



PART 1 OF SCHEDULE 12

COLLATERAL WARRANTIES



PART 1 OF PART 1

CONTRACTOR COLLATERAL WARRANTY



DATED _____ 20[21]

(1) [INSERT NAME OF CONTRACTOR]

(2) [INSERT NAME OF BENEFICIARY]

[(3) THE SECRETARY OF STATE FOR JUSTICE]]¹

CONTRACTOR COLLATERAL WARRANTY

relating to

[INSERT DESCRIPTION OF WORKS] AT [INSERT SITE
NAME]

¹ **DRAFTING NOTE:** This reference to the MoJ should be deleted if the Beneficiary will not benefit from step-in rights under the collateral warranty.



THIS DEED is made on

20[21]

BETWEEN

- (1) [INSERT NAME OF CONTRACTOR] (company number [INSERT NUMBER]), whose registered office is at [INSERT ADDRESS] (the "Contractor"); [and]
- (2) [INSERT NAME OF BENEFICIARY] (company number [INSERT NUMBER]), whose registered office is at [INSERT ADDRESS] (the "Beneficiary", with such term including its successors in title and permitted assigns)[.]; and
- (3) THE SECRETARY OF STATE FOR JUSTICE of the Ministry of Justice, 102 Petty France, Westminster, London SW1H 9AJ (the "Client", with such term including its successors in title and permitted assigns).²

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 [describe the Beneficiary's interest in the 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);³

"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 [INSERT DATE] 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)][the NEC4 Engineering & Construction Short Contract (as amended)]⁴ on the basis and in the terms specified in the [Notice to Proceed to Phase 2 / Order];

"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

² **DRAFTING NOTE:** This entry should be deleted if the Beneficiary will not benefit from step-in rights under the collateral warranty.

³ **DRAFTING NOTE:** This entry should be used if the Beneficiary will not benefit from step-in rights under the collateral warranty. Otherwise, it should be deleted.

⁴ **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.



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 [INSERT DATE] 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);⁵

["Order"] means the "Order" between (1) the Client and (2) the Contractor and dated [INSERT DATE] 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);⁶

"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 / Order"]**.⁷

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

⁵ **DRAFTING NOTE:** Use this wording if the collateral warranty relates to the main works.

⁶ **DRAFTING NOTE:** Use this wording if the collateral warranty relates to early works.

⁷ **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.



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;

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 [REDACTED]⁸ 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.

⁸ **DRAFTING NOTE:** Update to reflect the coverage as stated in the Contract Data annexed to the Notice to Proceed to Phase 2.



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. **[STEP-IN RIGHTS]⁹**

- 7.1 The Contractor shall not exercise nor seek to exercise any right of termination of its employment under the FAC-1 Contract or discontinue the performance of the FAC-1 Contract for any reason whatsoever (including any breach on the part of the Client) 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.
- 7.2 Any period stipulated in the FAC-1 Contract for the exercise of a right of termination by the Contractor of its employment under the FAC-1 Contract or to discontinue the performance of the FAC-1 Contract shall, nevertheless, be extended as may be necessary to take account of the period of notice required under clause 7.1.
- 7.3 The right of the Contractor to terminate its employment under the FAC-1 Contract or to discontinue the performance of the FAC-1 Contract shall cease within the period of twenty-one (21) days referred to in clause 7.1 if the Beneficiary shall give notice to the Contractor:
- 7.3.1 requiring the Contractor to continue its obligations under the FAC-1 Contract with the Beneficiary or its nominee;
- 7.3.2 acknowledging that the Beneficiary or its nominee will assume all the obligations of the Client under the FAC-1 Contract; and
- 7.3.3 undertaking that the Beneficiary or its nominee will discharge all payments which may subsequently become due to the Contractor under the terms of the FAC-1 Contract and will pay to the Contractor any sums which have been due and payable to it under the FAC-1 Contract but which remain unpaid.
- 7.4 Upon service by the Beneficiary or its nominee of a notice complying with the requirements of clause 7.3 the FAC-1 Contract will continue in full force and effect as if the same had been entered into between the Contractor and the Beneficiary to the exclusion of the Client.
- 7.5 Compliance by the Contractor with the provisions of this clause 7 will not be treated as a waiver of any breach on the part of the Client giving rise to the right of termination nor otherwise prevent the

⁹ **DRAFTING NOTE:** This clause should be deleted if the Beneficiary will not benefit from step-in rights under the collateral warranty.



Contractor 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.

7.6 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 Works and entered into between the Contractor and such person at the request of the Client.

7.7 By acting in accordance with this clause 7, the Contractor shall not incur any liability to the Client.]

8. 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.

9. EXTRANEOUS RIGHTS

9.1 This Deed shall not negate or diminish any duty or liability otherwise owed by the Contractor to the Beneficiary.

9.2 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.

9.3 This Deed may be executed in any number of counterparts all of which when taken together shall constitute one and the same instrument.

9.4 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.

10. 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.

[INSERT EXECUTION BLOCKS FOR THE PARTIES]



PART 2 OF PART 1

SUBCONTRACTOR COLLATERAL WARRANTY



DATED _____ 20[21]

(1) [INSERT NAME OF SUBCONTRACTOR]

(2) [INSERT NAME OF BENEFICIARY]

[(3) INSERT NAME OF CONTACTOR]]¹⁰

SUBCONTRACTOR COLLATERAL WARRANTY

relating to

[INSERT DESCRIPTION OF WORKS] AT [INSERT SITE
NAME]

¹⁰ **DRAFTING NOTE:** This reference to the Contractor should be deleted if the Beneficiary will not benefit from step-in rights under the collateral warranty. Any collateral warranties in favour of the MoJ should always include step-in rights.



THIS DEED is made on

20[21]

BETWEEN

- (1) [INSERT NAME OF SUBCONTRACTOR] (company number [INSERT NUMBER]), whose registered office is at [INSERT ADDRESS] (the "Subcontractor"); [and]
- (2) [INSERT NAME OF BENEFICIARY] (company registration number [INSERT NUMBER]), whose registered office is at [INSERT ADDRESS] (the "Beneficiary", which term shall include its successors in title and permitted assigns)[.]; and
- (3) [INSERT NAME OF CONTRACTOR] (company number [INSERT NUMBER]), whose registered office is at [INSERT ADDRESS] (the "Contractor", with such term including its successors in title and permitted assigns).]¹¹

BACKGROUND

- A The [Beneficiary / Client]¹² has entered into the FAC-1 Contract with the Contractor in connection with the Works.
- B The Contractor has entered into the Subcontract with the Subcontractor, pursuant to which the Subcontractor has been appointed by the Contractor to undertake and complete the Subcontract Works.
- C The Beneficiary has [DESCRIBE BENEFICIARY'S INTEREST] in the Works and, by extension, the Subcontract Works.
- D The Subcontractor has agreed to enter into this Deed with the Beneficiary pursuant to the terms of the Subcontract.

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);¹³

"Contractor" means [INSERT NAME OF CONTRACTOR] (company number [INSERT COMPANY NUMBER]), whose registered office is at [INSERT ADDRESS] (with such term including its successors in title and permitted assigns);¹⁴

"End of Liability Date" is [REDACTED]

"FAC-1 Contract" means an ACA Framework Alliance Contract (FAC-1) (as amended) between (1) the [Client / Beneficiary]¹⁵ and (2) the Contractor (defined as an "Alliance Member" therein) and other parties (each also defined as "Alliance Members" therein) dated [INSERT DATE] 2021 and, in connection with the Works only, incorporating the terms and conditions of the [NEC4 Engineering

¹¹ **DRAFTING NOTE:** This entry should be deleted if the Beneficiary will not benefit from step-in rights under the collateral warranty.

¹² **DRAFTING NOTE:** If the MoJ is the Beneficiary, the reference to "Client" should be deleted.

¹³ **DRAFTING NOTE:** This entry should be deleted if the MoJ is the Beneficiary under the collateral warranty.

¹⁴ **DRAFTING NOTE:** This entry should be deleted if the Beneficiary will not have step-in rights under the collateral warranty.

¹⁵ **DRAFTING NOTE:** Use the "Client" option if the MoJ is not the Beneficiary.



and Construction Contract: Option A (June 2017 edition, as amended in January 2019 and October 2020) (as amended)) [the NEC4 Engineering & Construction Short Contract (as amended)]¹⁶ on the basis and in the terms specified in the [Notice to Proceed to Phase 2 / Order];

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

["Notice to Proceed to Phase 2" means the "Notice to Proceed to Phase 2" between (1) the [Client / Beneficiary] and (2) the Contractor and dated [INSERT DATE] 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);]¹⁷

["Order" means the "Order" between (1) the [Client / Beneficiary] and (2) the Contractor and dated [INSERT DATE] 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);]¹⁸

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

"Subcontract" means the subcontract in the form of a [INSERT DETAILS] dated [INSERT DATE] between (1) the Contractor; and (2) the Subcontractor, under which the Subcontractor is appointed by the Contractor to undertake and complete the Subcontract Works;

"Subcontract Works" means [INSERT DESCRIPTION OF THE SUBCONTRACT WORKS], as more particularly described in the Subcontract; and

"Works" are the works and/or services identified as such and referred to in the [Notice to Proceed to Phase 2 / Order]¹⁹.

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;

¹⁶ **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.

¹⁷ **DRAFTING NOTE:** Use this wording if the collateral warranty relates to the main works.

¹⁸ **DRAFTING NOTE:** Use this wording if the collateral warranty relates to early works.

¹⁹ **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.



- 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 Subcontractor undertakes with and warrants to the Beneficiary that:

- 2.1.1 in carrying out and completing the Subcontract Works, the Subcontractor has delivered and will deliver such Subcontract Works in a good and workmanlike manner, using only materials which are new (unless the Subcontract states otherwise or as otherwise agreed with the Contractor in writing), and are sound and of good quality which are consistent with the intended use of the Works 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 Subcontract Works under or in connection with the Subcontract (including in relation to design of the Subcontract Works and in respect of the preparation of any reports, summaries, recommendations and/or any other analogous deliverable in relation to the Subcontract 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 Subcontract Works, professional designer) experienced in undertaking services such as those being performed in relation to the Subcontract Works in relation to projects of the same type, complexity, value and timescale as the Works;
- 2.1.3 the Subcontractor 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 in the provision of the Subcontract 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 Subcontract and/or 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 Subcontract in accordance with the Subcontract.

2.2 The Subcontractor 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 Contractor under the Subcontract. If a claim is brought against the Subcontractor by the Beneficiary, the Subcontractor may rely on any defence or limitation available to it under the terms of the Subcontract, save that the Subcontractor 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 Subcontract. The Subcontractor may not plead a "no-loss" defence, including one based on an argument that since the Contractor under the Subcontract 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 Contractor under the Subcontract would suffer such a loss.



