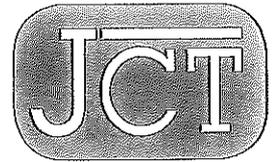


APPENDIX E

Sub Contractor Warranty



SCWa/E 2011

Sub-Contractor Collateral Warranty
for the Employer 2011



2011

COLLATERAL WARRANTIES

Warranty Agreement

This Agreement is made the _____, 20 _____

Between

(1)

_____ (Company No. _____)^[1]

of/whose registered office is at _____

_____ ('the Sub-Contractor')

And

(2)

_____ (Company No. _____)^[1]

of/whose registered office is at _____

_____ ('the Main Contractor')

[1] Where the Sub-Contractor, Main Contractor or Employer is neither a company incorporated under the Companies Acts nor a company registered under the laws of another country, delete the references to Company number and registered office. In the case of a company incorporated outside England and Wales, particulars of its place of incorporation should be inserted immediately before its Company number.

And

(3)

_____ (Company No. _____)⁽¹⁾

of/whose registered office is at _____

_____ ('the Employer',
which term shall include all permitted assignees under this Agreement).

Whereas

First the Employer has entered into an agreement dated _____ with the Main Contractor ('the Building Contract') for the carrying out of building works

_____ ('the Main Contract Works', which term shall include any changes made to the building works in accordance with the Building Contract);

Second in relation to the Building Contract, the Sub-Contractor entered into an agreement ('the Sub-Contract') dated _____ with the Main Contractor, to carry out and complete certain works ('the Sub-Contract Works') forming part of the Main Contract Works;

Third the Main Contractor is a Party to this Agreement for the purpose of giving the acknowledgements set out in clauses 5 and 6.4;

Now it is hereby agreed as follows

In consideration of the payment of one pound (£1) by the Employer to each of the Contractor and the Sub-Contractor, receipt of which each acknowledges:

- 1 ·1 The Sub-Contractor warrants and undertakes to the Employer that he has complied and will continue to comply with the Sub-Contract. In the event of any breach of this warranty and subject to clauses 1·2, 1·3 and 1·4:
 - 1 the Sub-Contractor shall be liable for the reasonable costs of repair, renewal and/or reinstatement of any part or parts of the Sub-Contract Works to the extent that the Employer incurs such costs and/or the Employer is or becomes liable either directly or by way of financial contribution for such costs; and
 - 2 where the Warranty Particulars state that clause 1·1·2 applies, but subject to clause 1·2, the Sub-Contractor shall in addition to the costs referred to in clause 1·1·1 be liable for any other losses incurred by the Employer up to the limit, if any, stated in the Warranty Particulars;
 - 2 where in the Warranty Particulars no single liability option is selected for clause 1·1·2 or where the selected option has a limit but no amount is stated, the Sub-Contractor shall not be liable for any losses incurred by the Employer other than the costs referred to in clause 1·1·1;
 - 3 where the Warranty Particulars state that clause 1·3 applies and the Consultants are there identified, the Sub-Contractor's liability to the Employer under this Agreement shall be limited to the proportion of the Employer's losses which it would be just and equitable to require the Sub-Contractor to pay having regard to the extent of the Sub-Contractor's responsibility for the same, on the following assumptions, namely that:
 - 1 the Consultant(s) referred to in the Warranty Particulars has or have provided contractual undertakings to the Employer as regards the performance of his or their services in connection with the Main Contract Works in accordance with the terms of his or their respective consultancy agreements and that there are no limitations on liability as between the Consultant and the Employer in the consultancy agreement(s);
 - 2 the Main Contractor has provided contractual undertakings to the Employer that he has complied and will continue to comply with his obligations under the Building Contract but, for the purpose of this clause 1·3, excluding any liability for work sub-contracted to the Sub-Contractor;
 - 3 the Consultant(s) and the Main Contractor have paid to the Employer such proportion of the Employer's losses which it would be just and equitable for them to pay having regard to the extent of their responsibility for the Employer's losses;
 - 4 the Sub-Contractor shall be entitled in any action or proceedings by the Employer to rely on any term in the Sub-Contract and to raise the equivalent rights in defence of liability as he would have against the Main Contractor under the Sub-Contract;
 - 5 the obligations of the Sub-Contractor under or pursuant to this clause 1 shall not be released or diminished by the appointment of any person by the Employer to carry out any independent enquiry into any relevant matter.
- 2 The Sub-Contractor further warrants to the Employer that:
 - 1 he has exercised and will exercise reasonable skill, care and diligence in:
 - 1 the design of the Sub-Contract Works to the extent that such works have been or will be designed by the Sub-Contractor; and
 - 2 the selection of materials and goods for the Sub-Contract Works to the extent that such materials and goods have been or will be selected by the Sub-Contractor;
 - 2 he will satisfy any performance specification or requirement contained in or referred to in the Sub-Contract;

