

**AMENDMENT 1**  
**EMPLOYER'S SCHEDULE OF CONTRACT AMENDMENTS (October, 2019)**

**[INSERT CONTRACT TITLE AND PROJECT REFERENCE NUMBER (if applicable)]**

**Notes for completing the Employer's Schedule of Contract Amendments:**

- Clauses highlighted yellow should be tailored to reflect project specific requirements (insert/delete information as appropriate)
- Delete all notes and square brackets in final version.

This Contract shall incorporate all the provisions of the JCT Design and Build Contract 2016 except that the Recitals, Articles, Contract Particulars and Conditions shall be amended by this Schedule of Employer's Contract Amendments (October, 2019) and shall be construed as varied accordingly.

The definitions in the JCT Design and Build Contract 2016 edition have the same meaning in this Employer's Schedule of Contract Amendments, unless the meaning given in the JCT Design and Build Contract 2016 edition is different to, or conflicts with, the meaning given in this Employer's Schedule of Contract Amendments, in which case this Employer's Schedule of Contract Amendments shall prevail.

Without prejudice to the above, in case of any difference, discrepancy or conflict between this Employer's Schedule of Contract Amendments and the JCT Design and Build Contract 2016 edition, this Employer's Schedule of Contract Amendments shall prevail.

**RECITALS**

**THIRD RECITAL**

Delete existing third recital and replace with: "the Contractor has examined the Employer's Requirements and has agreed to accept full responsibility for any design contained in them"

**ARTICLES**

**ARTICLE 10 EMPLOYER'S SCHEDULE OF CONTRACT AMENDMENTS - INCORPORATION**

Insert new Article 10:

"This Agreement and the Conditions shall have effect as modified by the amendments set out in the attached Employer's Schedule of Contract Amendments."

**CONTRACT PARTICULARS**

**CLAUSE 2.17.3**

Delete the whole entry of the JCT Contract Particulars relating to clause 2.17.3.

**CLAUSE 6.15**

Delete the whole entry of the JCT Contract Particulars relating to clause 6.15.

## **CLAUSE 7.2**

Delete the whole entry of the JCT Contract Particulars relating to clause 7.2.

## **CONDITIONS**

### **SECTION 1 DEFINITIONS AND INTERPRETATION**

#### **CLAUSE 1.1**

Add these definitions:

"Construction Products Regulations: the Construction Products Regulations 2013 (SI 2013/1387), the Construction Products Regulation (305/2011/EU), the Construction Products Regulations 1991 (SI 1991/1620) and the Construction Products Directive (89/109/EC)."

"Data Protection Impact Assessment: an assessment carried out pursuant to Article 35 of the General Data Protection Regulation."

"Data Protection Legislation: the Data Protection Act 2018, the Privacy and Electronic Communications (EC Directive) Regulations 2003, the Regulation of Investigatory Powers Act 2000, the Investigatory Powers Act 2016, the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 and the General Data Protection Regulation and any legislation implemented in connection with the General Data Protection Regulation and any replacement legislation coming into effect from time to time and all applicable laws and regulations relating to the processing of personal data and privacy, including as where applicable the guidance and codes of practice issued by the Information Commissioner."

"Data Security Breach: any breach of security or confidentiality leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, Personal Data."

"Deleterious Materials: materials, equipment, products or kits that are generally accepted, or generally suspected, in the construction industry at the relevant time as posing a threat to the health and safety of any person; or posing a threat to the structural stability, performance or physical integrity of the Works or any part or component of the Works; or reducing, or possibly reducing, the normal life expectancy of the Works or any part or component of the Works; or not being in accordance with any relevant British Standard, relevant code of practice, good building practice or any applicable agrément certificate issued by the British Board of Agrément; or having been supplied or placed on the market in breach of the Construction Products Regulations."

"Employer Data:

- a) the data, case management information, text, drawings, diagrams, documents, records, images or sounds (together with any database made up of any of these) which are embodied in any electronic, magnetic, optical or tangible media and which are:
  - i. supplied or communicated to the Contractor by or on behalf of the Council;
  - ii. inputted into the Council IT systems or the Service Providers IT system by the Council or the Council's Representatives; or
  - iii. which the Service Provider is required to access, generate, process, store or transmit pursuant to this Contract, whether on the Council IT systems or the Service Providers IT system; or

b) any Personal Data for which the Council is the Data Controller;

"Environmental Laws: any law, statute, statutory instrument or legislation of the European Union having effect in the United Kingdom concerning the protection of the environment or the generation, transportation, storage, use, treatment or disposal of Hazardous Substances."

"Hazardous Substances: any natural or artificial substances (whether in solid or liquid form or in the form of a gas or vapour and whether alone or in combination with any other substances) capable of causing harm to man or any other living organism supported by the environment or damaging the environment or public health including but not limited to any controlled, hazardous, toxic or dangerous waste."

"Standard of Care: all the reasonable skill, care and diligence to be expected of a qualified and experienced architect (or other appropriate professional designer) undertaking the design of works similar in scope and character to the Works."

"Supplier Advantage Initiative: the [insert brief description of WSCC early payment programme as per ITT]

**Note:** definition added as a result of the early payment programme entered into between the Employer and Oxygen Finance Limited – see also new clause 4.24A. Delete definition if Supplier Advantage Initiative is not applicable.

### **CLAUSE 1.3**

In clause 1.3, after "override or modify" add:

"the Employer's Schedule of Contract Amendments, " [and

at the end of the clause, after the full stop, insert:

"Following execution and completion of this agreement (incorporating the Employer's Schedule of Contract Amendments) by the Parties, nothing contained in the [pre-construction agreement] [limited instruction] entered into by the Parties on [DATE] shall override or modify the Schedule of Amendments, the Agreement or these Conditions." ]

**Note:** If a PCA or limited instruction have been used include wording in brackets and select appropriate document.

## **SECTION 2 CARRYING OUT THE WORKS**

### **CLAUSE 2.1**

#### **SUB-CLAUSE 2.1.2**

Delete sub-clause 2.1.2 and replace with "Number not used".

Insert new sub-clause 2.1.5:

"The Employer requires that the Contractor complies with West Sussex County Council Building Contract Directives (BCD) (copies of BCDs included in these Employers Requirements) and the following publications:

- WSCC Design Guide for Sustainable Buildings.
- WSCC Construction Guides for Building Construction, Mechanical Engineering and Electrical Engineering.
- 'A Data Protection Code of Practice for Surveillance Cameras and

Personal Information’  
as amended from time to time issued by Information Commissioners  
Office.