3. **COPYRIGHT**

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

4. **INDEMNITY INSURANCE**

- 4.1 The Subcontractor 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 **REDACTED**²⁰ 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 Subcontractor's profession generally carry such insurance ("**Reasonable Rates and Terms**").
- 4.2 Any increased or additional premium required by insurers by reason of the Subcontractor's own claims record or other acts, omissions, matters or things particular to the Subcontractor shall be deemed to be within Reasonable Rates and Terms.
- 4.3 The Subcontractor shall immediately inform the Beneficiary if such insurance ceases to be available upon Reasonable Rates and Terms in order that the Subcontractor and the Beneficiary can discuss means of best protecting their respective positions in respect of the Subcontract Works and the wider FAC-1 Programme in the absence of such insurance.
- 4.4 The Subcontractor 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

²⁰ **DRAFTING NOTE:** Update to reflect the coverage as stated in the subcontract.



undertakes in writing to reimburse the Subcontractor in respect of the net cost of such insurance to the Subcontractor above Reasonable Rates and Terms.

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

5. LIABILITY PERIOD

It is agreed that whatever the manner in which the Beneficiary and the Subcontractor have executed this Deed, the period of limitations (in respect of which the Beneficiary and the Subcontractor 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 Subcontractor 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 Subcontractor 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 Subcontractor 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]²¹ Contractor has not suffered that loss or because the [Client or]²² Contractor would not suffer a similar loss because of [their / its] different interest[s] 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. [STEP-IN RIGHTS]²³

- 7.1 The Subcontractor shall not exercise nor seek to exercise any right of termination of its employment under the Subcontract or discontinue the performance of the Subcontract for any reason whatsoever (including any breach on the part of the Contractor) 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.
- 7.2 Any period stipulated in the Subcontract for the exercise of a right of termination by the Subcontractor of its employment under the Subcontract or to discontinue the performance of the Subcontract shall, nevertheless, be extended as may be necessary to take account of the period of notice required under clause 7.1.

²¹ Delete where the Beneficiary is the Client

²² Delete where the Beneficiary is the Client

²³ This clause should be deleted if the Beneficiary will not benefit from step-in rights under the collateral warranty.



- 7.3 The right of the Subcontractor to terminate its employment under the Subcontract or to discontinue the performance of the Subcontract shall cease within the period of twenty-one (21) days referred to in clause 7.1 if the Beneficiary shall give notice to the Subcontractor:
- 7.3.1 requiring the Subcontractor to continue its obligations under the Subcontract with the Beneficiary or its nominee;
 - 7.3.2 acknowledging that the Beneficiary or its nominee will assume all the obligations of the Contractor under the Subcontract; and
 - 7.3.3 undertaking that the Beneficiary or its nominee will discharge all payments which may subsequently become due to the Subcontractor under the terms of the Subcontract and will pay to the Subcontractor any sums which have been due and payable to it under the Subcontract but which remain unpaid.
- 7.4 Upon service by the Beneficiary or its nominee of a notice complying with the requirements of clause 7.3 the Subcontract will continue in full force and effect as if the same had been entered into between the Subcontractor and the Beneficiary to the exclusion of the Contractor.
- 7.5 Compliance by the Subcontractor with the provisions of this clause 7 will not be treated as a waiver of any breach on the part of the Contractor giving rise to the right of termination nor otherwise prevent the Subcontractor 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.
- 7.6 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 FAC-1 Programme and entered into between the Subcontractor and such person at the request of the Contractor.
- 7.7 By acting in accordance with this clause 7, the Subcontractor shall not incur any liability to the Contractor.]

8. 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.

9. EXTRANEOUS RIGHTS

- 9.1 This Deed shall not negate or diminish any duty or liability otherwise owed by the Subcontractor to the Beneficiary.
- 9.2 No approval or inspection of the Subcontract 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 Subcontractor arising under this Deed.
- 9.3 This Deed may be executed in any number of counterparts all of which when taken together shall constitute one and the same instrument.
- 9.4 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.



10. **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.

[INSERT EXECUTION BLOCKS FOR THE PARTIES]



PART 3 OF PART 1

SUBSUBCONTRACTOR COLLATERAL WARRANTY



DATED _____ 20[21]

(1) [INSERT NAME OF SUBSUBCONTRACTOR]

(2) [INSERT NAME OF BENEFICIARY]

[(3) SUBCONTRACTOR]]²⁴

SUBSUBCONTRACTOR COLLATERAL WARRANTY

relating to

[INSERT DESCRIPTION OF WORKS] AT [INSERT SITE
NAME]

²⁴ **DRAFTING NOTE:** This reference to the Subcontractor should be deleted if the Beneficiary will not benefit from step-in rights under the collateral warranty. Any collateral warranties in favour of the MoJ should always include step-in rights.



THIS DEED is made on

20[21]

BETWEEN

- (1) [INSERT NAME OF SUBSUBCONTRACTOR] (company number [INSERT NUMBER]), whose registered office is at [INSERT ADDRESS] (the "Subsubcontractor"); [and]
- (2) [INSERT NAME OF BENEFICIARY] (company registration number [INSERT NUMBER]), whose registered office is at [INSERT ADDRESS] (the "Beneficiary", which term shall include its successors in title and permitted assigns)[.]; and
- (3) [INSERT NAME OF SUBCONTRACTOR] (company number [INSERT NUMBER]), whose registered office is at [INSERT ADDRESS] (the "Subcontractor", with such term including its successors in title and permitted assigns).²⁵

BACKGROUND

- A The [Beneficiary / Client]²⁶ has entered into the FAC-1 Contract with the Contractor in connection with the Works.
- B The Contractor has entered into the Subcontract with the Subcontractor, pursuant to which the Subcontractor has been appointed by the Contractor to undertake and complete certain subcontract works in connection with the Works.
- C The Subcontractor has entered into the Subsubcontract with the Subsubcontractor, pursuant to which the Subsubcontractor has been appointed by the Subcontractor to undertake and complete certain Subsubcontract Works in connection with the subcontract works.
- D The Beneficiary has [DESCRIBE BENEFICIARY'S INTEREST] in the Works and, by extension, the Subsubcontract Works.
- E The Subsubcontractor has agreed to enter into this Deed with the Beneficiary pursuant to the terms of the Subsubcontract.

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);²⁷

"Contractor" means [INSERT NAME OF CONTRACTOR] (company number [INSERT COMPANY NUMBER]), whose registered office is at [INSERT ADDRESS] (with such term including its successors in title and permitted assigns);

"End of Liability Date" is [REDACTED];

²⁵ **DRAFTING NOTE:** This entry should be deleted if the Beneficiary will not benefit from step-in rights under the collateral warranty.

²⁶ **DRAFTING NOTE:** If the MoJ is the Beneficiary, the reference to "Client" should be deleted.

²⁷ **DRAFTING NOTE:** This entry should be deleted if the MoJ is the Beneficiary under the collateral warranty.



"FAC-1 Contract" means an ACA Framework Alliance Contract (FAC-1) (as amended) between (1) the [Client / Beneficiary]²⁸; and (2) the Contractor (defined as an "Alliance Member" therein) and other parties (each also defined as "Alliance Members" therein) dated [INSERT DATE] 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)][the NEC4 Engineering & Construction Short Contract (as amended)]²⁹ on the basis and in the terms specified in the [Notice to Proceed to Phase 2 / Order];

"FAC-1 Programme" has the meaning given to such term in the FAC-1 Contract;

"Materials" means all existing and future designs, technical information, drawings, models, plans, specifications, schedules, design details and 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 Subsubcontractor's own internal purposes to determine the prices), photographs, brochures, reports, meeting notes, computer aided design (CAD) materials and any other materials, in any medium, provided by or prepared on behalf of the Subsubcontractor (in each case, as may be amended or replaced from time to time) in connection with the Works, the Subsubcontract and/or the FAC-1 Programme;

"Notice to Proceed to Phase 2" means the "Notice to Proceed to Phase 2" between (1) the [Client / Beneficiary] and (2) the Contractor and dated [INSERT DATE] 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);³⁰

"Order" means the "Order" between (1) the [Client / Beneficiary] and (2) the Contractor and dated [INSERT DATE] 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);³¹

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

"Subcontract" means the subcontract in the form of an [INSERT DETAILS] dated [INSERT DATE] between (1) the Contractor; and (2) the Subcontractor, under which the Subcontractor is appointed by the Contractor to undertake and complete certain subcontract works forming part of the Works;

"Subcontractor" means [INSERT NAME OF CONTRACTOR] (company number [INSERT COMPANY NUMBER]), whose registered office is at [INSERT ADDRESS] (with such term including its successors in title and permitted assigns);³²

"Subsubcontract" means the subsubcontract in the form of an [INSERT DETAILS] dated [INSERT DATE] between (1) the Subcontractor; and (2) the Subsubcontractor, under which the Subsubcontractor is appointed by the Subcontractor to undertake and complete the Subsubcontract Works;

²⁸ **DRAFTING NOTE:** Use the "Client" option if the MoJ is not the Beneficiary.

²⁹ **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.

³⁰ **DRAFTING NOTE:** Use this wording if the collateral warranty relates to the main works.

³¹ **DRAFTING NOTE:** Use this wording if the collateral warranty relates to early works.

³² **DRAFTING NOTE:** Delete if the Beneficiary will have step-in rights.



"Subsubcontract Works" means [INSERT DESCRIPTION OF THE SUBSUBCONTRACT WORKS], as more particularly described in the Subsubcontract;

"Works" are the works and/or services identified as such and referred to in the [Notice to Proceed to Phase 2 / Order]³³.

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 Subsubcontractor undertakes with and warrants to the Beneficiary that:

- 2.1.1 in carrying out and completing the Subsubcontract Works, the Subsubcontractor has delivered and will deliver such Subsubcontract Works in a good and workmanlike manner, using only materials which are new (unless the Subsubcontract states otherwise or as otherwise agreed with the Subcontractor in writing), and are sound and of good quality which are consistent with the intended use of the Works 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 Subsubcontract Works under or in connection with the Subsubcontract (including in relation to design of the Subsubcontract Works and in respect of the preparation of any reports, summaries, recommendations and/or any other analogous deliverable in relation to the Subsubcontract 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 Subsubcontract Works, professional designer) experienced in undertaking services such as those being performed in relation to the Subsubcontract Works and in relation to projects of the same type, complexity, value and timescale as the Works;
- 2.1.3 the Subsubcontractor 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 Subsubcontract 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);

³³ **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.



- 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 Subsubcontract and/or 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 Subsubcontract in accordance with the Subsubcontract.

2.2 The Subsubcontractor 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 Subcontractor under the Subsubcontract. If a claim is brought against the Subsubcontractor by the Beneficiary, the Subsubcontractor may rely on any defence or limitation available to it under the terms of the Subsubcontract, save that the Subsubcontractor 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 Subsubcontract. The Subsubcontractor may not plead a "no-loss" defence, including one based on an argument that since the Subcontractor under the Subsubcontract 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 Subcontractor under the Subsubcontract would suffer such a loss.

3. COPYRIGHT

3.1 The Subsubcontractor 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, the Subsubcontract Works and/or the FAC-1 Programme and (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the same, with this licence including a licence to grant sub-licences and to transfer the same to third parties.

3.2 The Subsubcontractor 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 Subsubcontractor.

3.3 The Beneficiary shall on written request, be entitled to be supplied by the Subsubcontractor with electronic copies of any Materials at no cost to the Beneficiary.

