termination or determination, and to omit any provision enabling a third party to assume the position of *Employer* under this Contract.

Z68 Option X22: Deed of Novation

Insert Secondary Option Clause X22 as follows:

X22.1 Unless the *Contractor* has a valid objection, the *Contractor* will, within fourteen (14) working days of the *Project Manager's* request so to do, enter into a Deed of Novation in the form of Appendix 5 hereto in respect of the appointments of any of the *Employer's* suppliers or consultants as may be requested by the *Project Manager*. By way of example, a valid objection may arise where the novation agreement would create a conflict of interest for the *Contractor* or the scope of the services to be performed under the novated agreement are not included in the Service Information.

Z69 Not Used

Z70 Not Used

Z71 Not Used

Z72 Not Used

Z73 Not Used

Appendix 1: Commercially Sensitive Information

Appendix 2: Form of Contractor Collateral Warranty in favour of Acquirer

Collateral Warranty by Contractor to Acquirer

Between:

[●] as *Contractor*,

Secretary of State for Justice as *Employer*

and

[●] as Acquirer

Relating to:

[●]

This Agreement is dated [●] and made

Between:

(1) **Party 1**, (the "*Contractor*"), registered in England and Wales as company [●] and having its registered office at [●].

(2) **Secretary of State for Justice**, (the "*Employer*"), (which term shall include their permitted assignees) whose registered office is at [●]; and

(3) **Party 3**, (the "Acquirer"), (which term shall include its permitted assignees) registered in England and Wales as company [●] and having its registered office at [●].

Whereas:

(1) The Acquirer intends to acquire, or has acquired, an interest in a project briefly described as *(insert description)* ('the Project').

(2) The *Employer* has entered into a contract dated [●] ('the Contract') with the *Contractor* for the construction of the Project.

Now in consideration of £1 (one pound) paid by the Acquirer to the Contractor (receipt of which the Contractor hereby acknowledges) this **Agreement Witnesses** as follows:

1. Contractor's Warranties

- 1.1. The Contractor covenants with the Acquirer that it has duly performed and observed, and will continue duly to perform and observe, all the terms of the Contract on the Contractor's part to be performed and observed and, without prejudice to the generality of the foregoing, the Contractor warrants that it has exercised and will continue to exercise reasonable skill, care and diligence in the performance of its duties to the *Employer* under the Contract.
- 1.2. The Acquirer shall be deemed to have relied and to rely upon the exercise of the Contractor's skill, care and diligence hereunder.

2. Prohibited materials

2.1 Without prejudice to the generality of and subject to clause 1, the Contractor further warrants:

- *that it has not used or specified and will not use or specify for use;*
- *that it has exercised and will continue to exercise reasonable skill, care and diligence to see that there are not used;*
- *that it is not aware and has no reason to suspect or believe that there have been or will have been used;*
- *that it will promptly notify the Acquirer in writing if it becomes aware or has reason to suspect or believe that there have been or will be used;*

in or in connection with the Project, materials or substances other than in accordance with:

- *the guidance in the publication 'Good Practice in the Selection of Construction Materials' published by Ove Arup & Partners in 1997 or the edition of which as may be current at the date of this Agreement.*
- relevant British or European Standards or Codes of Practice; and
- any publications of the Building Research Establishment related to the specification of products or materials.

3. Contractor's acknowledgement

3.1 The Contractor acknowledges that the *Employer* has paid all sums due and owing to the Contractor under the Contract up to the date of this Agreement. The Acquirer has no liability to the Contractor in respect of sums due under the Contract.

4. Authority to issue instructions

4.1 The Acquirer has no authority to issue any direction or instruction to the Contractor in relation to performance of the Contractor's duties under the Contract.

