

## MOUGHTON ENGINEERING LIMITED CONDITIONS OF ORDER - SERVICES

### 1. Definitions

- 1.1** The **Client** shall mean the party named in the Main Contract for whom the Works are being carried out including such party's successors and permitted assigns or assignees.
- 1.2** The **Works** shall mean the works being undertaken by MEL under the Main Contract of which the Sub-Contract Works form a part.
- 1.3** **MEL** shall mean Moughton Engineering Limited trading as Moughton.
- 1.4** The **Main Contract** shall mean the contract between the Client and MEL.
- 1.5** The **Sub-Contractor** shall mean the Person, Firm or Company to whom the Sub-Contract Order is addressed.
- 1.6** The **Order** shall mean the Sub-Contract Order, these Conditions of Order together with such other documents as are specified therein but excluding any terms and/or conditions of the Sub-Contractor unless expressly incorporated by reference.
- 1.7** The **Sub-Contract Sum** shall mean the sum stated in the Order or such other sum as may become payable under the Order.
- 1.8** The **Sub-Contract Works** shall mean the works to be carried out by the Sub-Contractor pursuant to the Order brief details of which are set out in the Sub-Contract Order and which are more particularly described in the documents forming the Order, as may be varied from time to time in accordance with the Order.
- 1.9** The **Site** shall mean the place or places in, through, under or to which the Sub-Contract Works are to be undertaken, stored or delivered.
- 1.10** The **Supervising Officer** shall mean the person, firm company or body appointed to supervise the Works being carried out under the Main Contract or the works being carried out under the contract with the ultimate employer or any successor or substitute of such persons, firm, company or body appointed from time to time as the case may be.
- 1.11** The terms **Construction Phase Plan, Health and Safety File, Principal Designer** and

**Principal Contractor** shall have the meaning ascribed to them in the Construction (Design and Management) Regulations 2015 (as may from time to time be amended).

- 1.12** The **Final Account Statement** shall mean the MEL statement of all adjustments to the Sub-Contract Sum under the Order.
- 1.13** The headings in the Order shall not be deemed to be part hereof or be taken into consideration in the interpretation or construction hereof.

### 2. Scope of the Sub-Contract Works

- 2.1** The Sub-Contractor acknowledges that it has visited the Site or had opportunity to do so and that the Sub-Contract Sum includes for carrying out and completing the Sub-Contract Works including all necessary ancillary work whether expressly stated or not.
- 2.2** MEL does not warrant the accuracy of any information it provides. It is for the Sub-Contractor to satisfy itself as to the accuracy of that information provided by MEL and to make due allowance within the Sub-Contract Sum for any variance between that information and the actual requirements of the Sub-Contract Works.
- 2.3** The Sub-Contractor is to make due allowance within the Sub-Contract Sum for co-ordinating the Sub-Contract Works with all other elements of the Works.
- 2.4** In respect of all free issue material the Sub-Contractor shall be responsible for timeous ordering, taking delivery, checking, discrepancy reporting, handling, storage and installation and shall make due allowance within the Sub-Contract Sum for the same.

### 3. Carrying out the Sub-Contract Works

- 3.1** Where the Sub-Contract Works or any part of them are required to be carried out to the satisfaction of MEL then MEL shall not be deemed to be satisfied until MEL have fulfilled any requirement to satisfy under the Main Contract in respect of the Sub-Contract Works or relevant part.
- 3.2** The Sub-Contractor shall design, supply, execute, complete and maintain the Sub-

Contract Works subject to and in accordance with the Order in all respects, in accordance with the Construction Phase Plan and to the satisfaction of MEL.

**3.3** Unless expressly stated within the Order the Sub-Contractor shall provide all the items required by the Order and all other labour, attendance, materials, equipment, plant, temporary works, facilities, services, supervision and administration necessary for the proper design, supply, execution, completion and maintenance of the Sub-Contract Works.

**3.4** The Sub-Contractor shall permit or procure for any purposes connected with the Sub-Contract Works that during working hours the Client, Supervising Officer, Principal Designer, the Principal Contractor, MEL and their respective servants, agents and subcontractors, have reasonable access to the Sub-Contract Works and to the places on or off the Site where any work or materials therefore are being executed, prepared or stored. The exercise of such rights under this clause shall not release the Sub-Contractor from any of its obligations under the Order or change the same.

**3.5** Without limitation to any other provision of this Order, the Sub-Contractor will, through MEL, co-operate and co-ordinate with and pass any information relevant to the Construction Phase Plan and/or the Health and Safety File to the Client, the Supervising Officer, Principal Designer and/or Principal Contractor and take into account any comments made by them which are confirmed in writing to the Sub-Contractor by MEL.

**3.6** The Sub-Contractor's site personnel shall all hold current Client Contractor National Safety Group (CCNSG) or Construction Skills Certification Scheme (CSCS) certification and before starting work on site all personnel shall attend an induction briefing for which the Sub-Contractor is to make due allowance within the Sub-Contract Sum.

