



DATED \_\_\_\_\_ 20[ ]

(1) [SUB-CONSULTANT]

(2) [BENEFICIARY]

(3) [CONSTRUCTOR]<sup>1</sup>

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SUB-CONSULTANT'S COLLATERAL WARRANTY

relating to

[INSERT A BRIEF DESCRIPTION OF THE SERVICES]

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<sup>1</sup> Include where step-in rights are required. Otherwise delete.



THIS DEED is made as a deed on the \_\_\_\_\_ day of \_\_\_\_\_ 20[\_\_\_\_\_] ]

**BETWEEN:**

- (1) [INSERT NAME OF SUB-CONSULTANT] (company number [INSERT COMPANY NUMBER]) whose registered office is at [INSERT REGISTERED OFFICE ADDRESS] (the "Sub-Consultant" with such term including its successors in title and permitted assigns); [and]
- (2) [INSERT NAME OF BENEFICIARY] of [INSERT ADDRESS] (the "Beneficiary" with such term including its successors in title and permitted assigns) [; and]
- (3) [INSERT NAME OF CONSTRUCTOR] of [INSERT ADDRESS] (the "Constructor" with such term including its successors in title and permitted assigns)],<sup>2</sup>

each a "Party" and together the "Parties".

**RECITALS:**

- (A) The [Beneficiary / Client] has by the Construction Contract, employed the Constructor to [design and build] the Project.
- (B) The Constructor has by the Appointment, employed the Sub-Consultant to provide the Services.
- (C) The Beneficiary has an interest in the Services.
- (D) The Sub-Consultant has agreed to enter into this Deed with the Beneficiary

**NOW THIS DEED WITNESSES** in consideration of the sum of ~~£10.00~~ paid by the Beneficiary, receipt of which the Constructor acknowledges, as follows:

**1. INTERPRETATION**

**1.1 In this Deed:**

"Appointment" means the appointment in the form of an [INSERT DETAILS] dated [INSERT DATE] between (1) the Constructor; and (2) the Sub-Consultant, under which the Sub-Consultant is appointed by the Constructor to undertake and complete the Services;

"Assignee" has the meaning given to such term at clause 6.2;

["Constructor" means [INSERT NAME] (company number [INSERT COMPANY NUMBER]), whose registered office is at [INSERT REGISTERED OFFICE ADDRESS] (with such term including its successors in title and permitted assigns)]<sup>3</sup>

"Construction Contract" means the FAC-1 Contract and any Orders and/or Notice to Proceed issued pursuant to the FAC-1 Contract;

["Client" means The Secretary of State for Justice of the Ministry of Justice, 102 Petty France, Westminster, London SW1H 9AJ (with such term including its successors in title and permitted assigns);]<sup>4</sup>

"End of Liability Date" is the date twelve (12) years from the later of:

<sup>2</sup> This entry should be deleted if the Beneficiary will not have step-in rights under the collateral warranty.

<sup>3</sup> This entry should be deleted if the Beneficiary will not have step-in rights under the collateral warranty.

<sup>4</sup> This entry should be deleted if the MoJ is the Beneficiary under the collateral warranty.



- (a) the last date on which the Sub-Consultant performed any works and/or services in connection with the Project; and
- (b) the date on which a written notice is issued to the Constructor confirming that the Constructor has fulfilled its obligations pursuant to clause 21.5 of the Construction Contract as determined pursuant to and in accordance with the Construction Contract;

**"FAC-1 Contract"** means the contract dated [INSERT DATE] between the Client and the Constructor based on an amended form of the ACA FAC-1 Framework Alliance Contract;

**"Materials"** means all technical information, drawings, models, plans, specifications, schedules, digital models and databases (provided that the same do not contain any personal data) (including relating to building information modelling), costings, budgets, calculations, bill of quantities, estimates and valuations (except where the same relate to documents produced solely for the Sub-Consultant's own internal pricing purposes), photographs, brochures, reports, meeting notes, and any other materials, in any medium provided by or prepared on behalf of the Sub-Consultant (in each case, as may be amended or replaced from time to time) in connection with the Appointment and/or the Project;

**"Notice to Proceed"** means a notice to proceed issued pursuant to the terms of the FAC-1 Contract in respect of the Project based on the PPC2000 (Amended 2013) – ACA Standard Form of Contract for Project Partnering (as amended) dated [INSERT DATE] and made between (1) the Client; (2) the Constructor and (3) [insert other partnering team members] in connection with the Project;

