

Schedule 18 (Construction Sub-Contractor Collateral Warranty)

SCHEDULE 9 (COLLATERAL AGREEMENTS)

PART 2 – CONSTRUCTION [ENGINEERING] CONTRACTOR’S COLLATERAL AGREEMENT

THIS DEED is made on ·

BETWEEN

- (1) a company incorporated in England and Wales under company number and whose registered office is at (“the Contractor”);
- (2) NOTTINGHAMSHIRE COUNTY COUNCIL of (“the Beneficiary”, which expression includes its permitted successors in title and assigns); and
- (3) · whose registered office is at · (“the Employer”).

BACKGROUND

- (A) By a contract dated (“the Project Agreement”), the Beneficiary has appointed the Employer to carry out in relation to the site therein described as “the Sites” the design and construction of the works therein defined as “the Works”, which expression has the same meaning in this Deed.
- (B) By a contract dated · (“the Contract”), the Employer has appointed the Contractor to carry out in relation to the Sites the design and construction of the Works.
- (C) The Contractor is obliged under the Contract to give a warranty in this form in favour of the Beneficiary.

OPERATIVE PROVISIONS

In consideration of the payment of one pound (£1.00) by the Beneficiary to the Contractor, receipt of which the Contractor acknowledges:

1. CONTRACTOR’S WARRANTY AND LIABILITY

- 1.1 The Contractor warrants to the Beneficiary that it has carried out and will continue to carry out and complete its obligations under the Contract in accordance with the Contract.
- 1.2 The Contractor has no liability hereunder which is greater or of a longer duration than it would have had if the Beneficiary had been a party to the Contract as joint employer. Upon the expiration of 12 years from the date of Practical

Completion under the Contract the liability of the Contractor under this Deed shall cease and determine, save in relation to any claims made by the Beneficiary against the Contractor and notified by the Beneficiary to the Contractor in writing prior thereto.

2 DOCUMENTS

- 2.1 In relation to all drawings, details, plans and other documents of any nature whatsoever and any designs and inventions contained in them which have been or are hereafter provided by the Contractor in the course of performing its obligations under the Contract (“Documents”) the Contractor hereby grants (or, if such grant cannot legally take place until a later date, agrees to grant) to the Beneficiary with effect from the date of this Deed or in the case of Documents not yet in existence with effect from the creation thereof, a royalty-free non-exclusive licence (such licence to remain in full force and effect notwithstanding the termination of the Contract or determination of the employment of the Contractor under the Contract or the abandonment or completion of the Works or of its obligations under the Contract or any dispute thereunder or hereunder) to use and to reproduce all Documents for any purpose whatsoever connected with the Works [and such other purposes as are reasonably foreseeable] including, but without limitation, the execution, completion, maintenance, letting, advertisement, modification, extension, reinstatement and repair of the Works. Such licence will carry the right to grant sub-licences and will be transferable to third parties. The Beneficiary will not hold the Contractor liable for any use it may make of the Documents for any purpose other than that for which they were originally provided by it and other than for such other uses as are reasonably foreseeable unless the Contractor authorises such use and confirms that the Documents are suitable for it. The Contractor will not grant to any third party the right to use any of the Documents save under any warranty it is obliged to give under the Contract or hereunder or as otherwise required to enable it to fulfil its obligations under the Contract.
- 2.2 The Contractor agrees on reasonable request at any time and following reasonable written prior notice to give the Beneficiary or those authorised by it access to the Documents and to provide copies (including copy negatives and CAD disks) thereof at the Beneficiary’s expense.
- 2.3 The Contractor warrants to the Beneficiary that the Documents (save to the extent duly appointed sub-consultants and sub-contractors have been used to prepare the same) are its own original work and that in any event their use in connection with the Works will not infringe the rights of any third party.

3 INSURANCE

- 3.1 The Contractor hereby covenants with the Beneficiary that it has effected Professional Indemnity insurance cover with a limit of indemnity of not less than £10,000,000 (ten million pounds) for any one occurrence or series of occurrences arising out of any one event in relation to the Works and that it will maintain such insurance with reputable insurers carrying on business in the European Union from the date hereof until 12 years after practical completion of the Works provided that such insurance is generally available in the market to

design and build Contractors at commercially reasonable rates and (for the avoidance of doubt) provided further that payment of any increased or additional premiums required by insurers by reason of the Contractor's own claims record or other acts omissions matters or things peculiar to the Contractor will be deemed to be within the reasonable rates.

- 3.2 As and when reasonably required by the Beneficiary the Contractor will produce for inspection documentary evidence that the insurance referred to in clause 3.1 is being properly maintained and that payment has been made in respect of the last preceding premium due thereunder.

4 NOTICES

- 4.1 Any notice to be given by either party hereunder will be sufficiently served if sent by hand, by facsimile transmission or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand will be deemed to be served on the date of delivery and any notice sent by facsimile transmission will be deemed to be served in full at the time recorded on the facsimile report sheet provided that if any notice sent by hand or facsimile is sent after 4.45 pm on any day it will be deemed to be served on the next working day. Any notice sent by post will be deemed to have been duly served at the expiration of 48 hours after the time of posting if the end of that period falls before 4.45pm on a working day and otherwise on the next working day.

