

DATED 23 FEBRUARY 2011

BORDER CONSTRUCTION LIMITED

and

CUMBRIA COUNTY COUNCIL

and

LANCASHIRE COMBINED FIRE AUTHORITY

and

MERSEYSIDE FIRE AND RESCUE AUTHORITY

and

BALFOUR BEATTY FIRE AND RESCUE NW LIMITED

DUTY OF CARE DEED

relating to North West Fire PFI Project



DICKINSON DEES

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THIS DEED is made on

23 FEBRUARY

2011 BETWEEN:-

- (1) BORDER CONSTRUCTION LIMITED (Company Number 00654704) whose registered office is at Marconi Road, Burgh Road Industrial Estate, Carlisle, Cumbria, CA2 7NA (the "Sub-Contractor");
- (2) CUMBRIA COUNTY COUNCIL of The Courts, Carlisle, Cumbria, CA3 8NA, LANCASHIRE COMBINED FIRE AUTHORITY of Lancashire Fire and Rescue Service Headquarters, Garstang Road, Fulwood, Preston, PR2 3LH and MERSEYSIDE FIRE AND RESCUE AUTHORITY of Merseyside Fire and Rescue Service Headquarters, Bridle Road, Bootle, Merseyside, L30 4YD (the "Authorities"); and
- (3) BALFOUR BEATTY FIRE AND RESCUE NW LIMITED (registered in England and Wales under company number 07403391) whose registered office is at 6th Floor, 350 Euston Road, Regent's Place, London, NW1 3AX (the "Contractor").

BACKGROUND

- (A) By a project agreement dated 23 FEBRUARY 2011 (the "Project Agreement") the Authorities have appointed the Contractor to carry out, in relation to the Sites, the provision of serviced accommodation to the Authorities at each and every Station as contemplated by the Project Agreement including the carrying out of the Works and the provision of the Services design and construction of the Works.
- (B) By a design and build contract dated 23 FEBRUARY 2011 (the "Building Contract") the Contractor has appointed the Building Contractor to carry out in relation to the Sites the design and construction of the Works.
- (C) The Sub-Contractor has been appointed by the Building Contractor under a contract dated 23 FEBRUARY 2011 (the "Sub-Contract") to provide services in relation to the Works.
- (D) The Sub-Contractor is obliged under the Sub-Contract to give a warranty in this form in favour of the Authorities.

1. DEFINITIONS AND INTERPRETATIONS

- 1.1 In this Deed unless the context otherwise requires, the following expressions shall have the following meanings:-

"Lender(s)" means any organisation providing funding to the Contractor in connection with the carrying out of the Works.

- 1.2 Unless expressly defined otherwise in this Deed, any defined term in this Deed shall have the same meaning given to such term in the Building Contract.

2. OPERATIVE PROVISIONS

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

3. SUB-CONTRACTOR'S WARRANTY AND LIABILITY

- 3.1 The Sub-Contractor warrants to the Authorities that it has carried out and will continue to carry out its duties under the Sub-Contract in accordance with the Sub-Contract and that

it has exercised and will continue to exercise, in carrying out the design of the Works, the level of skill and care reasonably to be expected from an appropriately qualified and competent professional designer providing those services in relation to a project of a similar size and scope to the Works. In particular and without limiting the generality of the foregoing the Sub-Contractor covenants with the Authorities that it has carried out and will carry out and complete the Works in accordance with the Sub-Contract and duly observe and perform all its duties and obligations thereunder.

- 3.2 The Sub-Contractor shall be entitled in any action or proceedings by the Authorities to raise equivalent rights in defence of liability (except for set off or counterclaim as it would have against the Building Contractor under the Sub-Contract. Upon the expiration of twelve (12) years from the date of completion of the Works in accordance with the Sub-Contract, the liability of the Sub-Contractor under this Deed shall cease and determine, save in relation to any claims made by the Authorities against the Sub-Contractor and notified by the Authorities to the Sub-Contractor in writing prior thereto.

4. **DOCUMENTS**

- 4.1 The Sub-Contractor hereby grants (or, if such grant cannot legally take place until a later date, agrees to grant) to the Authorities 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 completion of the Sub-Contractor's obligations under the Sub-Contract or the termination of the Sub-Contract or the determination of the Sub-Contractor's engagement under it 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, and such licence will carry the right to grant sub-licences and will be transferable to third parties. The Authorities will not hold the Sub-Contractor liable for any use they 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 Sub-Contractor authorises such use and confirms the Documents are suitable for it. The Sub-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 Sub-Contract or hereunder or as otherwise required to enable it to fulfil its obligations under the Sub-Contract.
- 4.2 The Sub-Contractor agrees on reasonable request at any time and following reasonable written prior notice to give the Authorities or those authorised by it access to the Documents and to provide copies (including copy negatives and CAD disks) thereof at the Authorities' expense.
- 4.3 The Sub-Contractor warrants to the Authorities that he has used the standard of skill, care and diligence as set out in clause 3.1 to see that the Documents (save to the extent duly appointed 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.