- WSCC General Policy Brief for Education Buildings”

Insert new sub-clause 2.1.6:

“The Contractor shall be deemed to have satisfied itself as to the soil and rock strata comprising the site of the Works and notwithstanding any other provision of this Contract, no matter arising from the state and condition of the soil and rock strata comprising the site Works shall give rise to any adjustment of the Contract Sum, or to any extension of time (whether under Clause 2.25 or otherwise) or to any entitlement on the part of the Contractor to terminate his employment under this Contract.”

#### **NEW CLAUSE 2.1.7 PREVENT DUTY**

Add a new sub-clause 2.1.7:

2.1.7.1 The Contractor shall adequately support the Employer, as a specified authority under section 26 of the Counter-Terrorism and Security Act 2015 (as amended by the Counter-Terrorism and Security Act 2015 (Risk of Being Drawn into Terrorism) (Guidance) Regulations 2015), in connection with the Employer’s duty to have due regard to the need to prevent people from being drawn into terrorism.

2.1.7.2 The adequate provisions procured by the Contractor in order to support the Employer as set out above will need to be considered by the Employer and Contractor on the basis of each individual contract.”

#### **[NEW CLAUSE 2.1.8A PLANNING PERMISSION]**

2.1.8A.1 Unless otherwise agreed between the Parties, it is the responsibility of the [Employer or the Employer’s representative] OR [the Contractor] to apply for planning permission in respect of the Works under the Town and Country Planning Act 1990 or other applicable legislation.]

Note: Delete this clause 2.1.8A if planning permission for the works is not required or if the Works fall within permitted development under the Town and Country Planning (General Permitted Development) Order 1995.

Note: Delete the option (and square brackets) which does not apply in respect of applying for planning permission.

#### **[NEW CLAUSE 2.1.8B PLANNING CONDITIONS]**

2.1.8B.1 Without prejudice to the Contractor’s duty to comply with the Statutory Requirements, the Contractor shall be responsible for the discharge of the planning conditions under application number [insert]. Whenever requested by the Employer, the Contractor shall provide to the Employer evidence that he has discharged the planning conditions that he is required to discharge under planning application number [insert].

2.1.8B.2 Notwithstanding any other provision of this Contract, the Contractor shall not be entitled to any extension of time under clause 2.25 to the relevant Completion Date, reimbursement of loss and/or expense or any other addition to the Contract Sum as a result of complying with this clause 2.1.8B and a Change shall not arise in connection therewith].

Note: Delete this clause 2.1.8B if planning permission for the works is not required or if the Works fall within permitted development under the Town and Country Planning (General Permitted Development) Order 1995.

## **CLAUSE 2.2**

Insert in sub-clause 2.2.1 after "so far as procurable, be":

"of satisfactory quality and"

Insert at the very end of clause 2.2.1:

"The Contractor shall encourage the use of recycled or environmentally friendly raw materials and products and ethical sourcing processes, provided that such materials and products are of satisfactory quality."

## **CLAUSE 2.2.6**

Insert new sub-clause 2.2.6:

"The Contractor shall not specify or use anything in the Works, which, at the time of specification or use, is a Deleterious Material."

## **CLAUSE 2.2.7**

Insert new sub-clause 2.2.7:

"Without prejudice to clause 2.2.6, the Contractor shall not knowingly suffer or permit the use in the Works of anything, which, at the time of use, is a Deleterious Material. The Contractor shall immediately notify the Employer if he becomes aware of any such use."

## **NEW CLAUSE 2.7.6 EXECUTION OF CONTRACT DOCUMENTS**

Insert new Clause 2.7.6:

"The Contractor shall, no later than 21 days from receipt of the Contract documents, properly execute and return the Contract documents to the Employer. If the Contractor does not properly execute and return the Contract documents, notwithstanding any other term of this Contract, the Employer may withhold 25% (in addition to any sums withheld under clause 7.3.3) of the sums that would otherwise be due to the Contractor under this Contract, until such a time as the Contract documents have been properly executed and returned to the Employer."

## **NEW CLAUSE 2.7.7 EXECUTION OF COLLATERAL WARRANTIES**

Insert new Clause 2.7.7:

"The Contractor procures the proper execution of all collateral warranties due under the Contract from sub-contractors and/or Consultants (and sub-consultants) prior to them starting work on site. If the Contractor does not procure all properly executed collateral warranties, notwithstanding any other term of this Contract, the Employer may withhold 10% (in addition to any sums withheld under clauses 2.7.6 and 7.3.3) of the sums that would otherwise be due to the Contractor under this Contract, until such a time as the Contractor does provide to the Employer all properly executed collateral warranties,"

**CLAUSE 2.11** delete clause 2.11 and its heading and replace with "Number not used"

**CLAUSE 2.12** delete clause 2.12 and its heading and replace with "Number not used".

**CLAUSE 2.13**

Delete "If the Contractor becomes aware of any inadequacy as is referred to in clause 2.12 or any other discrepancy or divergence in or between any of the following, namely:" and replace with "If the Contractor becomes aware of any inadequacy, discrepancy or divergence in or between the following, namely:".

**CLAUSE 2.14** Delete Clause 2.14 and replace with:

"Where there is a discrepancy within the Employer's Requirements or the Contractor's Proposals (including any non-compliance with the Statutory Requirements and including a discrepancy that results from a Change under clause 3.9), or a divergence between the Employer's Requirements and the Contractor's Proposals (including a divergence that results from a Change under clause 3.9), the Contractor shall notify the Employer of the discrepancy or divergence and of its proposed amendments to correct or remove it (as the case may be). Subject always to compliance with the Statutory Requirements, the Employer shall decide between the discrepant or divergent items (as the case may be) or otherwise may accept the Contractor's proposed amendments or decide how the discrepancy or divergence shall be dealt with. The Contractor shall be obliged to comply with the decision or acceptance by the Employer without any adjustment of the Contract Sum or extension of time for completion and without affecting in any way or to any degree the responsibility of the Contractor under this Contract."