5 ASSIGNMENT

- 5.1 Without prejudice to the provisions of clause 9, the benefit of and the rights of the Beneficiary under this Deed may be assigned without the consent of the Contractor on two occasions only to any person acquiring the whole or substantial part of the Beneficiary's interest in the Project and the Beneficiary will notify the Contractor in writing following any such assignment specifying the name and address of the assignee and the date of the assignment. The Contractor will not contend that any such assignee is precluded from recovering any loss resulting from any breach of this Deed (whatever the date of such breach) by reason only that that person is an assignee and not the original Beneficiary hereunder or by reason that the original Beneficiary or any intermediate Beneficiary escaped any loss resulting from such breach by reason of the disposal of any interest in the Site or that the original Beneficiary or any intermediate Beneficiary has not suffered any or as much loss.

6 BENEFICIARY'S REMEDIES

The rights and benefits conferred upon the Beneficiary by this Deed are in addition to any other rights and remedies it may have against the Contractor including without prejudice to the generality of the foregoing any remedies in negligence.

7 INSPECTION OF DOCUMENTS

The Contractor's liabilities under this Deed will not be in any way reduced or extinguished by reason of any inspection or approval of the Documents, or attendance at site meetings or other enquiry or inspection which the Beneficiary may make or procure be made for its benefit or on its behalf.

8 STANDARDS OF PRODUCTS AND MATERIALS

The Contractor warrants that it has exercised and will exercise reasonable skill, care and diligence in accordance with this Deed to see that it has not specified or used and it will not specify or use, and (as appropriate) it has not authorised or approved and it will not authorise or approve the specification or use by others, of any [products or] materials not in conformity with relevant British or European Union Standards or Codes of Practice or which at the time of use are widely known to construction contractors or members of the relevant design profession within the European Union to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used.

If in the performance of its duties under the Contract the Contractor becomes aware that it or any other person has specified or used, or authorised or approved the specification or use by others of any such products or materials the Contractor will notify the Beneficiary in writing forthwith. This clause does not create any additional duty for the Contractor to inspect or check the work of others which is not required by the Contract.

9 STEP-IN RIGHTS

9.1 The Contractor will not exercise or seek to exercise any right which may be or become available to it to terminate or treat as terminated or repudiated the Contract or its employment under it or discontinue or suspend the performance of any duties or obligations thereunder without first giving to the Beneficiary not less than 14 days' prior written notice specifying the Contractor's ground for terminating or treating as terminated or repudiated the Contract or its employment under it or discontinuing or suspending its performance thereof and stating the amount (if any) of monies outstanding under the Contract. Within such period of notice:

9.1.1 the Beneficiary may give written notice to the Contractor that the Beneficiary will thenceforth become the Employer under the Contract to the exclusion of the Employer and thereupon the Contractor will admit that the Beneficiary is the Employer and the Contract will be and remain in full force and effect notwithstanding any of the said grounds; and

9.1.2 if the Beneficiary has given such notice as aforesaid or under clause 9.3 below, the Beneficiary will as soon as practicable thereafter remedy any outstanding breach by the Employer which properly has been included in the Contractor's specified grounds and which is capable of remedy by the Beneficiary; and

9.1.3 if the Beneficiary has given such notice as aforesaid or under clause 9.3 below, the Beneficiary will from the service of such notice become responsible for all sums properly payable to the Contractor under the Contract accruing due after the service of such notice but the Beneficiary will in paying such sums be entitled to the same rights of set-off and deduction as would have applied to the Employer under the Contract.

- 9.2. Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by the Beneficiary to the Contractor, the Beneficiary will not be under any obligation to the Contractor nor will the Contractor have any claim or cause of action against the Beneficiary unless and until the Beneficiary has given written notice to the Contractor pursuant to clause 9.1.1 or clause 9.3 of this Deed.
- 9.3. The Contractor further covenants with the Beneficiary that if the Project Agreement is terminated by the Beneficiary, the Contractor, if requested by the Beneficiary, by notice in writing and subject to clause 9.1.2 and clause 9.1.3, will accept the instructions of the Beneficiary to the exclusion of the Employer in respect of the Works upon the terms and conditions of the Contract and will if so requested enter into a novation agreement whereby the Beneficiary is substituted for the Employer under the Contract.
- 9.4. Where the Contractor has given rights in relation to the Contract similar to those contained in this clause 9 to any other person then if both the Beneficiary and any such other person serve notice under clause 9.1.1 or clause 9.3 or its equivalent the notice served by the Beneficiary will not prevail over any notice served by but will prevail over any notice served by any other person.
- 9.5. The Employer acknowledges that the Contractor will be entitled to rely on a notice given to the Contractor by the Beneficiary under clause 9.3 as conclusive evidence that the Project Agreement has been terminated by the Beneficiary.
- 9.6. The Beneficiary may by notice in writing to the Contractor appoint another person to exercise its rights under this clause 9 subject to the Beneficiary remaining liable to the Contractor as guarantor for its appointee in respect of its obligations under this Deed.

10. OTHER COLLATERAL WARRANTIES

- 10.1 Following a written request from the Beneficiary the Contractor will (unless it has already done so) execute and/or [use reasonable endeavours to] procure that its sub-Contractors and/or professional consultants or any of them each execute a deed of collateral warranty in the relevant form specified in the Contract in favour of any person in whose favour the Contract obliged the Contractor to give or procure the giving of such a warranty.

11. APPLICABLE LAW AND JURISDICTION

This Deed will be construed in accordance with English law and be in all respects subject to the exclusive jurisdiction of the English courts.

12. THIRD PARTY RIGHTS

This Deed is enforceable by the original parties to it and by their successors in title and permitted assignees. Any rights of any person to enforce the terms of this Deed pursuant to the Contracts (Rights of Third Parties) Act 1999 are excluded.

IN WITNESS of which this document is executed as a Deed and is delivered on the date first stated above.