additional Fee, to be calculated on a time charge basis at the rates set out in paragraph 5 (Fee) of the Contract Details.
- 12.6 Notwithstanding Clauses 12.3 and 12.5, the Consultant shall not be entitled to any Additional Fee to the extent that the performance of any Additional Services is required as a result of the Consultant's default, negligence or breach of this Agreement.
- 12.7 The Employer may at any time instruct the Consultant to omit any of the Services or to provide the Services only in relation to certain elements of the Project and may instruct any other person to carry out any or all of the Services so omitted. To the extent that such instruction reduces the amount of work to be performed by the Consultant, the Employer shall be entitled to deduct from the Fee an amount agreed between the parties or, failing such agreement, an amount calculated by the Employer that fairly and reasonably reflects the reduction in the amount of services to be undertaken by the Consultant due to any instruction by the Employer under this Clause 12.7. The Consultant shall not be entitled to any payment in respect of loss of profit or opportunity or similar losses incurred by the Consultant due to any instruction by the Employer under this Clause 12.7 (even if those services are carried out by another person for a lower fee than that part of the Fee to which the omission of the Services relates).

### 13 **Total Fee**

- 13.1 The Consultant shall submit to the Employer a notice specifying any and all claims to further payment in relation to the Fee, Additional Fees and Reimbursable Costs (the **Consultant's Final Claims Notice**) within 6 (six) weeks of a request from the Employer so to do after completion of the Services. The Consultant's Final Claims Notice shall include details of the amounts and the basis on which the Consultant considers those amounts are due together with such supporting evidence as the Employer may reasonably require in order properly to assess the amounts claimed. In the event the Consultant does not issue a Consultant's Final Claims Notice in

accordance with this Clause 13.1, the Consultant's Final Claims Notice will be deemed as having been issued with no Fees, Additional Fees and/or Reimbursable Costs outstanding.

- 13.2 After receipt by the Employer of the Consultant's Final Claims Notice in accordance with the provisions of Clause 13.1, the Employer shall (without prejudice to the operation of the following of this Clause 13) have no further liability to the Consultant arising under or out of this Agreement for reimbursement of any fees and/or expenses except in relation to those matters (if any) expressly identified in the Consultant's Final Claims Notice.
- 13.3 Within four weeks of the submission of a valid Consultant's Final Claims Notice in accordance with Clause 13.1, the Employer shall submit to the Consultant a notice (the **Employer's Final Claims Notice**) identifying the amount the Employer considers due (if any). The parties shall thereafter use their reasonable endeavours to agree all final claims notified. If the amount is agreed in accordance with this Clause 13.3, the Consultant may then submit an invoice for the relevant amount and the provisions of Clauses 11.4 to 11.13 (Remuneration) shall apply.
- 13.4 If the parties cannot within four weeks of the Employer's Final Claims Notice agree an amount due, the Consultant may within 7 (seven) days thereafter submit an invoice for the amount it considers it is due and Clauses 11.4 to 11.13 (Remuneration) shall then apply.

#### **14 Consultant's Persons**

- 14.1 The Consultant shall forthwith appoint the Consultant's Persons to perform the Services. The Consultant's Persons shall have the Consultant's full authority to act on the Consultant's behalf in the provision of the Services under this Agreement.
- 14.2 The Consultant shall not remove the Consultant's Persons or any other persons appointed by the Consultant to carry out the Services without the Employer's prior written approval (such approval not to be unreasonably withheld). If the Employer gives the Consultant such approval, then the Consultant shall be responsible for replacing such person with a person who shall be subject to approval by the Employer (acting reasonably) in writing.
- 14.3 The Employer may request the removal of any person appointed by the Consultant to perform the Services, provided that in the Employer's reasonable opinion such person's performance or conduct is or has been unsatisfactory, and the Consultant shall promptly remove such person. The Consultant shall be responsible for replacing such person with a person who shall be subject to approval by the Employer in writing (such consent not to be unreasonably withheld).
- 14.4 The persons that the Consultant shall appoint to perform the Services shall have the necessary qualifications and experience to perform their duties for and in relation to the Project and under this Agreement.

#### **15 Assignment, Sub-contracting and Novation**

- 15.1 The Consultant shall not assign, charge or transfer any right or obligation under this Agreement or in any way deal or part with its interest in this Agreement or any part of it to any person without the Employer's prior written consent.
- 15.2 The Employer may assign the benefit of the terms of this Agreement and/or any of the present or future rights interests and benefits of the Employer hereunder:



- 15.2.1 twice to any person with an interest in the Project without the Consultant's consent; and
- 15.2.2 without counting as an assignment under Clause 15.2.1:
- (a) by way of assignment and/or charge by way of security (including any reassignment on redemption of security); or
  - (b) to any Affiliate of the Employer,
- but such benefit may not be further assigned without the written consent of the Consultant (such consent not to be unreasonably withheld or delayed). The Consultant shall not, in defence of any claim by an assignee of the Employer, seek to reduce or extinguish the claim by reason of the fact that the loss or damage is not suffered by the original Employer but by the assignee and/or chargee.
- 15.3 The Consultant shall not sub-contract to any person the performance of any of its obligations under this Agreement except with the Employer's prior written consent (such consent not to be unreasonably withheld).
- 15.4 No sub-contracting by the Consultant and no consent by the Employer shall in any way relieve the Consultant from any liability or obligation in respect of the Services. Without prejudice to the Employer's rights under this Agreement, the Consultant warrants and undertakes to the Employer that it shall exhaustively enforce any and all rights and remedies that it has in relation to its sub-consultants and/or sub-contractors in respect of any deficiencies in the performance of their services at no cost to the Employer.
- 15.5 Where paragraph 15 (Sub-consulting) of the Contract Details is stated to apply, the following provisions shall apply:
- 15.5.1 The Consultant and the relevant sub-consultant (the **Sub-consultant**) shall enter into a sub-consultancy agreement containing terms substantially similar to this Agreement (including a third party rights schedule in substantially the same form as that included in Schedule 3 (Third Party Rights) and the terms allowing the granting of such third party rights in accordance with Clause 15.5.3), such agreement to be approved by the Employer in writing (such approval not to be unreasonably withheld or delayed).
- 15.5.2 The Consultant shall, within 21 (twenty-one) days of entering into a sub-consultancy agreement with a Sub-consultant pursuant to this Clause 15.5, deliver to the Employer a certified copy of the sub-consultancy agreement.
- 15.5.3 The Consultant shall, within 14 (fourteen) days of request, issue a third party rights notice copied to the Employer in favour of the Employer and/or any Third Party. Alternatively, the Consultant shall procure that the Sub-consultant delivers a properly executed collateral warranty in favour of the Employer and/or any Third Party in the relevant forms annexed to the sub-consultancy agreement, with such amendments as the Employer may approve (such approval not to be unreasonably withheld or delayed). Such notice or collateral warranty shall be accompanied by evidence that the Sub-consultant is maintaining professional indemnity insurance in accordance with the terms of the sub-consultancy agreement.
- 15.6 Where so stated to be required by paragraph 11 (Novation) of the Contract Details, the Consultant shall, within 14 (fourteen) days of receipt of engrossment copies of the same, execute and deliver to the Employer a deed of novation substantially in the form set out in Schedule 5 (Form of Deed of Novation) together with such amendments as the parties to such deed shall agree (acting reasonably).

Following the completion of such deed of novation, all references to the Employer in this Agreement shall (unless the context otherwise requires) be construed as references to the Contractor.