**4. Relationship of the Order to the Main Contract**

**4.1** The Sub-Contractor acknowledges that un-priced copies of the Main Contract have been made available to it for inspection prior to the date of the Order, the Sub-Contractor shall be deemed to have full knowledge of the provisions of the Main Contract (other than the

pricing details thereof) and its effective date and shall have made due allowance for the same.

**4.2** Save where the provisions of the Order otherwise require, the Sub-Contractor shall so design, supply, install, execute, complete and maintain the Sub-Contract Works so that no act and/or omission of the Sub-Contractor arising out of and/or connected with and/or related to the Sub-Contract Works shall put MEL in breach of any of his obligations under the Main Contract (whether the Sub-Contractor's act and/or omission is the sole or only a contributory cause of such breach) and the Sub-Contractor shall, save as aforesaid, assume, perform and be bound by all obligations and liabilities of MEL under the Main Contract in relation to the Sub-Contract Works as if the same had been repeated herein with such modifications as may be required to give effect thereto. Nothing herein shall be construed as creating any privity of contract between the Sub-Contractor and the Client.

**4.3** The Sub-Contractor acknowledges that any breach by it of the Order may result in MEL committing breaches of and becoming liable in damages (including but not limited to liquidated damages) under the Main Contract and any other contracts made by MEL in connection with the Works and may occasion further loss or expense to MEL in connection with the Works and all such loss and expense are hereby agreed to be within the contemplation of the parties as being the probable result of any such breach by the Sub-Contractor.

**4.4** MEL shall have the like powers in relation to the Sub-Contract Works as the Client and/or the Supervising Officer has in relation to the Works under the Main Contract and the Sub-Contractor shall have the like obligations in connection with such powers and, provided that the Sub-Contractor complies with all the requirements which are necessary to enable MEL to obtain the same, MEL will, at the risk and cost of the Sub-Contractor, so far as in the opinion of MEL reasonably and lawfully possible, obtain for the Sub-Contractor the like rights in relation thereto (and to the extent thereof, but no further) as MEL has under the Main Contract as if the same had been repeated herein with such modifications as may be required to give effect thereto. The said powers of MEL shall be exercisable in any

case irrespective of whether the Client or the Supervising Officer has exercised like powers in relation thereto under the Main Contract.

- 4.5** Without prejudice to the generality of this Clause 4, whenever MEL is required by the terms of the Main Contract to give any return, account, application, notice or other information under the Main Contract the Sub-Contractor shall in relation to the Sub-Contract Works give a similar return, application, account or notice or such other information in writing to MEL as will enable MEL to comply timeously with such terms of the Main Contract.
- 4.6** If by reason of any breach by the Sub-Contractor of the provisions of the Order MEL is prevented from recovering any sum from the Client under the Main Contract in respect of the Works or if such recovery is rendered impractical or uneconomic then without prejudice to any other remedy of MEL for such breach MEL may deduct such sum from monies otherwise due to the Sub-Contractor or may recover the same as a debt.
- 4.7** Subject to Clause 10, the Sub-Contractor shall, in relation to the Sub-Contract Works comply with all instructions and decisions of the Client or the Supervising Officer which are notified and confirmed in writing to it by MEL, irrespective of whether such instructions and decisions were validly given under the Main Contract.
- 4.8** If required by the Main Contract, the Sub-Contractor will execute and deliver to MEL warranty agreement(s) within 7 days of MEL's request to do so, in favour of the persons or bodies specified in the Main Contract in such form as may be set out in the Main Contract or such other reasonable form as the Client may require. In the event that such warranty agreement is requested, the provision of the same shall be a precondition to any or any further payment to the Sub-Contractor by MEL.
- 4.9** Notwithstanding how or when this Order is executed or entered into, the parties agree that the limitation period under English law applicable at the effective date of the Main Contract shall be deemed for all purposes to be the limitation period under this Order whether for claims in contract, tort (including negligence), breach of statutory duty or otherwise.

## **5. Commencement and Completion**

- 5.1** The Sub-Contractor shall upon the date or within the period of written notice stated in the Order or as otherwise agreed commence the execution of the Sub-Contract Works, and thereafter shall regularly proceed with the same with all due diligence and without any delay, save as may be expressly sanctioned or instructed by MEL. Subject to the provisions of this Clause 5, the Sub-Contractor shall complete the Sub-Contract Works within the period or periods specified in the Order or in accordance with the programme stated therein from the said commencement date or within any extension or extensions to such period or periods or programme from time to time granted by MEL pursuant to this Clause 5 or, if dates or programmes are not set out in this Order, in accordance with the programme under the Main Contract or as directed by MEL. MEL shall be entitled to issue written instructions requiring postponement of the Sub-Contract Works or any part thereof.
- 5.2** If the Sub-Contractor shall be delayed in the execution of the Sub-Contract Works by-
- 5.2.1** any circumstances or occurrence (other than a breach of the Order by the Sub-Contractor), entitling MEL to an extension of its time for completion of the Works under the Main Contract; or
- 5.2.2** the instructing of any variation to the Sub-Contract Works or the giving of any instruction to which Clause 5.2.1 does not apply; or
- 5.2.3** any breach of the Order or act of prevention by MEL; or
- 5.2.4** where MEL is the Principal Contractor any omission or default by MEL in his discharge of its obligations as such Principal Contractor which affects the Sub-Contractor in the performance of the Sub-Contract Works; or
- 5.2.5** a valid suspension by the Sub-Contractor of the performance of its obligations as provided in Clause 13;
- Then in such event, whether such delay occurs before or after the time or extended time for completion of the Sub-Contract Works, MEL shall grant to the Sub-Contractor such extension or further extension to the programme or the period or periods specified in the Order as may in all the circumstances be fair and reasonable.
- 5.3** Provided Always That: -
- 5.3.1** it shall be a condition precedent to the Sub-Contractor's right to an extension or a further