5. **INSURANCE**

The Sub-Contractor hereby covenants with the Authorities to:-

- 5.1 take out Professional Indemnity Insurance cover with a limit of indemnity of not less than ten million pounds (£10,000,000) for any one (1) occurrence or series of occurrences

arising out of any one (1) 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 twelve (12) years after practical completion of the Works, provided that such insurance is generally available in the market to members of the Sub-Contractor's profession 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 Sub-Contractor's own claims record or other acts, omissions, matters or things peculiar to the Sub-Contractor will be deemed to be within the reasonable rates;

- 5.2 provide evidence (as and when reasonably required by the Authorities) satisfactory to the Authorities of the Professional Indemnity Insurance (referred to in clause 3.1) being in full force and effect from the date of the Sub-Contract (such evidence to include details of the cover);
- 5.3 provide the Authorities with copies of all notices under the Professional Indemnity Insurance (referred to in clause 3.1) relating to the Works;
- 5.4 provide the Authorities with notice of:-
 - 5.4.1 any cancellation of the Professional Indemnity Insurance (referred to in clause 3.1) not less than ninety (90) days prior to the relevant cancellation date;
 - 5.4.2 any material changes to or suspension of cover relevant to the Works;
 - 5.4.3 any event of which it becomes aware, or of which it could reasonably be expected to become aware, which may vitiate the Professional Indemnity Insurance;
 - 5.4.4 any act, omission or event which may adversely affect the terms and the scope of the Professional Indemnity Insurance relevant to the Works or invalidate or render it unenforceable;
- 5.5 provide such information to the Authorities as the Authorities may reasonably require in relation to any claim or circumstance notified to it under the Professional Indemnity Insurance in respect of the Works and any potential breach to the aggregate limit of the policy;
- 5.6 disclose to the relevant insurers any matters which could reasonably be expected to be material in the context of the Works or any part of the Works; and
- 5.7 indemnify the Authorities in respect of any subrogation claim by the insurers brought in connection with any claim made under the Professional Indemnity Insurance.

6. **NOTICES**

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 4.45pm on any day it will be deemed to be served on the next Business Day. Any notice sent by post will be deemed to have been duly served at the expiration of forty eight (48) hours after the time of posting if the end of that period falls before 4.45pm on a Business Day and otherwise on the next Business Day.

7. **ASSIGNMENT**

The benefit of and the rights of the Authorities under this Deed may be assigned without the consent of the Sub-Contractor on two (2) occasions only and the Authorities will notify the Sub-Contractor in writing following any such assignment specifying the name and address of the assignee and the date of the assignment. The Sub-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.

8. **AUTHORITIES' REMEDIES**

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

9. **INSPECTION OF DOCUMENTS**

The Sub-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 Authorities may make or procure to be made for their benefit or on their behalf.

10. **STEP-IN RIGHTS IN FAVOUR OF THE AUTHORITIES**

10.1 The Sub-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 Sub-Contract or its engagement under it or discontinue or suspend the performance of any duties or obligations thereunder without first giving to the Authorities not less than thirty (30) days' prior written notice specifying the Sub-Contractor's ground for terminating or treating as terminated or repudiated the Sub-Contract or its engagement under it or discontinuing or suspending its performance thereof and stating the amount (if any) of monies outstanding under the Sub-Contract. Within such period of notice:-

10.1.1 the Authorities may give written notice to the Sub-Contractor that the Authorities will thenceforth become the Contractor under the Sub-Contract to the exclusion of the Contractor and thereupon the Sub-Contractor will admit that the Authorities are the Contractor under the Sub-Contract and the Sub-Contract will be and remain in full force and effect notwithstanding any of the said grounds;

10.1.2 if the Authorities have given such notice as aforesaid or under clause 10.3 below, the Authorities shall accept liability for the Contractor's obligations under the Sub-Contract and will as soon as practicable thereafter remedy any outstanding breach by the previous client which properly has been included in the Sub-Contractor's specified grounds and which is capable of remedy by the Authorities; and

10.1.3 if the Authorities has given such notice as aforesaid or under clause 10.3 below, the Authorities will from the service of such notice become responsible for all sums properly payable to the Sub-Contractor under the Sub-Contract accruing due after the service of such notice but the Authorities will in paying such sums

be entitled to the same rights of set-off and deduction as would have applied to the previous client under the Sub-Contract.

- 10.2 Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by the Authorities to the Sub-Contractor, the Authorities will not be under any obligation to the Sub-Contractor nor will the Sub-Contractor have any claim or cause of action against the Authorities unless and until the Authorities have given written notice to the Sub-Contractor pursuant to clause 10.1.1 or clause 10.3 of this Deed.
- 10.3 The Sub-Contractor further covenants with the Authorities that if the Project Agreement is terminated by the Authorities the Sub-Contractor, if requested by the Authorities by notice in writing and subject to clause 10.1.2 and clause 10.1.3, will accept the instructions of the Authorities to the exclusion of the Contractor in respect of its duties under the Sub-Contract upon the terms and conditions of the Sub-Contract and will if so requested in writing enter into a novation agreement whereby the Authorities are substituted for the Contractor under the Sub-Contract.
- 10.4 If two (2) or more valid notices are received on the same day any notice served by the Lender(s) shall be deemed to have first priority. Only the notice deemed to have first priority shall take effect and no other relevant notice will bind the Sub-Contractor.
- 10.5 The Contractor acknowledges that the Sub-Contractor will be entitled to rely on a notice given to the Sub-Contractor by the Authorities under clause 10.3 as conclusive evidence that the Project Agreement has been terminated by the Authorities.
- 10.6 The Authorities may by notice in writing to the Sub-Contractor appoint another person to exercise their rights under this clause 10 subject to the Authorities remaining liable to the Sub-Contractor as guarantor for their appointee in respect of their obligations under this Deed.
- 10.7 Upon request by the Authorities the Sub-Contractor agrees to co-operate with the Authorities in determining the duties performed or to be performed by the Sub-Contractor and to provide a copy of the Sub-Contract and any variations thereto and details of all monies paid and due under the Sub-Contract.

11. **SUB-CONTRACTORS**

Following a written request from the Authorities the Sub-Contractor will (unless it has already done so) and/ or procure that its sub-contractors execute a deed of collateral warranty in the relevant form specified in the Sub-Contract in favour of any person in whose favour the Sub-Contract obliged the Sub-Contractor to give or procure the giving of such a warranty.

12. **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.

13. **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 before written:-