3.4 The Subsubcontractor unconditionally and irrevocably waives (and shall ensure that any sub-subsubcontractors waive), in respect of the Materials, all moral rights to which the Subsubcontractor (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 Subsubcontractor 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 Subsubcontractor's own original work and that in any event their use in connection with the Subsubcontract Works, 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 Subsubcontractor will obtain the necessary consents in relation to clause 3.1.



4. **INDEMNITY INSURANCE**

- 4.1 The Subsubcontractor 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 **REDACTED**³⁴ 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 Subsubcontractor's profession generally carry such insurance ("**Reasonable Rates and Terms**").
- 4.2 Any increased or additional premium required by insurers by reason of the Subsubcontractor's own claims record or other acts, omissions, matters or things particular to the Subsubcontractor shall be deemed to be within Reasonable Rates and Terms.
- 4.3 The Subsubcontractor shall immediately inform the Beneficiary if such insurance ceases to be available upon Reasonable Rates and Terms in order that the Subsubcontractor and the Beneficiary can discuss means of best protecting their respective positions in respect of the Subsubcontract Works and the wider FAC-1 Programme in the absence of such insurance.
- 4.4 The Subsubcontractor 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 Subsubcontractor in respect of the net cost of such insurance to the Subsubcontractor above Reasonable Rates and Terms.
- 4.5 As and when reasonably requested to do so by the Beneficiary the Subsubcontractor 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 Subsubcontract for any reason whatsoever, including (without limitation) breach by the Contractor.

5. **LIABILITY PERIOD**

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

³⁴ **DRAFTING NOTE:** Update to reflect the coverage as stated in the subsubcontract.



- 6.3 The Subsubcontractor 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]³⁵, Contractor or Subcontractor has not suffered that loss or because the [Client]³⁶, Contractor or Subcontractor would not suffer a similar loss because of their different interests 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. [STEP-IN RIGHTS]³⁷

- 7.1 The Subsubcontractor shall not exercise nor seek to exercise any right of termination of its employment under the Subsubcontract or discontinue the performance of the Subsubcontract for any reason whatsoever (including any breach on the part of the Subcontractor) 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.
- 7.2 Any period stipulated in the Subsubcontract for the exercise of a right of termination by the Subsubcontractor of its employment under the Subsubcontract or to discontinue the performance of the Subsubcontract shall, nevertheless, be extended as may be necessary to take account of the period of notice required under clause 7.1.
- 7.3 The right of the Subsubcontractor to terminate its employment under the Subsubcontract or to discontinue the performance of the Subsubcontract shall cease within the period of twenty-one (21) days referred to in clause 7.1 if the Beneficiary shall give notice to the Subsubcontractor:
- 7.3.1 requiring the Subsubcontractor to continue its obligations under the Subsubcontract with the Beneficiary or its nominee;
 - 7.3.2 acknowledging that the Beneficiary or its nominee will assume all the obligations of the Subcontractor under the Subsubcontract; and
 - 7.3.3 undertaking that the Beneficiary or its nominee will discharge all payments which may subsequently become due to the Subsubcontractor under the terms of the Subsubcontract and will pay to the Subsubcontractor any sums which have been due and payable to it under the Subsubcontract but which remain unpaid.
- 7.4 Upon service by the Beneficiary or its nominee of a notice complying with the requirements of clause 7.3 the Subsubcontract will continue in full force and effect as if the same had been entered into between the Subsubcontractor and the Beneficiary to the exclusion of the Subcontractor.
- 7.5 Compliance by the Subsubcontractor with the provisions of this clause 7 will not be treated as a waiver of any breach on the part of the Subcontractor giving rise to the right of termination nor otherwise prevent the Subsubcontractor 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.
- 7.6 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 FAC-1 Programme and entered into between the Subsubcontractor and such person at the request of the Subcontractor.
- 7.7 By acting in accordance with this clause 7, the Subsubcontractor shall not incur any liability to the Subcontractor.]

³⁵ **DRAFTING NOTE:** Delete if the Beneficiary is the Client

³⁶ **DRAFTING NOTE:** Delete if the Beneficiary is the Client

³⁷ **DRAFTING NOTE:** This clause should be deleted if the Beneficiary will not benefit from step-in rights under the collateral warranty.



8. **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.

9. **EXTRANEOUS RIGHTS**

- 9.1 This Deed shall not negate or diminish any duty or liability otherwise owed by the Subsubcontractor to the Beneficiary.
- 9.2 No approval or inspection of the Subsubcontract 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 Subsubcontractor arising under this Deed.
- 9.3 This Deed may be executed in any number of counterparts all of which when taken together shall constitute one and the same instrument.
- 9.4 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.

10. **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.

[INSERT EXECUTION BLOCKS FOR THE PARTIES]



PART 4 OF PART 1

SUBCONSULTANT COLLATERAL WARRANTY



DATED _____ 20[21]

(1) [INSERT NAME OF SUBCONSULTANT]

(2) [INSERT NAME OF BENEFICIARY]

[(3) INSERT NAME OF CONTRACTOR]³⁸

SUBCONTRACTOR COLLATERAL WARRANTY

relating to

[INSERT DESCRIPTION OF WORKS] AT [INSERT SITE
NAME]

³⁸ **DRAFTING NOTE:** This reference to the Contractor should be deleted if the Beneficiary will not benefit from step-in rights under the collateral warranty. Any collateral warranties in favour of the MoJ should always include step-in rights.



THIS DEED is made on

20[21]

BETWEEN

- (1) [INSERT NAME OF SUBCONSULTANT] (company number [INSERT NUMBER]), whose registered office is at [INSERT ADDRESS] (the "Subconsultant"); [and]
- (2) [INSERT NAME OF BENEFICIARY] (company registration number [INSERT NUMBER]), whose registered office is at [INSERT ADDRESS] (the "Beneficiary", which term shall include its successors in title and permitted assigns)[.]; and
- (3) [INSERT NAME OF CONTRACTOR] (company number [INSERT NUMBER]), whose registered office is at [INSERT ADDRESS] (the "Contractor", with such term including its successors in title and permitted assigns).³⁹

BACKGROUND

- A The [Beneficiary / Client]⁴⁰ has entered into the FAC-1 Contract with the Contractor in connection with the Works.
- B The Contractor has entered into the Appointment with the Subconsultant, pursuant to which the Subconsultant has been appointed by the Contractor to undertake and complete the Services.
- C The Beneficiary has [DESCRIBE BENEFICIARY'S INTEREST] in the Works and, by extension, the Services.
- D The Subconsultant has agreed to enter into this Deed with the Beneficiary pursuant to the terms of the Appointment.

AGREED TERMS

1. INTERPRETATION

1.1 In this Deed:

"Appointment" means the appointment in the form of a [INSERT DETAILS] dated [INSERT DATE] between (1) the Contractor; and (2) the Subconsultant, under which the Subconsultant is appointed by the Contractor to undertake and complete the Services;

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

"Contractor" means [INSERT NAME OF CONTRACTOR] (company number [INSERT COMPANY NUMBER]), whose registered office is at [INSERT ADDRESS] (with such term including its successors in title and permitted assigns);⁴¹

"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);⁴²

"End of Liability Date" is [REDACTED];

³⁹ **DRAFTING NOTE:** This entry should be deleted if the Beneficiary will not benefit from step-in rights under the collateral warranty.

⁴⁰ **DRAFTING NOTE:** If the MoJ is the Beneficiary, the reference to "Client" should be deleted.

⁴¹ **DRAFTING NOTE:** This entry should be deleted if the Beneficiary will not have step-in rights under the collateral warranty.

⁴² **DRAFTING NOTE:** This entry should be deleted if the MoJ is the Beneficiary under the collateral warranty.



"FAC-1 Contract" means an ACA Framework Alliance Contract (FAC-1) (as amended) between (1) the [Client / Beneficiary]⁴³ and (2) the Contractor (defined as an "Alliance Member" therein) and other parties (each also defined as "Alliance Members" therein) dated [INSERT DATE] 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)] [the NEC4 Engineering & Construction Short Contract (as amended)]⁴⁴ on the basis and in the terms specified in the [Notice to Proceed to Phase 2 / Order];

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

"Notice to Proceed to Phase 2" means the "Notice to Proceed to Phase 2" between (1) the [Client / Beneficiary] and (2) the Contractor and dated [INSERT DATE] 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);⁴⁵

"Order" means the "Order" between (1) the [Client / Beneficiary] and (2) the Contractor and dated [INSERT DATE] 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);⁴⁶

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

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

"Works" are the works and/or services identified as such and referred to in the [Notice to Proceed to Phase 2 / Order]⁴⁷.

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;

⁴³ **DRAFTING NOTE:** Use the "Client" option if the MoJ is not the Beneficiary.

⁴⁴ **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.

⁴⁵ **DRAFTING NOTE:** Use this wording if the collateral warranty relates to the main works.

⁴⁶ **DRAFTING NOTE:** Use this wording if the collateral warranty relates to early works.

⁴⁷ **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.



- 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 Subconsultant 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 Subconsultant in connection with 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 any design provided by or on behalf of the Subconsultant, 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; and
 - 2.1.3 the Subconsultant 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 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 FAC-1 Contract.
 - 2.2 The Subconsultant 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 Contractor under the Appointment. If a claim is brought against the Subconsultant by the Beneficiary, the Subconsultant may rely on any defence or limitation available to it under the terms of the Appointment, save that the Subconsultant 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 Appointment. The Subconsultant may not plead a "no-loss" defence, including one based on an argument that since the Contractor 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 Contractor under the Appointment would suffer such a loss.
- ## 3. COPYRIGHT
- 3.1 The Subconsultant 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 same, with this licence including a licence to grant sub-licences and to transfer the same to third parties.

- 3.2 The Subconsultant 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 Subconsultant.
- 3.3 The Beneficiary shall on written request, be entitled to be supplied by the Subconsultant with electronic copies of any Materials at no cost to the Beneficiary.
- 3.4 The Subconsultant unconditionally and irrevocably waives (and shall ensure that any sub-contractors waive), in respect of the Materials, all moral rights to which the Subconsultant (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 Subconsultant 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 Subconsultant's own original work and that in any event their use in connection with the Services, 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 Subconsultant will obtain the necessary consents in relation to clause 3.1.

4. INDEMNITY INSURANCE

- 4.1 The Subconsultant 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 **REDACTED**⁴⁸ 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 Subconsultant's profession generally carry such insurance ("**Reasonable Rates and Terms**").
- 4.2 Any increased or additional premium required by insurers by reason of the Subconsultant's own claims record or other acts, omissions, matters or things particular to the Subconsultant shall be deemed to be within Reasonable Rates and Terms.
- 4.3 The Subconsultant shall immediately inform the Beneficiary if such insurance ceases to be available upon Reasonable Rates and Terms in order that the Subconsultant and the Beneficiary can discuss means of best protecting their respective positions in respect of the Appointment and the wider FAC-1 Programme in the absence of such insurance.
- 4.4 The Subconsultant 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 Subconsultant in respect of the net cost of such insurance to the Subconsultant above Reasonable Rates and Terms.

