



SCHEDULE 11

APPENDIX 2

CONSTRUCTION CONTRACT COLLATERAL WARRANTY

Version number	Issue Date	Comment
1.0	22 April 2024	Execution Version



DATED _____ 2024

**(1) KIER CONSTRUCTION LIMITED
T/A KIER CONSTRUCTION STRATEGIC PROJECTS**

(2) MITIE CARE AND CUSTODY LIMITED

CONTRACTOR COLLATERAL WARRANTY

relating to

THE DESIGN AND CONSTRUCTION OF HMP MILLSIKE



THIS DEED is made on

2024

BETWEEN

- (1) **KIER CONSTRUCTION LIMITED T/A KIER CONSTRUCTION STRATEGIC PROJECTS** (company number 02099533), whose registered office is at 2nd Floor, Optimum House, Clippers Quay, Salford, England, M50 3XP (the "**Contractor**"); and
- (2) **MITIE CARE AND CUSTODY LIMITED** (company number 06976230), whose registered office is at Level 12 The Shard, 32 London Bridge Street, London, England, SE1 9SG (the "**Beneficiary**", with such term including its successors in title and permitted assigns),

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

BACKGROUND

- A The Client has appointed the Contractor to design and construct the Works as part of the FAC-1 Programme pursuant to and in accordance with the FAC-1 Contract.
- B The Beneficiary has been appointed under a separate operation and maintenance contract with the Client to, amongst other things, operate and maintain the site of the Works known as HMP Millsike at Moor Lane, Full Sutton, York, YO41 1FZ, as well as the completed Works.
- C The Contractor has agreed to enter into this Deed with the Beneficiary in accordance with the FAC-1 Contract.

AGREED TERMS

1. **INTERPRETATION**

1.1 In this Deed:

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

"**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);

"**End of Liability Date**" is the date identified as such in the FAC-1 Contract;

"**FAC-1 Contract**" means an ACA Framework Alliance Contract (FAC-1) (as amended) between (1) the Client and (2) the Contractor (defined as an "Alliance Member" therein) and other parties (each also defined as "Alliance Members" therein) dated 25 June 2021 (as varied by a deed of variation dated 1 November 2021) and, in connection with the Works only, incorporating the terms and conditions of the NEC4 Engineering and Construction Contract: Option A (June 2017 edition, as amended in January 2019 and October 2020) (as amended) on the basis and in the terms specified in the Notice to Proceed to Phase 2;

"**FAC-1 Programme**" has the meaning given to such term in the FAC-1 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 management), costings, budgets, calculations, bill of quantities, estimates and valuations (except where the same relate to documents produced solely for the



Contractor'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 Contractor (in each case, as may be amended or replaced from time to time) in connection with the Works, the FAC-1 Contract and/or the FAC-1 Programme;

"Notice to Proceed to Phase 2" means the "Notice to Proceed to Phase 2" between (1) the Client and (2) the Contractor and dated 21 July 2022 in respect of the Works entered into between such parties pursuant to and in accordance with the FAC-1 Contract (and which sets out, amongst other things, the terms and conditions which govern the undertaking of the Works by the Contractor and the scope, price and programme as agreed between the Client and the Contractor in respect of the same);

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

"Works" are the works and/or services identified as such and referred to in the Notice to Proceed to Phase 2.

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 Contractor undertakes with and warrants to the Beneficiary that:

- 2.1.1 in carrying out and completing the Works, the Contractor has undertaken and will undertake such Works in a good and workmanlike manner, using only materials which are new (unless the FAC-1 Contract states otherwise or as otherwise agreed with the Client in writing), and are sound and of good quality which are consistent with the intended use of the Works as stated in the contract or reasonably to be inferred given the nature of the Works;
- 2.1.2 in providing any services that are ancillary or otherwise related to the Works under or in connection with the FAC-1 Contract (including in relation to the design of the Works and in respect of the preparation of any reports, summaries, recommendations and/or any other analogous deliverable in relation to the Works) it has exercised and will exercise all the reasonable skill, care and diligence to be expected of a competent and appropriately qualified professional (and, in the context of the design of the Works, professional designer) experienced in undertaking services such as those being performed in relation to the Works and in relation to projects of the same type, complexity, value and timescale as the Works;



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- 2.1.3 the Contractor 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 Works and/or in the provision of the Works 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 FAC-1 Contract; and
- 2.1.4 it has carried out and will continue to carry out the duties and obligations on its part to be performed under the FAC-1 Contract in accordance with the FAC-1 Contract.