- extension to the programme or such period or periods that
- 5.3.1.1** it shall have given written notice to MEL forthwith of the circumstance or occurrence which is delaying it together with its best estimate of the effect of such delay and shall regularly thereafter advise MEL of the continuing effect of such circumstance or occurrence;
- 5.3.1.2** it has at all times and will continue to use its best endeavours to avoid or prevent delay and has done and will do all that may reasonably be required by MEL to secure the diligent and regular progress and timeous completion of the Sub-Contract Works;
- 5.3.1.3** in any case to which Clauses 5.2.1 or 5.2.5 apply then in the case of Clause 5.2.1 such extension or extensions shall not in any event exceed the extension of time granted to MEL under the Main Contract in respect of such circumstance or occurrence or, in the case of Clause 5.2.5, shall not in any event exceed the period of suspension;
- 5.3.1.4** in assessing any such extension or extensions of time, MEL shall be entitled to take into account any omission or omissions from the Sub-Contract Works; and
- 5.3.1.5** such extension or extensions of time shall be reduced to the extent that the Sub-Contractor or anyone for whom it is responsible caused or contributed to such delay or has not constantly used their best endeavours to avoid or prevent delay.
- 5.3.2** Nothing in this Clause 5 shall be construed as preventing the Sub-Contractor from commencing off the Site any work necessary for the execution of the Sub-Contract Works at any time before it is due to start the Sub-Contract Works on the Site.
- 5.4** Subject to Clause 5.2 should the Sub-Contractor fail to complete the Sub-Contract Works within the period or periods specified in the Order or in accordance with the programme stated therein from the said commencement date or within any extension or extensions to such period or periods or programme from time to time granted by MEL pursuant to this Clause 5, liquidated damages will be applied at the same rate stipulated within the Main Contract, or where there is no liquidated damages within the Main Contract, apply 1% per day capped at 20% of the Sub-Contract Sum. Such deduction under this Clause shall be in full satisfaction of

the financial liability of the Sub-Contractor to MEL in respect of delay but does not relieve the Sub-Contractor of its obligations to complete the Works, nor prejudice any other rights available to MEL under this Order.

## **6. Warranty**

- 6.1** Without prejudice to any other provisions of the Order express or implied: -
- 6.1.1** the Sub-Contractor warrants that the quality of workmanship and materials used in or supplied for the Sub-Contract Works will be appropriate for the respective purposes for which they are intended or required as part of the Works;
- 6.1.2** insofar as the Sub-Contract Works or any part thereof has been or is required to be designed by or on behalf of the Sub-Contractor, the Sub-Contractor warrants that it has exercised and will exercise all the skill, care and diligence to be expected of a properly qualified and competent specialist designer experienced in carrying out work of a similar scope, nature and size to the Sub-Contract Works in the design of the same and that such design will comply in all respects with the Order and the Main Contract so far as applicable thereto, and with any requirements of a statutory nature and be appropriate for the purposes for which they are intended or required as part of the Works; and
- 6.1.3** The Sub-Contractor warrants that the Sub-Contract Works do not and will not infringe any patent, registered design, copyright, trade mark or other protected right.

## **7. Assignment and Sub-letting**

- 7.1** The Sub-Contractor shall not assign the whole or any part of the benefit or burden of the Order or any right of action thereunder nor shall it sub-contract the whole or any part of the Sub-Contract Works without the prior written consent of MEL.
- 7.2** The consent of MEL to any assignment or sub-contracting by the Sub-Contractor shall not in any way relieve the Sub-Contractor of any of its obligations under or in connection with the Order.
- 7.3** If MEL consents to the assignment of monies to become due to the Sub-Contractor in accordance with Clause 7.1, written notice of such assignment shall be given to MEL at least

14 days before payment is due. Any such consent may be rescinded by MEL at any time by notice in writing to the Sub-Contractor. Assignment of any monies whether due or to become due shall be subject to all defences and set-offs in favour of MEL and to all deductions and withholdings provided for in the Order.

## **8. Site Working**

**8.1** Provided that the same shall have been made available to it, MEL shall from time to time make available to the Sub-Contractor such part or parts of the Site and such means of access thereto within the Site as shall be necessary to enable the Sub-Contractor to execute the Sub-Contract Works in accordance with the Order, but MEL shall not be bound to give the Sub-Contractor possession or exclusive control of any part of the Site.

