

Annex G7

FORM OF DESIGN CHECKER'S WARRANTY

THIS WARRANTY is made the [] day of [] of []

BETWEEN

1. [] [whose registered office is at []/of []("the Design Checker");

AND

2. The Government of the Hong Kong Special Administrative Region ("the Employer").

WHEREAS

- A. By a contract ("the Contract") made between the Employer and []("the Contractor") and dated the [] day of [] [] the Contractor has agreed to design, construct, complete and maintain certain works as more particularly described in the Contract relating to []("the Works") upon the terms and conditions contained in the Contract.
- B. The Design Checker has had an opportunity of reading and noting the provisions of the Contract (save for those parts of a confidential commercial nature).
- C. By an agreement dated [] ("the Consultancy Agreement") made between the Contractor and the Design Checker, the Design Checker has agreed to check the design of the Works as more particularly set out in the Consultancy Agreement.
- D. Pursuant to the terms of the Contract, the Contractor agreed to procure the provision of this Warranty executed by the Design Checker.

NOW IT IS HEREBY AGREED AS FOLLOWS :

- 1. All references in this Warranty to "the Works" shall be construed as meaning the Works as defined in Clause 1(1) of the General Conditions of Contract of the Contract. In this Warranty the expression "design of the Works" means to execute the design component of "the Works" as defined in Clause 1(1) of the General Conditions of Contract of the Contract as aforesaid.
- 2. Except to the extent (if any) expressly permitted by the Consultancy Agreement, the Design Checker shall not employ sub-consultants to carry out any of the Design Checker's obligations under the Consultancy Agreement without the prior written consent of the Supervising Officer.
- 3. The Design Checker hereby warrants and undertakes to the Employer that he has executed and will execute the checking of the design of the Works, and has carried out and will carry out each and all of the obligations, duties and undertakings of the Design Checker under the Consultancy Agreement when and if such obligations, duties and undertakings shall become due and performable, in accordance with the terms of the Consultancy Agreement.
- 4. Without limiting the Design Checker's obligations and liabilities under Clause 5, the Design Checker undertakes to indemnify the Employer against each and every liability which the Employer may have to any person whatsoever and against all demands, claims, causes of actions, proceedings, liabilities, loss, damages, costs, charges and expenses sustained, incurred or payable by the Employer of whatsoever nature provided that the Design Checker shall have no greater liability to the Employer by virtue of his undertaking under this clause than the liability of the Contractor to the Employer under the Contract insofar as and to the extent that the same has arisen by reason of any breach by the Design Checker of his obligations, duties and undertakings under the Consultancy Agreement.

5. Without prejudice to the generality of Clause 3, the Design Checker further warrants that all reasonable skill and care has been and shall be exercised by the Design Checker in connection with the checking of the design of the Works.
6. (a) The Design Checker shall indemnify and save harmless the Employer against and from all demands, claims, causes of actions, proceedings, liabilities, losses, damages, costs, charges and expenses sustained, incurred or payable by the Employer of whatsoever nature arising from or contributed to by:
 - (i) any breach by the Design Checker, his servants or agents, (including without limitation sub-consultants, their servants or agents) of this Warranty; and
 - (ii) any negligence or breach of statutory duty on the part of the Design Checker, his servants or agents (including without limitation sub-consultants, their servants or agents); and
 - (iii) any wilful misconduct on the part of the Design Checker, his servants or agents (including without limitation sub-consultants, their servants or agents).
- (b) Provided that the Design Checker's obligation to indemnify the Employer against any such demands, claims, causes of actions, proceedings, liabilities, loss, damages, costs, charges and expenses sustained, incurred or payable by the Employer of whatsoever nature as set out in sub-clause (a) shall be reduced to the extent that the same was caused by or contributed to by any act, neglect, omission or default of the Employer or its servants or agents.
7. No allowance of time by the Employer hereunder or by the Contractor under the Consultancy Agreement nor any forbearance or forgiveness in or in respect of any matter or thing concerning this Warranty or the Consultancy Agreement on the part of the Employer or the Contractor, nor anything that the Employer or the Contractor may do or omit or neglect to do, shall in any way release the Design Checker from any liability under this Warranty.
8. The Design Checker agrees that he shall not without first giving the Employer not less than twenty-one (21) days prior notice in writing exercise any right he may have to terminate the Consultancy Agreement or treat the same as having been repudiated by the Contractor or withhold performance of his obligations, duties and undertakings under the Consultancy Agreement.
9. (a) In the event that the Contract or the employment of the Contractor under the Contract is terminated for any reason whatsoever and if so requested by the Employer in writing within twenty-one (21) days of such termination, the Design Checker shall carry out and complete his obligations under this Warranty and shall enter into a novation agreement with the Employer and the Contractor in which the Design Checker shall undertake inter alia to perform the Consultancy Agreement and be bound by its terms and conditions as if the Employer had originally been named as a contracting party in place of the Contractor. The said novation agreement will be in such form as the Employer may reasonably require.
- (b) In the event that the Employer does not require the Design Checker to enter into a novation agreement as required by sub-clause (a), the Design Checker shall have no claim whatsoever against the Employer for any damage, loss or expense howsoever arising out of or in connection with this Warranty.
10. In the event of any ambiguity or conflict between the terms of the Consultancy Agreement and this Warranty, then for the purposes of this Warranty the terms of this Warranty shall prevail.
11. The provisions of this Warranty shall be without prejudice to and shall not be deemed or construed so as to limit or exclude any rights or remedies which the Employer may have against the Design Checker whether in tort or otherwise.