⁴⁸ **DRAFTING NOTE:** Update to reflect the coverage as stated in the appointment.



- 4.5 As and when reasonably requested to do so by the Beneficiary the Subconsultant 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 Contractor.

5. **LIABILITY PERIOD**

It is agreed that whatever the manner in which the Beneficiary and the Subconsultant have executed this Deed, the period of limitations (in respect of which the Beneficiary and the Subconsultant 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 Subconsultant 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 Subconsultant 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 Subconsultant 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]⁴⁹ Contractor has not suffered that loss or because the [Client or]⁵⁰ Contractor would not suffer a similar loss because of [their / its] different interest[s] 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. **[STEP-IN RIGHTS]⁵¹**

- 7.1 The Subconsultant 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 Contractor) 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.
- 7.2 Any period stipulated in the Appointment for the exercise of a right of termination by the Subconsultant 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.

⁴⁹ **DRAFTING NOTE:** Delete if the Beneficiary is the Client

⁵⁰ **DRAFTING NOTE:** Delete if the Beneficiary is the Client

⁵¹ **DRAFTING NOTE:** This clause should be deleted if the Beneficiary will not benefit from step-in rights under the collateral warranty.



- 7.3 The right of the Subconsultant 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 Subconsultant:
- 7.3.1 requiring the Subconsultant to continue its obligations under the Appointment with the Beneficiary or its nominee;
- 7.3.2 acknowledging that the Beneficiary or its nominee will assume all the obligations of the Contractor under the Appointment; and
- 7.3.3 undertaking that the Beneficiary or its nominee will discharge all payments which may subsequently become due to the Subconsultant under the terms of the Appointment and will pay to the Subconsultant any sums which have been due and payable to it under the Appointment but which remain unpaid.
- 7.4 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 Subconsultant and the Beneficiary to the exclusion of the Contractor.
- 7.5 Compliance by the Subconsultant with the provisions of this clause 7 will not be treated as a waiver of any breach on the part of the Contractor giving rise to the right of termination nor otherwise prevent the Subconsultant 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.
- 7.6 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 FAC-1 Programme and entered into between the Subconsultant and such person at the request of the Contractor.
- 7.7 By acting in accordance with this clause 7, the Subconsultant shall not incur any liability to the Contractor.]

8. 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.

9. EXTRANEOUS RIGHTS

- 9.1 This Deed shall not negate or diminish any duty or liability otherwise owed by the Subconsultant to the Beneficiary.
- 9.2 No approval or inspection of the Services 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 Subconsultant arising under this Deed.
- 9.3 This Deed may be executed in any number of counterparts all of which when taken together shall constitute one and the same instrument.
- 9.4 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.



10. **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.

[INSERT EXECUTION BLOCKS FOR THE PARTIES]



PART 2 OF SCHEDULE 12

THIRD PARTY RIGHTS

PART 1 OF PART 2

THIRD PARTY RIGHTS NOTICE & SCHEDULE: CONTRACTOR

PART 1 – THIRD PARTY RIGHTS NOTICE

[INSERT ADDRESSEE DETAILS]

[INSERT DATE] 20**[YEAR]**

To whom it may concern

Title:	Third Party Rights Notice
Client:	The Secretary of State for the Ministry of Justice of 102 Petty France, Westminster, London SW1H 9AJ (with such term including its successors in title and permitted assigns)
Contractor:	[INSERT NAME OF CONTRACTOR] (company number [INSERT COMPANY NUMBER]) whose registered office is at [INSERT ADDRESS] (with such term including its successors in title and permitted assigns)
FAC-1 Contract:	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 [INSERT DATE] 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)] ⁵² on the basis and in the terms specified in the [Notice to Proceed to Phase 2 / Order]
FAC-1 Programme:	Has the meaning given to such term in the FAC-1 Contract
[Notice to Proceed to Phase 2:	The "Notice to Proceed to Phase 2" between (1) the [Client / Beneficiary] and (2) the Contractor and dated [INSERT DATE] 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); ⁵³
[Order:	The "Order" between (1) the [Client / Beneficiary] and (2) the Contractor and dated [INSERT DATE] 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); ⁵⁴
Works:	The works and/or services identified as such and referred to in the [Notice to Proceed to Phase 2 / Order] ⁵⁵ .
P11 Indemnity Amount:	[INSERT AMOUNT IN WORDS] (£ [INSERT AMOUNT AS A NUMBER]) 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] ⁵⁶

⁵² **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.

⁵³ **DRAFTING NOTE:** Use this wording if the Third Party Rights Notice relates to the main works.

⁵⁴ **DRAFTING NOTE:** Use this wording if the Third Party Rights Notice relates to early works.

⁵⁵ **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.

⁵⁶ **DRAFTING NOTE:** Update to reflect the position in the Notice to Proceed to Phase 2 / Order.



Beneficiary:	[INSERT NAME] ([INSERT COMPANY NUMBER] and) whose [registered] address is set [INSERT ADDRESS] (with such term including its successors in title and permitted assigns)
--------------	--

This notice of third party rights (the "**Third Party Rights Notice**") is issued pursuant to the FAC-1 Contract and relates to the above-mentioned FAC-1 Programme and the Works. Unless otherwise stated, all capitalised terms in this Third Party Rights Notice have the meaning ascribed to them in the FAC-1 Contract and/or the **[Notice to Proceed to Phase 2][Order]**.

Pursuant to the rights granted to us pursuant to and in accordance with **[INSERT CLAUSE REFERENCE]** of the FAC-1 Contract, we hereby notify you, as the Contractor under the FAC-1 Contract, that the benefits of the rights set out in Part **[UPDATE AS APPROPRIATE]** of Schedule **[UPDATE AS APPROPRIATE]** of the FAC-1 Contract (the "**Third Party Rights Schedule**") are hereby vested in the Beneficiary for the purposes of **[INSERT CLAUSE REFERENCE]** of the FAC-1 Contract (and the Beneficiary is a "Beneficiary" as so defined in the FAC-1 Contract).

The Beneficiary and its permitted assignees shall accordingly be entitled to enforce the rights set out in the Third Party Rights Schedule pursuant to and in accordance with the provisions of the Third Party Rights Schedule. For the purposes of this Beneficiary, the provisions of paragraph **[7]** of the Third Party Rights Schedule **[do / do not]**⁵⁷ apply.

Notwithstanding whether you sign and return the acknowledgement below to us or not, the rights granted to the Beneficiary by this Third Party Rights Notice shall take effect from the date on which you receive the same (or are deemed to receive the same in accordance with the provisions of the FAC-1 Contract). We should, however, be grateful if you sign and return a copy of this notice in acknowledgement of receipt.

Yours faithfully

For and on behalf of **[INCLUDE DETAILS OF THE SENDER]**

cc. **[INSERT CONTACT DETAILS OF CONTACT AT BENEFICIARY]**

We hereby confirm receipt of the "Third Party Rights Notice" granting third party rights to **[INSERT DETAILS OF BENEFICIARY]** pursuant to and in accordance with the FAC-1 Contract and the Notice to Proceed to Phase 2 relating to the design and construction of **[INSERT DESCRIPTION]** at **[INSERT SITE]** between (1) The Secretary of State for the Ministry of Justice referred to in such Third Party Rights Notice.

Signed **[Partner][Member][Director]**

⁵⁷ **DRAFTING NOTE:** Select "do" where the Beneficiary will benefit from step-in rights.



PART 2 – THIRD PARTY RIGHTS SCHEDULE

THIRD PARTY RIGHTS PROVIDED BY THE CONTRACTOR IN FAVOUR OF A BENEFICIARY PURSUANT TO AND IN ACCORDANCE WITH A THIRD PARTY RIGHTS NOTICE

The Client and the Contractor acknowledge and agree that:

1. INTERPRETATION

1.1 In this Schedule, all capitalised terms shall have the meanings given to them below:

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

"Beneficiary" is the party identified as such in the Third Party Rights Notice (with such term including its successors in title and permitted assigns);

"Contractor" is the party identified as such in the Third Party Rights Notice (with such term including its successors in title and permitted assigns);

"Client" means the party identified as such in the Third Party Rights Notice (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 the contract identified as such in the Third Party Rights Notice;

"FAC-1 Programme" means the programme identified as such in the Third Party Rights Notice;

"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;

"PII Indemnity Amount" means the level (and type) of professional indemnity insurance specified in the Third Party Rights Notice (which shall be no greater than that (if any) specified in the Notice to Proceed to Phase 2 or Order (as the contest requires) identified in the Third Party Rights Notice.

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

"Schedule" means this schedule of third party rights;

"Third Party Rights Notice" means the notice issued to the Contractor pursuant to and in accordance with the provisions of the FAC-1 Contract; and

"Works" means the works identified as such in the Third Party Rights Notice.

1.2 In interpreting this Schedule:

1.2.1 if Contractor is a partnership then the provisions of this Schedule 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 paragraphs shall be disregarded when construing this Schedule; and
- 1.2.5 where the words "include(s)" or "including" are used in this Schedule, 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;
- 2.1.3 the Contractor has exercised and will continue to exercise the standard of skill and care referred to in paragraph 2.1.2 to ensure that it has not and shall not specify, authorise, cause or allow to be used in the Works 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 Schedule 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 paragraph 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 Schedule.
- 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 paragraph 3.1.

4. INDEMNITY INSURANCE

- 4.1 The Contractor shall maintain professional indemnity insurance covering (inter alia) its potential liability under this Schedule in the event that it breaches this Schedule 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 the PII Indemnity Amount 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 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 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 Schedule shall expire on the End of Liability Date.

6. **ASSIGNMENT**

- 6.1 The Contractor consents to the benefit of this Schedule 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 Schedule the Contractor shall not be entitled to contend that any person to whom this Schedule is assigned in accordance with paragraph 6.1 (an "**Assignee**") is precluded from recovering under this Schedule any loss incurred by such Assignee resulting from any breach of this Schedule (whenever happening), by reason that such person is an assignee and not the original named party to this Schedule.
- 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. **STEP-IN RIGHTS**

This paragraph 7 shall apply in favour of the Beneficiary referred to in a Third Party Rights Notice where it is stated in that Third Party Rights Notice as so applying and in that case shall have effect according to its terms, but otherwise shall be of no effect.

- 7.1 The Contractor shall not exercise nor seek to exercise any right of termination of its employment under the FAC-1 Contract or discontinue the performance of the FAC-1 Contract for any reason whatsoever (including any breach on the part of the Client) 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.