**8.2** MEL shall permit the Sub-Contractor, for the purpose of executing and completing the Sub-Contract Works, to use on a non-exclusive basis such scaffolding, ladders, facilities, services, attendances and other equipment as is from time to time and to the same extent as is provided by the Client on condition that the Main Contract shall permit such use by MEL in connection with the Works, and upon the same terms as MEL is entitled to use the same under the Main Contract but MEL shall not be bound to provide or retain and shall have no liability to the Sub-Contractor in respect of any failure to provide or retain any scaffolding, ladders, facilities, services, attendances or other equipment for the Sub-Contractor's use.

**8.3** No permission given under Clause 8.2 or otherwise shall imply any warranty by MEL as to the fitness, condition or suitability of such scaffolding, ladders, facilities, services, attendances or other equipment nor shall it impose any liability upon MEL in respect of its use by the Sub-Contractor or those for whom it is responsible, nor relieve the Sub-Contractor of any obligations to test or inspect such scaffolding, ladders or other equipment or to provide suitable scaffolding, ladders or other equipment for their use.

**8.4** The Sub-Contractor shall proceed with its services under this Order in a tidy and orderly manner so as not to hinder or prevent works by MEL or others on the Site and shall provide labour for clearing any rubbish and debris

arising from its services to a collection point to be agreed with MEL or removed from the Site on a daily basis.

## **9. Statutory and Other Provisions**

**9.1** The Sub-Contractor shall from time to time and at all times observe, perform and comply with all statutory and other obligations, regulations, amendments, codes of practice, guidance notes and conditions applicable to the Sub-Contract Works and the current editions of MEL's Health and Safety Policy, Organisation and Arrangements and Standard Conditions for Subcontractors, Safe Working Procedures Manual, the Health and Safety Plan and other quality, safety, organisation and arrangement documents relating to the Sub-Contract Works which are available for inspection by the Sub-Contractor upon reasonable notice. The Sub-Contractor shall indemnify and keep indemnified MEL from and against any breach of, non-compliance with or non-performance of any such matters and documents.

## **10. Variations**

**10.1** The Sub-Contractor shall make such variations to the Sub-Contract Works whether by way of addition, modification or omission as may be:

**10.1.1** instructed by the Supervising Officer or the Client under the Main Contract and confirmed in writing to the Sub-Contractor by MEL; or

**10.1.2** agreed to be made by the Client and MEL and confirmed in writing to the Sub-Contractor by MEL; or

**10.1.3** Instructed in writing by MEL.

**10.1.4** If the Sub-Contractor receives a written instruction otherwise than under Clause 10.1 above or any oral instruction it shall refer the same to MEL who shall give it directions thereon with all reasonable speed and the Sub-Contractor shall only act upon such instructions as are given in writing by MEL.

**10.1.5** Save as aforesaid or as otherwise expressly provided for by the Order the Sub-Contractor shall not make any addition or modification to, omission from or suspension of the Sub-Contract Works.

**10.1.6** MEL may, if in its opinion it is necessary or desirable, instruct in writing that any additional or modified work shall be executed on a day work basis. The Sub-Contractor shall then be paid for such work under the conditions set

out in the day work Schedule contained or referred to in the Order. In respect of all work executed on a day work basis the Sub-Contractor shall comply with all the requirements of MEL for the keeping and verification of complete and accurate records of the workmen engaged on such work and of all materials and plant used thereon or therefore. The Sub-Contractor shall not be entitled to any payment unless it has strictly complied with such requirements, and such records have been fully and punctually rendered, and have been signed by MEL duly authorised representative (such signature shall not of itself constitute an instruction or agreement to pay for such works on a day work basis or at all).

**11. Valuation of Variations**

**11.1** Within seven days of a written request from MEL the Sub-Contractor shall supply MEL with a breakdown of the Sub-Contract Sum in such detail as MEL may reasonably require establishing rates, prices and quantities.

**11.2** The value of all authorised variations shall be ascertained by measurement and by reference to the rates and prices specified in the Order or established pursuant to Clause 11.1 for the like or analogous work but if there are no such rates and prices or if they are not applicable then such value shall be ascertained by reference to analogous rates and prices. If such analogous rates and prices are not applicable MEL shall make a fair and reasonable valuation in all the circumstances. The value thereof shall be added to or deducted from the Sub-Contract Sum.

**12. Payment**

**12.1** Subject to any agreement between the Sub-Contractor and MEL as to stage payments, the amount of each payment to the Sub-Contractor shall be the gross valuation as referred to in Clause 12.33 less:

**12.1.1** an amount equal to any amount which may be deducted and retained by way of retention by MEL under the Order in accordance with Clause 12.44; and

**12.1.2** any disputed items MEL have notified Sub-Contractor of and the total payments previously due in respect of the Sub-Contract Works.

