

Dated

23 FEBRUARY

2011

**BLUE SKY DESIGN SERVICES LIMITED (1)**

**BALFOUR BEATTY FIRE AND RESCUE NW LIMITED (2)**

**BORDER CONSTRUCTION LIMITED (3)**

**DUTY OF CARE DEED**  
**relating to the North West Fire and Rescue Project**

THIS DEED is made on

23 FEBRUARY

2011

**BETWEEN**

- (1) **BLUE SKY DESIGN SERVICES LIMITED** incorporated in England and Wales registered company number 06235182 whose registered office is at Building 1000, Kings Reach, Yew Street, Stockport, SK4 2HD (the "**Consultant**");
- (2) **BALFOUR BEATTY FIRE AND RESCUE NW LIMITED** incorporated in England and Wales registered company number 07403391 whose registered office is at 6<sup>th</sup> Floor, 350 Euston Road, Regent's Place, London NW1 3AX (the "**Contractor**"); and
- (3) **BORDER CONSTRUCTION LIMITED** incorporated in England and Wales registered company number 654704 whose registered office is at Marconi Road, Burgh Road Industrial Estate, Carlisle, Cumbria, CA2 7NA (the "**Building Subcontractor**").

**BACKGROUND**

- (A) BY A DESIGN AND BUILD CONTRACT DATED ON OR ABOUT THE DATE OF THIS DEED (THE "**BUILDING CONTRACT**") THE CONTRACTOR HAS APPOINTED THE MANSELL CONSTRUCTION SERVICES LIMITED ("THE **BUILDING CONTRACTOR**") TO CARRY OUT IN RELATION TO THE SITES THE DESIGN AND CONSTRUCTION OF THE WORKS.
- (B) BY A DESIGN AND BUILD CONTRACT DATED ON OR ABOUT THE DATE OF THIS DEED THE BUILDING CONTRACTOR HAS APPOINTED THE BUILDING SUBCONTRACTOR TO CARRY OUT IN RELATION TO CERTAIN SITES DESIGN AND BUILD WORKS ("THE **BUILDING SUBCONTRACT**").
- (C) THE CONSULTANT HAS BEEN APPOINTED BY THE BUILDING SUBCONTRACTOR UNDER A DEED OF APPOINTMENT DATED 23 DAY OF FEBRUARY 2011 (THE "**APPOINTMENT**") TO PROVIDE SERVICES IN RELATION TO THE WORKS.
- (D) THE CONSULTANT IS OBLIGED UNDER THE APPOINTMENT TO GIVE A WARRANTY IN THIS FORM IN FAVOUR OF THE CONTRACTOR.

**1. DEFINITIONS AND INTERPRETATIONS**

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

**"Funders Direct Agreement"**

means the direct agreement dated on or about the date of this Deed between Cumbria County Council, Lancashire Combined Fire Authority and Merseyside Fire and Rescue Authority (together the "**Authorities**"), the Contractor, Dexia Management Services Limited (as Security Trustee) and Dexia Cr dit Local (as Facility Agent); and

**"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 Contractor to the Consultant, receipt of which the Consultant acknowledges:

## **3. CONSULTANT'S WARRANTY AND LIABILITY**

3.1 The Consultant warrants to the Contractor that it has carried out and will continue to carry out its duties under the Appointment in accordance with the Appointment and that it has exercised and will continue to exercise in the performance of those duties the reasonable skill care and diligence to be expected of a properly qualified member of its profession experienced in carrying out duties such as its duties under the Appointment in relation to works of similar scope, nature and complexity to the Works.

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

## **4. PROJECT DATA**

4.1 The Consultant hereby grants (or, if such grant cannot legally take place until a later date, agrees to grant) to the Contractor with effect from the date of this Deed or in the case of Project Data 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 Consultant's obligations under the Appointment or the termination of the Appointment or the determination of the Consultant's engagement under it or any dispute thereunder or hereunder) to use and to reproduce all Project Data 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 Contractor will not hold the Consultant liable for any use it may make of the Project Data for any purpose other than that for which they were originally provided by it and such other purposes as are reasonably foreseeable unless the Consultant authorises such use and confirms the Project Data are suitable for it. The Consultant will not grant to any third party the right to use any of the Project Data save under any warranty it is obliged to give under the Appointment or hereunder or as otherwise required to enable it to fulfill its obligations under the Appointment.

4.2 The Consultant agrees on reasonable request at any time and following reasonable written prior notice to give the Contractor or those authorised by it access to the Project Data and to provide copies (including copy negatives and CAD disks) thereof at the Contractor's expense.

4.3 The Consultant warrants to the Contractor that he has used the standard of skill, care and diligence as set out in clause 3.1 to see that the Project Data (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**

5.1 The Consultant hereby covenants with the Contractor to:

- 5.1.1 take out Professional Indemnity insurance cover with a limit of indemnity of not less than £10,000,000 (ten million pounds) for any one claim 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 Consultant'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 Consultant's own claims record or other acts, omissions, matters or things peculiar to the Consultant will be deemed to be within the reasonable rates;
- 5.1.2 provide evidence (as and when reasonably required by the Contractor) satisfactory to the Contractor of the Professional Indemnity insurance (referred to in clause 5.1.1) being in full force and effect from the date of the Appointment (such evidence to include details of the cover);
- 5.1.3 provide the Contractor with copies of all notices under the Professional Indemnity Insurance (referred to in clause 5.1.1) relating to the Works; and
- 5.1.4 provide the Contractor with notice of:
- (a) any cancellation of the Professional Indemnity Insurance referred to in clause 5.1.1 not less than ninety (90) days prior to the relevant cancellation date;
  - (b) any material changes to or suspension of cover relevant to the Works;
  - (c) 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;
  - (d) 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;
  - (e) provide such information to the Contractor as the Contractor 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;
  - (f) 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.