- 7.2 Any period stipulated in the FAC-1 Contract for the exercise of a right of termination by the Contractor of its employment under the FAC-1 Contract or to discontinue the performance of the FAC-1 Contract shall, nevertheless, be extended as may be necessary to take account of the period of notice required under paragraph 7.1.
- 7.3 The right of the Contractor to terminate its employment under the FAC-1 Contract or to discontinue the performance of the FAC-1 Contract shall cease within the period of twenty-one (21) days referred to in paragraph 7.1 if the Beneficiary shall give notice to the Contractor:
- 7.3.1 requiring the Contractor to continue its obligations under the FAC-1 Contract with the Beneficiary or its nominee;
 - 7.3.2 acknowledging that the Beneficiary or its nominee will assume all the obligations of the Client under the FAC-1 Contract; and
 - 7.3.3 undertaking that the Beneficiary or its nominee will discharge all payments which may subsequently become due to the Contractor under the terms of the FAC-1 Contract and will pay to the Contractor any sums which have been due and payable to him under the FAC-1 Contract but which remain unpaid.
- 7.4 Upon service by the Beneficiary or its nominee of a notice complying with the requirements of paragraph 7.3 the FAC-1 Contract will continue in full force and effect as if the same had been entered into between the Contractor and the Beneficiary to the exclusion of the Client.
- 7.5 Compliance by the Contractor with the provisions of this paragraph 7 will not be treated as a waiver of any breach on the part of the Client giving rise to the right of termination nor otherwise prevent the Contractor from exercising its rights after the expiration of the notice issued pursuant to paragraph 7.1 unless the rights of termination have ceased under the provisions of paragraph 7.3.
- 7.6 This paragraph 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 Works and entered into between the Contractor and such person at the request of the Client.
- 7.7 By acting in accordance with this paragraph 7, the Contractor shall not incur any liability to the Client.

8. NOTICES

Any notice to be given under this Schedule shall be in writing and shall be deemed to be duly given if it is delivered to the addressee's address as specified in the Third Party Rights Notice (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.

9. EXTRANEIOUS RIGHTS

- 9.1 This Schedule shall not negate or diminish any duty or liability otherwise owed by the Contractor to the Beneficiary.
- 9.2 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 Schedule.
- 9.3 Any term of this Schedule, the benefit of which is expressly or purportedly conferred upon the Beneficiary (or any Assignee) pursuant to and in accordance with this Schedule may be enforced by such Beneficiary pursuant to The Contracts (Rights of Third Parties) Act 1999. Subject as aforesaid,



this Schedule is not intended to confer any rights on any other third party pursuant to The Contracts (Rights of Third Parties) Act 1999.

10. **GOVERNING LAW**

This Schedule 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.

PART 2 OF PART 2

THIRD PARTY RIGHTS NOTICE & SCHEDULE: SUBCONTRACTOR

PART 1 – THIRD PARTY RIGHTS NOTICE

[INSERT ADDRESSEE DETAILS]

[INSERT DATE] 20[YEAR]

To whom it may concern

Title:	Third Party Rights Notice
Client:	The Secretary of State for the Ministry of Justice of 102 Petty France, Westminster, London SW1H 9AJ (with such term including its successors in title and permitted assigns)
Contractor:	[INSERT NAME OF CONTRACTOR] (company number [INSERT COMPANY NUMBER]) whose registered office is at [INSERT ADDRESS] (with such term including its successors in title and permitted assigns)
Subcontractor	[INSERT NAME] (company number [INSERT COMPANY NUMBER], whose registered office is at [INSERT ADDRESS]) dated [INSERT DATE]
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 [INSERT DATE] 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)] [the NEC4 Engineering & Construction Short Contract (as amended)] ⁵⁸ on the basis and in the terms specified in the [Notice to Proceed to Phase 2 / Order]
FAC-1 Programme:	Has the meaning given to such term in the FAC-1 Contract
[Notice to Proceed to Phase 2:	The "Notice to Proceed to Phase 2" between (1) the [Client / Beneficiary] ⁵⁹ and (2) the Contractor and dated [INSERT DATE] 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); ⁶⁰
[Order:	The "Order" between (1) the [Client / Beneficiary] ⁶¹ and (2) the Contractor and dated [INSERT DATE] 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); ⁶²
Works:	The works and/or services identified as such and referred to in the [Notice to Proceed to Phase 2 / Order] ⁶³ .
Subcontract:	A subcontract [in the form of a [INSERT DETAILS]] between (1) the Contractor and (2) the Subcontractor dated [INSERT DATE]

⁵⁸ **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.

⁵⁹ **DRAFTING NOTE:** Use the "Client" option if the MoJ is not the Beneficiary.

⁶⁰ **DRAFTING NOTE:** Use this wording if the Third Party Rights Notice relates to the main works.

⁶¹ **DRAFTING NOTE:** Use the "Client" option if the MoJ is not the Beneficiary.

⁶² **DRAFTING NOTE:** Use this wording if the Third Party Rights Notice relates to early works.

⁶³ **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.



Subcontract Works:	[INSERT DESCRIPTION OF THE SUBCONTRACT WORKS] (as more particularly described in the Subcontract)
P11 Indemnity Amount:	[INSERT AMOUNT IN WORDS] (£ [INSERT AMOUNT AS A NUMBER]) 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] ⁶⁴
Beneficiary:	[The Client][INSERT NAME] ([INSERT COMPANY NUMBER] and] whose [registered] address is set [INSERT ADDRESS]]⁶⁵

This notice of third party rights (the "**Third Party Rights Notice**") is issued pursuant to the Subcontract and relates to the above-mentioned FAC-1 Contract and FAC-1 Programme. Unless otherwise stated, all capitalised terms in this Third Party Rights Notice have the meaning ascribed to them in the Subcontract.

Pursuant to the rights granted to us pursuant to and in accordance with clause **[INSERT CLAUSE REFERENCE]** of the Subcontract, we hereby notify you, as the Subcontractor under the Subcontract, that the benefits of the rights set out in **[INSERT LOCATION]** of the Subcontract (the "**Third Party Rights Schedule**") are hereby vested in the Beneficiary for the purposes of **[INSERT CLAUSE REFERENCE]** of the Subcontract.

The Beneficiary and its permitted assignees shall accordingly be entitled to enforce the rights set out in the Third Party Rights Schedule pursuant to and in accordance with the provisions of the Third Party Rights Schedule. For the purposes of this Beneficiary, the provisions of paragraph **[7]** of the Third Party Rights Schedule **[do / do not]**⁶⁶ apply.

Notwithstanding whether you sign and return the acknowledgement below to us or not, the rights granted to the Beneficiary by this Third Party Rights Notice shall take effect from the date on which you receive the same (or are deemed to receive the same in accordance with the provisions of the Subcontract). We should, however, be grateful if you sign and return a copy of this notice in acknowledgement of receipt.

For and on behalf of **[INCLUDE DETAILS OF THE SENDER]**

cc. **[INSERT CONTACT DETAILS OF CONTACT AT BENEFICIARY]**

We hereby confirm receipt of the "Third Party Rights Notice" granting third party rights to **[INSERT DETAILS OF BENEFICIARY]** pursuant to and in accordance with a subcontract **[in the form of a [INSERT DETAILS]]** between (1) **[INSERT NAME OF CONTRACTOR]** and (2) **[INSERT NAME OF SUBCONTRACTOR]** dated **[INSERT DATE]**.

Signed **[Partner][Member][Director]**

⁶⁴ **DRAFTING NOTE:** Update to reflect the coverage in the subcontract.

⁶⁵ **DRAFTING NOTE:** Update accordingly.

⁶⁶ **DRAFTING NOTE:** Select "do" where the Beneficiary will benefit from step-in rights.



PART 2 – THIRD PARTY RIGHTS SCHEDULE

THIRD PARTY RIGHTS PROVIDED BY THE SUBCONTRACTOR IN FAVOUR OF A BENEFICIARY PURSUANT TO AND IN ACCORDANCE WITH A THIRD PARTY RIGHTS NOTICE

The Contractor and the Subcontractor acknowledge and agree that:

AGREED TERMS

1. INTERPRETATION

1.1 In this Schedule:

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

"Beneficiary" is the party identified as such in the Third Party Rights Notice (with such term including its successors in title and permitted assigns);

"Contractor" is the party identified as such in the Third Party Rights Notice (with such term including its successors in title and permitted assigns);

"End of Liability Date" is [REDACTED];

"FAC-1 Contract" means the contract identified as such in the Third Party Rights Notice;

"FAC-1 Programme" means the programme identified as such in the Third Party Rights Notice;

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

"PII Indemnity Amount" means the level (and type) of professional indemnity insurance specified in the Third Party Rights Notice (which shall be no greater than that (if any) specified in the Subcontract).

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

"Schedule" means this schedule of third party rights;

"Subcontract" means the subcontract identified as such in the Third Party Rights Notice;

"Subcontract Works" means the subcontract works identified as such in the Third Party Rights Notice;

"Third Party Rights Notice" means the notice issued to the Subcontractor pursuant to and in accordance with the provisions of the FAC-1 Contract and the Subcontract; and

"Works" means the works identified as such in the Third Party Rights Notice.

1.2 In interpreting this Schedule:



- 1.2.1 if the Subcontractor is a partnership then the provisions of this Schedule 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 paragraphs shall be disregarded when construing this Schedule; and
- 1.2.5 where the words "include(s)" or "including" are used in this Schedule, they are deemed to have the words "without limitation" following them.

2. SKILL AND CARE

- 2.1 The Subcontractor undertakes with and warrants to the Beneficiary that:
 - 2.1.1 in carrying out and completing the Subcontract Works, the Subcontractor has delivered and will deliver such Subcontract Works in a good and workmanlike manner, using only materials which are new (unless the contract states otherwise or as otherwise agreed with the Contractor in writing), and are sound and of good quality which are consistent with the intended use of the Works 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 Subcontract Works under or in connection with the Subcontract (including in relation to design of the Subcontract Works and in respect of the preparation of any reports, summaries, recommendations and/or any other analogous deliverable in relation to the Subcontract 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 Subcontract Works, professional designer) experienced in undertaking services such as those being performed in relation to the Subcontract Works and in relation to projects of the same type, complexity, value and timescale as the Works;
 - 2.1.3 the Subcontractor has exercised and will continue to exercise the standard of skill and care referred to in paragraph 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 Subcontract 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 Subcontract and/or 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 Subcontract in accordance with the Subcontract.



- 2.2 The Subcontractor shall have no greater liability to the Beneficiary, and shall owe to the Beneficiary no greater a standard of duty under this Schedule than would have been owed if the Beneficiary had been named as the Contractor under the Subcontract. If a claim is brought against the Subcontractor by the Beneficiary, the Subcontractor may rely on any defence or limitation available to it under the terms of the Subcontract, save that the Subcontractor 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 Subcontract. The Subcontractor may not plead a "no-loss" defence, including one based on an argument that since the Contractor under the Subcontract 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 Contractor under the Subcontract would suffer such a loss.

3. COPYRIGHT

- 3.1 The Subcontractor 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, the Subcontract Works and/or the FAC-1 Programme and (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the same, with this licence including a licence to grant sub-licences and to transfer the same to third parties.
- 3.2 The Subcontractor 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 Subcontractor.
- 3.3 The Beneficiary shall on written request, be entitled to be supplied by the Subcontractor with electronic copies of any Materials at no cost to the Beneficiary.
- 3.4 The Subcontractor unconditionally and irrevocably waives (and shall ensure that any sub-contractors waive), in respect of the Materials, all moral rights to which the Subcontractor (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 paragraph 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 Schedule.
- 3.6 The Subcontractor 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 Subcontractor's own original work and that in any event their use in connection with the Subcontract Works, 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 Subcontractor will obtain the necessary consents in relation to paragraph 3.1.

