

Collateral Warranty¹

(Clause 5.5 of PW-CF1 to PW-CF5 inclusive)

THIS AGREEMENT is made on BETWEEN:

1. *The Specialist*

Registered office of Specialist

2. *The Contractor*

*Registered office of
Contractor*

and

3. *The Employer*

Whose principal office is at

Dublin City Council

Civic Offices, Wood Quay, Dublin 8, D08 RF3F

BACKGROUND

A. The Employer has entered or is about to enter into a contract with the Contractor (the **Main Contract**) for

Dodder Greenway - Milltown Road-Dodder Walk to Dundrum Road
Active Travel Scheme

(the **Works**)

B. By written agreement dated (the **Contract**) the Contractor has appointed the Specialist to

*Description of contract
works or services or supply*

in connection with the Works.

C. The total amount to be paid by the Contractor to the Specialist under the Contract for completing the Specialist's obligations under the Contract is €

D. Unless otherwise defined in this Agreement, terms with initial capital letters have the meaning given to such terms in the Main Contract.

¹ If the Specialist and/or the Contractor is/are not incorporated in Ireland, execution will be in accordance with the law of its jurisdiction of incorporation for execution in Ireland.

IT IS AGREED as follows in consideration of the payment of €5 by the Employer to the Specialist (receipt and sufficiency of which the Specialist acknowledges):

1. Specialist's Undertakings to the Employer

- 1.1 The Specialist warrants and undertakes to the Employer that it has not broken and will not break any express or implied term of the Contract.
- 1.2a² The Specialist covenants with the Employer that, in carrying out the Contract, the Specialist has exercised and will continue to exercise the standard of skill, care and diligence reasonably to be expected of properly qualified persons providing works, services or supply comparable in value, size, scope, complexity and quality to that required under the Contract.
- 1.2b³ The Specialist covenants with the Employer that, in carrying out the Contract, the part of the Works to be undertaken by the Specialist, when complete, will be fit for its intended purpose as described in the Contract.

2. Insurance

- 2.1a⁴ The Specialist shall maintain professional indemnity insurance in the amount of at least € covering the Specialist's obligations under this Agreement for each and every claim or series of claims arising from the same originating cause until a date no earlier than six years from the date of Substantial Completion of the Works is certified under the Main Contract ("Each and Every Insurance") or subject to Clause 2.5, on an annual aggregate limit ("Annual Aggregate Insurance") until a date that is no earlier than six years from the date of Substantial Completion of the Works as certified under the Main Contract.
- 2.1b⁵ The Specialist shall maintain professional indemnity insurance in the amount of at least € on an annual aggregate limit until a date no earlier than six years from the date of Substantial Completion of the Works is certified under the Main Contract.
- 2.2 The maximum excess shall be 2% of the Specialist's annual turnover or €5,000, whichever is the greater.
- 2.3 On or before the date of renewal of the professional indemnity insurance policy, and in any event when it is reasonably requested to do so by the Employer, the Specialist shall produce for inspection satisfactory documentary evidence that its professional indemnity insurance is being maintained.
- 2.4 The Specialist shall immediately notify the Employer of any cancellation, non-renewal or material reduction in the insurance.
- 2.5 The Specialist agrees that, if at the date of this Agreement, it has in place Annual Aggregate Insurance at the level stated in the sub-clause 2.1a:
- (a) it shall monitor the EU and UK market at no longer than yearly intervals to establish whether (i) the Each and Every Insurance, or (ii) better cover than the cover in place at the later of the date of this Agreement or the latest relevant annual renewal, can be obtained at the Increased Premium Rates; and

² 1.2a and 1.2b are alternatives: if 1.2b applies it means that the Specialist is not a consultant and therefore text in 1.2a should be deleted and the words "(sub-clause not used)" inserted.

³ 1.2a and 1.2b are alternatives: if 1.2a applies the text in 1.2b should be deleted and the words "(sub-clause not used)" inserted. If both sub-clauses 1.2a and 1.2b are left in or deleted the default text for the sub-clause is "The Specialist covenants with the Employer that, in carrying out the Contract, the part of the Works to be undertaken by the Specialist, when complete, will be fit for its intended purpose as described in the Contract."

⁴ 2.1a and 2.1b are alternatives: if 2.1b applies it means that the Specialist is not a consultant and therefore the text in 2.1a should be deleted and the words "(sub-clause not used)" inserted.

