



20[●]

Duty of Care Agreement
from cost consultant to Homes England
relating to remedial works to address life critical fire safety risks at [●]

[Consultant] ⁽¹⁾

[Employer] ⁽²⁾ and

The Homes and Communities Agency (trading as Homes England) ⁽³⁾



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DATE.....20[Ⓢ]

PARTIES

- (1) [●] (registered in England and Wales with company No. [●]) whose registered office is [●] (**Consultant**).
- (2) [Ⓢ] (registered in England and Wales with company No. [●]) whose registered office is [●] (**Employer**).
- (3) **THE HOMES AND COMMUNITIES AGENCY (TRADING AS HOMES ENGLAND) (Homes England)**.

BACKGROUND

- (A) By the Appointment, the Employer has engaged the Consultant to act in the capacity of cost consultant in relation to the completion of the Remedial Works on the terms and subject to the conditions set out in the Appointment.
- (B) Homes England has established the Cladding Safety Scheme (**CSS**). The CSS provides funding to address life critical fire safety risks associated with private and social sector residential buildings over 11m and 18m.
- (C) [●] is an applicant of the Cladding Safety Scheme and has engaged the Consultant.
- (D) Pursuant to a funding agreement dated on or around the date of this Agreement between Homes England and the Employer, Homes England has agreed to fund the Remedial Works at the Site (**Funding Agreement**).
- (E) The Consultant has agreed to enter into this Agreement for the benefit of Homes England and its successors in title and assignees.

AGREED TERMS

In consideration of the payment of £1 by Homes England to the Consultant (receipt of which is hereby acknowledged) and which the parties hereby agree to be full and valuable consideration it is hereby agreed that:

1. DEFINITIONS AND INTERPRETATION

- 1.1 In this Agreement the words below have the meanings next to them unless the context requires otherwise:

Appointment	the appointment between the Employer and the Consultant [dated [●]] for the carrying out of cost consultant services, duties and obligations in relation to the Remedial Works including any documents or arrangements which are supplemental or ancillary to it by way of variation or otherwise.
Business Day	a day which is not a Saturday or Sunday or a bank or national holiday in England.
Cladding	components that are attached to the primary structure of a building to form a non-structural surface and includes the weather-exposed outer layer or screen, fillers, insulation, membranes, brackets, cavity barriers, flashing, fixings, gaskets and sealants.

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).

Contract the building contract in respect of the Remedial Works entered into or to be entered into including any documents or arrangements which are supplemental or ancillary to it by way of variation or otherwise

FRAEW


means a fire risk appraisal of external walls carried out by a suitably experienced, qualified, independent and competent professional in accordance with and to the standards required by (i) the guidance note published by the British Standards Institute under reference PAS9980:2022 or (ii) where the application was approved in the Building Safety Fund (prior to the relevant Site being transferred to the Programme) and supported by the Consolidated Advice Note (which provides recommendations and guidance to competent Fire Risk Assessors and other competent building safety professionals when carrying out a fire risk appraisal of external walls of existing multi storey residential buildings) that recommends that actions be taken to address life safety critical issues connected with the external wall system for the Building as supplemented by the Guidance.

Funding Agreement has the meaning ascribed in recital (D).

Material all designs, drawings, calculations, charts, diagrams, sketches, models, plans, specifications, design details, photographs, brochures, reports, notes of meetings, CAD materials, data, databases, schedules, programmes, bills of quantities, budgets, surveys, levels, setting out dimensions and/or other documents or materials produced or prepared by or on behalf of the Consultant in relation to and/or connection with the Remedial Works and/or Site (whether in existence or to be made) and all updates, amendments, additions and revisions to them and any works, designs or inventions contained incorporated or referred to in them for any purpose relating to the Remedial Works and/or Site.

Practical Completion the date of practical completion of the Remedial Works in accordance with the definition of "practical completion" (or equivalent) in the Contract and if there is no such definition (or equivalent) it means the date on which the Homes England is satisfied that the Remedial Works have been completed in accordance with the Funding Agreement.

Remedial Works means the works undertaken as a result of the recommendations made following a FRAEW where these relate to life critical fire safety risks

Site the building(s) known as  upon which the Remedial Works are to be performed.