4. INDEMNITY INSURANCE

- 4.1 The Subcontractor shall maintain professional indemnity insurance covering (inter alia) its potential liability under this Schedule in the event that it breaches this Schedule 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 the PII Indemnity Amount 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 Subcontractor's profession generally carry such insurance ("**Reasonable Rates and Terms**").
- 4.2 Any increased or additional premium required by insurers by reason of the Subcontractor's own claims record or other acts, omissions, matters or things particular to the Subcontractor shall be deemed to be within Reasonable Rates and Terms.



- 4.3 The Subcontractor shall immediately inform the Beneficiary if such insurance ceases to be available upon Reasonable Rates and Terms in order that the Subcontractor and the Beneficiary can discuss means of best protecting their respective positions in respect of the Subcontract Works and the wider FAC-1 Programme in the absence of such insurance.
- 4.4 The Subcontractor 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 Subcontractor in respect of the net cost of such insurance to the Subcontractor above Reasonable Rates and Terms.
- 4.5 As and when reasonably requested to do so by the Beneficiary the Subcontractor 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 Subcontract for any reason whatsoever, including (without limitation) breach by the Contractor.

5. **LIABILITY PERIOD**

It is agreed that the period of limitations (in respect of which the Beneficiary and the Subcontractor 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 Schedule shall expire on the End of Liability Date

6. **ASSIGNMENT**

- 6.1 The Subcontractor consents to the benefit of this Schedule 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 Schedule the Subcontractor shall not be entitled to contend that any person to whom this Schedule is assigned in accordance with paragraph 6.1 (an "**Assignee**") is precluded from recovering under this Schedule any loss incurred by such Assignee resulting from any breach of this Schedule (whenever happening), by reason that such person is an assignee and not the original named party to this Schedule.
- 6.3 The Subcontractor 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:

6.3.1 (where the Beneficiary is not the Client) the Client; or

6.3.2 the Contractor,

has not suffered that loss or because (where the Beneficiary is not the Client) the Client or Contractor would not suffer a similar loss because of their (or its, as the context requires) different interest(s) 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. **STEP-IN RIGHTS**

This paragraph 7 shall apply in favour of the Beneficiary referred to in a Third Party Rights Notice where it is stated in that Third Party Rights Notice as so applying and in that case shall have effect according to its terms, but otherwise shall be of no effect

- 7.1 The Subcontractor shall not exercise nor seek to exercise any right of termination of its employment under the Subcontract or discontinue the performance of the Subcontract for any reason whatsoever (including any breach on the part of the Contractor) 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.
- 7.2 Any period stipulated in the Subcontract for the exercise of a right of termination by the Subcontractor of its employment under the Subcontract or to discontinue the performance of the Subcontract shall, nevertheless, be extended as may be necessary to take account of the period of notice required under paragraph 7.1.
- 7.3 The right of the Subcontractor to terminate its employment under the Subcontract or to discontinue the performance of the Subcontract shall cease within the period of twenty-one (21) days referred to in paragraph 7.1 if the Beneficiary shall give notice to the Subcontractor:
- 7.3.1 requiring the Subcontractor to continue its obligations under the Subcontract with the Beneficiary or its nominee;
 - 7.3.2 acknowledging that the Beneficiary or its nominee will assume all the obligations of the Contractor under the Subcontract; and
 - 7.3.3 undertaking that the Beneficiary or its nominee will discharge all payments which may subsequently become due to the Subcontractor under the terms of the Subcontract and will pay to the Subcontractor any sums which have been due and payable to it under the Subcontract but which remain unpaid.
- 7.4 Upon service by the Beneficiary or its nominee of a notice complying with the requirements of paragraph 7.3 the Subcontract will continue in full force and effect as if the same had been entered into between the Subcontractor and the Beneficiary to the exclusion of the Contractor.
- 7.5 Compliance by the Subcontractor with the provisions of this paragraph 7 will not be treated as a waiver of any breach on the part of the Contractor giving rise to the right of termination nor otherwise prevent the Subcontractor from exercising its rights after the expiration of the notice issued pursuant to paragraph 7.1 unless the rights of termination have ceased under the provisions of paragraph 7.3.
- 7.6 This paragraph 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 FAC-1 Programme and entered into between the Subcontractor and such person at the request of the Contractor.
- 7.7 By acting in accordance with this paragraph 7, the Subcontractor shall not incur any liability to the Contractor.

8. **NOTICES**

Any notice to be given under this Schedule shall be in writing and shall be deemed to be duly given if it is delivered to the addressee's address as specified in the Third Party Rights Notice (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.



9. **EXTRANEOUS RIGHTS**

- 9.1 This Schedule shall not negate or diminish any duty or liability otherwise owed by the Subcontractor to the Beneficiary.
- 9.2 No approval or inspection of the Subcontract 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 Subcontractor arising under this Schedule.
- 9.3 Any term of this Schedule, the benefit of which is expressly or purportedly conferred upon the Beneficiary (or any Assignee) pursuant to and in accordance with this Schedule may be enforced by such Beneficiary pursuant to The Contracts (Rights of Third Parties) Act 1999. Subject as aforesaid, this Schedule is not intended to confer any rights on any other third party pursuant to The Contracts (Rights of Third Parties) Act 1999.

10. **GOVERNING LAW**

This Schedule 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.



PART 3 OF PART 2

THIRD PARTY RIGHTS NOTICE & SCHEDULE: SUBSUBCONTRACTOR

PART 1 – THIRD PARTY RIGHTS NOTICE

[INSERT ADDRESSEE DETAILS]

[INSERT DATE] 20[YEAR]

To whom it may concern

Title:	Third Party Rights Notice
Client:	The Secretary of State for the Ministry of Justice of 102 Petty France, Westminster, London SW1H 9AJ (with such term including its successors in title and permitted assigns)
Contractor:	[INSERT NAME OF CONTRACTOR] (company number [INSERT COMPANY NUMBER]) whose registered office is at [INSERT ADDRESS] (with such term including its successors in title and permitted assigns)
Subcontractor	[INSERT NAME] (company number [INSERT COMPANY NUMBER], whose registered office is at [INSERT ADDRESS]) dated [INSERT DATE]
Subsubcontractor	[INSERT NAME] (company number [INSERT COMPANY NUMBER], whose registered office is at [INSERT ADDRESS]) dated [INSERT DATE]
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 [INSERT DATE] 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)] [the NEC4 Engineering & Construction Short Contract (as amended)] ⁶⁷ on the basis and in the terms specified in the [Notice to Proceed to Phase 2 / Order]
FAC-1 Programme:	Has the meaning given to such term in the FAC-1 Contract
[Notice to Proceed to Phase 2:	The "Notice to Proceed to Phase 2" between (1) the [Client / Beneficiary] and (2) the Contractor and dated [INSERT DATE] 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); ⁶⁸
[Order:	The "Order" between (1) the [Client / Beneficiary] and (2) the Contractor and dated [INSERT DATE] 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); ⁶⁹
Works:	The works and/or services identified as such and referred to in the [Notice to Proceed to Phase 2 / Order] ⁷⁰ .

⁶⁷ **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.

⁶⁸ **DRAFTING NOTE:** Use this wording if the Third Party Rights Notice relates to the main works.

⁶⁹ **DRAFTING NOTE:** Use this wording if the Third Party Rights Notice relates to early works.

⁷⁰ **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.



Subsubcontract:	A subsubcontract [in the form of a [INSERT DETAILS]] between (1) [INSERT NAME] (as identified above) and (2) [INSERT NAME] (company number [INSERT COMPANY NUMBER], whose registered office is at [INSERT ADDRESS]) dated [INSERT DATE]
Subsubcontract Works:	[INSERT DESCRIPTION OF THE SUBSUBCONTRACT WORKS] (as more particularly described in the Subsubcontract)
PII Indemnity Amount:	[[INSERT AMOUNT IN WORDS] (£[INSERT AMOUNT AS A NUMBER]) 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] ⁷¹
Beneficiary:	[The Client][[INSERT NAME] ([[INSERT COMPANY NUMBER] and] whose [registered] address is set [INSERT ADDRESS]] ⁷²

This notice of third party rights (the "**Third Party Rights Notice**") is issued pursuant to the Subsubcontract and relates to the above-mentioned FAC-1 Contract and FAC-1 Programme. Unless otherwise stated, all capitalised terms in this Third Party Rights Notice have the meaning ascribed to them in the Subsubcontract.

Pursuant to the rights granted to us pursuant to and in accordance with clause [INSERT CLAUSE REFERENCE] of the Subsubcontract, we hereby notify you, as the Subsubcontractor under the Subsubcontract, that the benefits of the rights set out in [INSERT LOCATION] of the Subsubcontract (the "**Third Party Rights Schedule**") are hereby vested in the Beneficiary for the purposes of [INSERT CLAUSE REFERENCE] of the Subsubcontract.

The Beneficiary and its permitted assignees shall accordingly be entitled to enforce the rights set out in the Third Party Rights Schedule pursuant to and in accordance with the provisions of the Third Party Rights Schedule. For the purposes of this Beneficiary, the provisions of paragraph [7] of the Third Party Rights Schedule [do / do not]⁷³ apply.

Notwithstanding whether you sign and return the acknowledgement below to us or not, the rights granted to the Beneficiary by this Third Party Rights Notice shall take effect from the date on which you receive the same (or are deemed to receive the same in accordance with the provisions of the Subsubcontract). We should, however, be grateful if you sign and return a copy of this notice in acknowledgement of receipt.

Yours faithfully

For and on behalf of [INCLUDE DETAILS OF THE SENDER]

cc. [INSERT CONTACT DETAILS OF CONTACT AT BENEFICIARY]

We hereby confirm receipt of the "Third Party Rights Notice" granting third party rights to [INSERT DETAILS OF BENEFICIARY] pursuant to and in accordance with a subsubcontract [in the form of a [INSERT DETAILS]] between (1) [INSERT NAME OF SUBCONTRACTOR] and (2) [INSERT NAME OF SUBSUBCONTRACTOR] dated [INSERT DATE].

Signed [Partner][Member][Director]

⁷¹ **DRAFTING NOTE:** Update to reflect the coverage in the Subsubcontract.

⁷² **DRAFTING NOTE:** Update accordingly.

⁷³ **DRAFTING NOTE:** Select "do" where the Beneficiary will benefit from step-in rights.



PART 2 – THIRD PARTY RIGHTS SCHEDULE

THIRD PARTY RIGHTS PROVIDED BY THE SUBSUBCONTRACTOR IN FAVOUR OF A BENEFICIARY PURSUANT TO AND IN ACCORDANCE WITH A THIRD PARTY RIGHTS NOTICE

The Subcontractor and the Subsubcontractor acknowledge and agree that:

1. INTERPRETATION

1.1 In this Schedule:

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

"Beneficiary" is the party identified as such in the Third Party Rights Notice (with such term including its successors in title and permitted assigns);

"Contractor" is the party identified as such in the Third Party Rights Notice (with such term including its successors in title and permitted assigns);

"End of Liability Date" is [REDACTED];

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

"FAC-1 Contract" means the contract identified as such in the Third Party Rights Notice;

"FAC-1 Programme" means the programme identified as such in the Third Party Rights Notice;

"PII Indemnity Amount" means the level (and type) of professional indemnity insurance specified in the Third Party Rights Notice (which shall be no greater than that (if any) specified in the Subsubcontract.