## 16 **Third Party Rights**

16.1 The Consultant agrees that, pursuant to the Contracts (Rights of Third Parties) Act 1999:

16.1.1 the Employer shall, upon a novation of this Agreement pursuant to Clause 15.6 (Assignment, Sub-contracting and Novation), be entitled to rely upon and enforce for its benefit any of the provisions set out in Schedule 3 (Third Party Rights); or

16.1.2 any Third Party shall be entitled to enforce for its benefit any of the provisions set out in Schedule 3 (Third Party Rights) on issue to the Consultant by the Employer or the Employer's Representative (or their legal representatives) of a notice (substantially in the form set out in Schedule 4 (Third Party Rights Notice)) confirming the identity and interest of such third party.

16.2 Notwithstanding the foregoing of this Clause 16, the Consultant shall, as an alternative to the Third Party Rights vesting in a Third Party or the Employer, which shall be exercisable at the Employer's sole option and discretion, within 14 (fourteen) days of receipt of an engrossment copy of the same, execute and deliver to the Employer a deed of collateral warranty in favour of such a Third Party or the Employer substantially on the terms set out in Schedule 3 (Third Party Rights). If the Consultant fails to deliver any deed of collateral warranty validly requested under this Clause within the period required hereunder, the Employer shall not be obliged to make any further payment to the Consultant under this Agreement until such deed of collateral warranty is so delivered to the Employer.

16.3 No right of either party to this Agreement:

- (a) to terminate the Consultant's engagement under this Agreement;
- (b) to agree to rescind, amend or otherwise vary (without prejudice to paragraph 9 (Severance

1.1 If any provision of this Schedule is held to be illegal, void, invalid or unenforceable (in whole or in part) by any court or administrative body of competent jurisdiction, that provision shall to that extent be deemed not to form part of this Schedule but the enforceability of the remainder of this Schedule shall not be affected.

1.2 The parties agree, in the circumstances referred to in this paragraph 9, to attempt to substitute any illegal, void, invalid or unenforceable provision with a lawful, valid and enforceable provision, which achieves to the greatest extent possible the same effect as would have been achieved by the illegal, void, invalid or unenforceable provision.

(c) **Variation** of Schedule 4 (Third Party Rights)) or waive any of the terms of this Agreement; or

(d) to settle any dispute under or in relation to this Agreement,

shall be subject to the consent of any Third Party.

16.4 Save as set out in Clause 16.1, it is not intended that any third party should have the right to enforce any term of this Agreement pursuant to the Contracts (Rights of Third Parties) Act 1999.

## **17 Intellectual Property Rights**

- 17.1 The intellectual property rights in the Materials shall remain vested in the Consultant. The Consultant hereby grants to the Employer (and its nominees) an irrevocable, perpetual, non-terminable, worldwide, royalty-free licence to use and reproduce the Materials for all purposes relating to the Project and other similar projects undertaken by the Employer, including, but without limitation, the construction, completion, modification, maintenance, advertisement, reinstatement, repair, reconstruction, refurbishment, redevelopment, use, letting, marketing, promotion and sale of the Project and other similar projects undertaken by the Employer and to copy and use (but not to reproduce any designs contained therein) the Materials for an extension to the Project and other similar projects undertaken by the Employer. The Employer shall also be entitled to grant sub-licences to others and these shall be transferable to third parties without the prior consent of the Consultant.
- 17.2 The Consultant shall not be liable for any such use by the Employer or its nominees of any Materials for any purpose other than that for which the same were prepared or provided and for such purposes as are reasonably foreseeable as at the date the relevant parts of the Services are performed.
- 17.3 All royalties or other sums payable in respect of the supply and use of any patented article, processes or inventions required for and in relation to Project and the performance of the Services under this Agreement shall be paid by the Consultant. The Consultant shall indemnify the Employer from and against all claims, proceedings, damages, costs or expenses suffered or incurred by the Employer by reason of the Consultant infringing or being held to infringe any intellectual property rights in the performance of the Services.
- 17.4 The Consultant waives any right to be identified as the author of the Materials in accordance with section 77 of the Copyright, Designs and Patents Act 1988 and waives any right not to have the Materials subjected to derogatory treatment in accordance with section 80 of the same Act as against the Employer, any successors in title, any assignee and/or any licensee.
- 17.5 Notwithstanding that the intellectual property rights in the Material remains vested in the Consultant, the Consultant shall not, without the prior consent of the Employer, be entitled to use the Materials so as to design any building or structure substantially similar in overall design, appearance or features to the Project and (where such Materials are used therein) other similar projects undertaken by the Employer, nor shall the Consultant be entitled to use the Material for any purpose connected with the Property other than for the purposes of this Agreement and the completion of the Project (notwithstanding the expiry or termination of its engagement under this Agreement or the abandonment of the Project by the Employer).
- 17.6 The Consultant shall, at the request of the Employer, provide to the Employer such copies of the Materials (in hard copy or electronic form) as the Employer may reasonably require in connection with the Project.

## **18 Confidentiality**

- 18.1 The Consultant shall keep confidential all correspondence, books, records, documents, agreements, photographs, quotations, invoices, files, plans, drawings, and any other similar material relating in any way to the Project.

- 18.2 The Consultant shall not disclose to any person details of any confidential information (written or oral) concerning the business, affairs, operating methods, customers, clients or suppliers of the Employer or the Project without the consent of the Employer, except where:
- (a) the information was already lawfully known, or became lawfully known to the relevant party independently;
  - (b) the information is in or comes into the public domain other than due to wrongful use or disclosure by the relevant party;
  - (c) disclosure or use is necessary in connection with entry into this Agreement or for the proper and effective performance of its obligations under this Agreement (including disclosure by either party to its insurers and professional advisers and Consultant's Persons), provided that such persons are put under equivalent confidentiality requirements as this Clause 18 (Confidentiality)); or
  - (d) disclosure is required by law to a court of competent jurisdiction or any government, governmental department, agency, regulatory or fiscal body or authority (whether national or foreign).
- 18.3 The Consultant shall not make any announcement related to the Project without the written consent of the Employer.

## 19 **Insurance**

- 19.1 Without prejudice to the Consultant's obligations under this Agreement, the Consultant warrants that it currently maintains and shall continue to maintain professional indemnity insurance from the date of this Agreement until 12 (twelve) years after Practical Completion with a limit of and basis of indemnity set out in paragraph 6 (Professional Indemnity Insurance) of the Contract Details, provided that such insurance is generally available in the market at commercially reasonable rates and terms. The Consultant shall maintain such professional indemnity insurance with a well-established and reputable insurance office or underwriter of repute carrying on business in the United Kingdom on customary and usual terms and conditions prevailing for the time being in the insurance market.
- 19.2 For the avoidance of doubt, it is hereby agreed and declared that any increased or additional premium required by insurers by reason of the Consultant's own claims record or other acts, omissions, matter or things particular to the Consultant shall be deemed to be within commercially reasonable rates.
- 19.3 The Consultant shall immediately inform the Employer if the insurance required under Clause 19.1 ceases to be generally available at commercially reasonable rates and terms or otherwise is not maintained in accordance with this Agreement or for any reason becomes void or unenforceable or if the insurer withdraws cover. In that event, the Consultant shall continue to maintain insurance on as equivalent terms and with such a limit of indemnity as may then be available to the Consultant on a commercially reasonable basis.
- 19.4 As and when the Consultant is reasonably requested to do so by the Employer, the Consultant shall produce for inspection sufficient documentary evidence (which may be in the form of a broker's certificate or letter) that the insurance required under Clause 19.1 is being maintained in accordance with the terms of this Agreement. If the Consultant fails to supply the relevant evidence or is otherwise in breach of its obligations under Clause 19.1, the Employer may effect such

reasonable insurance cover (having regard to prevailing commercial conditions in the relevant market for such insurance) as he deems reasonably necessary and may recover from the Consultant a sum or sums equivalent to the amount paid or payable in respect of the premium for the same.