**"Order"** means an order issued pursuant to the terms of the FAC-1 Contract in respect of the Project;

**"Project"** has the meaning given to such term in the Construction Contract;

**"Reasonable Rates and Terms"** has the meaning given to such term in clause 4.1; and

**"Services"** means [INSERT DESCRIPTION OF THE SERVICES], as more particularly described in the Appointment.

## 1.2 In interpreting this Deed:

- 1.2.1 if any party to this Deed is a partnership then the provisions of this Deed will bind each and every partner in that partnership jointly and severally;
- 1.2.2 references to the singular shall be deemed to include the plural (and vice versa) and reference to a "person" shall be deemed to include any individual firm unincorporated association or body corporate;
- 1.2.3 any reference to any enactment includes any consolidation, re-enactment, amendment or replacement of it and any subordinate legislation under it;
- 1.2.4 headings to clauses shall be disregarded when construing this Deed; and
- 1.2.5 where the words "include(s)" or "including" are used in this Deed, they are deemed to have the words "without limitation" following them.

## 2. SKILL AND CARE

### 2.1 The Sub-Consultant undertakes with and warrants to the Beneficiary that:

- 2.1.1 it has carried out and will continue to carry out the Services and its duties and obligations on its part to be performed under the Appointment in accordance with the Appointment;



- 2.1.2 in providing the Services and any services that are ancillary or otherwise related to the Appointment under or in connection with the Appointment (including in relation to designs prepared by or on behalf of the Sub-Consultant in connection with the Project and in respect of the preparation of any reports, summaries, recommendations and/or any other analogous deliverable in relation to the Project) it has exercised and will exercise all of the reasonable skill, care, diligence and prudence to be expected of an appropriately qualified, skilled, competent and experienced professional (and, in the context of any design provided by or on behalf of the Sub-Consultant, professional designer) experienced in the carrying out of such activities for projects of a similar size, scope, value, character and complexity to the Project; and
- 2.1.3 the Sub-Consultant has exercised and will continue to exercise the standard of skill and care referred to in clause 2.1.2 to ensure that it has not and shall not specify, authorise, cause or allow to be used in the Project any products or materials which:
- (a) do not conform with British or European Standards (where appropriate) or industry codes of practice (or where no such standard exists do not conform with a British Board of Agrément Certificate);
  - (b) are generally known in the construction industry to be deleterious, in the particular circumstances in which they are specified for use, to health and safety and/or the durability of buildings or structures;
  - (c) do not comply with the guidance set out in the "Good Practice in the Selection of Construction Materials 2011" published by the British Council of Offices and/or
  - (d) are specifically prohibited by the Appointment and/or the Construction Contract.

- 2.2 The Sub-Consultant shall have no greater liability to the Beneficiary, and shall owe to the Beneficiary no greater a standard of duty under this Deed than would have been owed if the Beneficiary had been named as the Constructor under the Appointment. If a claim is brought against the Sub-Consultant by the Beneficiary, the Sub-Consultant may rely on any defence or limitation available to it under the terms of the Appointment, save that the Sub-Consultant may not raise by way of defence or set-off or abatement or to bring any counterclaim in respect of any monies due to it under or in connection with the Appointment. The Sub-Consultant may not plead a "no-loss" defence, including one based on an argument that since the Constructor under the Appointment has not suffered a loss then the Beneficiary is not entitled to recover a loss it has suffered or that the Beneficiary's loss is irrecoverable because it would not be foreseeable that the Constructor under the Appointment would suffer such a loss.

### 3. COPYRIGHT

- 3.1 The Sub-Consultant grants to the Beneficiary and its nominees with full title guarantee an irrevocable, royalty-free, worldwide and non-exclusive licence in perpetuity to use, copy and reproduce the Materials for any purpose whatsoever, including in relation to the Project and (but without limitation) the design, construction, completion, operation, extension, maintenance, letting, management, sale, advertisement, alteration, reinstatement and repair of any part of the same, with this licence including a licence to grant sub-licences and to transfer the same to third parties.
- 3.2 The Sub-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 by the Sub-Consultant.
- 3.3 The Beneficiary shall on written request, be entitled to be supplied by the Sub-Consultant with electronic copies of any Materials at no cost to the Beneficiary.
- 3.4 The Sub-Consultant unconditionally and irrevocably waives (and shall ensure that any sub-contractors waive), in respect of the Materials, all moral rights to which the Sub-Consultant (or any



relevant sub-contractors) may now or at any future time be entitled under the Copyright, Designs and Patents Act 1988 as amended from time to time or under any other applicable laws.