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

"Schedule" means this schedule of third party rights;

"Subsubcontract" means the subsubcontract identified as such in the Third Party Rights Notice;

"Subsubcontract Works" means the subsubcontract works identified as such in the Third Party Rights Notice;

"Third Party Rights Notice" means the notice issued to the Subsubcontractor pursuant to and in accordance with the provisions of the FAC-1 Contract and the Subsubcontract; and

"Works" means the works identified as such in the Third Party Rights Notice.

1.2 In interpreting this Schedule:

1.2.1 if the Subsubcontractor is a partnership then the provisions of this Schedule 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 paragraphs shall be disregarded when construing this Schedule; and
- 1.2.5 where the words "include(s)" or "including" are used in this Schedule, they are deemed to have the words "without limitation" following them.

2. SKILL AND CARE

2.1 The Subsubcontractor undertakes with and warrants to the Beneficiary that:

- 2.1.1 in carrying out and completing the Subsubcontract Works, the Subsubcontractor has delivered and will deliver such Subsubcontract Works in a good and workmanlike manner, using only materials which are new (unless the contract states otherwise or as otherwise agreed with the Subcontractor in writing), and are sound and of good quality which are consistent with the intended use of the Works 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 Subsubcontract Works under or in connection with the Subsubcontract (including in relation to design of the Subsubcontract Works and in respect of the preparation of any reports, summaries, recommendations and/or any other analogous deliverable in relation to the Subsubcontract 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 Subsubcontract Works, professional designer) experienced in undertaking services such as those being performed in relation to the Subsubcontract Works and in relation to projects of the same type, complexity, value and timescale as the Works;
- 2.1.3 the Subsubcontractor has exercised and will continue to exercise the standard of skill and care referred to in paragraph 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 Subsubcontract 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 Subsubcontract and/or 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 Subsubcontract in accordance with the Subsubcontract.

2.2 The Subsubcontractor shall have no greater liability to the Beneficiary, and shall owe to the Beneficiary no greater a standard of duty under this Schedule than would have been owed if the Beneficiary had been named as the Subcontractor under the Subsubcontract. If a claim is brought



against the Subsubcontractor by the Beneficiary, the Subsubcontractor may rely on any defence or limitation available to it under the terms of the Subsubcontract, save that the Subsubcontractor 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 Subsubcontract. The Subsubcontractor may not plead a "no-loss" defence, including one based on an argument that since the Subcontractor under the Subsubcontract 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 Subcontractor under the Subsubcontract would suffer such a loss.

3. COPYRIGHT

- 3.1 The Subsubcontractor 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, the Subsubcontract Works and/or the FAC-1 Programme and (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the same, with this licence including a licence to grant sub-licences and to transfer the same to third parties.
- 3.2 The Subsubcontractor 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 Subsubcontractor.
- 3.3 The Beneficiary shall on written request, be entitled to be supplied by the Subsubcontractor with electronic copies of any Materials at no cost to the Beneficiary.
- 3.4 The Subsubcontractor unconditionally and irrevocably waives (and shall ensure that any sub-subsubcontractors waive), in respect of the Materials, all moral rights to which the Subsubcontractor (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 paragraph 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 Schedule.
- 3.6 The Subsubcontractor 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 Subsubcontractor's own original work and that in any event their use in connection with the Subsubcontract Works, 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 Subsubcontractor will obtain the necessary consents in relation to paragraph 3.1.

4. INDEMNITY INSURANCE

- 4.1 The Subsubcontractor shall maintain professional indemnity insurance covering (inter alia) its potential liability under this Schedule in the event that it breaches this Schedule 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 the PII Indemnity Amount 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 Subsubcontractor's profession generally carry such insurance ("**Reasonable Rates and Terms**").
- 4.2 Any increased or additional premium required by insurers by reason of the Subsubcontractor's own claims record or other acts, omissions, matters or things particular to the Subsubcontractor shall be deemed to be within Reasonable Rates and Terms.



- 4.3 The Subsubcontractor shall immediately inform the Beneficiary if such insurance ceases to be available upon Reasonable Rates and Terms in order that the Subsubcontractor and the Beneficiary can discuss means of best protecting their respective positions in respect of the Subsubcontract Works and the wider FAC-1 Programme in the absence of such insurance.
- 4.4 The Subsubcontractor 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 Subsubcontractor in respect of the net cost of such insurance to the Subsubcontractor above Reasonable Rates and Terms.
- 4.5 As and when reasonably requested to do so by the Beneficiary the Subsubcontractor 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 Subsubcontract for any reason whatsoever, including (without limitation) breach by the Contractor.

5. **LIABILITY PERIOD**

It is agreed that the period of limitations (in respect of which the Beneficiary and the Subsubcontractor 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 Schedule shall expire on the End of Liability Date.

6. **ASSIGNMENT**

- 6.1 The Subsubcontractor consents to the benefit of this Schedule 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 Schedule the Subsubcontractor shall not be entitled to contend that any person to whom this Schedule is assigned in accordance with paragraph 6.1 (an "Assignee") is precluded from recovering under this Schedule any loss incurred by such Assignee resulting from any breach of this Schedule (whenever happening), by reason that such person is an assignee and not the original named party to this Schedule.
- 6.3 The Subsubcontractor 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:

- 6.3.1 (where the Beneficiary is not the Client) the Client;
- 6.3.2 the Contractor; or
- 6.3.3 the Subcontractor,

has not suffered that loss or because (where the Beneficiary is not the Client) the Client, the Contractor or the Subcontractor would not suffer a similar loss because of their (or its, as the context requires) different interest(s) 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. **STEP-IN RIGHTS**

This paragraph 7 shall apply in favour of the Beneficiary referred to in a Third Party Rights Notice where it is stated in that Third Party Rights Notice as so applying and in that case shall have effect according to its terms, but otherwise shall be of no effect.

- 7.1 The Subsubcontractor shall not exercise nor seek to exercise any right of termination of its employment under the Subsubcontract or discontinue the performance of the Subsubcontract for any reason whatsoever (including any breach on the part of the Subcontractor) 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.
- 7.2 Any period stipulated in the Subsubcontract for the exercise of a right of termination by the Subsubcontractor of its employment under the Subsubcontract or to discontinue the performance of the Subsubcontract shall, nevertheless, be extended as may be necessary to take account of the period of notice required under paragraph 7.1.
- 7.3 The right of the Subsubcontractor to terminate its employment under the Subsubcontract or to discontinue the performance of the Subsubcontract shall cease within the period of twenty-one (21) days referred to in paragraph 7.1 if the Beneficiary shall give notice to the Subsubcontractor:
- 7.3.1 requiring the Subsubcontractor to continue its obligations under the Subsubcontract with the Beneficiary or its nominee;
 - 7.3.2 acknowledging that the Beneficiary or its nominee will assume all the obligations of the Subcontractor under the Subsubcontract; and
 - 7.3.3 undertaking that the Beneficiary or its nominee will discharge all payments which may subsequently become due to the Subsubcontractor under the terms of the Subsubcontract and will pay to the Subsubcontractor any sums which have been due and payable to it under the Subsubcontract but which remain unpaid.
- 7.4 Upon service by the Beneficiary or its nominee of a notice complying with the requirements of paragraph 7.3 the Subsubcontract will continue in full force and effect as if the same had been entered into between the Subsubcontractor and the Beneficiary to the exclusion of the Subcontractor.
- 7.5 Compliance by the Subsubcontractor with the provisions of this paragraph 7 will not be treated as a waiver of any breach on the part of the Subcontractor giving rise to the right of termination nor otherwise prevent the Subsubcontractor from exercising its rights after the expiration of the notice issued pursuant to paragraph 7.1 unless the rights of termination have ceased under the provisions of paragraph 7.3.
- 7.6 This paragraph 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 FAC-1 Programme and entered into between the Subsubcontractor and such person at the request of the Subcontractor.
- 7.7 By acting in accordance with this paragraph 7, the Subsubcontractor shall not incur any liability to the Subcontractor.

8. **NOTICES**

Any notice to be given under this Schedule shall be in writing and shall be deemed to be duly given if it is delivered to the addressee's address as specified in the Third Party Rights Notice (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.



9. **EXTRANEOUS RIGHTS**

- 9.1 This Schedule shall not negate or diminish any duty or liability otherwise owed by the Subsubcontractor to the Beneficiary.
- 9.2 No approval or inspection of the Subsubcontract 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 Subsubcontractor arising under this Schedule.
- 9.3 Any term of this Schedule, the benefit of which is expressly or purportedly conferred upon the Beneficiary (or any Assignee) pursuant to and in accordance with this Schedule may be enforced by such Beneficiary pursuant to The Contracts (Rights of Third Parties) Act 1999. Subject as aforesaid, this Schedule is not intended to confer any rights on any other third party pursuant to The Contracts (Rights of Third Parties) Act 1999.

10. **GOVERNING LAW**

This Schedule 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.

PART 4 OF PART 2

THIRD PARTY RIGHTS NOTICE & SCHEDULE: SUBCONSULTANT

PART 1 – THIRD PARTY RIGHTS NOTICE

[INSERT ADDRESSEE DETAILS]

[INSERT DATE] 20**[YEAR]**

To whom it may concern

Title:	Third Party Rights Notice
Client:	The Secretary of State for the Ministry of Justice of 102 Petty France, Westminster, London SW1H 9AJ (with such term including its successors in title and permitted assigns)
Contractor:	[INSERT NAME OF CONTRACTOR] (company number [INSERT COMPANY NUMBER]) whose registered office is at [INSERT ADDRESS] (with such term including its successors in title and permitted assigns)
Subconsultant:	[INSERT NAME] (company number [INSERT COMPANY NUMBER] , whose registered office is at [INSERT ADDRESS]) dated [INSERT DATE]
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 [INSERT DATE] 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)] [the NEC4 Engineering & Construction Short Contract (as amended)] ⁷⁴ on the basis and in the terms specified in the [Notice to Proceed to Phase 2 / Order]
FAC-1 Programme:	Has the meaning given to such term in the FAC-1 Contract
[Notice to Proceed to Phase 2:	The "Notice to Proceed to Phase 2" between (1) the [Client / Beneficiary] and (2) the Contractor and dated [INSERT DATE] 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); ⁷⁵
[Order:	The "Order" between (1) the [Client / Beneficiary] and (2) the Contractor and dated [INSERT DATE] 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); ⁷⁶
Works:	The works and/or services identified as such and referred to in the [Notice to Proceed to Phase 2 / Order] ⁷⁷ .
Appointment:	An appointment [in the form of a [INSERT DETAILS]] between (1) the Contractor and (2) the Subconsultant dated [INSERT DATE]

⁷⁴ **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.