12. Nothing contained in this Warranty shall vary or affect the Design Checker's rights and obligations under the Consultancy Agreement.
13. The Employer shall be entitled to assign the benefit of this Warranty at any time without the consent of the Design Checker being required.
14. All documents arising out of or in connection with this Warranty shall be served :-
- (a) upon the Employer at [] marked for the attention of []; and
 - (b) upon the Design Checker, at [], Hong Kong Special Administrative Region.
15. The Employer and the Design Checker may change their respective nominated addresses for service of documents to another address in the Hong Kong Special Administrative Region but only by prior written notice to each other. All demands and notices must be in writing.
16. (a) The Design Checker hereby represents that, with respect to his obligations, duties, undertakings or any other matter under or arising out of or in connection with this Warranty, neither he nor any of his properties or assets has, in the Hong Kong Special Administrative Region, or in any other jurisdiction, any right of immunity on the grounds of sovereignty or otherwise from any legal action, suit or proceedings from :
- (i) the giving of relief in any legal action, suit or proceedings;
 - (ii) set-off or counterclaim;
 - (iii) the jurisdiction of any court, in the Hong Kong Special Administrative Region or in any other jurisdiction;
 - (iv) service of process upon him or any agent;
 - (v) attachment prior to judgement in order to obtain satisfaction hereof; or
 - (vi) attachment after judgement or from execution or any other process for the enforcement of any judgement or other legal process in any jurisdiction;
- and to the extent that the Design Checker is or becomes entitled to any immunity as aforesaid, in the Hong Kong Special Administrative Region or in any other jurisdiction in respect of his obligations, duties, undertakings or any other matter under or arising out of or in connection with this Warranty, he does hereby and will irrevocably and unconditionally waive and agree not to plead or claim any such immunity.
- (b) The Design Checker further consents to the giving of any relief in any legal action, suit or proceedings and to execution or any other form of process for the enforcement of any judgement against him or his assets.
17. This Warranty shall be governed by and construed in all respects according to the laws for the time being in force in the Hong Kong Special Administrative Region.
18. (a) Without prejudice to his obligations under this Warranty, the Design Checker shall maintain with underwriters approved by the Employer and on terms and conditions reasonably acceptable to the Employer professional indemnity insurance in respect of the Design Checker and his sub-consultants for HK\$[](Hong Kong Dollars) in relation to his checking of the design of the Works for any one occurrence or series of occurrences arising out of any one event from the date of commencement of appointment or engagement of the Design Checker until 6 years after the date of the certificate of completion of the Works, or where more than one such certificates has been or is to be issued, the date of the last such certificate of completion issued.