- 3.5 This waiver is made in favour of the Beneficiary and shall extend to the Beneficiary's sub-licensees, assignees and successors in title in accordance with this Deed.
- 3.6 The Sub-Consultant warrants that:
- 3.6.1 the Materials (save to the extent that duly authorised sub-contractors have been used to prepare the same) are the Sub-Consultant's own original work and that in any event their use in connection with the Services and/or the Project will not infringe the rights of any third party; and
- 3.6.2 where duly authorised sub-contractors are used their work will be original and that the Sub-Consultant will obtain the necessary consents in relation to clause 3.1.

#### 4. INDEMNITY INSURANCE

- 4.1 The Sub-Consultant shall maintain professional indemnity insurance covering (inter alia) its potential liability under this Deed for the given insurance policy year in the event that it breaches this Deed upon market norm terms and conditions prevailing for the time being in the insurance market, and with reputable insurers lawfully carrying on such insurance business in the United Kingdom, in an amount of not less than [INSERT FIGURE AGREED WITH THE CLIENT AS AT THE DATE OF THE APPOINTMENT] (£[INSERT FIGURE AGREED WITH THE CLIENT AS AT THE DATE OF THE APPOINTMENT]) in respect of each and every claim or series of claims arising out of the same original cause or source (or equivalent), without limit to the number of claims, with lower annual and/or annual aggregate limits of cover in respect of pollution and contamination related claims and similar where such limited cover is the norm] until the End of Liability Date, provided always that such insurance is available at commercially affordable rates and on terms such that members of the Sub-Consultant's profession generally carry such insurance ("**Reasonable Rates and Terms**").
- 4.2 Any increased or additional premium required by insurers by reason of the Sub-Consultant's own claims record or other acts, omissions, matters or things particular to the Sub-Consultant shall be deemed to be within Reasonable Rates and Terms.
- 4.3 The Sub-Consultant shall immediately inform the Beneficiary if such insurance ceases to be available upon Reasonable Rates and Terms in order that the Sub-Consultant and the Beneficiary can discuss means of best protecting their respective positions in respect of the Appointment and the wider Project in the absence of such insurance.
- 4.4 The Sub-Consultant shall co-operate fully with any measures reasonably required by the Beneficiary, including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above Reasonable Rates and Terms if the Beneficiary undertakes in writing to reimburse the Sub-Consultant in respect of the net cost of such insurance to the Sub-Consultant above Reasonable Rates and Terms.
- 4.5 As and when reasonably requested to do so by the Beneficiary the Sub-Consultant shall produce for inspection documentary evidence that its professional indemnity insurance is being maintained.
- 4.6 The above obligations in respect of professional indemnity insurance shall continue notwithstanding termination of the Appointment for any reason whatsoever, including (without limitation) breach by the Constructor.

#### 5. LIABILITY PERIOD

It is agreed that the period of limitations (in respect of which the Beneficiary and the Sub-Consultant hereby waive all and any rights whether already existing, arising now and/or in the future to raise as



a defence to any claim brought under this Schedule, the Limitation Act 1980 and any statute, regulation or similar amending, consolidating and/or replacing that Act) applicable to any claim or claims arising out of or in connection with this Deed shall expire on the End of Liability Date.

## ASSIGNMENT

- 5.1 The Sub-Consultant consents to the benefit of this Deed being assigned two (2) times only provided always that the maximum number of two (2) assignments referred to above shall not be affected by assignments or charges by way of security and their release or assignments to and from subsidiary or other associated companies within the same group of companies as the Beneficiary so long as such assignee company remains within the same group of companies as the Beneficiary.
- 5.2 Despite any other provision of this Deed the Sub-Consultant shall not be entitled to contend that any person to whom this Deed is assigned in accordance with clause 6.1 (an "**Assignee**") is precluded from recovering under this Deed any loss incurred by such assignee resulting from any breach of this Deed (whenever happening), by reason that such person is an assignee and not the original named party to this Deed.
- 5.3 The Sub-Consultant may not defend any claim brought by the Beneficiary or an Assignee on the basis of a no loss argument whether based on the logic that the Beneficiary or an Assignee has not suffered a recoverable loss because the [Client or]<sup>5</sup> Constructor has not suffered that loss or because the [Client or]<sup>6</sup> Constructor would not suffer a similar loss because of [their / its] different interest[s] in the completed Project compared to the interest of the Beneficiary or Assignee and/or if assigned that the original Beneficiary has not suffered such loss because it has parted with its interest in the Project or otherwise.