1.2 In this Agreement unless the context requires otherwise:

1.2.1 references to a Clause or Schedule are to a clause of, or schedule to this Agreement, references to this Agreement include its schedules, and references in a Schedule to a paragraph are to a paragraph of that Schedule;

- 1.2.2 references to this Agreement or any other document are to this Agreement or that document as amended from time to time;
- 1.2.3 words denoting the singular include the plural and vice versa;
- 1.2.4 references to a person include any corporate or unincorporated body;
- 1.2.5 the table of contents and headings in this Agreement do not affect its interpretation;
- 1.2.6 the terms **including, include, in particular** or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms;
- 1.2.7 references to the parties include their respective successors in title, permitted assignees, estates and legal personal representatives;
- 1.2.8 unless otherwise specified, a reference to a statutory provision is a reference to that provision as amended, consolidated, extended or re-enacted from time to time (whether before or after the date of this Agreement) and to any subordinate legislation made under it, except to the extent that it would increase the liability of any party under this Agreement; and
- 1.2.9 if the Consultant is a partnership each partner shall be jointly and severally liable under this Agreement. Where the context so requires and where the Consultant is a partnership, the term Consultant shall be deemed to include any additional partner(s) who may be admitted into the partnership of the Consultant during the currency of this Agreement. This Agreement shall not automatically terminate upon the death, retirement or resignation of one or more members of such partnership.
- 1.2.10 unless the context otherwise requires, any reference to European Union law that is directly applicable or directly effective in the UK at any time is a reference to it as it applies in England and Wales from time to time.

2. EXERCISE OF SKILL AND CARE

- 2.1 The Consultant warrants and undertakes to Homes England that it has observed and performed and shall continue to observe and perform each and all of its services, duties and obligations contained in or implied by the Appointment. Save as expressly provided for in this Agreement¹ the liability of the Consultant is to be treated as being no greater or longer than it would have been if Homes England had been a party to the Appointment instead of this Agreement and ²the Consultant shall be entitled in defence of any action or proceedings by Homes England under this Agreement to raise equivalent rights of defence of liability as it would have against the Employer under the Appointment but neither this provision nor any other provision in this Agreement shall entitle the Consultant to raise any defence based on set-off or counterclaim and/or prevent Homes England from recovering loss and/or damage from the Consultant as a result of the Consultant's breach of any provisions of this Agreement on the basis that the Employer has not suffered any loss and/or damage and/or the same loss and/or damage and the Consultant hereby irrevocably agrees and undertakes not to raise any such arguments by way of defence and/or set-off and/or counterclaim to any claim made by Homes England.
- 2.2 Without prejudice to the generality of Clause 2.1 the Consultant warrants and undertakes to Homes England that it has exercised and shall continue to exercise in the performance of the services, duties and obligations contained in or implied by the Appointment all reasonable skill, care and diligence to be expected of a properly qualified and competent consultant experienced in performing similar services, duties and obligations in relation to the Remedial Works of a similar nature, value, scope, character, complexity and timescale to the Remedial Works.

¹No greater liability clause included to satisfy insurers.

²Equivalent rights of defence provision to satisfy insurers.

- 2.3 The Consultant acknowledges that Homes England has relied and shall rely on the warranties under this Clause 2 and the other terms of this Agreement and may and/or shall suffer loss and/or damage in the event of a breach of these warranties and/or the other terms of this Agreement.
- 2.4 The obligations of the Consultant under this Agreement shall not be released or diminished by the appointment of any person by Homes England to carry out any independent enquiry into any matter.

3. OBLIGATIONS PRIOR TO TERMINATION OF THE APPOINTMENT

- 3.1 The Consultant warrants and undertakes to Homes England that it shall not exercise or seek to exercise any right of termination of the Appointment and/or to discontinue the performance of any of its services, duties and/or obligations thereunder for any reason whatsoever (including any services, duties and/or obligations in relation to the Remedial Works by reason of breach on the part of the Employer) without giving to Homes England not less than 28 days' notice of its intention to do so and specifying the grounds for the proposed termination and/or discontinuance.
- 3.2 Any period stipulated in the Appointment for the exercise by the Consultant of a right of termination of the Appointment and/or to discontinue the performance of any of its services, duties and/or obligations in relation to the Remedial Works shall be extended as may be necessary to take account of the period of notice required under Clause 3.1.
- 3.3 Compliance by the Consultant with the provisions of Clause 3.1 shall not be treated as a waiver of any breach on the part of the Employer giving rise to the right of termination of the Appointment and/or to discontinue the performance of any of the Consultant's services, duties and/or obligations in relation to the Remedial Works, nor otherwise prevent the Consultant from exercising its rights after the expiration of the notice.