- 19.5 The Consultant shall not, once a claim is notified to it, knowingly act and/or omit to act so as to compromise, settle or waive any insurance claim, which it may have in respect of any professional liability under this Agreement, without the prior consent of the Employer, provided that nothing in this Clause 19 shall preclude the Consultant's insurers from taking over (in the name of the Consultant) the defence of any claim made by the Employer under this Agreement and (in that capacity) from conducting and settling it as they see fit.
- 19.6 Where the Employer takes out insurance policies in respect of or relating to the Project (**Project Insurance**) and whether or not the existence of the Project Insurance is notified to the Consultant, the maintenance of such Project Insurance by the Employer shall in no way relieve the Consultant of its obligations to take out and maintain the insurances required under this Clause 19. The Consultant shall be liable to the Employer for any deductible, excess or shortfall to the Project Insurances caused by any default, breach or negligent omission of the Consultant.

## 20 **Suspension and Termination**

- 20.1 The Employer may at any time by notice to the Consultant suspend the Consultant's performance of the Services under this Agreement.
- 20.2 If the Consultant's performance of the Services is suspended pursuant to Clause 20.1, then the Employer may, by giving not less than 7 (seven) days' written notice, require the Consultant to resume performance at any time within a period of 6 (six) months from the date of suspension. The Consultant shall use all reasonable endeavours to resume performance of the Services as soon as possible after receipt of such notice. If the Employer shall not have required the Consultant to resume performance within such period, then unless the parties otherwise agree the Consultant's performance of the Services under this Agreement shall be deemed to have been terminated.
- 20.3 The Employer may at any time and for any reason, in addition to any other rights and remedies which it may have, by giving not less than 7 (seven) days' written notice to the Consultant, terminate the Consultant's performance of the Services under this Agreement.
- 20.4 The Employer may forthwith terminate performance of the Services upon serving written notice on the Consultant to that effect in the event of any of the following:
- 20.4.1 discovery of a material misrepresentation by the Consultant during the tender or negotiation period for the Services under the Agreement; or
- 20.4.2 the Consultant having failed to perform a substantial part of the Services or having committed any other breach of this Agreement and having failed to rectify such failure and/or breach within 7 (seven) days of the service of the Employer's written notice specifying such failure and/or breach.
- 20.5 In the event that:
- (a) any distress or execution is levied or threatened upon either party's property;
  - (b) any judgment against a party remains unsatisfied for more than 14 (fourteen) days;

- (c) a party is bankrupt (in the case of an individual) or suspends or threatens to suspend payment of its debts or is unable to pay its debts as they fall due;
- (d) a party seeks, or enters into, an arrangement with its creditors;
- (e) a party (being a company) has an administrator appointed over it or a receiver or manager or administrative receiver is appointed of it or any of its assets;
- (f) it enters into liquidation;
- (g) it proposes or makes any voluntary arrangement with its creditors;
- (h) any petition is presented or any resolution passed or any steps or proceedings taken which may lead to any of the foregoing occurrences,

then the other party may terminate performance of the Services with immediate effect.

- 20.6 In the event of a material breach by the Employer of its obligations under this Agreement, which the Employer fails to remedy within 28 (twenty eight) days after receiving a notice from the Consultant specifying the breach and requiring its remedy, the Consultant may by notice to the Employer immediately terminate the Consultant's engagement under this Agreement.

## 21 **Consequences of Suspension and Termination**

- 21.1 On any suspension of the performance of the whole of the Services or termination of the Consultant's engagement under this Agreement, the Consultant shall take immediate steps to conclude the Services in an orderly manner and within 14 (fourteen) days provide to the Employer copies of all Materials (whether in the course of preparation or completed) for and in relation to the Project prepared by it or on its behalf or in its possession as necessary forthwith to minimise any disturbance to the Project. In the event of termination of the Consultant's employment under this Agreement, the Consultant shall:

- 21.1.1 cooperate fully and diligently with the orderly and complete transfer of the Services to any third party that the Employer may appoint to carry out the Services or any part of the Services, including in the place of the Consultant; and

- 21.1.2 at the Employer's sole option and direction, assign or novate any sub-consultants, sub-contractors and/or agents to any third party that the Employer may specify and/or direct and using such contractual instruments as the Employer may approve (acting reasonably).

- 21.2 If performance of the Services or the Consultant's engagement has been:

- 21.2.1 suspended pursuant to Clause 20.1 (Suspension and Termination) or terminated pursuant to Clauses 20.2, 20.3 or 20.6 (Suspension and Termination) (in the case of the Employer suffering the circumstances set out therein), then the Employer shall pay to the Consultant (subject to any withholdings, deductions or set-offs which the Employer is entitled to make and to Clauses 21.3 to 21.5) any instalments of the Fee which have accrued due prior to the date of suspension or termination together with a reasonable proportion of the next following instalment of the Fee commensurate with the Basic Services properly performed up to the date of suspension or termination and the fee for any Additional Services carried out prior to the date of suspension or termination (the **Fee at Termination**); or

- 21.2.2 otherwise terminated, then the Employer shall not be liable to pay any sum due under this Agreement to the Consultant until after the completion of the Services by the Employer or by another consultant engaged by the Employer at which time the Employer shall pay to the Consultant such parts of the Fee at Termination that are owing (if any) following the exercise of any withholding, deductions or set-offs by the Employer against such amounts of the Employer's costs, losses and/or expenses caused or contributed to by such termination.
- 21.3 On termination or suspension of the Consultant's engagement for whatever reason, the Employer shall not (except as exclusively set out in Clause 21.2) be liable to the Consultant for any loss of profit, loss of contracts or other costs, losses and/or expenses incurred by the Consultant in connection with such termination or suspension.
- 21.4 Termination of the Consultant's engagement for whatever reason shall not (subject to Clause 21.5) limit the rights and remedies of either party in relation to any negligence, omission or default of the other party occurring prior to the termination.
- 21.5 The provisions of this Agreement shall continue to bind the parties for as long as may be necessary to give effect to their respective rights and obligations under it.

## **22 Anti-Corruption**

22.1 The Consultant shall:

- 22.1.1 comply with all applicable laws, regulations, codes and sanctions relating to anti-bribery and anti-corruption, including but not limited to the Bribery Act 2010;
- 22.1.2 not engage in any activity, practice or conduct which would constitute an offence under the Bribery Act 2010 if such activity, practice or conduct had been carried out in the UK;
- 22.1.3 comply with the Employer's anti-bribery and anti-corruption policies, as published and updated by the Employer from time to time;
- 22.1.4 have and maintain throughout the term of this Agreement its own anti-bribery and anti-corruption policies and procedures, including but not limited to adequate procedures to ensure compliance with the Bribery Act 2010 and the Employer's anti-corruption policy, and will enforce the same where appropriate;
- 22.1.5 immediately notify the Employer if a foreign public official becomes an officer or employee of the Consultant or acquires a direct or indirect interest in the Consultant (and the Consultant warrants that it has no public officials as officers, employees or direct or indirect owners at the date of this Agreement);
- 22.1.6 ensure that all persons associated with the Consultant or other persons who are performing services or providing goods in connection with this Agreement comply with this Clause 22.1.
- 22.2 The Consultant warrants and represents that at the time of entering into the Agreement it has not and none of its officers, employees, agents, representatives, subcontractors, consultants, or other persons acting with the authority of the Consultant have:
- 22.2.1 done anything that would have placed it or them in breach of the obligations at Clause 22.1 above; or
- 22.2.2 without prejudice to Clause 22.2.1, offered or given, or agreed to give, to any member, employee or representative of the Employer any gift or consideration of

any kind as an inducement or reward for doing, or refraining from doing, or for having done, or refrained from doing, any act in relation to obtaining or executing this Agreement.