⁵ 2.1a and 2.1b are alternatives: If 2.1a applies the text in 2.1b should be deleted and the words "(sub-clause not used)" inserted. If both sub-clauses 2.1a and 2.1b are left in or deleted the default text for the sub-clause is "The Specialist shall maintain professional indemnity insurance in the amount of at least €6,500,000.00 on an annual aggregate limit until a date no earlier than six years from the date Substantial Completion of the Works is certified under the Main Contract."

(b) if the Each and Every Insurance:

- (i) becomes available to at the Increased Premium Rates; or
- (ii) is not available (or not available at the Increased Premium Rates) but better cover than the cover in place at the later of the date of this Agreement or the latest relevant annual renewal becomes available to the Specialist at the Increased Premium Rates,

the Specialist shall immediately effect such available cover (subject to having obtained the Employer's prior written approval, such approval not to be unreasonably withheld or delayed) and notify the Employer in writing within seven days that the Specialist has so effected the cover.

For the purposes of this Agreement, the "**Increased Premium Rates**" means premium rates that do not exceed 125% of the premium rates payable by the Specialist for cover on an annual aggregate basis at the time of the applicable annual renewal PROVIDED THAT any difference between (i) premium rates for cover on an annual aggregate basis and (ii) premium rates for the Each and Every Insurance or better cover than the cover in place at the later of the date of this Agreement or the latest relevant annual renewal (whichever is applicable), is not due to any act, omission, default, claim, notice of claim, negligence or otherwise of or against the Specialist.

3. Copyright

- 3.1⁶ Ownership of and copyright in all Contractor's Documents provided or produced by or on behalf of the Specialist will transfer to the Employer when the Employer receives them.
- 3.2 The intellectual property rights in all drawings, designs, reports, specifications, calculations and other similar documents and written information (including all information stored on any disk, computer or processing facility) obtained or provided by or on behalf of the Specialist in connection with the Works, other than Contractors Documents⁷ (**Design Information**) will remain vested in the Specialist.
- 3.3 The Specialist grants to the Employer, and all those authorised by it, an irrevocable royalty free non-exclusive licence to copy and use Design Information and to reproduce the designs contained in them for any purpose related to the Works including, but without limitation, to construct, complete, maintain, extend, let, sell, promote, advertise, reinstate and repair the Works.
- 3.4 The Specialist will not be liable for any use by the Employer of the Contractor's Documents or Design Information for any purpose other than that for which the Specialist prepared and provided them.
- 3.5 The Specialist shall pay and indemnify the Employer against all royalties and other sums for the supply and use of any patented or copyrighted articles, processes, information or investigations required to perform its duties under the Contract.
- 3.6 The Specialist shall, on reasonable demand, produce to the Employer a copy of all the Contractor's Documents and Design Information.
- 3.7 The Specialist shall indemnify the Employer against losses, liability, damages, claims, proceedings and costs suffered or incurred by reason of the Specialist infringing or being held to have infringed any copyright or other intellectual property rights in any Contractor's Documents or Design Information.

4. Assignment

The Employer may assign the benefit of this Agreement on three occasions without the consent of the Specialist. Thereafter, any further assignment shall require the consent of the Specialist with such consent not to be unreasonably withheld or delayed.

⁶ Include 3.1 only if required under the main contract (Schedule, part 10); otherwise delete it and insert the words "(sub-clause not used)".

⁷ The text "other than Contractors Documents" should only be included if assignment of copyright is required.

5. Step In

- 5.1 The Employer has no authority under this Agreement to issue any instruction to the Specialist in relation to the Specialist's duties under the Contract, unless and until the Employer has given notice under sub-clause 5.3 below.
- 5.2 The Specialist agrees that:
- a) it will not, without first giving the Employer written notice (a **"Discontinuance Notice"**), exercise any right of termination of the Contract, or treat the Contract as having been repudiated, or discontinue carrying out the Contract;
 - b) the Discontinuance Notice must be accompanied by all of the information referred to in sub-clause 5.5 below (the **"Particulars"**); and
 - c) its rights of termination (and the like) will cease if, within 28 days from receipt of the Discontinuance Notice and all Particulars, the Employer gives notice to the Specialist under sub-clause 5.3 below.
- 5.3 The Specialist agrees that, if the Employer gives notice requiring the Specialist to accept the Employer's instructions to the exclusion of the Contractor, the Specialist will, subject to sub-clause 5.4 below, deal with and accept instructions solely from the Employer in substitution for the Contractor as if the Employer had appointed the Specialist originally on the terms of the Contract.
- 5.4 If the Employer gives notice under sub-clause 5.3 above, the Employer shall be liable for payment of amounts payable to the Specialist under the Contract save that the Employer shall have no liability to the Specialist:
- (a) for payment of :
 - (i) any amount in excess of the amount of the unpaid balance of the Contract Sum; or
 - (ii) amounts due for the Works undertaken by the Specialist for which the Employer has already paid the Contractor,
 - (b) for any:
 - (i) claims by, losses of, damages incurred by, or indemnities in favour of, the Specialist; or
 - (ii) any other liability or potential liability of the Contractor to the Specialist, arising from or connected to circumstances arising before the Employer has provided notice under sub-clause 5.3 above.