## 6. LIABILITY OF PARTNERS

Where the Consultant is a partnership, references in this Deed to the "Consultant" will be deemed to include reference to each and every present and future partner of such partnership and the liability of each and every such partner under this Deed will be deemed to be joint and several.

## 7. 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 4.45 pm 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.

## **8. ASSIGNMENT**

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

## **9. CONTRACTOR'S REMEDIES**

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

## **10. INSPECTION OF PROJECT DATA**

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

## **11. STANDARDS OF PRODUCTS AND MATERIALS**

11.1 The Consultant 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 for use and it will not specify for 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 specification are widely known to members of the Consultant's 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.

11.2 If in the performance of its duties under the Appointment the Consultant 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 Consultant will notify the Contractor in writing forthwith. This clause does not create any additional duty for the Consultant to inspect or check the work of others which is not required by the Appointment.

## **12. STEP-IN RIGHTS IN FAVOUR OF THE CONTRACTOR**

12.1 The Consultant 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 Appointment or its engagement under it or discontinue or suspend the performance of any duties or

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

12.1.1 the Contractor may give written notice to the Consultant that the Contractor will thenceforth become the employer under the Appointment to the exclusion of the Building Subcontractor and thereupon the Consultant will admit that the Contractor is the Building Subcontractor under the Appointment and the Appointment will be and remain in full force and effect notwithstanding any of the said grounds;

12.1.2 if the Contractor has given such notice as aforesaid or under clause 12.3 below, the Contractor shall accept liability for the Building Subcontractor's obligations under the Appointment and will as soon as practicable thereafter remedy any outstanding breach by the previous client which properly has been included in the Consultant's specified grounds and which is capable of remedy by the Contractor; and

12.1.3 if the Contractor has given such notice as aforesaid or under clause 12.3 below, the Contractor will from the service of such notice become responsible for all sums properly payable to the Consultant under the Appointment accruing due after the service of such notice but the Contractor 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 Appointment.

12.2 Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by the Contractor to the Consultant, the Contractor will not be under any obligation to the Consultant nor will the Consultant have any claim or cause of action against the Contractor unless and until the Contractor has given written notice to the Consultant pursuant to clause 12.1.1 or clause 12.3 of this Deed.

12.3 The Consultant further covenants with the Contractor that if either the Building Contract or the Building Subcontract are terminated the Consultant, if requested by the Contractor by notice in writing and subject to clause 12.1.2 and clause 12.1.3, will accept the instructions of the Contractor to the exclusion of the Building Subcontractor in respect of its duties under the Appointment upon the terms and conditions of the Appointment and will if so requested in writing enter into a novation agreement whereby the Contractor is substituted for the Building Subcontractor under the Appointment.

12.4 If two or more valid notices are received on the same day any notice served by the Contractor 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 Consultant.

12.5 The Building Subcontractor acknowledges that the Consultant will be entitled to rely on a notice given to the Consultant by the Contractor under clause 12.3 as conclusive evidence that either the Building Contract or the Building Subcontract have been terminated.

12.6 The Contractor may by notice in writing to the Consultant appoint another person to exercise its rights under this clause 12 subject to the Contractor remaining liable to the Consultant as guarantor for its appointee in respect of its obligations under this Deed.

### **13. SUB-CONSULTANTS**

Following a written request from the Contractor the Consultant will (unless it has already done so) and/or procure that its sub-consultants execute a deed of collateral warranty in

the relevant form specified in the Appointment in favour of any person in whose favour the Appointment obliged the Consultant to give or procure the giving of such a warranty.

#### 14. APPLICABLE LAW AND JURISDICTION

This Deed and any non-contractual obligations arising out of or in connection with it will be construed in accordance with English law and be in all respects subject to the exclusive jurisdiction of the English courts.

#### 15. THIRD PARTY RIGHTS

This Deed and any non-contractual obligations arising out of or in connection with it 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

**EXECUTED AS A DEED** by the Consultant acting by a Director and its Secretary/two Directors:

Director

C. D. Russell

Director/Secretary

*John Connolly*

EXECUTED AS A DEED by BORDER CONSTRUCTION LIMITED acting by duly appointed attorney

*[Handwritten signature]*

in the presence of:

*C. C. Daw* ..... Witness Signature

*G. A. Daw* ..... Witness Name

*BORDER CONSTRUCTION* ..... Witness Address

*CARLISLE, CARTRNA*

EXECUTED AS A DEED by BALFOUR BEATTY FIRE AND RESCUE NW LIMITED acting by its duly appointed attorney

*[Handwritten signature]*

in the presence of:

*[Handwritten signature]* ..... Witness Signature

*JOANNA SPALDING* ..... Witness Name

..... Witness Address

**Ashfords** LLP.  
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Tower Wharf  
Cheese Lane  
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