**A5 (iv)**

**WARRANTY TO BE PROVIDED BY SUB-CONTRACTOR**

****

**(1) [Sub-Contractor]**

**(2) [Beneficiary]**

**(3) [Contractor in Fund Warranty if there is a Step in provision]**

**SUB-CONTRACTOR’S EMPLOYER/END USER/FUND/PURCHASER/TENANT WARRANTY**

**Relating to**

**[describe works and development]**

This Agreement is made between

**BETWEEN**:-

[ ] (No [ ]) of/whose registered office is at [ ] (the ‘**Beneficiary**’); and

[ ] (No [ ]) of/whose registered office is at [ ] (the ‘**Sub-Contractor**’).

[[ ] (No [ ]) of/whose registered office is at [ ] (the ‘**Contractor**’).]

**BACKGROUND**

A The Employer has retained the Contractor under the terms of the Building Contract to carry out and complete the Development.

B The Contractor has retained the Sub-Contractor under the terms of the Sub-Contract to carry out certain works (‘the Works’).

C The Beneficiary has an interest in the Development as **[describe Beneficiary’s interest]**.

D The Sub-Contractor has agreed to enter into this Agreement with the Beneficiary as a condition of the Sub-Contract.

**AGREED TERMS**

1. **INTERPRETATION**
   1. In this Agreement:-

‘**Contract**’ means a contract dated [ ] made between (1) the Employer (2) the Contractor for the Development;

**‘Business Day’** means a day other than a Saturday, Sunday or public holiday in England when banks in London are open for business;

**‘Contractor’** means [ ];

‘**Development**’ means [ **describe** ] 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 Sub-Contractor in the course of performing its obligations under the Sub-Contract;

**‘Employer’** means [ ];

**‘Sub-Contract’** means a contract dated [ ] made between the Contractor and the Sub-Contractor.

In interpreting this Agreement:-

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;

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;

references to the Beneficiary shall be deemed to include its successors in title and assignees;

* + 1. any reference to any enactment includes any consolidation, re-enactment, amendment or replacement of it and any subordinate legislation under it;
    2. headings to Clauses shall be disregarded;
    3. where the words include(s) or including are used in this Agreement, they are deemed to have the words ‘without limitation’ following them.

1. **SKILL AND CARE**

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

2.1.1 it has and shall continue to:-

(a) carry out and complete the Development in conformity with the Sub-Contract;

(b) comply with its obligations contained in the Sub-Contract;

(c) carry out and complete the works using workmanship and materials of the quality and standard specified in the Sub-Contract;

(d) without limiting Clause 2.1 and to the extent that under the Sub-Contract the Sub-Contractor takes responsibility for the design of the Development and the selection of goods, materials, plant and equipment for incorporation therein the Sub-Contractor warrants that the same has been or will be designed or selected with all reasonable skill and care and diligence to be expected of a competent and appropriately qualified designer of the relevant discipline to the design services being carried out who is experienced in undertaking the design of sub contract works like the Sub-Contract works for developments of the same type, complexity, value and timescale to the Development and experienced in the same way in selecting goods, materials and so forth in connection with the same;

2.1.2 it has not specified or used nor will it specify for use or use any products or materials in the Development which at the time of use:-

(a) do not confirm with British and European Standards or Codes of Practice;

(b) are generally known within the Sub-Contractor’s trade to be deleterious in the particular circumstances in which they are used or specified for use to health and safety and/or the durability of the Development.

2.2 The Beneficiary has relied on the Sub-Contractor’s performance of the Sub-Contract.

2.3 The Sub-Contractor 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 Sub-Contract. If a claim is brought against the Sub-Contractor by the Beneficiary the Sub-Contractor may rely on any defence or limitation available to it under the Sub-Contract except that it may not raise by way of defence, set off or counterclaim any monies claimed due from the Contractor under the Sub-Contract or otherwise.

1. **[OBLIGATIONS PRIOR TO TERMINATION OF THE SUB-CONTRACT BY THE SUB-CONTRACTOR [For use in Funder Warranty]**
   1. The Sub-Contractor covenants with the Beneficiary that it will not exercise nor seek to exercise any right of termination of its employment under the Sub-Contract or to discontinue the performance of the Sub-Contract for any reason whatsoever (including any breach on the part of the Contractor) 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.
   2. Any period stipulated in the Sub-Contract for the exercise of a right of termination by the Contractor of its employment under the Sub-Contract or to discontinue the performance of the Sub-Contract shall, nevertheless, be extended as may be necessary to take account of the period of notice required under Clause 3.1.
   3. The right of the Sub-Contractor to terminate its employment under the Sub-Contract or to discontinue the performance of the Sub-Contract shall cease within the period of 21 days referred to in Clause 3.1 if the Beneficiary shall give notice to the Sub-Contractor:-
      1. requiring the Sub-Contractor to continue its obligations under the Sub-Contract with the Beneficiary or its nominee; and
      2. acknowledging that the Beneficiary or its nominee will assume all the obligations of the Contractor under the Sub-Contract; and
      3. undertaking that the Beneficiary or its nominee will discharge all payments which may subsequently become due to the Sub-Contractor under the terms of the Sub-Contract and will pay to the Sub-Contractor any sums which have been due and payable to him under the Sub-Contract but which remain unpaid.
   4. Upon service by the Beneficiary or its nominee of a notice complying with the requirements of Clause 3.3 the Sub-Contract will continue in full force and effect as if the same had been entered into between the Sub-Contractor and the Beneficiary to the exclusion of the Contractor.
   5. Compliance by the Sub-Contractor with the provisions of this Clause 3 will not be treated as a waiver of any breach on the part of the Sub-Contractor giving rise to the right of termination nor otherwise prevent the Sub-Contractor from exercising its rights after the expiration of the notice issued pursuant to Clause 3.1 unless the rights of termination have ceased under the provisions of Clause 3.3.
   6. This Clause 3 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 Development and entered into between the Sub-Contractor and such person at the request of the Contractor.**]**
2. **[SUB-CONTRACTOR’S POSITION**

