

MPF2 MPF2 MPF2

Major Projects Framework 2

Consultant Warranty



(1) [Consultant]

(2) [Employer]

(3) [Contractor where step-in]

CONSULTANT'S WARRANTY

**TO [EMPLOYER/END USER/FUNDER/FIRST PURCHASER /
FIRST TENANT]**

relating to

[Project]

This Agreement is made

BETWEEN:-

- (1) **[NAME OF CONSULTANT]** (company registration number ([]) of/whose registered office is at **[ADDRESS]** (the 'Consultant'); and
- (2) **[BENEFICIARY]** (company registration number []) of/whose registered office is at **[ADDRESS]** (the 'Beneficiary' which term shall include its permitted assignees);
- (3) **[Contractor etc. if step in].**

BACKGROUND

- A The Contractor has appointed the Consultant to act in the capacity of **[architect etc.]** in relation to the Development.
- B The Beneficiary is **[describe the Beneficiary's interest in the Property].**
- C The Consultant has agreed to enter into this Agreement with the Beneficiary.

AGREED TERMS

1. INTERPRETATION

1.1 In this Agreement:-

'Appointment' mean the appointment dated [] made between (1) the Contractor and (2) the Consultant under which the Consultant is providing professional services in relation to the Development;

'Contract' means the building contract(s) entered into by the Employer and the Contractor to procure the design, construction and completion of the Development;

'Contractor' means [];

'Development' means the design and construction of **[Description of Development]** at [];

'Documents' includes all drawings, details, plans, reports, calculations, specifications, bills of quantities levels and setting out details and other documents of any nature whatsoever (including those in electronic format) and designs contained in them (and any works executed from them) provided by or on behalf of the Consultant in the course of performing its obligations under its contract with the Contractor in relation to the Development;

'Employer' [].

1.2 In interpreting this Agreement:-

- 1.2.1 if any party to this Agreement is a partnership then the provisions of this Agreement will bind each and every such partner 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 references to the Beneficiary shall be deemed to include its successors in title and permitted assignees;

- 1.2.4 any reference to any enactment includes any consolidation, re-enactment, amendment or replacement of it and any subordinate legislation under it;
- 1.2.5 headings to Clauses shall be disregarded when construing this Agreement;
- 1.2.6 where the words include(s) or including are used in this Agreement, they are deemed to have the words 'without limitation' following them.

2. SKILL AND CARE

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

- 2.1.1 in carrying out and performing the services under or in connection with the Appointment, the Consultant has exercised and will continue to exercise all the reasonable skill, care and diligence to be expected of a competent and appropriately qualified member of the Consultant's profession who is experienced of and who holds himself out as being experienced in carrying out services equivalent to those undertaken by the Consultant under the Appointment in connection with developments of the same type, complexity, value and timescale to the Development;
- 2.1.2 the Consultant has exercised and will continue to exercise the standard of skill, care and attention referred to in Clause 2.1.1 not to specify any products or materials for use in the Project which at the time of use:-
 - (a) do not conform with British and European Standards or Codes of Practice; or
 - (b) are generally known within the Consultant's profession to be deleterious, in the particular circumstances in which they are specified for use, to health and safety and/or the durability of the building or structure or structure in which they are used;
- 2.1.3 it has carried out and will continue to carry out the duties and obligations on its part to be performed under the Appointment.

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

3. COPYRIGHT

3.1 Copyright and all intellectual property rights subsisting over the Documents which are vested in the Consultant will remain vested in the Consultant but the Consultant hereby grants (or if such a grant cannot legally take place until a later date shall grant) to the Beneficiary with effect from the date of this Agreement or, in the case of Documents not yet in existence, with effect from the creation of them an irrevocable fully paid up royalty free non-exclusive licence (such licence to remain in full force and effect notwithstanding the completion of the Consultant's obligations or termination of its employment under the Appointment or any dispute under the Appointment) to use and reproduce all Documents and the designs contained in them in built or physical form for any purpose whatsoever connected with the Development (including but without limitation the execution, completion, maintenance, letting, advertisement, modification, extension, reinstatement and repair of the Development). Such licence will carry the right to grant sub-licences and will be transferable to third parties. Such licence shall

enable the Beneficiary to copy and use the Documents for an extension of the Development but such licence shall not include a licence to reproduce the designs contained in the Documents as an extension to the Development save to the extent that such reproduction is reasonably necessary to facilitate the join of the extension to the Development or to obtain planning or any other relevant consent for the extension or to make the extended building a reasonably harmonious whole. The Consultant shall not be liable for any use by the Beneficiary of any of the Documents for any purpose other than that for which the same were prepared by or on behalf of the Consultant.

- 3.2 The Beneficiary may request copies of part or all of the Documents and, upon paying a reasonable copying charge for them, the Consultant shall supply the copies.

4. INDEMNITY INSURANCE

- 4.1 The Consultant shall maintain professional indemnity insurance covering (inter alia) its potential liability under this Agreement for the given insurance policy year in the event that it breaches this Agreement 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 **[£5,000,000.00 (Five million pounds)]** 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 for a period beginning now and ending 12 years after the date of completion of the services under the Appointment or termination of the Appointment if earlier, provided always that such insurance is available at commercially affordable rates and on terms such that members of the Consultant's profession generally carry such insurance ('Reasonable Rates and Terms').

