



SCHEDULE 21:

COLLATERAL WARRANTY AND SUB-CONTRACTORS



OFFICIAL

HMP []

Commercial and Contract Management Directorate

**COLLATERAL WARRANTY BY CONTRACTOR'S SUB-CONTRACTOR
TO AUTHORITY**

BETWEEN

[]

as Sub-Contractor

SECRETARY OF STATE FOR JUSTICE

as Authority

and

[]

as Contractor

relating to

THE PRISON OPERATION CONTRACT AT HMP []

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THIS DEED is dated

and made

BETWEEN:

- (1) [REDACTED], (the "Sub-Contractor"), whose registered office is at [REDACTED], company registration number [REDACTED];
- 2) **Secretary of State for Justice**, acting as a part of the Crown (the "Authority"), (which term shall include their permitted assignees) whose address is at Ministry of Justice, 102 Petty France, London SW1H 9AJ; and
- (3) [REDACTED], (the "Contractor"), whose registered office is [REDACTED], company registration number [REDACTED],

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

WHEREAS:

- (A) The Authority has entered into a contract dated [date] for the provision of custodial services at [REDACTED] ('the Contract') with the Contractor ('the Project').
- (B) The Contractor has entered into a sub-contract dated [date] ('the Sub-Contract') with the Sub-Contractor for the execution of certain sub-contract works briefly described as [insert description] and forming part of the Project ('the Sub-Contract Works').

NOW in consideration of £1 (one pound) paid by the Authority to the Sub-Contractor (receipt of which the Sub-Contractor hereby acknowledges) **THIS DEED WITNESSES** as follows:

1. **Sub-Contractor's Warranties**

- 1.1 The Sub-Contractor covenants with the Authority that it has duly performed and observed, and will continue duly to perform and observe, all the terms of the Sub-Contract on the Sub-Contractor's part to be performed and observed and, without prejudice to the generality of the foregoing, the Sub-Contractor warrants that it has exercised and will continue to exercise reasonable skill, care and diligence (save where the Sub-Contract imposes a higher standard in which case such higher standard will apply) in the performance of its duties to the Contractor under the Sub-Contract.
- 1.2 The Authority shall be deemed to have relied and to rely upon the exercise of the Sub-Contractor's skill, care and diligence hereunder.



2. **Prohibited materials**

2.1 Without prejudice to the generality of and subject to clauses 1.1 and 1.2, the Sub-Contractor further warrants:

2.1.1 that it has not used or specified and will not use or specify for use;

2.1.2 that it has exercised and will continue to exercise reasonable skill, care and diligence to see that there are not used;

2.1.3 that it is not aware and has no reason to suspect or believe that there have been or will be used;

2.1.4 that it will promptly notify the Authority in writing if it becomes aware or has reason to suspect or believe that there have been or will be used;

in or in connection with the Project, materials or substances other than in accordance with the guidance in the publication 'Good Practice in the Selection of Construction Materials' published by British Council for Offices in 2011 or the edition of which as may be current at the date of this Deed.

2.2 The Sub-Contractor further warrants and covenants with the Authority that:

2.2.1 notwithstanding any other clause of this Deed, the Sub-Contract Works will be carried out in a good and workmanlike manner and will, on completion of the Project, be fit and suitable for the purposes for which they are intended and will satisfy all performance specifications and other requirements contained or referred to in the Sub-Contract;

2.2.2 subject to clause 2.2.1, it has exercised and will exercise all reasonable skill and care commensurate with that of a sub-contractor experienced in the provision of professional services for projects similar in size, scope and complexity to the Project in:

2.2.2.1 the design of the Sub-Contract Works and of any other part or parts of the Project to the extent that the Sub-Contractor has been and will be responsible for such design; and

2.2.2.2 the selection of goods and materials for the Sub-Contract Works or any part or parts of the Project to the extent that such goods and materials have been or will be selected by or on behalf of the Sub-Contractor

provided always that the Sub-Contractor shall have in respect of any defect or insufficiency in any design of the Sub-Contract Works the like liability to the Authority, whether under statute or otherwise, as would an architect or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for

such design who, acting independently under a separate contract with the Contractor, had supplied such design for or in connection with works to be carried out and completed by a building contractor not being the supplier of the design;

2.2.3 the Sub-Contract Works and all materials and goods comprised therein will correspond as to description quality and condition with the requirements of the Sub-Contract and be of sound manufacture and workmanship; and

2.2.4 the Sub-Contract Works will, on completion of the Project, comply with all applicable statutory requirements.