- 3 he has not used nor will he use any materials or goods which at the time of use do not conform with British and European Standards or Codes of Practice; and that unless required by the Sub-Contract or unless otherwise authorised in writing by the Main Contractor, he has not used and will not use materials in the Sub-Contract Works other than in accordance with the guidelines contained in the edition of 'Good Practice in Selection of Construction Materials' (Ove Arup & Partners) current at the date of the Building Contract.
- 3 The Employer has no authority to issue any direction or instruction to the Sub-Contractor in relation to the Sub-Contract unless and until the Employer has given notice under clause 5 or 6.4.
- 4 The Employer has no liability to the Sub-Contractor in respect of amounts due under the Sub-Contract unless and until the Employer has given notice under clause 5 or 6.4.
- 5 The Sub-Contractor agrees that, in the event of the termination of the Main Contractor's employment under the Building Contract, the Sub-Contractor shall, if so required by written notice given by the Employer and subject to clause 7, accept the instructions of the Employer or his appointee to the exclusion of the Main Contractor in respect of the Sub-Contract Works upon the terms and conditions of the Sub-Contract. The Main Contractor acknowledges that the Sub-Contractor shall be entitled to rely on a notice given to the Sub-Contractor by the Employer under this clause 5 as conclusive evidence for the purposes of this Agreement of the termination of the Main Contractor's employment under the Building Contract; and further acknowledges that such acceptance of the instructions of the Employer to the exclusion of the Main Contractor shall not constitute any breach of the Sub-Contractor's obligations to the Main Contractor under the Sub-Contract.
- 6 ·1 The Sub-Contractor shall not exercise any right of termination of his employment under the Sub-Contract without having first:

 - 1 copied to the Employer any notices required by the Sub-Contract to be sent to the Main Contractor prior to the Sub-Contractor being entitled to give notice under the Sub-Contract that his employment under the Sub-Contract is terminated; and
 - 2 given to the Employer written notice that the Sub-Contractor has the right under the Sub-Contract forthwith to notify the Main Contractor that his employment under the Sub-Contract is terminated.

·2 The Sub-Contractor shall not treat the Sub-Contract as having been repudiated by the Main Contractor without having first given to the Employer written notice that he intends so to notify the Main Contractor.

·3 The Sub-Contractor shall not:

 - 1 issue a notice to the Main Contractor to which clause 6.1.2 refers; or
 - 2 notify the Main Contractor that he is treating the Sub-Contract as having been repudiated by the Main Contractor as referred to in clause 6.2

before the lapse of 14 days from receipt by the Employer of the notice by the Sub-Contractor which the Sub-Contractor is required to give under clause 6.1.2 or 6.2.