**12.2** Subject to Clause 12.7 payment shall be due no later than 60 days post date of receipt of invoice by MEL.

**12.3** The gross valuation as referred to in Clause 12.1 shall comprise the total value of the Sub-Contract Works properly executed by the Sub-Contractor including any work so executed to which Clause 10 refers and the value of any material or goods properly delivered for incorporation into the Sub-Contract Works and any other sums due to the Sub-Contractor under or arising out of this Order calculated in accordance with the provisions of the Order in respect of the period up to the date of Sub-Contractors issuance of invoice to MEL.

**12.4** Where the Sub-Contract Works have not reached completion, MEL may deduct and retain from the gross valuation a retention percentage of 5%. Unless otherwise stated, one half of the amount referred to in Clause 12.1.1 shall be due on completion of the Sub-Contract Works.

**12.5** Not later than 5 days before the date on which any payment under Clause 12.2 becomes due MEL shall notify the Sub-Contractor in writing the amount of such payment (the Notified Sum) and the basis on which such amount is calculated.

**12.6** The amount of the final payment to the Sub-Contractor shall be the value of the Sub-Contract Works calculated in accordance with the provisions of the Order less the total payments previously due in respect of the Sub-Contract Works.

**12.7** The final payment shall be due six months after the later of the following:

**12.7.1** The expiry of the period of maintenance under Clause 18.2;

**12.7.2** The making good of any defect, shrinkage, imperfection or other fault which the Sub-Contractor is liable to make good under the Order.

**12.8** Not later than 5 days after the date on which the payment under Clause 12.77 becomes due MEL shall notify the Sub-Contractor in writing the amount of such payment (the Final Notified Sum) and the basis on which such amount is calculated.

**12.9** The final date for payment of the Final Notified Sum shall be 30 days after the due date calculated in accordance with Clause 12.77.

**12.10** Without prejudice to any other rights of set off or deduction which MEL may have, MEL may

adjust any payment otherwise due to the Sub-Contractor on account of any sum or sums to which MEL may claim to be entitled whether under the Order or for breach of the Order or under any other agreement between MEL and the Sub-Contractor.

**12.11** Where MEL intends to exercise its entitlement under Clause 12.100 it shall give to the Sub-Contractor notice of its intention to pay less than the Notified Sum or Final Notified Sum and such notice shall specify;

**12.11.1** the sum that MEL considers to be due on the date the notice is served; and

**12.11.2** The basis on which that sum is calculated.

**12.12** Such notice shall be given no later than 5 days before the final date for payment.

**12.13** The prices and rates stated in the Order and the Sub-Contract Sum are, unless otherwise specified in the Order, fixed and firm for the duration of the Sub-Contract Works and are deemed to be inclusive of anything required to undertake the Sub-Contract Works and shall not be subject to increase for any reason whatsoever save as provided in the Order.

**12.14** The entitlement of the Sub-Contractor to receive payment of any sum under or in connection with this Order is subject to the provisions of Chapter iv of Part XIII of the Income and Corporation Taxes Act 1988 (as amended, consolidated, extended or re-enacted from time to time) and any Regulations thereunder including IR35 and the Income Tax (Sub-Contractors in the Construction Industry) Regulations 1993.

**12.15** The Sub-Contract Sum and prices and rates stated in the Order are exclusive of Value Added Tax (VAT). MEL shall pay Value Added Tax properly chargeable on the amount of payment made in accordance with the Order.

**12.16** If and to the extent that MEL fails properly to pay the amount due to the Sub-Contractor under this Order by the final date for its payment, MEL shall pay simple interest on the sum due and unpaid, such interest to be calculated at 2% over the base rate of the Bank of England. Such rate of interest is hereby agreed to be a substantial contractual remedy for late payment of the amount due.

### **13. Final Account**

**13.1** Within 1 month of the completion of the Sub-Contract Works the Sub-Contractor shall provide to MEL a statement of account showing all adjustments to be made to the

Sub-Contract Sum with all documentation reasonably necessary to support the adjustments made.

**13.2** Within 2 months of receipt of the Sub-Contractor's statement of account or, if the Sub-Contractor fails to provide a statement of account in accordance with Clause 13.1, then within 3 months of completion of the Sub-Contract Works, MEL will give the Sub-Contractor a Final Account Statement showing all adjustments to the Sub-Contract Sum to which the Sub-Contractor is entitled under the Order.

**13.3** Unless the Sub-Contractor gives written notice of disagreement with the Final Account Statement and the grounds for that disagreement within 1 month of receipt of the Final Account Statement the Final Account Statement shall be final and conclusive evidence of all adjustments to the Sub-Contract Sum having been made in accordance with the terms of the Order.

### **14. Right to Suspend**

**14.1** Where any sum due under this Order is not paid in full by the final date for payment as provided for under this Order and no effective notice is given under Clause 12.111, the Sub-Contractor shall be entitled (without prejudice to any other right or remedy) to suspend performance of part or all of its obligations under this Order after the expiry of not less than 7 days' notice of intention to suspend performance stating the ground or grounds on which it is intended to suspend performance. The right to suspend performance shall cease immediately when MEL makes payment in full of the amount due.