- (b) In the event that, although no fault of the Design Checker, such insurance becomes unavailable at reasonable commercial rates the Design Checker shall immediately inform the Employer and the Contractor and shall, subject to obtaining the prior written consent of the Employer, effect such insurance at such levels of cover as are, in the opinion of the Employer, reasonably available. The Design Checker shall immediately inform the Employer if for any reason professional indemnity insurance is not maintained in accordance with this Warranty or becomes void and unenforceable.
- (c) If the Design Checker shall fail upon request to produce to the Employer satisfactory evidence that there is in force professional indemnity insurance as required by sub-clause (a), the Employer may effect and keep in force any such insurance and pay such premium as may be necessary for that purpose. The Employer shall be entitled to recover such premium or premiums as a debt due from the Design Checker.

[Guidance Note: Delete this Clause 18 and renumber following clause when Special Condition of Contract requiring the Design Checker to provide Professional Indemnity Insurance (PII) is not adopted.]

19. (a) Any dispute or difference of any kind whatsoever between the Employer and the Design Checker arising under out of or in connection with this Warranty shall be referred to arbitration in accordance with the provisions of the Arbitration Ordinance and any such reference shall be deemed to be a submission to arbitration within the meaning of such Ordinance.
- (b) (i) Subject to paragraphs (ii) and (iii) of this sub-clause, the Domestic Arbitration Rules (2014) of the Hong Kong International Arbitration Centre (the Arbitration Rules) shall apply to any arbitration instituted in accordance with this Clause.
 - (ii) Notwithstanding any provision of the Arbitration Rules, the place of meetings and hearings in the arbitration shall be Hong Kong unless the parties otherwise agree.
 - (iii) Article 20.1 of the Arbitration Rules shall be deleted and replaced by:

" 20.1(a) The arbitration proceedings are private and confidential between the parties and the arbitrator. Subject to the provisions of section 18 of the Ordinance and these Rules, no information relating to the arbitration shall be disclosed by any person without the written consent of each and every party to the arbitration. Disclosures are permissible where disclosures –

 - (a) are necessary for implementation or enforcement;
 - (b) are required by the parties’ auditors or for some other legitimate business reason;
 - (c) are required by any order of the courts of Hong Kong or other judicial tribunal;
 - (d) are necessary for the making of claims against any third party or to defend a claim brought by any third party.

20.1(b) Notwithstanding Article 20.1(a) and subject to the following provisions, the party comprising the Government of the Hong Kong Special Administrative Region (the Government party) may disclose the outline of any dispute with the other party and the outcome of the arbitration to the Public Accounts Committee of the Legislative Council upon its request. Before disclosures are made to the said Committee, the Government party shall inform the other party. Disclosures shall not be made to the said Committee before expiry of the first 6 months from the date of the outcome of the arbitration without the written consent of the other party but such consent shall not be unreasonably withheld. The other party shall be deemed to have given his consent to disclosures on the expiry of the first 6 months from the date of the outcome of the arbitration. The other party may, if he considers necessary to protect the sensitive nature of certain information relating to him, request the Government party to disclose such specified information to the said Committee strictly on a confidential basis. If the Government party considers that there are legitimate grounds to accede to the other party’s request, the Government party shall convey the request to the said Committee for its consideration. "
- (c) All the provisions in Schedule 2 to the Arbitration Ordinance shall apply to any arbitration

instituted in accordance with this Clause.

- (d) For the purposes of this Clause, "Arbitration Ordinance" means the Arbitration Ordinance (Cap. 609) or any statutory modification thereof for the time being in force.
- (e) Save as expressly otherwise provided, the arbitrator shall have full power to open up, review and revise any decision, opinion, instruction, notice, order, direction, withholding of approval or consent, determination, certificate, statement of objection, assessment or valuation of the Supervising Officer as defined in the Contract or the Contractor relating to the dispute or difference.

IN WITNESS WHEREOF this Warranty has been executed as a deed on the date first above written.

**Works departments shall select and insert the appropriate attestation clauses for the Design Checker and the Employer as specified in prevailing TC(W) on Guidance on Execution of Public Works Contracts as a Deed.*

* The italic parts are not part of the execution clause. They are for guidance or information only.

All Guidance Notes above, in bold lettering, should be deleted when preparing this document for signature.

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