**CLAUSE 2.15**

In sub-clause 2.15.2.1 after "change in Statutory Requirements" insert: "that was not foreseen by the Contractor at the Base Date and could not reasonably have been foreseen by a competent contractor at the Base Date".

Delete sub-clause 2.15.2.3

**CLAUSE 2.17**

Delete clause 2.17 and its heading and replace with a new heading:

**"Design Work – liabilities**

Insert new sub-clause 2.17.1:

"Without derogating from any other provision in this Contract, the Contractor shall be fully responsible in all respects for the design of the Works including all design work proposed by or on behalf of the Employer on or before the date of this Contract forming part of the Employer's Requirements."

Insert new sub-clause 2.17.2:

"Without prejudice to clause 2.17.1, the Contractor shall be fully responsible in all respects for any design work carried out by a professional consultant or specialist designer or sub-contractor that the Contractor has or will employ (including a person employed at the Employer's request), whether such design work is carried out before, on or after the date of this Contract."

Insert new sub-clause 2.17.3:

"Without derogating from any other provision in this Contract, the Contractor warrants to the Employer that it shall use the Standard of Care when:

- .1 designing the Works; and
- .2 selecting goods, materials, plant and equipment for incorporation in the Works."

Insert new sub-clause 2.17.4:

"Without prejudice to clauses 2.1.1 and 2.17.3, the Contractor warrants that it shall use the Standard of Care to see that its design complies with Statutory Requirements."

#### **CLAUSE 2.26**

In sub-clause 2.26.2.1, after "clause 2.13" insert: "(subject always to clause 2.14)"

**CLAUSE 2.35** Delete "within a reasonable time" in line 11.

In line 12 after "be made good" insert "within the following required times"

Insert after fourteenth line at end of clause:

"The required times are:

- a) Water ingress or damp from internal services; 8 working hours
- b) Electrical and heating faults; 8 working hours
- c) Blocked drains; 8 working hours
- d) Ill-fitting doors/windows where security affected; 8 working hours
- e) Defective floor coverings or pavings; 7 working days unless in the opinion of the Employer, these represent a possible danger in which case 8 working hours
- f) All other defects which the Employer's Agent considers require attention before the end of the Rectification Period, which are not listed above, will be attended to within 5 working days or such lesser period as the Employer's Agent may reasonably require."

**NEW CLAUSE 2.36A** Insert new clause 2.36A after clause 2.36:

#### **"Snagging list and defects, shrinkages or other faults remaining at practical completion**

Clauses 2.35 and 2.36 shall apply, all other things being equal, to:

- .1 any items identified on any snagging list issued by or on behalf of the Employer at or around practical completion or attached to a Practical Completion Statement or Section Completion Statement;
- .2 any defects, shrinkages or other faults in the Works at practical completion; and
- .3 any incomplete work, forming part of the Works, remaining at practical completion."

#### **CLAUSE 2.38.2**

Insert: ", extension" after "refurbishment" in line 5 of clause 2.38.2 and delete the last sentence of clause 2.38.2

### **SECTION 4 PAYMENT**

#### **PROVISION FOR THE EMPLOYER'S PAYMENT PROCEDURE**

**CLAUSE 4.7.3:**

In clause 4.7.3 insert after 'sum has been calculated; in line 3:

"Immediately following the issue of an Interim Payment Application, the Contractor shall send an invoice to the Employer and to the Employer's Agent confirming the amount due within the Interim Payment Application ("the Contractor's Invoice"). For the purpose of the Housing Grants, Construction and Regeneration Act 1996 (as amended) the due date for payment in respect of an Interim Payment Application shall be the date of receipt by the Employer of a valid Contractor's Invoice. The Contractor's Invoice shall be deemed valid 7 days after the relevant Interim Valuation Date. The Contractor's Invoice must contain the invoice date and number, the relevant project purchase order number, the total amount payable plus VAT (if applicable), the vendor number, the Small and Medium Enterprises number (if applicable), the project name and address, the project number and the Project Officer's name and must be sent via e-mail to [ctg.invoicing@westsussex.gov.uk](mailto:ctg.invoicing@westsussex.gov.uk) and copied to [invoices@westsussex.gov.uk](mailto:invoices@westsussex.gov.uk).

Add at the end of clause 4.7.3:

"In accordance with new clause 12.1.1 of Schedule 2 Part 2, the Employer shall use the 7 day period in this clause 4.7.3 and in clause 4.7.2 in order to verify that the Contractor's Invoice is valid. If the Contractor's Invoice is found to be invalid, the Contractor and the Employer will agree the amount due under the Interim Payment Application within the 7 day period and the Contractor's Invoice will be adjusted accordingly."

**CLAUSE 4.8**

Insert at the end of clause 4.8:

"Where the paying Party is the Contractor, immediately following the issue of a Final Payment Notice, the Contractor shall send an invoice to the Employer and to the Employer's Agent confirming the amount due within the Final Payment Notice ("the Contractor's Final Invoice"). The Contractor's Final Invoice must contain the invoice date and number, the relevant project purchase order number, the total amount payable plus VAT (if applicable), the vendor number, the Small and Medium Enterprises number (if applicable), the project name and address, the project number and the Project Officer's name and must be sent via e-mail to [ctg.invoicing@westsussex.gov.uk](mailto:ctg.invoicing@westsussex.gov.uk) and copied to [invoices@westsussex.gov.uk](mailto:invoices@westsussex.gov.uk).

**CLAUSE 4.9.1**

Amend clause 4.9.1:

Delete: '14' and insert '[30]' or '[20]'.

Note: the Council's payment terms under Standing Orders are 30 days (20 days for SMEs) from receipt of a valid invoice. Select appropriate payment term.

**CLAUSE 4.10**

Delete from the start of sub-clause 4.10.4 "The Employer's fiduciary" to "prevent him exercising" (inclusive) and replace with:  
"The Employer may exercise".

**CLAUSE 4.16**

Delete clause 4.16 and replace with:



"With regard to the Retention, which the Employer may deduct and retain as referred to in clause 4.14, the Employer shall be:

- .1 under no fiduciary obligation to the Contractor or any third party;
- .2 under no obligation to set aside in a separate bank account any amount representing the Retention; and
- .3 entitled to the full beneficial interest in any interest accruing on the Retention and shall be under no obligation to account to the Contractor for any such interest."