3. **Sub-Contractor's Acknowledgement**

The Sub-Contractor acknowledges that the Contractor has paid all sums due and owing to the Sub-Contractor under the Sub-Contract up to the date of this Deed. Subject to clauses 6 and 8 the Authority has no liability to the Sub-Contractor in respect of sums due under the Sub-Contract.

4. **Authority to issue instructions**

4.1 The Authority has no authority to issue any direction or instruction to the Sub-Contractor in relation to performance of the Sub-Contractor's duties under the Sub-Contract unless and until the Authority has given notice under clauses 6 or 8.

4.2 The Authority has no liability nor be under any obligation to the Sub-Contractor unless and until the Authority has given the above notice.

5. **Copyright**

The copyright in all drawings, reports, specifications, bills of quantities, calculations and other similar documents ('the Documents') provided by the Sub-Contractor in connection with the Project shall remain vested in the Sub-Contractor (or as may be otherwise provided by the Sub-Contract), but the Sub-Contractor grants to the Authority, with effect from the date of this Deed or in the case of any of the copyright not yet in existence with effect from the creation of such copyright, an irrevocable, royalty free, non-exclusive licence to copy and use the Documents, and to reproduce the designs contained in them, for any purpose related to the Project including, but without limitation, the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, repair and/or extension of the Project and subsequent phases thereof. Such licence will carry the right to grant sub-licences and will be transferable to third parties. The Sub-Contractor shall, if the Authority so requests and undertakes in writing to pay the Sub-Contractor's reasonable copying charges, promptly supply the Authority with conveniently reproducible copies of the Documents. The Sub-Contractor shall have no liability for any loss or damage whatsoever caused by any person using the Documents for any purpose other than a purpose connected with the Project.

6. Termination or occurrence of event of default under the Contract

The Sub-Contractor agrees that in the event of expiry or termination (for any reason) of the Contract, the Sub-Contractor will, if so required by notice in writing given by the Authority compliant with clause 8.1, accept the instructions of the Authority to the exclusion of the Contractor in respect of the Project upon the terms and conditions of the Sub-Contract. The Contractor acknowledges that the Sub-Contractor shall be entitled to rely on a notice given to the Sub-Contractor by the Authority under this clause 6 as conclusive evidence for the purposes of this Deed of the determination of the Contractor's employment under the Contract.

7. Obligations prior to termination of the Sub-Contract

7.1 The Sub-Contractor covenants with the Authority that it will not exercise nor seek to exercise any right of determination of its employment under the Sub-Contract or of ceasing to perform any of its obligations in relation to the Sub-Contract Works for any reason whatsoever, including any breach on the part of the Contractor, without giving to the Authority not less than 21 days notice of its intention to do so and specifying the grounds for the proposed determination or ceasing.

7.2 Any period stipulated in the Sub-Contract for the exercise by the Sub-Contractor of a right of determination shall nevertheless be extended, as far as is necessary, to allow for the period of notice required under the foregoing clause.

7.3 The Sub-Contractor by complying with the provisions of this clause shall not be treated as waiving any breach on the part of the Contractor giving rise to the right of determination nor shall it cease to be entitled to exercise its rights after the expiration of the notice, unless the right of determination shall have ceased under the provisions of clause 8.

8. Obligations of the Sub-Contractor to the Authority

8.1 The right of the Sub-Contractor to determine the Sub-Contract shall cease within the period of 21 days referred to above, if the Authority shall give notice to the Sub-Contractor:

8.1.1 requiring it to continue its obligations under the Sub-Contract; and

8.1.2 acknowledging that the Authority is assuming all the obligations of the Contractor under the Sub-Contract; and

8.1.3 undertaking to the Sub-Contractor to discharge all payments which may subsequently become due to the Sub-Contractor under the terms of the Sub-Contract.