4. INTELLECTUAL PROPERTY RIGHTS

All rights including copyright in all the Materials, if any, shall remain vested in the Consultant but, subject to the Consultant having been paid all sums due and payable under the Appointment, Homes England and its appointee shall have an irrevocable, royalty-free, non-exclusive licence to copy and use the Materials and to reproduce the designs and content of them for any purpose relating to the Remedial Works including, without limitation, the construction, completion, maintenance, letting, sale, promotion, advertisement, reinstatement, refurbishment and repair of the Remedial Works. Such licence shall enable Homes England and its appointee to copy and use the Consultant's Materials for an extension of the Remedial Works but shall not include any right or licence to reproduce the designs contained in them for any extension of the Remedial Works. The Consultant shall not be liable for any such use by Homes England or its appointee of any of the Materials for any purpose other than that for which they were prepared.

5. INSURANCE

- 5.1 The Consultant warrants to Homes England that it maintains, has at all relevant times maintained, and shall continue to maintain throughout the duration of the Remedial Works and for a period of 6 years following Practical Completion (irrespective of any termination of the Appointment or the Consultant's employment under the Appointment for any reason) professional indemnity insurance with reputable insurers lawfully carrying on such insurance business in the United Kingdom at commercially reasonable rates and terms with a limit of indemnity and basis of cover of not less than that set out in the Appointment for any one claim or series of claims arising out of the same originating or underlying cause to cover its potential liability under this Agreement.
- 5.2 As and when reasonably required by Homes England the Consultant shall provide satisfactory documentary evidence of the terms of insurance referred to in Clause 5.1 and that it has at all times maintained and shall continue to maintain at all times the insurance referred to in Clause 5.1, and shall confirm that payment has been made in respect of the last preceding premium due under such insurance.

- 5.3 The Consultant warrants that it has at all relevant times observed and shall continue to observe all of the conditions of the insurance policy referred to in Clause 5.1 and all of the insurance provisions contained or referred to in the Appointment.
- 5.4 The Consultant shall as soon as reasonably practicable inform Homes England if the insurance referred to in Clause 5.1 ceases to be available at commercially reasonable rates and terms and shall obtain such reduced cover (if any) as is available and as would be fair and reasonable in the circumstances for the Consultant to obtain. For the purposes of this Clause 5, commercially reasonable rates shall mean such level of premium rates at which other consultants of a similar size and financial standing as the Consultant at each renewal date generally continue to take out such insurance. For the avoidance of doubt, any increased or additional premium required by insurers by reason of the Consultant's own claims record or other acts, errors, omissions, negligence, breaches, defaults, matters or things particular to the Consultant shall be deemed to be within commercially reasonable rates.

6. HEALTH AND SAFETY

The Consultant warrants that it has complied and shall comply with all of its obligations in relation to the Remedial Works as set out in the Construction (Design and Management) Regulations 2015.

7. EXCLUDED MATERIALS

- 7.1 The Consultant warrants that it has exercised and will continue to exercise the standard of reasonable skill and care to ensure that it has not and shall not use and/or permit the use of and/or specify for use in or in connection with the Remedial Works any substances materials equipment products kit practices or techniques which by their nature or application do not conform with relevant British Standards or Codes of Practice or regulations or good building practice or any European Union equivalent current at the time of use or permission or specification, nor any substances materials equipment products kit practices or techniques which are generally known or generally suspected within the Consultant's trade and/or the construction industry:
- 7.1.1 to be deleterious in the particular circumstances in which they are used or specified for use to the health or safety of any person;
- 7.1.2 to be deleterious in the particular circumstances in which they are used or specified for use to the health, safety, stability, performance, physical integrity and/or durability of the Remedial Works or any part thereof and/or to other structures, finishes, plant and/or machinery;
- 7.1.3 not to comply with or have due regard to the report entitled "Good Practice in the Selection of Construction Materials" (current edition) published by the British Council for Offices; and/or
- 7.1.4 to be supplied or placed on the market in breach of the Construction Products Regulations.