**[PROVISION FOR THE EMPLOYER'S EARLY PAYMENT PROCEDURE]**

**CLAUSE 4.24A**

Insert new clause 4.24A after clause 4.24:

**"Supplier Advantage Initiative**

- 4.24A.1 The Employer has established the Supplier Advantage Initiative and if the Supplier Advantage Initiative applies to this Contract then for the duration of this Contract or until the Supplier Advantage Initiative is terminated or in any other way comes to an end then, notwithstanding clauses 4.7, 4.9 and 4.24 the Contractor acknowledges and agrees that in consideration of the Employer paying an Interim Payment or the final payment under or in connection with this Contract prior to the final date for payment under the terms of this Contract, the Employer shall be entitled to deduct and retain from the Interim Payment or the final payment, for its own benefit, such percentage of that Interim Payment or final payment (the "Rebate") that is calculated in accordance with the Calculation of Rebate Table below. This is notwithstanding any provision in this Contract prohibiting the Employer's right to set-off sums owed to it by the Contractor against any sums due to the Contractor.
- 4.24A.2 For the avoidance of doubt, nothing in this clause 4.24A shall:
  - .1 affect the date by which payment of an Interim Payment or the final payment is required to be made by the Employer; or
  - .2 require the Employer to make early payment to the Contractor in respect of any Interim Payment or the final payment.
- 4.24A.3 In the event the Contractor, acting reasonably, considers that the Employer has incorrectly applied a Rebate it shall raise a query in respect of that Rebate with the Employer's accounts payable team (whose details will be provided to the Contractor by the Employer, as updated from time to time) within seven (7) days of the relevant Rebate being applied.
- 4.24A.4 If the Contractor does not raise a genuine query under clause 4.24A.3 within seven (7) days of the relevant Rebate being applied, the Employer shall be deemed to have applied the Rebate correctly in that instance and shall be entitled to retain that Rebate.
- 4.24A.5 The Parties shall refer any query raised in accordance with clause 4.24A.3 to Section 9 (Settlement of Disputes) of this Contract.
- 4.24A.6 The Parties agree to implement an e-invoicing process within 1 month of the date of this Contract. The Contractor will then send electronic copies of their invoices;
  - .1 in machine generated PDF format (i.e. produced directly from

.2 the Contractor's billing application or PC program;  
to the designated Employer invoice receiving email address:  
[ctg.invoicing@westsussex.gov.uk](mailto:ctg.invoicing@westsussex.gov.uk) and copied to  
[invoices@westsussex.gov.uk](mailto:invoices@westsussex.gov.uk).

- 4.24A.7 The Employer may make proposals to implement an online portal to administer the early payment programme and the Contractor agrees to consider such proposals in good faith and not refuse reasonable amendments to this Contract to reflect such proposals.
- 4.24A.8 In the event that the Employer implements an online portal the Employer shall grant (insofar as it has the power to do so) to the Contractor a revocable, royalty free, non-exclusive, worldwide licence to use the online portal for the sole purpose of meeting its obligations under and realising its benefits arising from this Contract.
- 4.24A.9 The Contractor shall not transfer the licence granted under clause 4.24A.8, without the prior written consent of the Employer.
- 4.24A.10 The licence granted at clause 4.24A.8 shall continue for the duration of the Contract or until the Employer decides for any reason to terminate the licence (by notifying the Contractor in writing), whichever occurs first.
- 4.24A.11 Notwithstanding anything to the contrary in the Contract, any and all intellectual property rights in the online portal shall remain vested in the Employer and/or any other third party or Parties that supplied the online portal (or any part of it) to the Employer.

Calculation of Rebate Table  
[Insert calculation of Rebate here]

Note: delete clause 4.24A if Supplier Advantage Initiative is not applicable.

## SECTION 5 CHANGES

### **CLAUSE 5.6**

Insert at the end of clause 5.6, before the full stop:

"provided always that the substantial change in the conditions does not arise by reason of any error, omission, negligence or default of the Contractor or the Contractor's Persons, "

## SECTION 6 INJURY DAMAGE AND INSURANCE

### **CLAUSE 6.1**

In Clause 6.1, after "caused by the carrying out of the Works" insert:

"or of any other obligation pursuant to Section 2 or Section 3 of the Conditions".

### **CLAUSE 6.2**

In clause 6.2, after “by reason of the carrying out of the Works” insert:

“or of any other obligation pursuant to Section 2 or Section 3 of the Conditions”.

#### **CLAUSE 6.10.5**

Insert new clause 6.10.5:

“Where Insurance Option A applies, the Contractor shall ensure that his insurer is a member of the Pool Reinsurance Company Limited scheme (or of any similar successor scheme) prior to entering into the contract and if requested to do so by the Employer, shall produce for inspection documentary evidence of such membership.”

#### **NEW CLAUSE 6.15**

Delete clause 6.15 and replace with:

##### **“Obligation to insure**

The Contractor shall maintain professional indemnity insurance for an amount of at least £[\*] ([in words]) for any one occurrence, or series of occurrences, arising out of any one event for a period beginning on the date of entering into the contract and ending 12 years after the date of practical completion of the Works, provided that (subject to clause 6.15A) such insurance is available at commercially reasonable rates. The Contractor shall maintain that professional indemnity insurance:

.1 with reputable insurers lawfully carrying on insurance business in the UK;

.2 on customary and usual terms and conditions prevailing for the time being in the insurance market; and

.3 on terms that do not require the Contractor to discharge any liability before being entitled to recover from the insurers and that would not adversely affect the rights of any person to recover from the insurers under the Third Parties (Rights Against Insurers) Act 1930”.

\* Note: Standing Orders require a minimum level of indemnity for Professional Indemnity insurance of £2,000,000.00. This figure may need to be increased according to project specific circumstances.

#### **NEW CLAUSE 6.15A**

Insert new clause 6.15A, after clause 6.15:

##### **“Commercially reasonable rates**

Any increased or additional premium required by insurers for the insurance referred to in clauses 6.15, 6.16B and 6.16C because of the Contractor's claims record or other acts, omissions, matters or things particular to the Contractor shall be deemed to be within commercially reasonable rates.”