·4 The Employer may, not later than the expiry of the period referred to in clause 6.3, require the Sub-Contractor by written notice and subject to clause 7 to accept the instructions of the Employer or his appointee to the exclusion of the Main Contractor in respect of the Sub-Contract Works upon the terms and conditions of the Sub-Contract. The Main Contractor acknowledges that the Sub-Contractor shall be entitled to rely on a notice given to the Sub-Contractor by the Employer under this clause 6.4 and that acceptance by the Sub-Contractor of the instruction of the Employer to the exclusion of the Main Contractor shall not constitute any breach of the Sub-Contractor's obligations to the Main Contractor under the Sub-Contract. Provided that nothing in this clause 6.4 shall relieve the Sub-Contractor of any liability he may have to the Main Contractor for any breach by the Sub-Contractor of the Sub-Contract.
- 7 It shall be a condition of any notice given by the Employer under clause 5 or 6.4 that the Employer accepts liability for payment of the sums due and payable to the Sub-Contractor under the Sub-Contract and for performance of the Main Contractor's obligations including payment of any sums outstanding at the date of such notice. Upon the issue of any notice by the Employer under clause 5 or 6.4, the Sub-Contract shall continue in full force and effect as if no right of termination of the Sub-Contractor's employment under the Sub-Contract, nor any right of the Sub-Contractor to treat the Sub-Contract as having been repudiated by the Main Contractor, had arisen and the Sub-Contractor shall be liable to the Employer under the Sub-Contract in lieu of his liability to the Main Contractor.

- 8 Where the Warranty Particulars state that clause 8 applies, the copyright in all drawings, reports, models, specifications, plans, schedules, bills of quantities, calculations and other similar documents prepared by or on behalf of the Sub-Contractor in connection with the Sub-Contract Works (together referred to as 'the Documents') shall remain vested in the Sub-Contractor but, subject to the Sub-Contractor having received all sums due and payable under the Sub-Contract, the Employer shall have an irrevocable, royalty-free, non-exclusive licence to copy and use the Documents and to reproduce the designs and content of them for any purpose relating to the Main Contract Works including, without limitation, the construction, completion, maintenance, letting, sale, promotion, advertisement, reinstatement, refurbishment and repair of the Main Contract Works. Such licence shall enable the Employer to copy and use the Documents for the extension of the Main Contract Works but shall not include a licence to reproduce the designs contained in them for any extension of the Main Contract Works. The Sub-Contractor shall not be liable for any such use by the Employer of any of the Documents for any purpose other than that for which they were prepared.
- 9 Where the Warranty Particulars state that clause 9 applies, the Sub-Contractor warrants that he has and shall maintain a Professional Indemnity insurance or Product Liability insurance policy (whichever is thereby stated to apply) with limits of indemnity of the types and in amounts not less than those there stated and for a period of the length there stated from the date of practical completion of the Main Contract Works (or, where the Building Contract provides for completion by Sections, practical completion of the relevant Section of the Main Contract Works), provided always that such insurance is available at commercially reasonable rates. The Sub-Contractor shall immediately give written notice to the Employer if such insurance ceases to be available at commercially reasonable rates in order that the Sub-Contractor and the Employer can discuss the means of best protecting their respective positions in respect of the Sub-Contract Works in the absence of such insurance. As and when reasonably requested to do so by the Employer or his appointee under clause 5 or 6.4, the Sub-Contractor shall produce for inspection documentary evidence that his insurance is being maintained.
- 10 This Agreement may be assigned without the Sub-Contractor's consent by the Employer, by way of absolute legal assignment, to another person (P1) and by P1, by way of absolute legal assignment, to another person (P2). In such cases the assignment shall only be effective upon written notice of it being given to the Sub-Contractor. No further or other assignment of this Agreement shall be permitted and in particular P2 shall not be entitled to assign this Agreement.
- 11 Any notice to be given by the Sub-Contractor to the Employer or by the Employer to the Sub-Contractor shall be duly given if delivered by hand or sent by Recorded Signed for or Special Delivery post to the recipient at such address as he may from time to time notify to the sender or (if no such address is then current) his last known principal business address or (where a body corporate) its registered or principal office. Where sent by post in that manner, it shall, subject to proof to the contrary, be deemed to have been received 48 hours after the date of posting.
- 12 No action or proceedings for any breach of this Agreement shall be commenced against the Sub-Contractor after the expiry of the relevant period from the date of practical completion of the Main Contract Works. Where the Main Contract provides for completion by Sections, no action or proceedings shall be commenced against the Sub-Contractor in respect of any Section after the expiry of the relevant period from the date of practical completion of such Section. For the purposes of this clause, the relevant period shall be:
- .1 where this Agreement is executed under hand, 6 years; and
 - .2 where this Agreement is executed as a deed, 12 years.
- 13 This Agreement shall not negate or diminish any duty or liability otherwise owed by the Sub-Contractor to the Employer.
- 14 Notwithstanding any other provision of this Agreement nothing in this Agreement confers or is intended to confer any right to enforce any of its terms on any person who is not a party to it.
- 15 This Agreement shall be governed by and construed in accordance with the law of England and the English courts shall have jurisdiction over any dispute or difference.