8. COMMUNICATIONS

- 8.1 Except as otherwise provided for in this agreement, all notices or other communications under or in respect of this agreement to either party shall be in writing and, unless otherwise stated, may be made by letter or by electronic mail.
- 8.2 Where communications are sent by letter, by personal delivery or by sending it recorded postal delivery, in the case of:
- 8.2.1 Homes England, this shall be to the address specified at the head of this agreement and marked for the attention of the Director of the Cladding Safety Scheme or to such other address as notified in writing by Homes England to the other parties;

- 8.2.2 the Consultant, this shall be to the address specified at the head of this agreement and marked for the attention of a board level director or member of the Consultant's or such other address as notified in writing by the Consultant to the other parties;
- 8.2.3 the Employer, this shall be to the address specified at the head of this agreement and marked for the attention of a board level director or member of the Employer or such other addresses as notified in writing by the Employer to the other parties.
- 8.3 Any notice or other communication to be made between the parties by electronic mail shall be made to the email address specified in the signature block for the relevant party or such alternative as may be supplied by them to the other parties from time to time by not less than five Business Days' notice.
- 8.4 Any written notice or other communication sent by post will be deemed served and received on the second Business Day following the day of posting and where delivered personally will be deemed to have been served when delivered.
- 8.5 Any such electronic notice as specified in clause 8.3 above made between the parties will be effective only when actually received in readable form.
- 8.6 Any electronic notice or other communication which becomes effective, in accordance with clause 8.3 above, after 5:00pm in the place in which the party to whom the relevant communication is sent or made available has its address for the purpose of this agreement shall be deemed only to become effective on the following Business Day.
- 8.7 With respect to service by email, only a response or communication issued by a member of issuing party's legal team or senior management shall constitute a formal response to legal proceedings.

9. CONCURRENT LIABILITIES

The rights and benefits conferred upon Homes England by this Agreement 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. ASSIGNMENT

- 10.1 Homes England may without the consent of the Consultant assign transfer and/or charge the benefit of all or any of the Consultant's obligations under this Agreement and/or any benefit arising under or out of this Agreement:
- 10.1.1 by absolute assignment to any relevant government department, body/or organisation; that has responsibility, or becomes responsible for the CSS;
- 10.1.2 by absolute assignment to a financier or funding party a maximum of two times; and
- 10.1.3 by absolute assignment on one other occasion only.
- 10.2 In this Agreement references to Homes England include where the context admits its permitted assignees.
- 10.3 The Consultant shall not be entitled to contend that any person to whom this Agreement is assigned in accordance with Clause 10.1 is precluded from recovering under this Agreement any loss incurred by such assignee resulting from any breach of this Agreement (whenever happening), by reason that such person is an assignee and not a named party under this Agreement.
- 10.4 The Consultant shall not be entitled to assign, transfer and/or charge the benefit of any (if any) of Homes England's obligations under this Agreement and/or any benefit (if any) arising to the Consultant out of this Agreement.

11. LIMITATION PERIOD

The liability of the Consultant under this Agreement shall cease 6 years following Practical Completion save in relation to any claims made by Homes England against the Consultant and/or notified by Homes England to the Consultant in writing prior thereto.

12. EMPLOYER

The Employer agrees that it shall not take any steps which would prevent or hinder Homes England from exercising its rights under this Agreement and confirms that the rights of Homes England in Clause 3 override any obligations of the Consultant to the Employer under the Appointment.

13. GOVERNING LAW AND JURISDICTION

13.1 This Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.

13.2 The parties irrevocably submit to the exclusive jurisdiction of the courts of England and Wales which shall have jurisdiction to hear and decide any suit, action or proceedings and/or to settle any dispute or claim which may arise out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).

14. RIGHTS OF THIRD PARTIES

Unless the right of enforcement is expressly provided for it is not intended that a third party should have the right to enforce a provision of this Agreement pursuant to the Contracts (Rights of Third Parties) Act 1999. This Clause 14 shall not affect or prevent any assignees who take the benefit of this Agreement pursuant to Clause 10 or successors in title to Homes England from enforcing the provisions of this Agreement.

15. ELECTRONIC SIGNATURE

The parties acknowledge and agree that this Agreement may be executed by electronic signature (whatever form the electronic signature takes) and that this method of signature is conclusive of the parties intention to be bound by this Agreement as if signed by the parties manuscript signature.

16. COUNTERPARTS

This Agreement may be executed in any number of counterparts, but will not take effect until each Party has executed at least one counterpart. Each counterpart will constitute an original, but all the counterparts together will constitute a single agreement.

Signed for and on behalf of **[CONSULTANT]**

Email address: []

.....
Director's signature

.....
Director's name

Signed for and on behalf of **[Employer]**

Email address: []

.....
Director's signature

.....
Director's name

The common seal of the)
HOMES AND COMMUNITIES AGENCY)
was hereunto affixed in the presence of:)

Authorised Signatory

e-mail