#### **NEW CLAUSE 6.15B**

Insert new clause 6.15B after clause 6.15A:

#### **"Evidence of insurance**

Whenever the Employer reasonably requests, the Contractor shall send the Employer evidence that the Contractor's insurance referred to in clause 6.15 is in force, including, if required by the Employer, an original letter from the Contractor's insurers or brokers confirming:

- .1 the Contractor's then current professional indemnity insurance; and
- .2 that the premiums for that insurance have been paid in full at the date of that letter."

#### **NEW CLAUSE 6.16A**

Insert new clause 6.16A after clause 6.16:

#### **"Sub-contractors' and professional consultant or specialist designers' professional indemnity insurance**

The Contractor shall procure that sub-contractors with a design responsibility and professional consultants or specialist designers who are required by the Employer to provide a deed of collateral warranty, shall maintain professional indemnity insurance in accordance with the required form of collateral warranty. Within 14 days of the date of this Contract (or, if later, within 14 days of the appointment of a sub-contractor or professional consultant or specialist designer), the Contractor shall procure and shall send to the Employer evidence that the sub-contractors or professional consultants or specialist designer's insurance referred to in this clause is in force, including, if required by the Employer, an original letter from each sub-contractor's or professional consultant's or specialist designer's insurers or brokers confirming:

- .1 the sub-contractor's or professional consultant's or specialist designer's then current insurance, as referred to in this clause; and
- .2 that the premiums for that insurance have been paid in full at the date of that letter.

If the sub-contractor or professional consultant or specialist designer does not have and/or is unable to obtain professional indemnity insurance cover, the Employer will be entitled to call upon the Contractor's professional indemnity insurance policy under and pursuant to the Contract. For the avoidance of doubt, the sub-contractor's or professional consultant's or specialist designer's professional indemnity insurance cover shall be the first and primary cover for the purposes of any matter for which professional indemnity insurance is required pursuant to the Contract."

#### **NEW CLAUSE 6.16B**

Insert new clause 6.16B after clause 6.16A:

6.16B.1 "Cover for asbestos claims [is required, with a limit of indemnity of £2,000,000 (Two Million Pounds). The required limit of indemnity is an annual aggregate amount.] **OR** [is not required].

6.16B.2 Notwithstanding clause 6.16B.1, where asbestos is known to be present or is later discovered in connection with the Works, all removal, movement and any other activities involving asbestos shall be carried out by a specialist contractor or sub-contractor licenced by the Health and Safety Executive (if the Contractor is not a specialist and licenced asbestos contractor) and who has taken out and is maintaining adequate insurance cover for asbestos claims."

Note: Select option in square brackets as appropriate with regard to the project specific requirements.

#### **NEW CLAUSE 6.16 C**

Insert new clause 6.16C after clause 6.16B:

"Cover for pollution and contamination claims [is required, with a limit of indemnity of £2,000,000.00\* (Two Million Pounds)] **OR** [is not required]"

Note: Select option in square brackets as appropriate with regard to the project specific requirements. \*An increased limit may be required for high value contracts; seek advice from Legal Services.

### **SECTION 7 ASSIGNMENT THIRD PARTY RIGHTS AND COLLATERAL WARRANTIES**

#### **CLAUSE 7.1**

Delete clause 7.1 and replace with:

##### **"Right to assign**

.1 The Employer may assign or otherwise transfer the benefit of this Contract twice without the Contractor's consent (upon any subsequent assignments, such consent not to be unreasonably withheld by the Contractor) to any person taking an interest in the Works or the completed Works. In this Contract, the term "Employer" shall be construed accordingly.

.2 The Employer shall notify the Contractor of any assignment within 14 days. If the Employer fails to do this, the assignment shall still be valid.

.3 The Contractor shall not contend that any person to whom the benefit of this agreement is assigned under this clause 7.1 may not recover any sum under this Contract because that person is an assignee and not a named party to this Contract.

.4 The Contractor shall not assign or charge the benefit of this Contract or any right arising under it without the Employer's prior consent, which the Employer may withhold at its absolute discretion."

#### **CLAUSE 7.2**

Delete clause 7.2 and its heading and replace with "Number not used".

#### **[CLAUSE 7.3**

Delete clause 7.3 and replace with:

The Contractor shall, no later than 4 weeks of the Date of Possession under the Contract, provide to the Employer whichever of the following the Contract Particulars state as being required:

.1 an on demand performance bond of the Contractor's due performance of the Contract from a bank or other surety approved by the Employer in an amount equal to the percentage of the Contract Sum and for the period stated in the Contract Particulars. The Contractor may elect to deposit the bond amount with the Employer's bank in lieu of a bond. In such circumstances, the Contractor shall, no later than 4 weeks of the Date of Possession under the Contract, enter into an Agreement for Deposit by Way of Security with the Employer in the form provided by the Employer and deposit into the Employer's bank account an amount which shall be no less than 10% of the Contract Sum;

.2 a guarantee by the Contractor's parent company identified in the Contract Particulars;

Any such bond or guarantee, unless otherwise agreed by the Employer, being in the form of the document identified by the Contract Particulars.

.3 If the Contractor does not procure the execution and delivery of either the bond, Guarantee or Deposit by Way of Security no later than 4 weeks of the Date of Possession under the Contract then, notwithstanding any other term of this Contract, the Employer may deduct £[insert figure which equates to 10% of the Contract Sum] from the Contract Sum or the sums that would otherwise be due to the Contractor under this Contract, until the Contractor procures such execution and delivery. The above figure will be deducted in equal amounts from the first three Interim Payments and will be released upon procurement of the bond, Guarantee or Deposit by Way of Security.”]

Note: include new clause 7.3 only where a bond or PCG is required (where the Contract Sum is £250,000 or more).

Note: the Employer’s standard wording for an Agreement for Deposit by Way of Security is available from Legal Services Commercial Team.

## **SECTION 8 TERMINATION**

### **CLAUSE 8.4.**

In sub-clause 8.4.1.3 after “requiring him to remove” insert:

“or rectify”

### **CLAUSE 8.6**

In clause 8.6 delete: ‘73(1)(b)’ and insert ‘73(1)(a), (b) and (c)’ in line 7.

### **NEW CLAUSE 8.7.2.4**

Insert new clause 8.7.2.4:

“Upon any termination of the Contractor’s employment or if the Contract is terminated or discharged and notwithstanding that the validity of termination or discharge is disputed by the Contractor, the Contractor shall vacate the site having carried out all necessary measures to ensure the Works and the site are left in a condition whereby:

- they present no hazard to any personnel and the general public;
- they are compliant with all Health and Safety legislation; and
- they are suitably secured to prevent unauthorised access and the removal of any unfixed materials and any plant.