8.2 Upon compliance by the Authority with the requirements of clause 8.1 the Sub-Contract shall continue in full force and effect as if the right of determination on the part of the Sub-Contractor had not arisen and in all respects as if the Sub-Contract had been entered into between the Sub-Contractor and the Authority to the exclusion of the Contractor. The Sub-Contractor will, if so

requested, enter into a novation agreement in order to substitute the Authority for the Contractor under the Sub-Contract.

8.3 Notwithstanding that as between the Contractor and the Sub-Contractor the Sub-Contractor's right of determination of the Sub-Contract may not have arisen the provisions of clause 8.2 shall nevertheless apply if the Authority gives notice to the Sub-Contractor and the Contractor to that effect the Authority complies with the requirement on its part under clause 8.1.

8.4 The Sub-Contractor shall not be concerned or required to enquire whether and shall be bound to assume that as between the Contractor and the Authority the circumstances have occurred permitting the Authority to give notice under clause 8.3.

8.5 The Sub-Contractor, acting in accordance with the provisions of this clause 8, shall not by so doing incur any liability to the Contractor.

8.6 The Authority may by written notice to the Sub-Contractor appoint another person to exercise its rights under this clause 8 subject to the Authority remaining liable to the Sub-Contractor as guarantor for its appointee in respect of its obligations under this Deed.

9. **Professional indemnity insurance**

9.1 The Sub-Contractor by this Deed covenants with the Authority that it has at its own cost taken out, or procured the taking out of, and shall (at its own cost) maintain professional indemnity insurance covering (without limitation) all liability hereunder upon customary and usual 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 with a limit of indemnity of not less than [amount in words] million pounds [£[amount in figures]] for any one occurrence or series of occurrences arising out of any one event for a period expiring no earlier than 12 years after the issue of the final certificate of completion for the works (as defined in the Sub-Contract) in relation to the Project, provided always that such insurance is available at commercially reasonable rates in the insurance market at large.

9.2 Any increased or additional premium required by insurers by reason of the Sub-Contractor's own claims record or other acts, omissions, matters or things particular to the Sub-Contractor shall be deemed to be within commercially reasonable rates.

9.3 The Sub-Contractor shall immediately inform the Authority if such insurance ceases to be available at commercially reasonable rates in the insurance market at large in order that the Sub-Contractor and the Authority can discuss means of best protecting the respective positions of the Authority and the Sub-Contractor in respect of the Project in the absence of such insurance.

9.4 The Sub-Contractor shall fully co-operate with any measures reasonably required by the Authority, including (without limitation) completing any proposals for insurance and associated

documents, maintaining such insurance at rates above commercially reasonable rates if the Authority undertakes in writing to reimburse the Sub-Contractor in respect of the net cost of such insurance to the Sub-Contractor above commercially reasonable rates or, if the Authority effects such insurance at rates at or above commercially reasonable rates, reimbursing the Authority in respect of what the net cost of such insurance to the Authority would have been at commercially reasonable rates.

9.5 As and when it is reasonably requested to do so by the Authority the Sub-Contractor shall produce for inspection documentary evidence (including, if required by the Authority, the original of the relevant insurance documents) that its professional indemnity insurance is being maintained in accordance with clause 9.1.

9.6 The Sub-Contractor shall provide the Authority with copies of all notices under the professional indemnity insurance, and with notices of (a) any cancellation of the professional indemnity insurance; (b) any material changes to or suspension of cover; (c) any event of which it becomes aware, or of which it could reasonably be expected to become aware, which may vitiate the professional indemnity insurance; and (d) any act, omission or event which may adversely affect the terms and the scope of the insurance or invalidate or render it unenforceable.

9.7 In the event of any dispute arising in relation to the issue of whether insurance has ceased to be available in the insurance market at large at commercially reasonable rates, either Party may refer such dispute to a person to be agreed upon between them ('the Expert') or failing such agreement within 3 days of the dispute arising to be selected at the instance of either Party by the President for the time being of [name of institution]. Such Expert shall act as an expert and not as an arbitrator. It shall endeavour to reach its decision within 28 days of referral and its decision shall be final and binding on the Parties hereto. The Expert's fees and the Parties' legal costs shall be borne by the Parties equally or in such other proportions as the Expert shall direct.