- 22.3 If the Consultant is in breach of any obligation, warranty or representation as provided in this Clause 22, then the Employer shall be entitled (without prejudice to any other right and/or remedy, including the right to terminate this Agreement under Clause 20 (Suspension and Termination)):
  - 22.3.1 to suspend performance of this Agreement for such period as the Employer may consider to be necessary in order to investigate any such breach. During any such period of suspension, the Employer shall be under no obligation to perform its part of this Agreement, but the Consultant will continue to be bound by all of its obligations under this Agreement insofar as they are compatible with this Agreement being suspended and will continue to comply with all of its duties under this Agreement. The Employer shall be entitled to require the Consultant to stay away from the Employer's premises and to have no contact with any employees, officers, customers, Employers, agents or suppliers of the Employer; and/or
  - 22.3.2 to terminate this Agreement with immediate effect on written notice and the provisions of Clause 21 (Consequences of Suspension and Termination) shall apply (where and to the extent that they relate to Clause 20.4 (Suspension and Termination)).
- 22.4 The Consultant is liable for and indemnifies the Employer against all payment, loss, damage, action, cost, fines, financial penalty or expense of whatsoever nature paid made or incurred by the Employer arising out of or in connection with any breach by the Consultant of its obligations, representations and/or warranties under this Clause 22.

## 23 **Data Protection**

- 23.1 This Clause 23 is only applicable where and to the extent that the obligations and/or duties of the Consultant (including the performance of the Services) under and/or arising from this Agreement relate to and/or are affected by any data protection legislation.
- 23.2 Each party shall, at its own expense, ensure that it complies with and assists the other party to comply with the requirements of all legislation and regulatory requirements in force from time to time relating to the use of personal data, including, without limitation:
  - 23.2.1 the General Data Protection Regulation ((EU) 2016/679) (**GDPR**) and any national implementing laws, regulations and secondary legislation, for so long as the GDPR is effective in the UK; and
  - 23.2.2 any successor legislation to the Data Protection Act 2018 and the GDPR, in particular the Data Protection Bill 2017-2019, once it becomes law.
- 23.3 The Consultant shall indemnify and hold harmless the Employer from and against all costs, expenses, damages, loss, liabilities, demands, claims, actions or proceedings whatsoever which the Employer may suffer or incur as a consequence of any breach by and/or through the Consultant of this Clause.
- 23.4 The data and/or information referred to in this Clause is solely the property of the Employer. The Consultant hereby agrees that it has no interest whatsoever in such property (whether equitable, legal, and/or otherwise) and, accordingly, the Consultant's interaction with any such data and/or information is by way of a non-



exclusive, revocable, non-assignable licence subject to the terms and conditions of this Agreement.

## 24 **Freedom of Information**

24.1 In this clause the following definitions shall apply:

**Environmental Information Regulations:** the Environmental Information Regulations 2004 (SI 2004/3391) together with any guidance and/or codes of practice issued by the Information Commissioner or relevant government department in relation to such regulations;

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

**Information:** has the meaning given under section 84 of FOIA; and

**Request for Information:** a request for information or an apparent request under the FOIA or the Environmental Information Regulations.

24.2 The Consultant acknowledges that the Employer is subject to the requirements of the FOIA and the EIRs. The Consultant shall:

24.2.1 provide all necessary assistance and cooperation as reasonably requested by the Employer to enable the Employer to comply with its obligations under the FOIA and EIRs;

24.2.2 transfer to the Employer all Requests for Information relating to this Agreement that it receives as soon as practicable and in any event within 2 working days of receipt;

24.2.3 provide the Employer with a copy of all Information belonging to the Consultant requested in the Request For Information which is in its possession or control in the form that the Employer requires within 5 working days (or such other period as the Employer may reasonably specify) of the Employer's request for such Information; and

24.2.4 not respond directly to a Request for Information unless authorised in writing to do so by the Employer.

24.3 The Consultant acknowledges that the Employer may be required under the FOIA and EIRs to disclose Information (including commercially sensitive information) without consulting or obtaining consent from the Consultant. The Employer shall take reasonable steps to notify the Consultant of a Request for Information (in accordance with the Cabinet Office's Freedom of Information Code of Practice issued under section 45 of the FOIA) to the extent that it is permissible and reasonably practical for it to do so but (notwithstanding any other provision in this Agreement) the Employer shall be responsible for determining in its absolute discretion whether any commercially sensitive information and/or any other information is exempt from disclosure in accordance with the FOIA and/or the EIRs.

## 25 **Communications**

25.1 All contractual notices and instructions to be given hereunder shall be in writing, either delivered personally or sent by first class recorded delivery post and addressed to the persons at the addresses stated at paragraph 16

(Communications) of the Contract Details or such other addresses as shall be notified by each party to the other from time to time). Such notice or instruction shall be deemed to have been delivered:

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

25.2 All notices and/or other communications in respect of this Agreement or the Services shall be in English.

## 26 **Adjudication**

26.1 As the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009 (the **1996 Act as amended**) applies to this Agreement, if any dispute or difference arises under this Agreement then either party may refer it to adjudication in accordance with this Clause 26.

26.2 Any dispute or difference between the Employer and the Consultant arising out of and/or in connection with this Agreement or the Project or termination or alleged termination of the Consultant's employment under this Agreement may be referred to the Adjudicator appointed under Clause 26.5.

26.3 Either the Employer or the Consultant may give to the other written notice that a dispute or difference as referred to in Clause 26.1 has arisen. The notice shall include:

- (a) all particulars of the dispute or difference together with a summary of the contentions on which the party relies;
- (b) a statement of the relief or remedy which is sought; and
- (c) any material the party wishes the Adjudicator to consider which that party intends to include in its referral to the Adjudicator pursuant to the TeCSA Adjudication Rules. The notice shall be delivered in compliance with Section 115 of the 1996 Act as amended.

26.4 The adjudication shall be conducted in accordance with the TeCSA Adjudication Rules from time to time in force, which are hereby incorporated into this Agreement.

26.5 Either party may apply to TeCSA for nomination of an Adjudicator by the Chairman of TeCSA. The application shall be in accordance with the TeCSA Adjudication Rules.

26.6 If any dispute or difference arising under this Agreement raises the same or parallel issues as a related dispute or difference between the Employer and any third party which has already been referred to adjudication, the parties shall (wherever practicable) refer the dispute or difference under this Agreement to the same adjudicator for decision and that adjudicator shall be the "Adjudicator" for the purposes of this Agreement in relation to the dispute or difference.

26.7 No adjudication between the Employer and the Consultant, whether pursuant to the 1996 Act as amended or otherwise, shall finally determine the matter in dispute.