The Contractor shall promptly deliver to the Employer possession of the Site and of the Works.”

### **CLAUSE 8.12**

Delete sub-clause 8.12.3.5.

Delete sub-clause 8.12.4.

## **SCHEDULE 2 SUPPLEMENTAL PROVISIONS**

Part 2

**Paragraph 11**

Delete paragraph 11 and insert:

- 11.1 The Contractor acknowledges that the Employer is subject to the requirements of the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations and the National Audit Act 1983 and further acknowledges the statutory obligations on and commitment of the Employer to open government and public access to information and, accordingly, shall assist and cooperate with the Employer to enable the Employer to comply with its information disclosure and audit obligations.
- 11.2 The Contractor shall and shall procure that its sub-contractors shall:
- (a) transfer to the Employer all requests for information that it receives as soon as practicable and in any event within two (2) working days of receiving a request for information;
  - (b) provide the Employer with a copy of all information in its possession or power in the form that the Employer requires within five (5) working days (or such other period as the Employer may reasonably specify) of the Employer's request; and
  - (c) provide all necessary assistance as reasonably requested by the Employer to enable the Employer to respond to the request for information within the time for compliance set out in the FOIA or the Environmental Information Regulations or the National Audit Act 1983.
- 11.3 The Employer shall be responsible for determining in its absolute discretion and notwithstanding any other provision in this Agreement or any other agreement whether the commercially sensitive information and/or any other information is exempt from disclosure in accordance with the provisions of the FOIA or the Environmental Information Regulations or the National Audit Act 1983.
- 11.4 In no event shall the Contractor respond directly to a request for information unless expressly authorised to do so by the Employer.
- 11.5 The Contractor acknowledges that (notwithstanding the provisions of this clause 10.1 the Employer may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the Freedom of Information Act 2000 ("the Code") and any directions of the Information Commissioner, be obliged under the FOIA, or the Environmental Information Regulations, or the National Audit Act 1983 to disclose information concerning the Contractor or the Works:
- (a) in certain circumstances without consulting the Contractor; or
  - (b) following consultation with the Contractor and having taken their views into account;
- provided always that the Employer shall, in accordance with any recommendations of the Code, take reasonable steps, where appropriate, to give the Contractor advanced notice, or failing that, to draw the disclosure to the Contractor's attention after any such disclosure.
- 11.6 The Contractor shall ensure that all Information is retained for disclosure and shall permit the Employer to inspect such records as may be reasonably requested from time to time.
- 11.7 In the event that the Contractor incurs or would incur costs in actively locating, retrieving and extracting information in assisting the Employer to respond to a request for information, the Contractor must inform the Employer of such likely

costs and the Employer will inform the Contractor in writing whether or not it still requires the Contractor to assist with complying with the request. If the Employer informs the Contractor to proceed with the request, the Employer will reimburse the Contractor for such reasonable and necessary costs as the Contractor incurs but only to the extent that the Employer itself is entitled to reimbursement of such costs in accordance with and to the level set by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

- 11.8 The Contractor acknowledges that identification of any matter to the Employer by the Contractor as commercially sensitive information is of indicative value only and that the Employer may be obliged to disclose it in accordance with this clause.
- 11.9 The Contractor acknowledges that the Employer is subject to transparency obligations which require the Employer to publish certain contract information and materials. Accordingly, and notwithstanding any other term of this Contract, the Contractor hereby gives its consent for the Council to publish this Contract and its schedules in its entirety, including from time to time agreed changes to the Contract (save and except such matters as the Employer is by law able to exclude as being confidential, commercially sensitive, or otherwise not in the public interest to disclose), to the general public in whatever form the Employer decides. The Contractor shall render such assistance and cooperate with the Employer to enable such publication, including, if the Employer so requires, assisting the Employer at no additional cost to the Employer in the redaction of such contract documents prior to publication to eliminate material considered confidential, commercially sensitive, or otherwise not in the public interest to disclose."

### **PARAGRAPH 13 DATA PROTECTION**

Insert new Paragraph 13:

For the purposes of this paragraph 13, "Data Controller", "Data Processor", "Data Subject" and "Personal Data" have the meanings given to those terms in the Data Protection Legislation in force from time to time.

- 13.1 Both parties shall, and the Contractor shall procure that its Contractor's Persons shall, duly observe all their obligations under the Data Protection Legislation, which arise in connection with the performance of this Contract.
- 13.2 The Contractor shall perform its obligations under this Contract in such a way as to ensure that it does not cause the Employer to breach any of its applicable obligations under the Data Protection Legislation.
- 13.3 The Contractor shall be liable for and shall indemnify (and keep indemnified) the Employer against each and every action, proceeding, liability, cost, claim, loss, expense (including reasonable legal fees and disbursements on a solicitor and client basis) and demands incurred by the Employer which arise directly from a breach by the Contractor of its obligations under the Data Protection Legislation, including without limitation those arising out of any third party demand, claim or action, or any breach of contract, negligence, fraud, wilful misconduct, breach of statutory duty or non-compliance with any part of the Data Protection Legislation by the Contractor or the Contractor's Persons.
- 13.4 The Contractor agrees that it shall enter into a data sharing agreement with the Employer if required to do so at the Employer's absolute discretion so as to set out the Parties' obligations in relation to any Personal Data which may be



shared between the Parties.<sup>1</sup>

13.5 The provisions of this Paragraph 13 (Data Protection) shall apply during the continuance of this Contract and indefinitely after its expiry or termination.

[Insert new sub-paragraphs 13.6 – 13.9:]

13.6 With respect to the Parties' rights and obligations under this Contract, the Parties agree that the Employer is the Data Controller and that the Contractor is the Data Processor. A description of the Personal Data processed by the Contractor and the processing activities undertaken by the Contractor is set out in Appendix 1 (Data Processing Activities).