⁷⁵ **DRAFTING NOTE:** Use this wording if the Third Party Rights Notice relates to the main works.

⁷⁶ **DRAFTING NOTE:** Use this wording if the Third Party Rights Notice relates to early works.

⁷⁷ **DRAFTING NOTE:** Select the relevant "main works" or "early works" option.



Services:	[INSERT DESCRIPTION OF THE SERVICES] (as more particularly described in the Appointment)
PII Indemnity Amount:	[[INSERT AMOUNT IN WORDS] (£[INSERT AMOUNT AS A NUMBER]) 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] ⁷⁸
Beneficiary:	[The Client][[INSERT NAME] ([[INSERT COMPANY NUMBER] and] whose [registered] address is set [INSERT ADDRESS]]]⁷⁹

This notice of third party rights (the "**Third Party Rights Notice**") is issued pursuant to the Appointment and relates to the above-mentioned FAC-1 Contract and FAC-1 Programme. Unless otherwise stated, all capitalised terms in this Third Party Rights Notice have the meaning ascribed to them in the Appointment.

Pursuant to the rights granted to us pursuant to and in accordance with clause **[INSERT CLAUSE REFERENCE]** of the Appointment, we hereby notify you, as the Subconsultant under the Appointment, that the benefits of the rights set out in **[INSERT LOCATION]** of the Appointment (the "**Third Party Rights Schedule**") are hereby vested in the Beneficiary for the purposes of **[INSERT CLAUSE REFERENCE]** of the Appointment.

The Beneficiary and its permitted assignees shall accordingly be entitled to enforce the rights set out in the Third Party Rights Schedule pursuant to and in accordance with the provisions of the Third Party Rights Schedule. For the purposes of this Beneficiary, the provisions of paragraph **[7]** of the Third Party Rights Schedule **[do / do not]**⁸⁰ apply.

Notwithstanding whether you sign and return the acknowledgement below to us or not, the rights granted to the Beneficiary by this Third Party Rights Notice shall take effect from the date on which you receive the same (or are deemed to receive the same in accordance with the provisions of the Appointment). We should, however, be grateful if you sign and return a copy of this notice in acknowledgement of receipt.

Yours faithfully

For and on behalf of **[INCLUDE DETAILS OF THE SUBCONSULTANT]**

cc. **[INSERT CONTACT DETAILS OF CONTACT AT BENEFICIARY]**

We hereby confirm receipt of the "Third Party Rights Notice" granting third party rights to **[INSERT DETAILS OF BENEFICIARY]** pursuant to and in accordance with a Appointment **[in the form of a [INSERT DETAILS]]** between (1) **[INSERT NAME OF CONTRACTOR]** and (2) **[INSERT NAME OF SUBCONSULTANT]** dated **[INSERT DATE]**.

Signed **[Partner][Member][Director]**

⁷⁸ **DRAFTING NOTE:** Update to reflect the coverage in the subcontract.

⁷⁹ **DRAFTING NOTE:** Update accordingly.

⁸⁰ **DRAFTING NOTE:** Select "do" where the Beneficiary will benefit from step-in rights



PART 2 – THIRD PARTY RIGHTS SCHEDULE

THIRD PARTY RIGHTS PROVIDED BY THE SUBCONSULTANT IN FAVOUR OF A BENEFICIARY PURSUANT TO AND IN ACCORDANCE WITH A THIRD PARTY RIGHTS NOTICE

The Contractor and the Subconsultant acknowledge and agree that:

1. INTERPRETATION

1.1 In this Schedule:

"Appointment" means the appointment identified as such in the Third Party Rights Notice;

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

"Beneficiary" is the party identified as such in the Third Party Rights Notice (with such term including its successors in title and permitted assigns);

"Contractor" is the party identified as such in the Third Party Rights Notice (with such term including its successors in title and permitted assigns);

"End of Liability Date" is [REDACTED];

"FAC-1 Contract" means the contract identified as such in the Third Party Rights Notice;

"FAC-1 Programme" means the programme identified as such in the Third Party Rights Notice;

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

"PII Indemnity Amount" means the level (and type) of professional indemnity insurance specified in the Third Party Rights Notice (which shall be no greater than that (if any) specified in the Appointment.

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

"Schedule" means this schedule of third party rights;

"Services" means the services identified as such in the Third Party Rights Notice;

"Third Party Rights Notice" means the notice issued to the Subconsultant pursuant to and in accordance with the provisions of the FAC-1 Contract and the Appointment; and

"Works" means the works identified as such in the Third Party Rights Notice.

1.2 In interpreting this Schedule:

1.2.1 if the Subconsultant is a partnership then the provisions of this Schedule 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 paragraphs shall be disregarded when construing this Schedule; and
- 1.2.5 where the words "include(s)" or "including" are used in this Schedule, they are deemed to have the words "without limitation" following them.

2. SKILL AND CARE

2.1 The Subconsultant 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 Subconsultant in connection with 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 any design provided by or on behalf of the Consultant, 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; and
- 2.1.3 the Subconsultant has exercised and will continue to exercise the standard of skill and care referred to in paragraph 2.1.2 to ensure that it has not and shall not specify, authorise, cause or allow to be used in 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 Appointment and/or the FAC-1 Contract.

2.2 The Subconsultant shall have no greater liability to the Beneficiary, and shall owe to the Beneficiary no greater a standard of duty under this Schedule than would have been owed if the Beneficiary had been named as the Contractor under the Appointment. If a claim is brought against the Subconsultant by the Beneficiary, the Subconsultant may rely on any defence or limitation available to it under the terms of the Appointment, save that the Subconsultant 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 Appointment. The Subconsultant may not plead a "no-loss" defence, including one based on an argument that since the Contractor 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 Contractor under the Appointment would suffer such a loss.

3. COPYRIGHT

- 3.1 The Subconsultant 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 same, with this licence including a licence to grant sub-licences and to transfer the same to third parties.
- 3.2 The Subconsultant 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 Subconsultant.
- 3.3 The Beneficiary shall on written request, be entitled to be supplied by the Subconsultant with electronic copies of any Materials at no cost to the Beneficiary.
- 3.4 The Subconsultant unconditionally and irrevocably waives (and shall ensure that any sub-contractors waive), in respect of the Materials, all moral rights to which the Subconsultant (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 Schedule.
- 3.6 The Subconsultant 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 Subconsultant's own original work and that in any event their use in connection with the Services, 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 Subconsultant will obtain the necessary consents in relation to paragraph 3.1.

4. INDEMNITY INSURANCE

- 4.1 The Subconsultant shall maintain professional indemnity insurance covering (inter alia) its potential liability under this Schedule in the event that it breaches this Schedule 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 the PII Indemnity Amount 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 Subconsultant's profession generally carry such insurance ("**Reasonable Rates and Terms**").
- 4.2 Any increased or additional premium required by insurers by reason of the Subconsultant's own claims record or other acts, omissions, matters or things particular to the Subconsultant shall be deemed to be within Reasonable Rates and Terms.
- 4.3 The Subconsultant shall immediately inform the Beneficiary if such insurance ceases to be available upon Reasonable Rates and Terms in order that the Subconsultant and the Beneficiary can discuss means of best protecting their respective positions in respect of the Appointment and the wider FAC-1 Programme in the absence of such insurance.
- 4.4 The Subconsultant 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 Subconsultant in respect of the net cost of such insurance to the Subconsultant above Reasonable Rates and Terms.

- 4.5 As and when reasonably requested to do so by the Beneficiary the Subconsultant 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 Contractor.

5. **LIABILITY PERIOD**

It is agreed that the period of limitations (in respect of which the Beneficiary and the Subconsultant 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 Schedule shall expire on the End of Liability Date.

6. **ASSIGNMENT**

- 6.1 The Subconsultant consents to the benefit of this Schedule 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 Schedule the Subconsultant shall not be entitled to contend that any person to whom this Schedule is assigned in accordance with paragraph 6.1 (an "**Assignee**") is precluded from recovering under this Schedule any loss incurred by such Assignee resulting from any breach of this Schedule (whenever happening), by reason that such person is an assignee and not the original named party to this Schedule.
- 6.3 The Subconsultant 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:

6.3.1 (where the Beneficiary is not the Client) the Client; or

6.3.2 the Contractor has not suffered that loss or because,

(where the Beneficiary is not the Client) the Client or Contractor would not suffer a similar loss because of their (or its, as the context requires) different interest(s) 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. **STEP-IN RIGHTS**

This paragraph 7 shall apply in favour of the Beneficiary referred to in a Third Party Rights Notice where it is stated in that Third Party Rights Notice as so applying and in that case shall have effect according to its terms, but otherwise shall be of no effect.

- 7.1 The Subconsultant 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 Contractor) 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.

- 7.2 Any period stipulated in the Appointment for the exercise of a right of termination by the Subconsultant 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 paragraph 7.1.
- 7.3 The right of the Subconsultant 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 paragraph 7.1 if the Beneficiary shall give notice to the Subconsultant:
- 7.3.1 requiring the Subconsultant to continue its obligations under the Appointment with the Beneficiary or its nominee;
 - 7.3.2 acknowledging that the Beneficiary or its nominee will assume all the obligations of the Contractor under the Appointment; and
 - 7.3.3 undertaking that the Beneficiary or its nominee will discharge all payments which may subsequently become due to the Subconsultant under the terms of the Appointment and will pay to the Subconsultant any sums which have been due and payable to it under the Appointment but which remain unpaid.
- 7.4 Upon service by the Beneficiary or its nominee of a notice complying with the requirements of paragraph 7.3 the Appointment will continue in full force and effect as if the same had been entered into between the Subconsultant and the Beneficiary to the exclusion of the Contractor.
- 7.5 Compliance by the Subconsultant with the provisions of this paragraph 7 will not be treated as a waiver of any breach on the part of the Contractor giving rise to the right of termination nor otherwise prevent the Subconsultant from exercising its rights after the expiration of the notice issued pursuant to paragraph 7.1 unless the rights of termination have ceased under the provisions of paragraph 7.3.
- 7.6 This paragraph 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 FAC-1 Programme and entered into between the Subconsultant and such person at the request of the Contractor.
- 7.7 By acting in accordance with this paragraph 7, the Subconsultant shall not incur any liability to the Contractor.

8. NOTICES

Any notice to be given under this Schedule shall be in writing and shall be deemed to be duly given if it is delivered to the addressee's address as specified in the Third Party Rights Notice (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.

9. EXTRANEOUS RIGHTS

- 9.1 This Schedule shall not negate or diminish any duty or liability otherwise owed by the Subconsultant to the Beneficiary.
- 9.2 No approval or inspection of the Services 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 Subconsultant arising under this Schedule.



- 9.3 Any term of this Schedule, the benefit of which is expressly or purportedly conferred upon the Beneficiary (or any Assignee) pursuant to and in accordance with this Schedule may be enforced by such Beneficiary pursuant to The Contracts (Rights of Third Parties) Act 1999. Subject as aforesaid, this Schedule is not intended to confer any rights on any other third party pursuant to The Contracts (Rights of Third Parties) Act 1999.

10. **GOVERNING LAW**

This Schedule 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.