## **27 Litigation**

- 27.1 If any dispute or difference arises under this Agreement or in connection therewith, it shall be determined by legal proceedings and Clause 28 (Liability) hereunder shall apply to such proceedings.
- 27.2 Without prejudice to the parties' rights under Clause 26.1 (Adjudication), if any dispute or difference shall arise between the parties, the party who believes that the dispute or difference has arisen shall, as soon as it is aware of the dispute or difference, give written notice to the other party. The notice shall include all available details of the dispute and difference. On receipt of the notice under this Clause 27.2, the Employer's Representative and the Consultant's Persons shall, during a period of 28 (twenty-eight) days from the date of the written notice, meet regularly and use reasonable endeavours to resolve such dispute or difference by negotiation. For the avoidance of doubt, compliance with this Clause 27.2 is a condition precedent to the right of any party to commence Court proceedings or litigation.
- 27.3 This Agreement 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.
- 27.4 The parties to this Agreement irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to hear and determine any suit, action or proceedings, and to settle any dispute arising out of or in connection with this Agreement, and any other agreement between the parties, or their subject matter or formation.
- 27.5 Subject to Clause 11.11.2 and Clause 20.4, where the parties to this Agreement are in any form of dispute, the Consultant shall continue to perform the services in accordance with this Agreement.

## **28 Liability**

- 28.1 No actions or proceedings for any breach by the Consultant under or relating to this Agreement shall be commenced against the Consultant after the expiry of 12 (twelve) years from Practical Completion or, if later, the termination or completion of the Services in accordance with this Agreement.
- 28.2 Notwithstanding anything to the contrary contained in this the Agreement (without prejudice to the following of this clause) the Consultant's liability under or in connection with this Agreement whether in contract or tort, in negligence for breach of statutory duty or otherwise (other than in respect of personal injury or death) shall not exceed ten million pounds (£10,000,000) for any one claim or ten million pounds (£10,000,000) in the annual aggregate for any claims which may arise out of or in connection with pollution or contamination or asbestos.
- 28.3 Notwithstanding anything to the contrary contained in this Agreement, the rights and remedies of the Consultant set out in this Agreement shall be the sole and exclusive rights and remedies available to the Consultant in respect of any liability for the Employer to the Consultant whether in contract, tort, for breach of statutory duty or otherwise.

## **29 Entire Agreement**

This Agreement constitutes the entire and complete agreement between the Employer and the Consultant and supersedes all other communications, promises, assurances, warranties, representations, agreements and undertakings between

them, whether written or oral, relating to its subject matter. The parties agree that in entering into this agreement it does not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty not set out in the Agreement and any such statement, representation, assurance, warranty shall not be deemed to be incorporated into this Agreement. Nothing in this Clause shall limit or exclude liability for fraud.

### 30 **Severance**

30.1 If any provision of this Agreement is held to be illegal, void, invalid or unenforceable (in whole or in part) by any court or administrative body of competent jurisdiction, that provision shall to that extent be deemed not to form part of this Agreement but the enforceability of the remainder of this Agreement shall not be affected.

30.2 The Parties agree, in the circumstances referred to in this Clause 30, to use reasonable endeavours to substitute any illegal, void, invalid or unenforceable provision with a lawful, valid and enforceable provision, which achieves to the greatest extent possible the same effect as would have been achieved by the illegal, void, invalid or unenforceable provision and which gives effect to the spirit and intent of the original provision.

### 31 **No Joint Venture or Partnership**

Nothing in this Agreement is intended to, or shall be deemed to, establish any partnership or joint venture between any of the parties, constitute any party the agent or another party, or authorise any party to make or enter into any commitments for or on behalf of any other party.

### 32 **Survival**

The parties acknowledge and agree that, without prejudice to the operation of Clause 21.5 (Consequences of Suspension and Termination), the provisions of Clauses 17 (Intellectual Property Rights), 18 (Confidentiality), 22 (Anti-Corruption) and 23 (Data Protection) and any provision that is by implication intended to come into or continue in force on or after termination or expiry of this Agreement shall remain in full force and effect, notwithstanding the termination and/or suspension of the Consultant's employment under this Agreement for any reason or notwithstanding the completion of the performance of the Services.

### 33 **Counterparts**

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

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

Executed as a Deed by  
**EASTLEIGH BOROUGH COUNCIL**  
acting by:

)  
)  
)  
)

sign here:

Director/Member

print name

sign here

Director/Company Secretary/Member

print name:

**OR**

**Executed** as a **Deed** by  
**EASTLEIGH BOROUGH COUNCIL**  
acting by:

)  
)  
)  
)

sign here:

Director/Member

print name:

In the presence of:

Witness signature:

Witness sign here:

Witness name:

print name:

Witness address:

Witness occupation:

Executed as a Deed by  
[CONSULTANT]  
acting by:

)  
)  
)  
)

sign here:

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

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

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

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

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

[OR]

Executed as a Deed by  
[CONSULTANT]  
acting by:

)  
)  
)  
)

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

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

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

In the presence of:

Witness signature:

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

Witness name:

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

Witness address:

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

## Schedule 2 Contract Details

### 1 Project Brief, Programme, Budget and Design Responsibility Matrix

1.1 The Project is: S106 Highways Improvement Scheme

1.2 The Property is: Horton Heath, Eastleigh, Hampshire

1.3 The documents are as follows:<sup>1</sup>

(a) Budget: Not applicable

(b) Project Brief: [INSERT DESCRIPTION OF DOCUMENT OR APPENDIX NO.]

(c) Programme: [INSERT DESCRIPTION OF DOCUMENT OR APPENDIX NO.]

(d) Design Responsibility Matrix: [INSERT DESCRIPTION OF DOCUMENT OR APPENDIX NO.]

### 2 Consultant's Persons

Consultant's Persons are: [INSERT NAME(S)]

### 3 Employer's Policies

Employer's Policies are: Not applicable

### 4 Employer's Representative

Employer's Representative: Shaun Harkin

### 5 Fee

5.1 Fee for the Basic Services is the fixed price of £[FEE IN FIGURES] ([FIGURE IN WORDS])

5.2 The Fee instalments are as follows: [INSERT FEE DRAWDOWN OR APPENDIX NO.]

5.3 Due date: [●] day of each calendar month

5.4 Hourly rates:	Professional Role	Inclusive Hourly Rate (£)
	[ROLE]	[AMOUNT IN FIGURES]
	[ROLE]	[AMOUNT IN FIGURES]
	[ROLE]	[AMOUNT IN FIGURES]

### 6 Professional Indemnity Insurance

Ten million pounds (£10,000,000) for any one claim or ten million pounds (£10,000,000) in the annual aggregate for any claims which may arise out of or in connection with pollution or contamination or asbestos

<sup>1</sup> Insert references to relevant documents (should contain revision numbers, dates and other key identifiers). Note these documents could be appended to this schedule (and reference to number of appendix insert here) if required

7 **Other Consultants and Lead Designer**

Other Consultants are as follows:

Firm Role	Firm Name
Architect	[INSERT NAME OF FIRM]
Structural Engineer	[INSERT NAME OF FIRM]
Mechanical and Electrical Engineer	[INSERT NAME OF FIRM]
Cost Consultant	[INSERT NAME OF FIRM]
[INSERT]	[INSERT NAME OF FIRM]

7.1 The Lead Designer is the Consultant

8 **Reimbursable Costs**

Following are reimbursable costs: None

9 **Third Parties**

Third Parties include:

- (a) any other third party with a material interest in the Project and/or the Property.

10 **Third Party Agreements**

Third Party Agreements include:

None at date of this agreement

11 **Novation**

Novation: Does not apply

12 **Authorised Basic Services**

Authorised Basic Services on or before the Date of this Agreement:

The Services identified in Schedule 2 (Basic Services). The entire Basic Services.