13.7 In respect of any Personal Data that the Contractor processes on behalf of the Employer in connection with this Contract, the Contractor shall and shall procure that the Contractor's Persons shall:

13.7.1 solely process the Personal Data for the purposes of fulfilling its obligations under this Contract and in compliance with the Employer's written instructions as set out in this Contract and as may be specified from time to time in writing by the Employer;

13.7.2 notify the Employer immediately if any instructions of the Employer relating to the processing of Personal Data are unlawful;

13.7.3 not transfer to or access any Personal Data from a country outside of the United Kingdom without the prior written consent of the Employer;

13.7.4 comply with the Employer's instructions in relation to transfers of Personal Data to a country outside of the United Kingdom unless the Contractor is required pursuant to applicable laws to transfer Personal Data outside the United Kingdom, in which case the Contractor shall inform the Employer in writing of the relevant legal requirement before any such transfer occurs unless the relevant law prohibits such notification on important grounds of public interest;

13.7.5 take reasonable steps to ensure the reliability of any Contractor's Persons who have access to the Personal Data and ensure that all Contractor's Persons used by the Contractor to process Personal Data are subject to legally binding obligations of confidentiality in relation to the Personal Data;

13.7.6 ensure that none of the Contractor's Persons publish, disclose or divulge any of the Personal Data to any third party unless directed in writing to do so by the Employer;

13.7.7 not engage any Contractor's Persons to carry out any processing of Personal Data without the prior written consent of the Employer provided that notwithstanding any such consent the Contractor shall remain liable for compliance with all the requirements of this Contract including in relation to the processing of Personal Data;

13.7.8 ensure that obligations equivalent to the obligations set out in these

---

<sup>1</sup> A data sharing agreement will be required where the parties are sharing personal data under the Contract and where each party is using the personal data as a data controller in its own right. The data sharing agreement should set out the protocols that the parties will follow to determine exactly what data will be shared, the means of transmission and how the parties will cooperate with one another to ensure compliance with data protection requirements.

- data protection clauses are included in all contracts between the Contractor and any permitted Contractor's Persons who will be processing Personal Data and who have been approved in accordance with these data protection clauses;
- 13.7.9 take appropriate technical and organisational measures against unauthorised or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data taking into account the harm that might result from such unauthorised or unlawful processing, loss, destruction or damage and the nature of the Personal Data to be protected including without limitation, all such measures that may be required to ensure compliance with the Data Protection Legislation;
  - 13.7.10 upon request provide a written description of the technical and organisational measures employed by the Contractor pursuant to these data protection clauses (within the timescales required by the Employer) and if the Employer does not consider that such measures are adequate to enable compliance with the Data Protection Legislation, implement such additional measures as may be specified by the Employer (acting reasonably) to ensure compliance;
  - 13.7.11 taking into account the nature of the data processing activities undertaken by the Contractor, provide, at no cost to the Employer, all possible assistance and co-operation (including without limitation putting in place appropriate technical and organisational measures) to enable the Employer to fulfil its obligations to respond to requests from individuals exercising their rights under the Data Protection Legislation, including (without limitation):
    - 13.7.11.1 notifying the Employer within two (2) working days, of receiving any request from a Data Subject exercising their rights under the Data Protection Legislation; and
    - 13.7.11.2 complying with the Employer's instructions in relation to complying with the Data Subject's rights under the Data Protection Legislation, which may include (without limitation) providing notices to Data Subjects in a format specified by the Employer, rectifying inaccurate Personal Data, ceasing or restricting processing of Personal Data, providing access to Personal Data, permanently deleting or securely destroying Personal Data and providing copies of Personal Data in a format specified by the Employer;
  - 13.7.12 maintain a record of the Contractor's processing activities in accordance with the requirements of the Data Protection Legislation;
  - 13.7.13 assist the Employer, at no cost to the Employer, in ensuring compliance with the obligations set out in Articles 32 to 36 (inclusive) of the General Data Protection Regulation (or any equivalent legislation in the UK or any subsequent legislation) taking into account the nature of the data processing undertaken by the Contractor and the information available to the Contractor, including (without limitation):
    - 13.7.13.1 providing information and assistance upon request to enable the Employer to notify Data Security Breaches to the Information Commissioner's and/or to affected individuals and/or to any other regulators to whom the Employer is required to notify any Data Security Breaches; and
    - 13.7.13.2 providing input into and carrying out Data Protection Impact Assessments in relation to the Contractor's data

processing activities;

13.7.14 ensure that it has in place appropriate technical and organisational measures to ensure that processing of Personal Data carried out by the Contractor in connection with this Contract meets the requirements of the Data Protection Legislation and ensures protection of the rights of individuals under the Data Protection Legislation;

13.7.15 notify the Employer immediately and in any event within twenty four (24) hours in writing if:

13.7.15.1 the Contractor or any Contractor's Persons engaged by or on behalf of the Contractor suffers a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, Personal Data; or

13.7.15.2 the Contractor or any Contractor's Persons engaged by or on behalf of the Contractor receives any Data Security Breach notification, complaint, notice or communication which relates directly or indirectly to the processing of the Personal Data or to either Party's compliance with the Data Protection Legislation

and in each case the Contractor shall provide full co-operation, information and assistance to the Employer in relation to any such Data Security Breach, complaint, notice or communication at no cost to the Employer;

13.7.16 upon termination of this Contract, at the discretion of and at no cost to the Employer, delete securely or return all Personal Data to the Employer and delete all existing copies of the Personal Data unless and to the extent that the Contractor is required to retain copies of the Personal Data in accordance with applicable laws in which case the Contractor shall notify the Employer in writing of the applicable laws which require the Personal Data to be retained. In the event the Personal Data is deleted or destroyed by the Contractor, the Contractor shall provide the Employer with a certificate of destruction evidencing that the Personal Data has been destroyed or deleted;

13.7.17 make available to the Employer at no cost to the Employer all information necessary to demonstrate compliance with the obligations set out in these data protection clauses and, upon request, allow the Employer, the Information Commissioner's Office and its representatives access to the Contractor's premises, records and Contractor's Persons for the purposes of assessing the Contractor's compliance with its obligations under these Data Protection clauses; and

13.8 The provisions of these data protection clauses shall apply during the continuance of the Contract and indefinitely after its expiry or termination.