5. Intellectual Property Rights

In this clause

- *"Intellectual Property Rights" ("IPRs") means patents, inventions, trade marks, service marks, logos, design rights (whether registerable or otherwise), applications for any of the foregoing, copyright (including rights in computer software), database rights, domain names, trade or business names, moral rights trade secrets, discovery, process, formula, know-how, specification, improvement, technique, topography right, technical information, drawing and other similar rights or obligations whether registerable or not in any country (including but not limited to the United Kingdom), and the right to sue for passing off.*

- *"Know-How" means all ideas, concepts, schemes, information, knowledge, techniques, methodology, and anything else in the nature of know-how relating to Providing the Works but excluding know-how already in the* **Contractor***'s or the* **Employer***'s possession before the Contract.*

5.1 All Intellectual Property Rights in any guidance, specifications, instructions, toolkits, plans, Data, drawings, databases, patents, patterns, models, designs or other material (the "IP Materials"):

- *furnished or made available to the* **Contractor** *by or on behalf of the* **Employer** *remains the property of the* **Employer** *and*

- *prepared by or for the* **Contractor** *on behalf of the* **Employer** *for use, or intended use, in relation to the performance by the* **Contractor** *of its obligations under the Contract belongs to the* **Employer**

and the *Contractor* does not, and procures that the Contractor's Personnel do not, (except when necessary for the performance of the Contract) without prior written consent of the *Employer*, use or disclose any such Intellectual Property Rights in the IP Materials.

5.2 Subject to the retention by the *contractor* of the IPR in pre-existing background IP, the *Contractor* assigns to the *Employer*, with full title guarantee, all Intellectual Property Rights which may subsist in the IP Materials. This assignment takes effect on the date of this Contract or as a present assignment of future rights that will take effect immediately on the coming into existence of the Intellectual Property Rights produced by the *Contractor*. The *Contractor* executes all documentation necessary to execute this assignment.

5.3 The *Contractor* waives or procures a waiver of any moral rights subsisting in copyright produced for the Contract or the performance of the Contract.

5.4 The *Contractor* ensures that the third party owner of any Intellectual Property Rights that are or which may be used to perform the Contract grants to the *Employer* a non-exclusive licence or, if itself a licensee of those rights, grants to the *Employer* an authorised sub-licence, to use, reproduce, modify, develop and maintain the Intellectual Property Rights in the same. Such licence or sub-licence is non-exclusive, perpetual, royalty free and irrevocable and includes the right for the *Employer* to sub-licence, transfer, novate or assign to other Contracting Authorities, the Replacement Contractor or to any other third party supplying works to the *Employer*.

5.5 The *Contractor* does not infringe any Intellectual Property Rights of any third party in providing the *works* and the *Contractor*, from the Contract Date until the *Completion Date*, indemnifies and keeps indemnified and holds the *Employer* and the Crown harmless from and against all actions, suits, claims, demands, losses, charges, damages, costs and expenses and other liabilities which the *Employer* or the Crown may suffer or incur as a result of or in connection with any breach of this clause, except where such claim arises from:

- ***items or materials based upon designs supplied by the* Employer *; or***
- ***the use of Data supplied by the* Employer *which is not required to be verified by the* Contractor *under any provision of the Contract.***

5.6 The *Employer* notifies the *Contractor* in writing of any claim or demand brought against the *Employer* for infringement or alleged infringement of any Intellectual Property Right in materials supplied or licensed by the *Contractor*.

5.7 The *Contractor* at its own expense conducts all negotiations and any litigation arising in connection with any claim for breach of Intellectual Property Rights in materials supplied or licensed by the *Contractor*, provided always that the *Contractor*:

- ***consults the* Employer *on all substantive issues which arise during the conduct of such litigation and negotiations;***

- *takes due and proper account of the interests of the* **Employer** *and*

- *does not settle or compromise any claim without the* **Employer***'s prior written consent (not to be unreasonably withheld or delayed).*

5.8 The *Employer* at the *Contractor's* request affords to the *Contractor* all reasonable assistance for the purpose of contesting any claim or demand made or action brought against the *Employer* or the *Contractor* by a third party for infringement or alleged infringement of any third party Intellectual Property Rights in connection with the performance of the *Contractor's* obligations under the Contract and the *Contractor* indemnifies the *Employer* for all costs and expenses (including, but not limited to, legal costs and disbursements) incurred in doing so. The *Contractor* is not, however, required to indemnify the *Employer* in relation to any costs and expenses incurred in relation to items or materials based upon designs supplied by the *Employer* or the use of Data supplied by the *Employer* which is not required to be verified by the *Contractor* under any provision of the Contract.