Warranty Particulars

*Note: An asterisk * indicates text that is to be deleted as appropriate.*

Clause	Subject	
1-1-2	Sub-Contractor's liability for other losses incurred by Employer	Clause 1-1-2 * applies/does not apply ^[2]
	Maximum liability options ^[3]	* Liability is limited to £ _____ in respect of each breach/ * Liability is limited to £ <u>100,000</u> under this Agreement/ * Liability is unlimited
1-3	Net Contribution	Clause 1-3 * applies/does not apply
1-3-1	Net Contribution: Consultants	For the purposes of clause 1-3-1 'the Consultants' are ^[4] : <u>N/A</u>
8	Copyright	Clause 8 * applies/does not apply
9	Professional Indemnity and Product Liability insurances	Clause 9 * applies/does not apply ^[5]
	Type of insurance	* Professional Indemnity insurance/ * Product Liability insurance

[2] Where clause 1-1-2 is required to apply, it is necessary, in addition to the appropriate deletion here, to select one of the liability options and where required to insert an amount – see clause 1-2 for effect if this is not done.

[3] Identify whichever option is to apply and where applicable insert an amount: delete the options not required.

[4] If clause 1-3 applies insert the discipline of the Consultant warrantors. If no Consultants are identified, the whole of clause 1-3 shall be deemed deleted.

[5] Delete "applies" if the Sub-Contractor is not required to produce any design.

Level of cover

Amount of indemnity required
* relates to claims or series of claims arising out of one event/
* ~~is the aggregate amount for any one period of insurance~~

and is

£ 100,000

Cover for pollution and contamination claims (if required)

£ N/A

Expiry of required period of insurance is

* 6 years/
* ~~12 years~~
* _____ years
(not exceeding 12 years)

Execution as a Deed

Executed as a Deed by the Sub-Contractor

namely ¹ _____

(A) acting by a Director and the Company Secretary/two Directors of the company ^{2,3}

(Print name of signatory) and _____
(Print name of signatory)

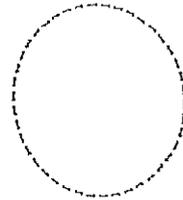
Signature Director Signature Company Secretary/Director

(B) by affixing hereto the common seal of the company/other body corporate ^{2,4}

in the presence of

Signature Director

Signature Company Secretary/Director



[Common seal of company]

(C) by attested signature of a single Director of the company ^{2,5}

Signature Director

in the presence of

Witness' signature _____ (Print name) _____

Witness' address _____

(D) by attested signature of the individual ⁵

Signature

in the presence of

Witness' signature _____ (Print name) _____

Witness' address _____

Note: The numbers on this page refer to the numbered paragraphs in the Notes on Execution as a Deed.

Executed as a Deed by the Main Contractor

namely¹ _____

(A) acting by a Director and the Company Secretary/two Directors of the company^{2,3}

(Print name of signatory) and _____
(Print name of signatory)

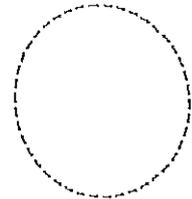
Signature Director Signature Company Secretary/Director

(B) by affixing hereto the common seal of the company/other body corporate^{2,4}

in the presence of

Signature Director

Signature Company Secretary/Director



[Common seal of company]

(C) by attested signature of a single Director of the company^{2,5}

Signature Director

in the presence of

Witness' signature _____ (Print name) _____

Witness' address _____

(D) by attested signature of the individual⁶

Signature

in the presence of

Witness' signature _____ (Print name) _____

Witness' address _____

Note: The numbers on this page refer to the numbered paragraphs in the Notes on Execution as a Deed.