10. **Assignment**

The Sub-Contractor agrees that the benefit of this Deed may be assigned by the Authority to any person without the consent of the Sub-Contractor being required.

11. **Notices**

11.1 Any notice to be given by the Sub-Contractor hereunder shall be deemed to be duly given if it is delivered by hand at or sent by registered post or recorded delivery to the above-mentioned address of the Authority or to the principal business address of the Authority for the time being or given via email to the Authority at [ADDRESS] (provided the original is sent to the Authority by hand or registered post or recorded delivery)

11.2 Any notice to be given by the Authority hereunder shall be deemed to be duly given if it is addressed to the Sub-Contractor and delivered by hand at or sent by registered post or recorded



delivery to the above-mentioned address of the Sub-Contractor or to the principal business address of the Sub-Contractor for the time being or given via email to the Sub-Contractor at [ADDRESS] (provided the original is sent to the Sub-Contractor by hand or registered post or recorded delivery).

11.3 Any notice given by either Party shall:

11.3.1 if sent by registered post or recorded delivery, be deemed to have been received 48 hours after being posted; and

11.3.2 if sent by email, be deemed to have been received on the later of: (i) twenty-four (24) hours from delivery (provided that this is on a Business Day); or (ii) 9.00am on the first Business Day following the email being sent (if the twenty-four (24) hour period ends on a non Business Day), and (in either case) where the email is sent to the correct email address and no notice of delivery failure is received. Failure to send any original notice by hand or registered post or recorded delivery in accordance with this clause shall invalidate the service of the related e-mail transmission. The deemed time of delivery of such notice shall be the deemed time of delivery of the original notice sent by hand or registered delivery or recorded delivery or, if earlier, the time of response or acknowledgement by an individual representing the other Party of the email attaching the relevant notice.

and "**Business Day**" for the purposes of this clause 11.3 shall mean a day (other than a Saturday or Sunday) on which banks are open for domestic business in London.

12. **The Contractor**

The Contractor has agreed to be a Party to this Deed for the purpose of clause 6 and for acknowledging that the Sub-Contractor shall not be in breach of the Sub-Contract by complying with the obligations imposed on it by this Deed.

13. **Contracts (Rights Of Third Parties) Act 1999**

No person who is not a Party to this Deed shall have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Deed.

14. **Other Rights and Remedies**

The rights and benefits conferred under the Authority by this Deed are in addition to any other rights and remedies it may have against the Sub-Contractor including, without limitation, any remedies in negligence.



15. Law and Jurisdiction

15.1 This Deed and any non-contractual obligations arising from or connected with it shall be governed by the laws of England and Wales and this Deed shall be construed in accordance with laws of England and Wales.

15.2 In relation to any legal action or proceedings arising out of or in connection with this Deed (whether arising out of or in connection with contractual or non-contractual obligations) ('Proceedings'), each of the Parties irrevocably submits to the exclusive jurisdiction of the courts of England and Wales and waives any objection to Proceedings in such courts on the grounds of venue or on the grounds that Proceedings have been brought in an inappropriate forum.

IN WITNESS whereof this document has been executed and delivered as a Deed on the date first before written.

EXECUTED AS A DEED (but not delivered until the date of this Deed) by [NAME OF SUB-CONTRACTOR] acting by

.....
Full Name (Director/Attorney)
in the presence of:

.....
Signature of Director/Attorney

.....
Full Name (Witness)
.....

.....
Address

.....
Signature of Witness



OFFICIAL

HMP []

Commercial and Contract Management Directorate

EXECUTED AS A DEED (but not delivered until the date of this Deed) by **[NAME OF SUB-CONTRACTOR]** acting by

.....
Full Name (Director/Attorney)
in the presence of:

.....
Signature of Director/Attorney

.....
Full Name (Witness)

.....

.....

.....
Address

.....
Signature of Witness

THE CORPORATE SEAL of the **SECRETARY OF STATE FOR JUSTICE** hereunto affixed is authenticated by:

Authorised by the Secretary of State for Justice

Name