5.9 The *Employer* does not make any admissions which may be prejudicial to the defence or settlement of any claim, demand or action for infringement or alleged infringement of any Intellectual Property Right by the *Employer* or the *Contractor* in connection with the performance of its obligations under the Contract.

5.10 If a claim, demand or action for infringement or alleged infringement of any Intellectual Property Right is made in connection with the Contract or in the reasonable opinion of the *Contractor* is likely to be made, the *Contractor* notifies the *Employer* as soon as reasonably practicable and, at its own expense and subject to the consent of the *Employer* (not to be unreasonably withheld or delayed), uses its best endeavours to:

- *modify the works without reducing the performance or functionality of the same, or substitute alternative works of equivalent performance and functionality in order to avoid the infringement or the alleged infringement, provided that the provisions herein apply mutatis mutandis to such modified works or to the substitute works or*

- *procure a licence to use and provide the* **works***, which are the subject of the alleged infringement, on terms which are acceptable to the* **Employer**

- *and in the event that the* **Contractor** *is unable to comply with these requirements within 28 days of receipt of the* **Contractor**'*s notification the* **Employer** *may terminate the Contract by notice in writing.*

5.11 The *Contractor* grants to the *Employer* a royalty-free, irrevocable and non-exclusive licence (with a right to sub-licence) (and where appropriate, worldwide) to use any Intellectual Property Rights that the *Contractor* owned or developed prior to the starting date and which the *Employer* reasonably requires in order to exercise its rights and take the benefit of the Contract including the works provided.

6. Professional indemnity insurance

- 6.1. The Contractor shall maintain professional indemnity insurance covering (without limitation) all liability hereunder upon customary and usual terms and conditions prevailing for the time being in the insurance market and with reputable insurers lawfully carrying on such insurance business in the United Kingdom with a limit of indemnity of not less than *(amount)* million pounds (£...) for any one occurrence or series of occurrences arising out of any one event for a period expiring no earlier than 6 years after the date of practical completion of the Project, provided always that such insurance is available at commercially reasonable rates in the insurance market at large.
- 6.2. 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 commercially reasonable rates.
- 6.3. The Contractor shall immediately inform the Acquirer if such insurance ceases to be available at commercially reasonable rates in the insurance market at large in order that the Contractor and the Acquirer can discuss means of best protecting the respective positions of the Acquirer and the Contractor in respect of the Project in the absence of such insurance.
- 6.4. The Contractor shall fully co-operate with any measures reasonably required by the Acquirer, including (without limitation) completing any proposals for insurance and associated documents,

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

- 6.5. As and when it is reasonably requested to do so by the Acquirer the Contractor produces for inspection documentary evidence (including, if required by the Acquirer, the originals of either the relevant insurance documents or broker's letter or certificate) that its professional indemnity insurance is being maintained.

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

7. Assignment

7.1 The Contractor agrees that the benefit of this Agreement may be assigned on two occasions only by the Acquirer without the consent of the Contractor being required. Further assignments may be made with the consent of the Contractor (such consent not to be unreasonably withheld or delayed).

8. Notices

8.1 Any notice to be given by the Contractor hereunder shall be deemed to be duly given if it is delivered by hand at or sent by registered post or recorded delivery to the above-mentioned address of the Acquirer or to the principal business address of the Acquirer for the time being, and any notice to be given by the Acquirer hereunder shall be deemed to be duly given if it is

addressed to the Contractor and delivered by hand at or sent by registered post or recorded delivery to the above-mentioned address of the Contractor or to the principal business address of the Contractor for the time being and, in the case of any such notices, the same shall if sent by registered post or recorded delivery be deemed to have been received 48 hours after being posted.

9. Net contribution

9.1 In the event of any breach of this Agreement, the Contractor's liability pursuant to this Agreement shall be limited to that proportion of the Acquirer's loss by reason of the breach which it would be just and equitable to require the Contractor to pay having regard to the extent of the Contractor's liability for the same and on the basis that *(list the consultants)* ('the Consultants') and *(list the sub-contractors)* ('the Sub-Contractors') shall be deemed to have provided contractual undertakings on terms no less onerous than this Agreement to the Acquirer in respect of performance of their services and/or obligations in relation to the Project and shall be deemed to have paid to the Acquirer such proportion which it would be just and equitable for them to pay having regard to the extent of their responsibility.