13 **BIM**

13.1 Does not apply

13.2 BIM Protocol is: Not applicable



14 **CDM Regulations – Principal Designer**

14.1 The Principal Designer is to be advised

15 **Sub-consulting**

15.1 Clause 15.5 does not apply

15.2 Sub-Consultants are:

- (a) any sub-consultant with a material design role

16 **Communications**

- (a) Employer

Name: Shaun Harkin. E-mail [saun.harkin@eastleigh.gov.uk](mailto:saun.harkin@eastleigh.gov.uk)

Address: Eastleigh Borough Council, Eastleigh House, Upper Market Street,  
Eastleigh, SO50 9YN

- (b) Consultant

Name: [INSERT RECIPIENT NAME]

Address: [INSERT RECIPIENT ADDRESS]

## Schedule 3 Basic Services

As the 'Civil Engineer' detailed design engineer, you will act as 'Lead Designer' in preparing and co-ordinating with your own directly appointed third party consultants as applicable for each work package. To provide a set of detailed design documentation based on the principles shown in the 'Paul Basham' scheme drawings provided.

As Lead Designer the following is included in the scope of works:

- Site visit, walkover to determine site constraints, take photographs and any required investigations works / survey's to record any unique features.
- Detailed Engineering drawings demonstrating the key elements of the scheme (materials, drainage and signing/ lining etc.). Suitable for HCC Highways Technical Approval and to be used by Civil Contractors to tender and construct.
- Program of deliverable package to be agreed to meet obligation milestones as set out in section 6.
- Although not exhausted, your design packages should include for services as outlined in 'Phase 1 / 2 / 3' schedules below.
- Instruct any necessary Road Safety Audit Stage 1 / 2 and provide Designers Response and include any requirements within the design documentation.
- Consultation (including fee's) with statutory undertakers for any required diversion works.
- Gather all necessary accompanying information required for submission package Walking, Cycling and Horse-Riding Assessment and Review (WCHAR) if required.
- Make submission (including fee's) to Hampshire County Council (HCC) and address comments through to technical approval.
- Assist OHH team with estimate of construction costs for S278 works.
- Fulfil Principle Designer's & Designer's responsibilities as defined by the Construction Design & Management (CDM) Regulations.
- Allowance for 3 x Meetings.

### Phase 1 – Review / Scoping

- Walkover survey including street furniture audits.
- Initial meeting/consultation with Local Highway Authority to confirm scope of Section 278 works.
- Review of 'Paul Basham' scheme design to define impact of the works, and
- If not already provided, request C2 Preliminary Enquiries from Public Utilities.
- The inclusion in any work package specific requirements. The appointment for ecology, arboriculture, soft landscaping etc appointments.

### Phase 2 – Preliminary Design

- Horizontal alignment design and production of outline general arrangements for the work packages based upon supplied topographical survey, scheme designs and scoping review.
- Review and / or update the design of the Auto Track and visibility checks.
- Design of Highways Drainage.
- Submission of the Preliminary Design drawings to the OHH team for review acceptance.
- Collation of NRSWA information, using the C2 and C3 enquiries.

- Meeting/preliminary negotiations regarding the Stage 2 submission.
  - o The local authority may request a Stage 1 Road Safety Audit for this stage where not already provided, however, we would promote a combined Stage 1 and 2 RSA in the Detailed Design Phase

### **Phase 3 – Detailed Design**

- Finalise the 3D level designs;
- Finalise the drainage design
- Design the road / pavement construction details;
- Detailed streetlighting design by HCC Highways approved consultant.
- Finalise the road marking and signage drawings; and
- If required preparation of documents for any TRO applications;
  - o Issue TRO application documents to EBC for sign off prior to Lead Design. Application fees to be included.
- Designers' Response to stage 1 /2 Road Safety Audit.
- Produce a complete civil drawing and specification package for Technical Approval and inclusion within the S278 Agreement.
- Submit S278 application, responding to any comments received to enable technical Approval. All application fees to be included within tender return.
- Although not exhaustive deliverables will be dependent on requirement of each of the work packages.

## Schedule 4 Third Party Rights

The Employer and Consultant agree that:

### 1 Interpretation

Unless the context otherwise requires or an alternative definition is provided for, words and expressions defined in the Agreement shall have the same meaning when used in this Schedule. In addition:

**Beneficiary** means the Third Party granted Third Party Rights pursuant to Clause 16 (Third Party Rights) of the Agreement;

**Fund** means any Fund provided with a collateral warranty or in whom third party rights have vested in respect of the Consultant in accordance with the Agreement;

**Fund Rights** means those rights contained within any Schedule or collateral warranty vested in the Fund or made between the Consultant, the Fund and the Employer or the Original Employer (as relevant) in respect of the Services under which the Fund has rights equivalent in all material respects to the rights granted in accordance with paragraphs 6.2 to 6.4 (Termination of the Agreement) of this Schedule to the Beneficiary, save that the period for the exercise of those rights by the Fund shall expire 14 (fourteen) days after service of the Consultant's simultaneous notices on the Beneficiary and the Fund in accordance with paragraphs 6.2 to 6.5 (Termination of the Agreement);

**Original Employer** means the employer under the Agreement acting in the capacity of the Employer at the Commencement Date; and

**Original Employer Rights** means those rights contained within any Schedule or collateral warranty vested in the Original Employer or made between the Consultant, the Original Employer and the Employer (as relevant) in respect of the Services under which the Original Employer has the rights equivalent in all material respects to those granted by paragraphs 6.2 to 6.4 (Termination of the Agreement) of this Schedule to the Beneficiary save that the period for the exercise of those rights by the Original Employer shall expire 14 (fourteen) days after service of the Consultant's simultaneous notices on the Beneficiary, the Original Employer and the Fund in accordance with paragraphs 6.2 to 6.5 (Termination of the Agreement).

### 2 Duty of Care

2.1 The Consultant warrants and undertakes to the Beneficiary that:

2.1.1 it has been appointed to perform the Services in connection with the Project and that it has exercised and will continue to exercise in the performance of the Services all the reasonable skill, care and diligence to be expected of a properly qualified and competent consultant (in each of the disciplines to which the Services relate) experienced in the provision of like services for projects of a similar size, type, scope, complexity and value to the Project;

2.1.2 it has performed and will continue properly and diligently to perform all of its obligations under the Agreement and will owe the same contractual duties (including without limitation duties of care) to the Beneficiary as those owed by the Consultant to the Employer; and

2.1.3 where the Consultant has carried out any of the Services prior to its engagement by the Employer (including without limitation the preparation of documents and drawings for inclusion in the Building Contract) the warranties and undertakings of

the Consultant under this paragraph 2 shall apply in respect of those parts of the Services.

- 2.2 The Consultant warrants and undertakes to the Beneficiary that it has exercised, and undertakes that it shall continue to exercise, the duty of care required by 2.1.1, so as not to specify for use, or within the scope of its inspection duties permit to be used, any goods, materials, substances or products generally known at the time the Consultant commences its Services and up to the time of Practical Completion to be deleterious to health or safety or the durability of the Project (in the circumstances in which they are used) and/or that are otherwise not in accordance with:
- (a) good building practice or techniques or any other materials or substances used in the design and construction of the Project;
  - (b) Statutory Requirements, current British Standards or Codes of Practice or the European Union equivalent (if applicable) and/or the Construction Products Regulations; and/or
  - (c) the relevant recommendations in The British Council for Offices' publication entitled "Good Practice in the Selection of Construction Materials 2011".