2.2 The Contractor 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 Client under the FAC-1 Contract. If a claim is brought against the Contractor by the Beneficiary, the Contractor may rely on any defence or limitation available to it under the terms of the FAC-1 Contract, save that the Contractor may not raise by way of defence or set-off or abatement or bring any counterclaim in respect of any monies due to it under or in connection with the FAC-1 Contract. The Contractor may not plead a "no-loss" defence, including one based on an argument that since the Client under the FAC-1 Contract has not suffered a loss then the Beneficiary is not entitled to recover a loss that it has suffered or that the Beneficiary's loss is irrecoverable because it would not be foreseeable that the Client under the FAC-1 Contract would suffer such a loss.

3. COPYRIGHT

- 3.1 The Contractor grants to the Beneficiary and its nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy, use and reproduce the Materials for any purpose whatsoever, including in relation to the Works and/or the FAC-1 Programme and (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Works, with this licence including a licence to grant sub-licences and to transfer the same to third parties.
- 3.2 The Contractor 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 Contractor.
- 3.3 The Beneficiary shall on written request, be entitled to be supplied by the Contractor with electronic copies of any Materials at no cost to the Beneficiary.
- 3.4 The Contractor unconditionally and irrevocably waives (and shall ensure that any sub-contractors waive), in respect of the Materials, all moral rights to which the Contractor (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 The waiver referred to in clause 3.4 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 Contractor 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 Contractor's own original work and that in any event their use in connection with the Works and/or the FAC-1 Programme 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 Contractor will obtain the necessary consents in relation to clause 3.1.

4. **INDEMNITY INSURANCE**

4.1 The Contractor shall maintain professional indemnity insurance covering (inter alia) its potential liability under this Deed in the event that it breaches this Deed for the given insurance policy year 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 twenty million pounds (£20,000,000) for any one (1) claim or series of claims arising from one (1) single incident (including unlimited automatic reinstatements of this limit, including costs and expenses), and in the aggregate in respect of claims of seepage, pollution and contamination, fire safety and cladding claims 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 Contractor's profession generally carry such insurance ("**Reasonable Rates and Terms**").

4.2 Any increased or additional premium required by insurers by reason of the Contractor's own claims record or other acts, omissions, matters or things particular to the Contractor shall be deemed to be within Reasonable Rates and Terms.

4.3 The Contractor shall immediately inform the Beneficiary if such insurance ceases to be available upon Reasonable Rates and Terms in order that the Contractor and the Beneficiary can discuss means of best protecting their respective positions in respect of the Works in the absence of such insurance.

4.4 The Contractor 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 Contractor in respect of the net cost of such insurance to the Contractor above Reasonable Rates and Terms.

4.5 As and when reasonably requested to do so by the Beneficiary the Contractor 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 FAC-1 Contract for any reason whatsoever, including (without limitation) breach by the Client.

5. **LIABILITY PERIOD**

It is agreed that whatever the manner in which the Beneficiary and the Contractor have executed this Deed, the period of limitations (in respect of which the Beneficiary and the Contractor 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 Deed, 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.

6. **ASSIGNMENT**

6.1 The Contractor 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.

6.2 Despite any other provision of this Deed the Contractor 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.

6.3 The Contractor 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 has not suffered that loss or because the Client would not suffer a similar loss because of its different interest in the completed Works 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 Works and/or the FAC-1 Programme or otherwise.

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 Contractor to the Beneficiary.

8.2 No approval or inspection of the Works and/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 Contractor 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 the laws of England and Wales 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.

EXECUTED AS A DEED for and on behalf of
KIER CONSTRUCTION LIMITED T/A KIER
CONSTRUCTION STRATEGIC PROJECTS

acting by one (1) Board Director and one (1) attorney in
the presence of a witness pursuant to a power of
attorney dated 6 December 2023

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Full Name (Board Director)

.....

Signature of Board Director

in the presence of:

.....

Full Name (Witness)

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.....

.....

Address

I confirm I was physically present with the signatory
when they signed this document

.....

Signature of Witness



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HMP Millsike

Commercial and Contract Management Directorate

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Full Name (Attorney)

Signature of Attorney

in the presence of:

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Full Name (Witness)

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Address

I confirm I was physically present with the signatory
when they signed this document

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Signature of Witness

EXECUTED AS A DEED for and on behalf of
MITIE CARE AND CUSTODY LIMITED

acting by

.....

.....

Full Name (Director/Attorney)

Signature of Director/Attorney

in the presence of:



OFFICIAL

HMP Millsike

Commercial and Contract Management Directorate

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Full Name (Witness)

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Signature of Witness

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Address

I confirm I was physically present with the signatory
when they signed this document