10. Limitation

10.1 No action or proceedings under or in respect of this Agreement shall be brought against the Contractor after:

- the expiry of 6 years from the date of practical completion of the Project; or;

- where such date does not occur or the Contractor performed services in relation to the Project later than such date, the expiry of 6 years from the date the Contractor last performed services in relation to the Project.

10.2 The Contractor shall have no greater liability to the Acquirer under this Agreement than its liability to the Employer under the Contract.

11. Law and Jurisdiction

- 11.1. Any contractual or non-contractual obligations arising from or connected with this Agreement shall be governed by English law and this Agreement shall be construed in accordance with English law.

- 11.2. In relation to any legal action or proceedings arising out of or in connection with this Agreement (whether arising out of or in connection with contractual or non-contractual obligations) ("Proceedings"), each of the parties irrevocably submits to the exclusive jurisdiction of the English Courts and waives any objection to Proceedings, in such Courts on the grounds of venue

12. Contracts (Rights of Third Parties) Act 1999

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

IN WITNESS whereof this document has been executed in duplicate on the date first stated above, as follows:

SIGNED for and on behalf of **Party 1**, (the "Contractor")

Authorised Signatory .....

Name .....

Position .....

SIGNED for and on behalf of **Secretary of State for Justice**

Authorised Signatory .....

Name .....

Position .....

SIGNED for and on behalf of **Party 3**, (the "Acquirer")

Authorised Signatory .....

Name .....

Position .....

Appendix 3: Form of Sub-Contractor Collateral Warranty in favour of Employer

Collateral Warranty by Contractor's Sub-Contractor to Employer

Between:

[●] as Sub-contractor,

Secretary of State for Justice as *Employer*

and

[●] as *Contractor*

Relating to

[●]

This Agreement is dated [●] and made

Between:

(1) **Party 1**, (the "Sub-contractor"), registered in England and Wales as company [●] and having its registered office at [●];

(2) **Secretary of State for Justice**, (the "*Employer*"), (which term shall include their permitted assignees) whose registered office is at [●]; and

(3) **Party 3**, (the "*Contractor*"), registered in England and Wales as company [●] and having its registered office at [●].

Whereas:

(A) The *Employer* has entered into a Contract dated [●] ('the Contract') with the *Contractor* for the provision of Project Works as described as works at [●] ("the Works").

(B) By the Sub-contract the Sub-contractor has agreed with the *Contractor* to carry out and complete the Sub-contract Works forming part of the *works* upon the terms and conditions of the Sub-contract.

(C) It is a term of the Sub-contract that the Sub-contractor enters into this Contract with the *Employer* in relation to the Sub-contract Works.

Now in consideration of £1 (one pound) paid by the *Employer* to the Sub-Contractor (receipt of which the Sub-Contractor hereby acknowledges) this **Agreement Witnesses** as follows:

1. Sub-Contractor's warranties

- 1.1. The Sub-Contractor covenants with the *Employer* that it has duly performed and observed, and will continue duly to perform and observe, all the terms of the Sub-Contract on the Sub-Contractor's

part to be performed and observed and, without prejudice to the generality of the foregoing, the Sub-Contractor warrants that it has exercised and will continue to exercise reasonable skill, care and diligence in the performance of its duties to the *Employer* under the Sub-Contract.

- 1.2. The *Employer* shall be deemed to have relied and to rely upon the exercise of the Sub-Contractor's skill, care and diligence hereunder.

2. Prohibited materials

- 2.1. Without prejudice to the generality of and subject to clauses 1, the Sub-Contractor further warrants:

  - *that it has not used or specified and will not use or specify for use;*
  - *that it has exercised and will continue to exercise reasonable skill, care and diligence to see that there are not used;*
  - *that it is not aware and has no reason to suspect or believe that there have been or will be used;*
  - *that it will promptly notify the* **Employer** *in writing if it becomes aware or has reason to suspect or believe that there have been or will be used;*

in or in connection with the sub-contract, materials or substances other than in accordance with:

  - *the guidance in the publication 'Good Practice in the Selection of Construction Materials' published by Ove Arup & Partners in 1997 or the edition of which as may be current at the date of this Agreement;*
  - *relevant British or European Standards or Codes of Practice; and*
  - *any publications of the Building Research Establishment related to the specification of products or materials.*

- 2.2. The Sub-Contractor further warrants and covenants with the *Employer* that:

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

(B) subject to clause 2.2(A), it has exercised and will exercise all reasonable skill and care commensurate with that of a sub-contractor experienced in the provision of professional services for projects similar in size, scope and complexity to the Project in:

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

(C) provided always that the Sub-Contractor shall have in respect of any defect or insufficiency in any design of the Sub-Contract Works the like liability to the Employer, *whether under statute or otherwise, as would an architect or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for such design who, acting independently under a separate contract with the Contractor, had supplied such design for or in connection with works to be carried out and completed by a building contractor not being the supplier of the design;*

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

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

3. Sub-Contractor's acknowledgement

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

4. Authority to issue instructions

4.1 The *Employer* has no authority to issue any direction or instruction to the Sub-Contractor in relation to performance of the Sub-Contractor's

duties under the Sub-Contract unless and until the *Employer* has given notice under clauses 6 or 8.

5. Intellectual Property Rights

In this clause

- *"Intellectual Property Rights" ("IPRs") means patents, inventions, trade marks, service marks, logos, design rights (whether registerable or otherwise), applications for any of the foregoing, copyright (including rights in computer software), database rights, domain names, trade or business names, moral rights trade secrets, discovery, process, formula, know-how, specification, improvement, technique, topography right, technical information, drawing and other similar rights or obligations whether registerable or not in any country (including but not limited to the United Kingdom), and the right to sue for passing off.*

- *"Know-How" means all ideas, concepts, schemes, information, knowledge, techniques, methodology, and anything else in the nature of know-how relating to Providing the Works but excluding know-how already in the* **Contractor***'s or the* **Employer***'s possession before the Contract.*

5.1 All Intellectual Property Rights in any guidance, specifications, instructions, toolkits, plans, Data, drawings, databases, patents, patterns, models, designs or other material (the "IP Materials"):

- *furnished or made available to the* **Contractor** *by or on behalf of the* **Employer** *remains the property of the* **Employer** *and*

- *prepared by or for the* **Contractor** *on behalf of the* **Employer** *for use, or intended use, in relation to the performance by the* **Contractor** *of its obligations under the Contract belongs to the* **Employer**

and the *Contractor* does not, and procures that the Contractor's Personnel do not, (except when necessary for the performance of the Contract) without prior written consent of the *Employer*, use or disclose any such Intellectual Property Rights in the IP Materials.

5.2 Subject to the retention by the *contractor* of the IPR in pre-existing background IP, the *Contractor* assigns to the *Employer*, with full title guarantee, all Intellectual Property Rights which may subsist in the IP Materials. This assignment takes effect on the date of this Contract or as a present assignment of future rights that will take effect immediately on

the coming into existence of the Intellectual Property Rights produced by the *Contractor*. The *Contractor* executes all documentation necessary to execute this assignment.

5.3 The *Contractor* waives or procures a waiver of any moral rights subsisting in copyright produced for the Contract or the performance of the Contract.

5.4 The *Contractor* ensures that the third party owner of any Intellectual Property Rights that are or which may be used to perform the Contract grants to the *Employer* a non-exclusive licence or, if itself a licensee of those rights, grants to the *Employer* an authorised sub-licence, to use, reproduce, modify, develop and maintain the Intellectual Property Rights in the same. Such licence or sub-licence is non-exclusive, perpetual, royalty free and irrevocable and includes the right for the *Employer* to sub-licence, transfer, novate or assign to other Contracting Authorities, the Replacement Contractor or to any other third party supplying works to the *Employer*.

5.5 The *Contractor* does not infringe any Intellectual Property Rights of any third party in providing the *works* and the *Contractor*, from the Contract Date until the *Completion Date*, indemnifies and keeps indemnified and holds the *Employer* and the Crown harmless from and against all actions, suits, claims, demands, losses, charges, damages, costs and expenses and other liabilities which the *Employer* or the Crown may suffer or incur as a result of or in connection with any breach of this clause, except where such claim arises from:

- ***items or materials based upon designs supplied by the* Employer *; or***
- ***the use of Data supplied by the* Employer *which is not required to be verified by the* Contractor *under any provision of the Contract.***

5.6 The *Employer* notifies the *Contractor* in writing of any claim or demand brought against the *Employer* for infringement or alleged infringement of any Intellectual Property Right in materials supplied or licensed by the *Contractor*.