### **3 Insurance**

- 3.1 The Consultant warrants that it currently maintains and shall continue to maintain professional indemnity insurance from the date of the Agreement until 12 (twelve) years after Practical Completion with a limit of indemnity of not less than ten million pounds (£10,000,000) for any one claim or ten million pounds (£10,000,000) in the annual aggregate for any claims which may arise out of or in connection with pollution or contamination or asbestos, provided that such insurance is generally available in the market at commercially reasonable rates and terms. The Consultant shall maintain such professional indemnity insurance with a well-established and reputable insurance office or underwriter of repute carrying on business in the European Union or UK on customary and usual terms and conditions prevailing for the time being in the insurance market.
- 3.2 For the avoidance of doubt, it is hereby agreed and declared that any increased or additional premium required by insurers by reason of the Consultant's own claims record or other acts, omissions, matter or things particular to the Consultant shall be deemed to be within commercially reasonable rates.
- 3.3 The Consultant shall immediately inform the Beneficiary if the insurance required under this paragraph ceases to be generally available at commercially reasonable rates and terms or otherwise is not maintained in accordance with this Schedule or for any reason becomes void or unenforceable or if the insurer withdraws cover. In that event, the Consultant shall continue to maintain insurance on as equivalent terms and limit of indemnity as may then be available to the Consultant on a commercially reasonable basis.
- 3.4 As and when the Consultant is reasonably requested to do so by the Beneficiary, the Consultant shall produce for inspection sufficient documentary evidence (which may be in the form of broker's letter or certificate) that the insurance required under paragraph 3.1 is being maintained in accordance with the terms of this Schedule.
- 3.5 The Consultant shall not, once a claim is notified to it, knowingly act or omit to act so as to compromise, settle or waive any insurance claim which it may have in respect of any professional liability under this Schedule without the prior consent of the Beneficiary, provided that nothing in this paragraph 3 shall preclude the

Consultant's insurers from taking over (in the name of the Consultant) the defence of any claim made by the Beneficiary under this Schedule and (in that capacity) from conducting and settling it as they see fit.

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

- 4.1 The intellectual property rights in the Materials shall remain vested in the Consultant. The Consultant hereby grants to the Beneficiary (and its nominees) an irrevocable, perpetual, non-terminable, worldwide, royalty-free licence to use and reproduce the Materials for all purposes relating to the Project, including, but without limitation, the construction, completion, modification, maintenance, advertisement, reinstatement, repair, reconstruction, refurbishment, redevelopment, use, letting, marketing, promotion and sale of the Project, and to copy and use (but not to reproduce any designs contained therein) the Materials for an extension to the Project. The Beneficiary shall also be entitled to grant sub-licences to others and these shall be transferable to third parties without the prior consent of the Consultant.
- 4.2 The Consultant shall not be liable for any such use by the Beneficiary or its nominees of any Materials for any purpose other than that for which the same were prepared or provided and such purposes as are reasonably foreseeable as at the date the relevant parts of the Services are performed.
- 4.3 All royalties or other sums payable in respect of the supply and use of any patented article, processes or inventions required for and in relation to Project and the performance of the Services under the Agreement shall be paid by the Consultant. The Consultant shall indemnify the Beneficiary from and against all claims, proceedings, damages, costs or expenses suffered or incurred by the Beneficiary by reason of the Consultant infringing or being held to infringe any intellectual property rights in the performance of the Services.
- 4.4 The Consultant waives any right to be identified as the author of the Materials in accordance with section 77 of the Copyright, Designs and Patents Act 1988 and waives any right not to have the Materials subjected to derogatory treatment in accordance with section 80 of the same Act as against the Beneficiary, any successors in title, any assignee and/or any licensee.
- 4.5 The Consultant shall, at the request of the Beneficiary, provide to the Beneficiary such copies of the Materials (in hard copy or electronic form) as the Beneficiary may reasonably require in connection with the Project.

#### **5 Assignment**

- 5.1 The Beneficiary may assign the benefit of the terms of this Schedule and/or any of the present or future rights interests and benefits of the Beneficiary hereunder:
- 5.1.1 twice to any person with an interest in the Project without the Consultant's consent; and
- 5.1.2 without counting as an assignment under paragraph 5.1.1: and/or
- (a) by way of assignment and/or charge by way of security (including any reassignment on redemption of security); or
- (b) to any Affiliate of the Beneficiary,
- but such benefit may not be further assigned without the written consent of the Consultant (such consent not to be unreasonably withheld or delayed). The

Consultant shall not in defence of any claim under this Schedule of rights by an assignee of the Beneficiary seek to reduce or extinguish the claim by reason of the fact that the loss or damage is not suffered by the original Beneficiary but by the assignee and/or chargee.

## **6 Termination of the Agreement**

- 6.1 The provisions of each of paragraphs 6 and/or 7 of this Schedule shall only vest in and be relied upon by a Beneficiary for whom a validly served third party rights notice has been issued in accordance with the terms of the Agreement that states on its face that such provisions do so vest and may be relied upon by the Beneficiary.
- 6.2 The Consultant warrants and undertakes to the Beneficiary that the Consultant will not exercise or seek to exercise any right which may be or become available to it to terminate or treat as terminated the Agreement or discontinue or suspend the performance of any obligations thereunder without first giving to the Beneficiary not less than 28 (twenty-eight) days' prior written notice of its intention to do so. Such notice shall specify the Consultant's grounds for terminating or treating as terminated the Agreement or discontinuing or suspending its performance thereof and full particulars of any amounts owed by the Employer to the Consultant under the Agreement.
- 6.3 Within 28 (twenty-eight) days of receipt of such notice from the Consultant pursuant to paragraph 6.2, the Beneficiary may give written notice to the Consultant that the Beneficiary or its nominee shall thenceforth be treated as the employer under the Agreement and thereupon (subject to payment by the Beneficiary of any sums due under the Agreement whether or not accrued before or after the date of the notice referred to in paragraph 6.2), the Consultant shall treat the Beneficiary or its nominee as aforesaid as the employer under the Agreement. All rights and obligations of the employer under the Agreement shall thereafter be exercisable and performed by the Beneficiary or its as aforesaid nominee to the exclusion of the Employer and the Agreement shall be and continue in full force and effect.
- 6.4 It is hereby agreed between the Beneficiary and the Consultant that, if any event shall occur in relation to the Project whereby the Beneficiary shall be entitled to and shall exercise its rights to forfeit or terminate the Agreement on default of the Employer or otherwise, the Beneficiary shall be entitled to require, by notice in writing to the Consultant and upon payment of all sums due under the Agreement whether accrued before or after the date of the notice referred to in paragraph 6.2, forthwith to be treated by the Consultant as employer under the Agreement to the exclusion of the Employer, whereupon all the rights and obligations of the Employer under the Agreement shall be exercised and performed by the Beneficiary.
- 6.5 Any notice served by the Consultant on the Beneficiary or by the Beneficiary on the Consultant pursuant to paragraphs 6.2 to 6.4 respectively shall be served simultaneously upon both the Fund and/or (where relevant) the Original Employer.
- 6.6 The Beneficiary shall have no right to give notice to the Consultant under paragraph 6.3 within the period referred to in paragraph 6.2 unless the Fund and (where relevant) the Original Employer shall each previously have notified the Beneficiary that it will not exercise its equivalent rights under the Fund Rights or the Original Employer Rights.