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

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

- 4.4 The Consultant shall co-operate fully with any measures reasonably required by the Beneficiary, including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above Reasonable Rates and Terms if the Beneficiary undertakes in writing to reimburse the Consultant in respect of the net cost of such insurance to the Consultant above Reasonable Rates and Terms.

- 4.5 As and when reasonably requested to do so by the Beneficiary the Consultant shall produce for inspection documentary evidence that his 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 Employer.

5. LIABILITY PERIOD

Actions or proceedings for any breach of this Agreement may be commenced up to and including but not after the expiry of 12 years from the date of completion of the services under the Appointment or termination of the Appointment if earlier.

6. ASSIGNATION

- 6.1 The Consultant consents to the benefit of this Agreement being assigned two times only **PROVIDED ALWAYS** that the maximum number of two assignations 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 Agreement the Consultant shall not be entitled to contend that any person to whom this Agreement is assigned in accordance with Clause 6.1 (an 'Assignee') is precluded from recovering under this Agreement any loss incurred by such assignee resulting from any breach of this Agreement (whenever happening), by reason that such person is an assignee and not the original named party to this Agreement.

6.3 The Consultant may not defend any claim brought by the Beneficiary or an Assignee on the basis of a no loss argument whether based on the logic that the Beneficiary or an Assignee has not suffered a recoverable loss because the Contractor or Employer has not suffered that loss or because the Contractor or Employer would not suffer a similar loss because of their different interests in the completed Development compared to the interest of the Beneficiary or Assignee and/or if assigned that the original Beneficiary has not suffered such loss because he has parted with his interest in the Development or otherwise.

7. [IN EMPLOYER / FUNDER WARRANTY – OBLIGATIONS PRIOR TO TERMINATION OF THE APPOINTMENT BY THE CONSULTANT

7.1 The Consultant shall not exercise nor seek to exercise any right of termination of its employment under the Appointment or discontinue the performance of the Appointment for any reason whatsoever (including any breach on the part of the Employer) without giving not less than 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 Consultant of its employment under the Appointment or to discontinue the performance of the Appointment shall, nevertheless, be extended as may be necessary to take account of the period of notice required under Clause 7.1.

7.3 The right of the Consultant to terminate its employment under the Appointment or to discontinue the performance of the Appointment shall cease within the period of 21 days referred to in Clause 7.1 if the Beneficiary shall give notice to the Consultant:-

7.3.1 requiring the Consultant to continue its obligations under the Appointment with the Beneficiary or its nominee; and

7.3.2 acknowledging that the Beneficiary or its nominee will assume all the obligations of the Employer 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 Consultant under the terms of the Appointment and will pay to the Consultant any sums which have been due and payable to him 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 Consultant and the Beneficiary to the exclusion of the Employer.

7.5 Compliance by the Consultant with the provisions of this Clause 7 will not be treated as a waiver of any breach on the part of the Employer giving rise to the right of termination nor otherwise prevent the Consultant from exercising its rights after the expiration of the notice issued pursuant to Clause 7.1 unless the rights of termination have ceased under the provisions of Clause 7.3.

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 Project and entered into between the Consultant and such person at the request of the Employer.].

8. [IN FUNDER WARRANTY – CONSULTANT'S POSITION

By acting in accordance with Clause 7 the Consultant shall not incur any liability to the Contractor.]

9. NOTICES

Any notice required to be given under this Agreement shall be in writing and shall be deemed to be properly given if delivered personally to the addressee at its address as shown above (or such other address as may be notified in writing from time to time as its address for service).

10. EXTRANEOUS RIGHTS

10.1 This Agreement shall not negate or diminish any duty or liability otherwise owed by the Consultant to the Beneficiary.

10.2 No approval or inspection of the Development 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 Consultant arising under this Agreement.

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

10.4 This Agreement does not create any right enforceable by any person not a party to it (whether pursuant to the Contracts (Third Party Rights) (Scotland) Act 2017 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 Agreement.

11. GOVERNING LAW

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

IN WITNESS WHEREOF these presents on this and the [XX] preceding are executed as follows:

They are signed for and on behalf of **[CONSULTANT]:**

signature of
Director/ Company Secretary/Authorised

signature of
Director/Company Secretary/Authorised Signatory/

full name of above (print)

full name of above (print)

date of signing

place of signing

address of witness

They are signed for and on behalf of **[BENEFICIARY]:**

signature of
Director/ Company Secretary/Authorised

signature of
Director/Company Secretary/Authorised Signatory/

full name of above (print)

full name of above (print)

date of signing

place of signing

address of witness

[They are signed for and on behalf of **[CONTRACTOR]:**

signature of
Director/ Company Secretary/Authorised

signature of
Director/Company Secretary/Authorised Signatory/

full name of above (print)

full name of above (print)

date of signing

place of signing

address of witness]



Kevin Stewart
Framework Manager

M 07447 849 470

E k.stewart@robertson.co.uk

Robertson House
Castle Business Park, Stirling, FK9 4TZ

Contact us on 0845 266 7629
www.procurementhub.co.uk

Find us on social media



Procurement Hub
Part of Places for People
Group Support Centre, 4 The Pavilions,
Preston, PR2 2YB