5.7 The *Contractor* at its own expense conducts all negotiations and any litigation arising in connection with any claim for breach of Intellectual

Property Rights in materials supplied or licensed by the *Contractor*, provided always that the *Contractor*:

- ***consults the* Employer *on all substantive issues which arise during the conduct of such litigation and negotiations;***
- ***takes due and proper account of the interests of the* Employer *and***
- ***does not settle or compromise any claim without the* Employer*'s prior written consent (not to be unreasonably withheld or delayed).***

5.8 The *Employer* at the *Contractor's* request affords to the *Contractor* all reasonable assistance for the purpose of contesting any claim or demand made or action brought against the *Employer* or the *Contractor* by a third party for infringement or alleged infringement of any third party Intellectual Property Rights in connection with the performance of the *Contractor's* obligations under the Contract and the *Contractor* indemnifies the *Employer* for all costs and expenses (including, but not limited to, legal costs and disbursements) incurred in doing so. The *Contractor* is not, however, required to indemnify the *Employer* in relation to any costs and expenses incurred in relation to items or materials based upon designs supplied by the *Employer* or the use of Data supplied by the *Employer* which is not required to be verified by the *Contractor* under any provision of the Contract.

5.9 The *Employer* does not make any admissions which may be prejudicial to the defence or settlement of any claim, demand or action for infringement or alleged infringement of any Intellectual Property Right by the *Employer* or the *Contractor* in connection with the performance of its obligations under the Contract.

5.10 If a claim, demand or action for infringement or alleged infringement of any Intellectual Property Right is made in connection with the Contract or in the reasonable opinion of the *Contractor* is likely to be made, the *Contractor* notifies the *Employer* as soon as reasonably practicable and, at its own expense and subject to the consent of the *Employer* (not to be unreasonably withheld or delayed), uses its best endeavours to:

- ***modify the works without reducing the performance or functionality of the same, or substitute alternative works of equivalent performance and functionality in order to***

avoid the infringement or the alleged infringement, provided that the provisions herein apply mutatis mutandis to such modified works or to the substitute works or

- *procure a licence to use and provide the* **works**, *which are the subject of the alleged infringement, on terms which are acceptable to the* **Employer**

- *and in the event that the* **Contractor** *is unable to comply with these requirements within 28 days of receipt of the* **Contractor's** *notification the* **Employer** *may terminate the Contract by notice in writing.*

5.11 The *Contractor* grants to the *Employer* a royalty-free, irrevocable and non-exclusive licence (with a right to sub-licence) (and where appropriate, worldwide) to use any Intellectual Property Rights that the *Contractor* owned or developed prior to the starting date and which the *Employer* reasonably requires in order to exercise its rights and take the benefit of the Contract including the works provided.

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

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

7. Obligations prior to termination of the Sub-Contract

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

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

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

8. Obligations of the Sub-Contractor to the Employer

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

  - ***requiring him to continue his obligations under the Sub-Contract; and***
  - ***acknowledging that the* Employer *is assuming all the obligations of the Contractor under the Sub-Contract; and***
  - ***undertaking to the Sub-Contractor to discharge all payments which may subsequently become due to the Sub-Contractor under the terms of the Sub-Contract.***

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

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

- 8.4. The Sub-Contractor shall not be concerned or required to enquire whether and shall be bound to assume that as between the

Contractor and the *Employer* the circumstances have occurred permitting the *Employer* to give notice under clause 8.3.