By acting in accordance with Clause 3 the Sub-Contractor shall not incur any liability to the Contractor.**]**

1. **COPYRIGHT**

5.1 Copyright and all intellectual property rights subsisting over the Documents which are vested in the Sub-Contractor will remain vested in the Sub-Contractor but the Sub-Contractor hereby grants (or if such a grant cannot legally take place until a later date agrees to 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 Sub-Contractor obligations or termination of its employment under the Sub-Contract or any dispute under the Sub-Contract) 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 Contractor 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 Sub-Contractor.

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

1. **INDEMNITY INSURANCE [if Sub-Contractor has a design responsibility]** 
   1. The Sub-Contractor 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 its obligations under the Sub-Contract upon market norm terms and conditions prevailing for the time being in the insurance market, and with reputable insurers lawfully carrying out such insurance business in the United Kingdom, in an amount of not less than **£[ ] ([ ] 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 under the Contract or termination of the Contract if earlier, provided always that such insurance is available at commercially affordable rates and on terms such that a prudent sub-contractor in the Sub-Contractor’s trade who undertakes design would carry such insurance (**‘Reasonable Rates and Terms’**).
   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 Reasonable Rates and Terms.
   3. The Sub-Contractor shall immediately inform the Beneficiary if such insurance ceases to be available upon Reasonable Rates and Terms in order that the Sub-Contractor and the Beneficiary can discuss means of best protecting the respective positions of the Beneficiary and the Sub-Contractor in respect of the Development in the absence of such insurance.
   4. The Sub-Contractor shall fully co-operate 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 Sub-Contractor in respect of the net cost of such insurance to the Sub-Contractor above commercially affordable rates.
   5. As and when reasonably requested to do so by the Beneficiary the Sub-Contractor shall produce for inspection satisfactory documentary evidence (and a copy of an insurance broker’s letter or similar certificate shall be satisfactory) that the required professional indemnity insurance is being maintained.
   6. The above obligations in respect of professional indemnity insurance shall continue notwithstanding termination of the Sub-Contract for any reason whatsoever, including (without limitation) breach by the Contractor.
2. **LIABILITY PERIOD**

Actions or proceedings may be brought against the Sub-Contractor under this Agreement up to but not after the expiry of 12 years from the date of completion under the Contract or termination of the Contract if earlier.

1. **ASSIGNATION**
   1. The Sub-Contractor consents to the benefits 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 assignations or charges by way of security and assignation by way of release or releases from charges, and assignations 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.
   2. Despite any other provision of this Agreement the Sub-Contractor shall not be entitled to contend that any person to whom this Agreement is assigned in accordance with Clause [8].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.
   3. Despite any other provision of this Agreement the Sub-Contractor shall not be entitled to 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 has not suffered that loss or because the Contractor would not suffer a similar loss because of his different interest in the completed Development 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.
2. **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 address for the party shown above or such other address as may be notified in writing.

1. **EXTRANEOUS RIGHTS**
   1. This Agreement shall not negate or diminish any duty or liability otherwise owed by the Sub-Contractor to the Beneficiary.
   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 Sub-Contractor arising under this Agreement.
   3. This Agreement may be executed in any number of counterparts all of which when taken together shall constitute one and the same instrument.
   4. This Agreement does not create any right enforceable by any person not a party to it (pursuant to The Contract (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 Agreement.
2. **GOVERNING LAW**

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

1. **[CONTRACTOR’S CONSENT – If Contractor is a party]**

[The Contractor has executed this Agreement to signify consent to its terms.**]**

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

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | |  |  | |
| signature of  Director/ Company Secretary/Authorised Signatory | |  | signature of  Director/Company Secretary/Authorised Signatory/ Witness | |
|  | |  |  | |
| 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 Signatory | |  | signature of  Director/Company Secretary/Authorised Signatory/ Witness | |
|  | |  |  | |
| 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 Signatory | |  | signature of  Director/Company Secretary/Authorised Signatory/ Witness | |
|  | |  |  | |
| full name of above (print) | |  | full name of above (print) | |
|  | |  |  | |
| date of signing | |  |  |  |
|  | |  |  |
| place of signing |  | | address of witness ] | |