- 6.7 The Beneficiary shall have no right to give notice to the Consultant under paragraph 6.4 if the Fund or (where relevant) the Original Employer has already exercised its equivalent right under the Fund Rights or the Original Employer Rights in response to the Consultant's simultaneous notice to the Fund and the Original Employer.
- 6.8 In the event that both the Fund and (where relevant) the Original Employer serve equivalent notices required under paragraphs 6.3 or 6.4, the Consultant acknowledges and agrees that the notice of the Fund shall take priority over that of the Original Employer and accordingly shall be complied with by the Consultant to the exclusion of that of the Original Employer.
- 6.9 Any notices given by the Consultant and/or Beneficiary in breach of this paragraph 6 shall be invalid and shall have no force for the purposes of this paragraph.
- 6.10 Following the full exercise of the Beneficiary's rights and compliance with its obligations under paragraphs 6.3 or 6.4, the Consultant shall comply with all reasonable instructions of the Beneficiary (or its nominee) to formalise the contractual position between the Beneficiary and the Consultant. Such instructions may include (but not be limited to) the novation of the rights and obligations of the Employer under the Agreement to the Beneficiary or its nominee (in a materially similar form to that set out in Schedule 6 (Form of Deed of Novation) of the Agreement) or, at the Beneficiary's sole option and discretion, entering into a new agreement with the Beneficiary (in a material similar form to the Agreement) under which the Consultant warrants to the Beneficiary the full and proper performance of all of the Services performed prior to the exercise of the Beneficiary's rights under paragraphs 6.3 or 6.4.
- 6.11 The Consultant shall have no claim whatsoever against the Beneficiary in respect of any damage loss or expense howsoever arising out of or in connection with any termination of the Agreement.
- 6.12 The Beneficiary has no liability to the Consultant in respect of fees and expenses under the Agreement unless and until the Beneficiary has given notice under paragraphs 6.3 or 6.4.
- 6.13 The Employer confirms its concurrence with any arrangements required, made and/or contemplated by the provisions of paragraphs 6 and 7 of this Schedule.

## **7 Third Party Rights or Collateral Warranties**

- 7.1 The Consultant agrees that, pursuant to the Contracts (Rights of Third Parties) Act 1999, the provisions of this Schedule shall vest in and may be relied upon by any Third Party (without prejudice to the operation of paragraph 6.1) for whom a validly served third party rights notice has been issued by the Beneficiary to the Consultant in accordance with the relevant terms of the Agreement and with the Beneficiary being held to be the Employer for the purposes of such notice.
- 7.2 As an alternative to the exercise by the Beneficiary of its rights in paragraph 7.1 and at the Beneficiary's sole option and discretion, the Consultant shall, within 14 (fourteen) days of the Beneficiary providing an engrossment copy of the same, execute and deliver to the Beneficiary a deed of collateral warranty in favour of a Third Party containing substantially the same terms as set out in this Schedule (with such amendments as the Beneficiary shall reasonably require) and always save that this paragraph 7.2 may not be enforced in respect of any such third party that has already been provided with a deed of collateral warranty or the benefit of third party rights from the Consultant in respect of the Project.



## **8 Liability**

- 8.1 Notwithstanding the foregoing of paragraph 2 (Duty of Care), the Consultant owes to the Beneficiary the same duty of care in respect of its duties as aforesaid as it owes to the Employer, provided always that the Consultant shall have no greater liability to the Beneficiary under this Schedule than it had to the Employer under the Agreement and shall be entitled to rely on the same defenses and rights of counter-claim as it would have had if the Beneficiary had been named as joint employer under the Agreement, always excluding any rights of set-off or deduction.
- 8.2 This Schedule shall in no way prejudice or affect any other rights or remedies of the Beneficiary against the Consultant whether at common law or otherwise in respect of the Project or other matters referred to herein.
- 8.3 It is hereby agreed and declared that this Schedule operates notwithstanding that the Consultant may delegate or may have delegated any of its duties and responsibilities under the Agreement in pursuance of its terms.
- 8.4 The Consultant acknowledges that no negligent or other act omission or delay by or on behalf of the Beneficiary and its respective successors in title and assigns in inspecting, approving or informing itself about anything related to the Project shall abate or reduce the Consultant's obligations hereunder to the Beneficiary and its respective successors in title and assigns.
- 8.5 No action or proceedings for any breach by the Consultant under or relating to this Schedule shall be commenced against the Consultant after the expiration of 12 (twelve) years from the date of Practical Completion. For the avoidance of doubt, any term of the Agreement preserving the Consultant's liability in respect of proceedings or arbitration commenced by the Employer shall apply mutatis mutandis to proceedings or arbitration commenced by the Beneficiary pursuant to or in connection with this Schedule.

## **9 Severance**

- 9.1 If any provision of this Schedule is held to be illegal, void, invalid or unenforceable (in whole or in part) by any court or administrative body of competent jurisdiction, that provision shall to that extent be deemed not to form part of this Schedule but the enforceability of the remainder of this Schedule shall not be affected.
- 9.2 The parties agree, in the circumstances referred to in this paragraph 9, to attempt to substitute any illegal, void, invalid or unenforceable provision with a lawful, valid and enforceable provision, which achieves to the greatest extent possible the same effect as would have been achieved by the illegal, void, invalid or unenforceable provision.

## **10 Variation**

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

## **11 Notices**

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

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

## **12 Adjudication**

- 12.1 Any adjudication under the Housing Grants Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009) shall be carried out in accordance with the TeCSA Adjudication Rules from time to time in force and either party may apply to TeCSA for nomination of an Adjudicator by the Chairman of TeCSA..
- 12.2 No adjudication under this Schedule whether pursuant to the Housing Grants Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009) or otherwise shall finally determine the matter in dispute.

## **13 Governing Law and Jurisdiction**

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

## **14 Confidentiality**

- 14.1 The Consultant warrants that it shall not disclose to any person this Schedule, details of any confidential information (written or oral) concerning the business, affairs, operating methods, customers, clients or suppliers of the Beneficiary, except as is necessary to perform the duties under this Schedule, and unless and until such information comes into the public domain, other than through disclosure or wrongful use by you, or as required by law.
- 14.2 The Consultant shall not make any announcement related to the Beneficiary's interest in the Project without the written consent of the Beneficiary.

## Schedule 5 Third Party Rights Notice

[ON EMPLOYER HEADED PAPER]

[CONSULTANT NAME]

[CONSULTANT'S ADDRESS]

[DATE] 20[•]

Dear Sirs

You have entered into an appointment with [EMPLOYER'S NAME] dated [DATE] in respect of the design and construction for and in connection with the [DESCRIPTION OF PROJECT/DEVELOPMENT] at [ADDRESS OF THE PROPERTY], [the rights and obligations under which have been novated to [CONTRACTOR]] (the **Employer**) by a novation agreement dated [DATE] (together, the **Agreement**).

Schedule [3] of the Agreement sets out the benefits and rights which may be enforced by a third party on the issue of this notice.

On behalf of the Employer as at the date of this notice, we hereby nominate [BENEFICIARY], whose registered office is at [REGISTERED ADDRESS] (**Beneficiary**), as a third party entitled to enforce the benefits and rights set out in Schedule [3] of the Agreement in accordance with the terms of the Agreement. The Beneficiary is a [Affiliate of the Employer][Fund][Purchaser][Tenant][Landlord] (each as defined in the Agreement) [OR][one of the categories of Third Party (as defined in the Agreement)].

We confirm that the Beneficiary [MAY][MAY NOT] exercise the rights under paragraphs [6] [and/or] [7] of Schedule [3].

Yours faithfully

For and on behalf of

[FULL EMPLOYER NAME]

## **Schedule 6 Form of Deed of Novation**

Not required