## 6. [STEP-IN RIGHTS]<sup>7</sup>

- 6.1 The Sub-Consultant shall not exercise nor seek to exercise any right of termination of its employment under the Appointment or discontinue the performance of the Appointment for any reason whatsoever (including any breach on the part of the Constructor) without giving not less than twenty-one (21) days' written notice of its intention to do so to the Beneficiary and specifying the grounds for the proposed termination or discontinuance.
- 6.2 Any period stipulated in the Appointment for the exercise of a right of termination by the Sub-Consultant of its employment under the Appointment or to discontinue the performance of the Appointment shall, nevertheless, be extended as may be necessary to take account of the period of notice required under clause 7.1.
- 6.3 The right of the Sub-Consultant to terminate its employment under the Appointment or to discontinue the performance of the Appointment shall cease within the period of twenty-one (21) days referred to in clause 7.1 if the Beneficiary shall give notice to the Sub-Consultant:
- 6.3.1 requiring the Sub-Consultant to continue its obligations under the Appointment with the Beneficiary or its nominee;
- 6.3.2 acknowledging that the Beneficiary or its nominee will assume all the obligations of the Constructor under the Appointment; and
- 6.3.3 undertaking that the Beneficiary or its nominee will discharge all payments which may subsequently become due to the Sub-Consultant under the terms of the Appointment and will pay to the Sub-Consultant any sums which have been due and payable to him under the Appointment but which remain unpaid.

<sup>5</sup> Delete if the Beneficiary is the Client

<sup>6</sup> Delete if the Beneficiary is the Client

<sup>7</sup> This clause should be deleted if the Beneficiary will not benefit from step-in rights under the collateral warranty.



- 6.4 Upon service by the Beneficiary or its nominee of a notice complying with the requirements of clause 7.3 the Appointment will continue in full force and effect as if the same had been entered into between the Sub-Consultant and the Beneficiary to the exclusion of the Constructor.]
- 6.5 Compliance by the Sub-Consultant with the provisions of this clause 7 will not be treated as a waiver of any breach on the part of the Constructor giving rise to the right of termination nor otherwise prevent the Sub-Consultant from exercising its rights after the expiration of the notice issued pursuant to clause 7.1 unless the rights of termination have ceased under the provisions of clause 7.3.
- 6.6 This clause 7 shall cease to have effect upon the prior exercise by any third person of any similar rights of substitution contained in any other agreement concerning the Project and entered into between the Sub-Consultant and such person at the request of the Constructor.
- 6.7 By acting in accordance with this clause 7, the Sub-Consultant shall not incur any liability to the Constructor.]

7. **NOTICES**

Any notice to be given under this Deed shall be in writing and shall be deemed to be duly given if it is delivered to the addressee's address as shown above (or its registered office from time to time, if different). Notices shall be delivered by hand delivery, pre-paid registered or recorded delivery mail. Notices shall be deemed to have been delivered or received in the case of (a) hand delivery, on the date of delivery; and (b) pre-paid registered or recorded delivery mail, two (2) days after the notice is posted, excluding Saturdays, Sundays and statutory holidays.

8. **EXTRANEOUS RIGHTS**

- 8.1 This Deed shall not negate or diminish any duty or liability otherwise owed by the Sub-Consultant to the Beneficiary.
- 8.2 No approval or inspection of the Project or of any designs or specifications and no testing of any work or materials by or on behalf of the Beneficiary and no omission to inspect or test shall negate or diminish any duty or liability of the Sub-Consultant arising under this Deed.
- 8.3 This Deed may be executed in any number of counterparts all of which when taken together shall constitute one and the same instrument.
- 8.4 This Deed does not create any right enforceable by any person not a party to it (whether pursuant to the Contracts (Rights of Third Parties) Act 1999 or otherwise) except that a person who is the successor to or the permitted assignee of the rights of the Beneficiary is deemed to be a party to this Deed.

9. **GOVERNING LAW**

This Deed is subject in all respects to English law and the English Courts shall have exclusive jurisdiction with regard to all matters arising under or in connection with it.

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

[INSERT EXECUTION BLOCKS FOR THE PARTIES]