### **15. Payment in Insolvency**

**15.1** Notwithstanding anything else to the contrary elsewhere in this Order if the ultimate employer or the Client is insolvent as defined in Sections 113(2) -(5) of Part II of the Housing Grants, Construction and Regeneration Act 1996, MEL shall not be obliged to make any further payment to the Sub-Contractor of any amount which is due or may become due to the Sub-Contractor unless MEL has received payment in respect thereof from the Client and then only to the extent of such receipt.

**16. Risk, Title and On Site Handling**

**16.1** The Sub-Contract Works and any unfixed goods, or materials plant and/or equipment delivered to the Site for incorporation in the Sub-Contract Works or use by the Sub-Contractor shall be at the risk of the Sub-Contractor until the Works have been completed, or if the Works are to be completed by sections, until the last of such sections in time has been completed (notwithstanding that payment for the same has been made by MEL or that the property in the same has vested in MEL), and the Sub-Contractor shall make good all loss of and/or damage occurring to the Sub-Contract Works and any unfixed goods, materials, plant and/or equipment prior thereto at its own expense. The Sub-Contractor shall take all necessary precautions in carrying out the Sub-Contract Works to prevent damage to the existing works and structure and to any works being carried out contemporaneously with the Sub-Contract Works and shall indemnify MEL against any claim, demand, proceeding, damage, cost, charge, loss or expense as a result of any such damage. No such unfixed goods and/or materials shall be removed except for use upon the Sub-Contract Works without the permission in writing of MEL.

**16.2** The title of any goods, equipment and/or materials incorporated or to be incorporated in the Sub-Contract Works or the Works shall pass from the Sub-Contractor to MEL on delivery to the Site, on payment for the same, on incorporation into the Sub-Contract Works or the Works or immediately before title in the same is due to pass from MEL to the Client pursuant to the Main Contract (whichever first shall happen) or if delivery is made by instalments upon delivery of any such instalment.

MEL may at any time take possession of any goods, equipment and/or materials the title of which has passed to MEL. The Sub-Contractor shall ensure that such goods, equipment and/or materials are set aside and clearly marked as the property of MEL or the Client as the case may be.

**16.3** The Sub-Contractor shall be responsible for the off-loading, distribution and safe storage on Site of all unfixed goods, materials, plant and/or equipment delivered to the Site for

incorporation in the Sub-Contract Works or use by the Sub-Contractor (for the avoidance of doubt this includes all goods, materials, plant and or equipment supplied by MEL to the Sub-Contractor).

**17. Insurance and Indemnity**

**17.1** Save where and to the extent insurance cover is provided to the Sub-Contractor pursuant to the Order, the Sub-Contractor shall at its sole expense effect insurance with first class insurers and upon policy terms approved by MEL against such risks as are specified in the Order and for not less than such sums and for the benefit of such persons as are specified therein and shall maintain in effect at all times such insurance from the date hereof until it has finally performed its obligations under Clause 18 provided always that if Professional Indemnity Insurance is required, the Sub-Contractor shall maintain the same in effect at all times from the date hereof until the cessation of MEL's obligations under or pursuant to the Main Contract.

**17.2** The Sub-Contractor shall, as and when required by MEL, provide to MEL satisfactory evidence that the insurances referred to in this Clause 17 have been effected and are being maintained. Should the Sub-Contractor be in breach of any of its obligations under this Clause 17, MEL may itself insure against any risk with respect to which the default shall have occurred and may deduct a sum or sums equivalent to the amount paid or payable in respect of premiums from any monies due or to become due to the Sub-Contractor or recover them from the Sub-Contractor as a debt.

**17.3** The Sub-Contractor shall indemnify MEL against every liability which MEL may incur to any other person whatsoever (including, but not limited to, the employees, servants and agents of MEL or the Sub-Contractor) and against all claims, demands, proceedings, losses, damages, costs and expenses (including but not limited to bodily injury and damage to property) made against or incurred by MEL by reason of any breach by the Sub-Contractor of the Order or by reason of any act, default or negligence on the part of the Sub-Contractor or those for whom it is responsible to the extent that the same arise from such breach, act, default or negligence.

**18. Maintenance and Defects**

**18.1** Before completion of the Works or where the Works are completed by sections, before completion of the last such section in time to be completed, the Sub-Contractor shall maintain and protect the Sub-Contract Works in such condition as to comply fully with all specified requirements and shall make good without delay every defect, shrinkage, imperfection or other fault therein to the satisfaction of MEL from whatsoever cause arising and shall not be entitled to any payment for so doing unless such defect, shrinkage, imperfection or fault is caused by any act, neglect or default of the Client, the Supervising Officer, or those for whom they are respectively responsible under the Main Contract.

**18.2** After completion of the Works or of the last section in time thereof to be completed the Sub-Contractor shall maintain the Sub-Contract Works and shall make good without delay such defects, shrinkages, imperfections and other faults therein as MEL is liable to make good under the Main Contract for the like period and otherwise upon the like terms as MEL is liable to do under the Main Contract.