#### **[EMPLOYER'S DATA ON CONTRACTOR'S IT SYSTEM(S)]**

13.9 The Contractor shall:

13.9.1 take all reasonable precautions and use all reasonable endeavours to preserve the integrity of any Employer Data or other data which it stores and/or processes on behalf of the Employer and to prevent any corruption or loss of such data and to have in place an

appropriate archiving and back-up policy;

- 13.9.2 follow its detailed archiving procedures for Employer Data as set out in its archiving and back-up policy, a copy of which is to be provided to the Employer and as such policy may be updated by the Contractor from time to time, which shall include as a minimum, the Contractor making a back-up copy of Employer Data at the intervals and following the process detailed in its archiving and back-up policy and recording the copy on media form which the Employer Data can be reloaded if there is any corruption or loss of the Employer Data;
- 13.9.3 in the event of any corruption of or loss or damage to the Employer Data, use all reasonable endeavours to restore the lost or damaged Employer Data, at its own expense, from the latest back-up of such Employer Data maintained by the Contractor in accordance with the archiving procedure described in its archiving and back-up policy or, where the Employer Data has not been restored by the Contractor within ten (10) Working Days, at the Employer's option, promptly reimburse the Employer for any reasonable expenses it incurs in having the Employer Data restored by a third party;
- 13.9.4 be responsible for any loss, destruction, alteration or disclosure of Employer Data caused by itself and any of its Contractor's Persons including (but not limited to) any third parties sub-contracted by the Contractor to perform services related to Employer Data maintenance and back-up; and
- 13.9.5 in providing the Works, have in place and comply with its privacy and security policy relating to the privacy and security of the Employer Data. The Contractor shall provide a copy of its privacy and security policy to the Employer upon request and wherever such policy is updated by the Contractor from time to time and shall take into account any comments the Employer has on such policy.]

Notes:

**If the Contractor will NOT be processing Personal Data on behalf of the Employer (i.e. the Contractor will be the Data Controller, processing its own Personal Data), use paragraphs 13.1 to 13.5 inclusive only and delete paragraphs 13.6 to 13.9 inclusive and Appendix 1 (Data Processing Activities).**

**However, if the Contractor WILL be processing Personal Data on behalf of the Employer, use paragraphs 13.1 to 13.8 inclusive and, but ONLY where the Contractor will be holding the Council's Data on its IT systems, use paragraph 13.9. In addition, the Contractor must complete the Schedule of Data Processing Activities.**

A Data Controller is a person who determines the purpose for and decides the manner in which Personal Data is processed, whether alone or in concert with another person. A Data Processor processes Personal Data on behalf of the Data Controller and not for any of its own purposes.

A data sharing agreement will be required where the parties are sharing Personal Data under the Contract and where each party is using the Personal Data as a Data Controller in its own right. The data sharing agreement should set out the protocols that the parties will follow to determine exactly what data will be shared, the means of transmission and how the parties will cooperate with one another to ensure compliance with data protection requirements.

**PARAGRAPH 14 CRIME & DISORDER ACT**

Insert new Paragraph 14:

The Contractor shall comply on the Employer's behalf with the provisions of Section 17 of the Crime & Disorder Act 1998 and will indemnify the Employer against all actions, costs, expenses, proceedings and demands which may be brought against the Employer for breach of statutory duty under the Act which arises upon acts or omissions by the Contractor and/or Contractor's Persons under the Contract.

| **Appendix 1 (Data Processing Activities)**

**Categories of Data**

Please tick all relevant boxes and add more detail if required:

**Personal Data**

- |                                      |                          |
|--------------------------------------|--------------------------|
| Name                                 | <input type="checkbox"/> |
| identification number                | <input type="checkbox"/> |
| location data                        | <input type="checkbox"/> |
| online identifier (email/IP address) | <input type="checkbox"/> |

Other (please insert details):

--

**Special Categories of Personal Data**

- |   |                          |
|---|--------------------------|
| race                                    | <input type="checkbox"/> |
| ethnic origin                           | <input type="checkbox"/> |
| political opinions                      | <input type="checkbox"/> |
| religion                                | <input type="checkbox"/> |
| trade union membership                  | <input type="checkbox"/> |
| genetics                                | <input type="checkbox"/> |
| biometrics (where used for ID purposes) | <input type="checkbox"/> |
| health                                  | <input type="checkbox"/> |
| sex life                                | <input type="checkbox"/> |
| sexual orientation                      | <input type="checkbox"/> |

**Criminal Offence Data**

- |             |                          |
|-------------|--------------------------|
| allegations | <input type="checkbox"/> |
| proceedings | <input type="checkbox"/> |
| convictions | <input type="checkbox"/> |

**Categories of Data Subjects**

Please tick all relevant boxes:

- |   |                          |
|---|--------------------------|
| Council service users/customers           | <input type="checkbox"/> |
| Council service user/customer next of kin | <input type="checkbox"/> |
| Council employees                         | <input type="checkbox"/> |
| Council employees next of kin             | <input type="checkbox"/> |

Other (please insert details):

--

**Processing Operations**

Please tick all relevant boxes:

- |   |                          |
|---|--------------------------|
| Using data provided by the Council(s)   | <input type="checkbox"/> |
| Collecting new data from Data Subjects  | <input type="checkbox"/> |
| Transforming data by adding new data collected from service users/customers to data provided by the Council | <input type="checkbox"/> |
| Sharing data with anyone other than the Council   | <input type="checkbox"/> |
| Erasure or destruction of personal data   | <input type="checkbox"/> |

Other (please insert details):

**Location of Processing Operations**

Please tick one box only:

- |   |                          |
|---|--------------------------|
| UK  | <input type="checkbox"/> |
| EEA <sup>2</sup> (European Economic Area) | <input type="checkbox"/> |
| Outside EEA (European Economic Area)      | <input type="checkbox"/> |

If outside the EEA please provide details:

**Identity of sub-contractors**

*Insert details of all permitted sub-contractors, including full legal name, registered address and location where processing of Personal Data will occur and a description of the processing operations undertaken by each sub-contractor. Please note that you are not permitted to engage any sub-contractors to process this data without prior written Council approval.*

**Purposes**

For the purpose of performing the Contract.

*If you're using the data for a reason other than the purpose of delivering the contract, please amend this section accordingly and provide details here.*

---

<sup>2</sup> Details of countries in the EEA are available at the following website: [www.gov.uk/eu-eea](http://www.gov.uk/eu-eea)

**Duration**

Until the expiry or termination date of the Contract.

*If the length of time for which data processing activities will be carried out will go beyond the expiry date of the Contract, please amend this section accordingly and detail how long these activities will go on for.*