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

9. Professional indemnity insurance

- 9.1. The Sub-Contractor shall maintain professional indemnity insurance covering (without limitation) all liability hereunder upon customary and usual terms and conditions prevailing for the time being in the insurance market and with reputable insurers lawfully carrying on such insurance business in the United Kingdom with a limit of indemnity of not less than *(amount)* million pounds (£...) for any one occurrence or series of occurrences arising out of any one event for a period expiring no earlier than 6 years after the date of practical completion of the Project, provided always that such insurance is available at commercially reasonable rates in the insurance market at large.
- 9.2. Any increased or additional premium required by insurers by reason of the Sub-Contractor's own claims record or other acts, omissions, matters or things particular to the Sub-Contractor shall be deemed to be within commercially reasonable rates.
- 9.3. The Sub-Contractor shall immediately inform the *Employer* if such insurance ceases to be available at commercially reasonable rates in the insurance market at large in order that the Sub-Contractor and the *Employer* can discuss means of best protecting the respective positions of the *Employer* and the Sub-Contractor in respect of the Project in the absence of such insurance.
- 9.4. The Sub-Contractor shall fully co-operate with any measures reasonably required by the *Employer*, including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above commercially reasonable rates if the *Employer* undertakes in writing to reimburse the Sub-Contractor in respect of the net cost of such insurance to the Sub-Contractor above commercially reasonable rates or, if the *Employer*

effects such insurance at rates at or above commercially reasonable rates, reimbursing the *Employer* in respect of what the net cost of such insurance to the *Employer* would have been at commercially reasonable rates.

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

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

10. Assignment

10.1 The Sub-Contractor agrees that the benefit of this Agreement may be assigned by the *Employer* on two occasions only without the consent of the Sub-Contractor being required. Further assignments may be made with the consent of the Sub-Contractor (such consent not to be unreasonably withheld or delayed).

10.2. The Sub-contractor will not contend that any such assignee is precluded from recovering any loss resulting from any breach of this Agreement (whatever the date of such breach) by reason only that that person is an assignee and not the original employer under this Agreement or by reason that the original employer or any intermediate employer escaped any loss resulting from such breach by reason of the disposal of any interest in the site or that the original employer or any intermediate employer has not suffered any or as much loss.

11. Notices

11.1 Any notice to be given by the Sub-Contractor hereunder shall be deemed to be duly given if it is delivered by hand at or sent by registered post or recorded delivery to the above-mentioned address of the *Employer* or to the principal business address of the *Employer* for the time being, and any notice to be given by the *Employer* hereunder shall be deemed to be duly given if it is addressed to the Sub-Contractor and delivered by hand at or sent by registered post or recorded delivery to the above-mentioned address of the Sub-Contractor or to the principal business address of the Sub-Contractor for the time being and, in the case of any such notices, the same shall if sent by registered post or recorded delivery be deemed to have been received 48 hours after being posted.

12. Net contribution

12.1 In the event of any breach of this Agreement, the Sub-Contractor's liability pursuant to this Agreement shall be limited to that proportion of the *Employer's* loss by reason of the breach which it would be just and equitable to require the Sub-Contractor to pay having regard to the extent of the Sub-Contractor's liability for the same and on the basis that *(list the consultants)* ('the Consultants') and the Contractor and *(list the other sub-contractors)* ('the other Sub-Contractors') shall be deemed to have provided contractual undertakings on terms no less onerous than this Agreement to the *Employer* in respect of performance of their services and/or obligations in relation to the Project and shall be deemed to have paid to the *Employer* such proportion which it would be just and equitable for them to pay having regard to the extent of their responsibility.

13. Limitation

13.1 No action or proceedings under or in respect of this Agreement shall be brought against the Sub-Contractor after:

- the expiry of 6 years from the date of practical completion of the Project or;
- where such date does not occur, or the Sub-Contractor performed services in

relation to the Project later than such date, the expiry of 6 years from the date the Sub-Contractor last performed services in relation to the Project.

14. Law and jurisdiction

- 14.1. Any contractual or non-contractual obligations arising from or connected with this Agreement shall be governed by English law and this Agreement shall be construed in accordance with English law.
- 14.2. In relation to any legal action or proceedings arising out of or in connection with this Agreement (whether arising out of or in connection with contractual or non-contractual obligations) ("Proceedings"), each of the parties irrevocably submits to the exclusive jurisdiction of the English Courts and waives any objection to Proceedings, in such Courts on the grounds of venue or on the grounds that Proceedings have been brought in an inappropriate forum.