**18.3** MEL may by itself, its servants, agents or subcontractors, on the failure of the Sub-Contractor at any time to remove defective work and/or materials and make good the same within the time specified by MEL or, if no such time is specified, within a reasonable time, carry out and remedy any such work or supply such materials and the Sub-Contractor shall repay to MEL any direct or indirect costs, losses and/or expenses so incurred and any such costs, losses or expenses may be set off against any monies due to or to become due to the Sub-Contractor or may be recovered forthwith as a debt due.

**18.4** Where the Sub-Contractor guarantees the Sub-Contract Works or any part thereof, the period of such guarantee will commence upon completion of the Works or if such works are completed in sections the latest in time of such sections and such guarantee shall be in addition to and not in substitution for the obligations of the Sub-Contractor pursuant to the Order.

**19. Determination of the Main Contract**

**19.1** If for any reason MEL's employment under the Main Contract or the Main Contract itself is determined before the Sub-Contractor has fully performed its obligations under the Order then at any time thereafter MEL may by written notice to the Sub-Contractor forthwith determine the Sub-Contractor's employment under the Order and the Sub-Contractor shall, subject to the provision of Clauses 12, 15 and 19.2 hereof (which provisions shall continue in full force and effect notwithstanding such determination) be entitled to be paid an amount calculated in accordance with Clause 12.33 up to the date of determination but less such sums as the Sub-Contractor has already received on account of the Sub-Contract Sum, provided always that nothing herein shall affect the rights of either party in respect of any breach of the Order committed by the other prior to such determination.

**19.2** If MEL's employment under the Main Contract or the Main Contract itself is determined by the Client in consequence of any breach of the Order by the Sub-Contractor then the provisions of Clause 19.1 as to payment shall not apply but the rights of MEL and the Sub-Contractor hereunder shall be the same as if the Sub-Contractor had by such breach repudiated the Order and MEL had by its notice of determination under Clause 19.1 elected to accept such repudiation.

**20. Determination of the Order by MEL**

**20.1** In the event that  
**20.1.1** the Sub-Contractor fails to execute or proceed regularly and diligently with the Sub-Contract Works or perform its other obligations in accordance with the Order after being required in writing to do so by MEL;

**20.1.2** the Sub-Contractor without reasonable cause wholly suspends the Sub-Contract Works or any part thereof before completion thereof;

**20.1.3** the Sub-Contractor has financial difficulties which are likely, in the bona fide opinion of MEL, to affect its ability to complete its obligations under the Order;

**20.1.4** the Sub-Contractor fails to comply with the provisions of Clause 7;

the Sub-Contractor fails to provide the warranty agreement(s) referred to in Clause 4.8 within 7 days of the written request of MEL to do so; the Supervising Officer or the Client revokes or withdraws its approval of the Sub-Contractor under the Main Contract; then in

any such event and without prejudice to any of its other rights and remedies MEL may, by written notice to the Sub-Contractor, forthwith determine the Sub-Contractor's employment under the Order either wholly or in part as hereinafter provided without payment or compensation to the Sub-Contractor, and thereupon MEL may take possession of all materials, machinery, plant, appliances and other things whatsoever brought onto the Site by the Sub-Contractor and may use them for the purpose of executing, completing and maintaining the Sub-Contract Works and may, if MEL thinks fit, sell all or any of them and apply the proceeds in or towards the satisfaction of monies otherwise due to him from the Sub-Contractor. The Sub-Contractor shall at no time bring any materials, machinery, plant, appliances and other things whatsoever onto the Site unless the right contained in this Clause 20.1 has been reserved to MEL in respect of all and each of them.

**20.2** Upon such a determination, the rights and liabilities of MEL and the Sub-Contractor shall, subject to Clause 20.1, be the same as if the Sub-Contractor had repudiated the Order and MEL had by his notice of determination under Clause 20.1 elected to accept such repudiation provided always that the Sub-Contractor shall not be entitled to any further payments until such time as the Works are completed and within a reasonable time of completion of the Works MEL shall ascertain any direct or indirect costs, losses and/or damages suffered by MEL as a result of such determination and shall deduct such costs, losses and/or damages from any sums which would otherwise be due to the Sub-Contractor or may recover such sums as a debt. The Sub-Contractor shall assign to MEL the benefit in such materials and/or equipment ordered by the Sub-Contractor but not yet delivered to site as MEL shall instruct.

**20.3** MEL may, in lieu of giving a notice of determination under this Clause 20;

**20.3.1** take part only of the Sub-Contract Works out of the hands of the Sub-Contractor and may by itself, its servants, agents or subcontractors execute, complete and maintain such part; or supplement the Sub-Contractor's labour with its own labour under the Sub-Contractor's control; and in any such event MEL may recover its reasonable costs of so doing from the Sub-Contractor as a debt due, or deduct

such costs from monies otherwise due or becoming due to the Sub-Contractor.

**20.4** The provisions of these Conditions of Order shall survive determination of the Sub-Contractor's employment under this Order from whatever cause arising.