15. The Contractor

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

16. Contracts (Rights of Third Parties) Act 1999

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

IN WITNESS whereof this document has been executed in duplicate on the date first stated above, as follows:

SIGNED for and on behalf of **Party 1**, (the "Sub-contractor")

Authorised Signatory .....

Name .....

Position .....

SIGNED for and on behalf of **Secretary of State for Justice**

Authorised Signatory .....

Name .....

Position .....

SIGNED for and on behalf of **Party 3**, (the "*Contractor*")

Authorised Signatory .....

Name .....

Position .....

Appendix 4: Form of Sub-Contractor Collateral Warranty in favour of Acquirer

Collateral Warranty by Contractor's Sub-Contractor to Acquirer

Between:

[●] as Sub-contractor,

[●] as Acquirer

and

[●] as *Contractor*

Relating to

[●]

This Agreement is dated [●] and made

Between:

(1) **Party 1**, (the "Sub-Contractor"), registered in England and Wales as company [●] and having its registered office at [●];

(2) **Party 2**, (the "Acquirer"), (which term shall include his permitted assignees) registered in England and Wales as company [●] and having its registered office at [●]; and

(3) **Party 3**, (the "Contractor"), registered in England and Wales as company [●] and having its registered office at [●].

Whereas:

(A) The E*mployer* has entered into a contract dated [●] ('the Contract') with the *Contractor* for the construction of a project briefly described as works at [●] ('the Project').

(B) The *Contractor* has entered into a sub-contract dated [●] ('the Sub-Contract') with the Sub-Contractor for the execution of certain sub-contract works briefly described as [●] and forming part of the Project ('the Sub-Contract Works').

(C) The Acquirer intends to acquire, or has acquired, an interest in the Project.

Now in consideration of £1 (one pound) paid by the Acquirer to the Sub-Contractor (receipt of which the Sub-Contractor hereby acknowledges) this **Agreement Witnesses** as follows:

1. Sub-Contractor's warranties

- 1.1. The Sub-Contractor covenants with the Acquirer that it has duly performed and observed, and will continue duly to perform and observe, all the terms of the Sub-Contract on the Sub-Contractor's part to be performed and observed and, without prejudice to the generality of the foregoing, the Sub-Contractor warrants that it has exercised and will

continue to exercise reasonable skill, care and diligence in the performance of its duties to the Contractor under the Sub-Contract.

- 1.2. The Acquirer shall be deemed to have relied and to rely upon the exercise of the Sub-Contractor's skill, care and diligence hereunder.

2. Prohibited materials

- 2.1. Without prejudice to the generality of and subject to clauses 1, the Sub-Contractor further warrants:

  - *that it has not used or specified and will not use or specify for use;*
  - *that it has exercised and will continue to exercise reasonable skill, care and diligence to see that there are not used;*
  - *that it is not aware and has no reason to suspect or believe that there have been or will be used;*
  - *that it will promptly notify the Acquirer in writing if it becomes aware or has reason to suspect or believe that there have been or will be used;*

  in or in connection with the Project, materials or substances other than in accordance with:

  - *the guidance in the publication 'Good Practice in the Selection of Construction Materials' published by Ove Arup & Partners in 1997 or the edition of which as may be current at the date of this Agreement;*
  - *relevant British or European Standards or Codes of Practice; and*
  - *any publications of the Building Research Establishment related to the specification of products or materials.*

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

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

  (B) subject to clause 2.2(A), it has exercised and will exercise all reasonable skill and care commensurate with that of a sub-contractor experienced in

the provision of professional services for projects similar in size, scope and complexity to the Project in:

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

(C) provided always that the Sub-Contractor shall have in respect of any

defect or insufficiency in any design of the Sub-Contract Works the like liability to the Acquirer, whether under statute or otherwise, as would an architect or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for such design who, acting independently under a separate contract with the Contractor, had supplied such design for or in connection with works to be carried out and completed by a building contractor not being the supplier of the design;

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

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

3. Sub-Contractor's acknowledgement

3.1 The Sub-Contractor acknowledges that the Contractor has paid all sums due and owing to the Sub-Contractor under the Sub-Contract up to the date of this Agreement. The Acquirer has no liability to the Sub-Contractor in respect of sums due under the Sub-Contract.