## **21. Ruling Law and Disputes**

**21.1** Subject to Clause 21.9 below, any dispute or difference arising under this Order may be referred to adjudication in accordance with the following provisions:

**21.1.1** The Scheme for Construction Contracts (England and Wales) Regulations 1998 as amended by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment)(England) Regulations 2011 (together the Scheme) shall apply.

**21.1.2** Subject to any other agreement between the parties as to who shall act as Adjudicator, the Adjudicator shall be the person mutually agreed by both MEL and the Sub-Contractor or where there is no person so named the person selected by the President or Vice President of the Royal Institution of Chartered Surveyors or such other persons who may be appointed from time to time under Clause 21.4 to act as Adjudicator in place of the Adjudicator so named or selected.

**21.2** The Adjudicator's decision is binding until the dispute or difference is finally determined as provided in Clause 21.5.

**21.3** The Adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and any employee or agent of the Adjudicator is similarly protected.

**21.4** If the Adjudicator fails to give his decision in accordance with the provisions of paragraph 19 of the Scheme all disputes or differences under Clause 21.1 shall be referred to a person to be appointed in accordance with the provisions of paragraph 6(1)(b) of Part 1 of the Scheme by an industry recognised adjudicator nominating body.

**21.5** Subject to the provisions of this Clause 21, the Order shall be read and construed in accordance with English law and the parties hereto are deemed to have submitted any disputes arising out of or in connection with this Order to the exclusive jurisdiction of the English Courts subject to the rights of the

- parties to enforce a judgement or order obtained in the English Courts in any other jurisdiction and subject to the provisions of Clause 21.8.
- 21.6** Notwithstanding the provisions of Clause 21.5, if the Main Contract provides that the ruling law of the Main Contract is other than English law and/or the courts of a country other than England shall have jurisdiction over any disputes under or in respect of the Main Contract, then such law shall apply to the Order and/or such courts shall have jurisdiction over any disputes under this Order as the case may be subject only to the rights of the parties to enforce a judgement.
- 21.7** Notwithstanding any dispute under or in respect of the Order, the parties shall continue to perform their respective obligations under the Order.
- 21.8** Where any dispute under or in connection with the Main Contract is referred to arbitration and that dispute is related to or touches and concerns the subject matter of this Order, then the Sub-Contractor, at the written direction of MEL shall join in that Main Contract arbitration or, at the written direction of MEL, shall submit to arbitration before the same person(s) sitting as the tribunal appointed under the Main Contract to arbitrate on any dispute of the type referred to in Clause 21.5 which is related to or touches and concerns the dispute under the Main Contract.
- 21.9** Where the Main Contract is not governed by or subject to the Housing Grants, Construction and Regeneration Act 1996, then the provisions of Clause 21.1 shall not apply to this Order
- 22. General**
- 22.1** Notwithstanding the date or dates of execution hereof, the Order shall be deemed to apply to all and any works carried out by the Sub-Contractor pursuant to this Order prior to the said date or dates.
- 22.2** No stamping, comment, approval, authorisation or satisfaction expressed by or on behalf of MEL, the Client or the Supervising Officer shall relieve the Sub-Contractor of any liability which it would otherwise have in relation thereto.
- 22.3** Save as may be implied by operation of law for the benefit of MEL, any other terms and conditions, whether arising directly or indirectly out of the Sub-Contractors quotation, invoices, accounts, statements, correspondence or otherwise, or by any course of trading between the parties or otherwise out of anything produced by or on behalf of the Sub-Contractor shall be deemed to be null and void. There are no agreements or understandings in relation to the Sub-Contract Works other than those contained in the Order.
- 22.4** If so stated in the Order, the Sub-Contractor shall provide on execution of the Order and maintain throughout the operation of the Order, a performance bond with a surety and in a form approved by MEL in the sum stated in the Order, in such case the provision and maintenance of such bond being a prerequisite to any payment or any further payment by MEL to the Sub-Contractor notwithstanding any provisions to the contrary elsewhere contained.
- 22.5** Any notice required to be given by either party shall be in writing and addressed to the persons at the address stated in the Order and shall be served either;
- 22.5.1** Personally, when service shall be deemed effective on delivery;
- 22.5.2** By telex or facsimile when service shall be deemed effective at the time of transmission;
- 22.5.3** By first class post when service shall be deemed effective on the day after posting.
- 22.5.4** Where the Order requires an act to be done within a specified period after or from a specified date, the period begins immediately after that date. Where the period would include Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a Bank Holiday in England and Wales that day shall be excluded.
- 22.5.5** Nothing in this Order is intended to confer on any person any right to enforce any provision of this Order which such person would not have had but for the Contracts (Rights of Third Parties) Act 1999 save where that person is an associated or subsidiary company of MEL or save to the extent necessary pursuant to any warranty agreement entered under Clause 4.8.
- 22.5.6** MEL is committed to the employment of a suitable skilled workforce within the industry. As such the Sub-Contractor is required to provide MEL with details of its current workforce, including the skill certification reference for each man, prior to commencement of the contract, and to provide regular updates of the situation at three monthly intervals thereafter.