For the purposes of this Clause 5, "Contract Sum" shall mean the amount stated in Recital C (as may change in accordance with the Contract).

- 5.5 The Specialist and the Contractor shall, if so required by the Employer at any time, give the Employer a copy of the whole Contract, particulars of the amounts paid to the Specialist under the Contract, particulars of amount of the Contract Sum due and unpaid to the Specialist, particulars of amount of the Contract Sum remaining to be paid to the Specialist under the Contract but not yet due, and any information requested by the Employer that is relevant to these amounts.
- 5.6 If the Contractor's obligation to complete the Works is terminated under the Main Contract, and the Employer so requires, the Specialist shall enter into a contract with the Employer or a replacement contractor for the Specialist to complete its obligations under the Contract, in the same terms as the Contract with all necessary changes where under the Employer shall have no liability to make any payment of:
- a) any amount in excess of the amount of the unpaid balance of the Contract Sum; nor

- b) amounts due for the Works undertaken by the Specialist for which the Employer has already paid the Contractor.

5.7 The Contractor releases the Specialist from any obligation to inquire about whether the Employer's rights under this clause have become exercisable, and from any liability to the Contractor for complying with this clause.

6. Notices

Any notice to be given under this Agreement must be in writing and delivered by hand or sent by prepaid registered post to the address of the relevant party at the top of this Agreement, or at any other address the relevant party may specify by written notice to the other parties. A notice will be taken to have been received on the day of delivery if delivered by hand, or 48 hours later if sent by prepaid registered post.

7. Common Law Rights

Subject to Clause 11, nothing in this Agreement limits the Employer's rights at law.

8. Law

8.1 This Agreement is governed by and construed according to Irish law. The parties submit, subject to Clause 8.3, to the jurisdiction of the Irish courts in relation to all matters concerning it.

8.2 If any dispute, difference or question (a "dispute") shall at any time hereafter arise between the parties to this Agreement or their respective assigns in respect of the construction, interpretation or effect of this Agreement, then a party shall deliver to the other party a notice of dispute in writing adequately identifying and providing details of the dispute. Within seven (7) days after the delivery of the notice of the dispute, the parties shall confer at least once to attempt to resolve the dispute or to agree to methods of resolving the dispute by other means. At any such conference, each party shall be represented by a person having authority to agree to a resolution of the dispute. If the dispute has not been resolved within 21 days of the delivery of the notice of dispute, or such other time as may be mutually agreed by the chief executives of the parties prior to the expiry of 21 days of the delivery of the notice of the dispute, the dispute shall be finally decided by arbitration in accordance with the rules referred to in Clause 13.4 of the Main Contract. The arbitrator shall be agreed by the parties, or in default of agreement, nominated at the request of either party by the nominating body named in the Main Contract.

9. Procedure

If there is a conflict between this Agreement and the Contract, this Agreement takes precedence.

10. Joint and Several Liability

The obligations in this Agreement of the persons comprising the Specialist are joint and several.

11. Limitation on Liability

11.1⁸ The Specialist's liability to the Employer as ascertained in any year commencing on 1 January arising out of or under this Agreement is limited to the amount of, and subject to the exceptions in Clause 11.2 to, the Liability Cap (as defined below).

The Liability Cap is:

€ / (euro)

11.2 The Liability Cap shall not apply to any claim, loss, damage, cost, expense, or liability relating to:

- a) death, personal injury or illness;

⁸

Clauses 11.1 and 11.2 apply where Clause 1.2a applies. Clause 11.3 applies where Clause 1.2b applies.

- b) fraud or fraudulent misrepresentation;
- c) wilful default;
- d) gross negligence;
- e) third party property;
- f) any infringement upon a third party's intellectual property rights; or
- g) any liability which the Specialist cannot lawfully exclude or limit.

11.3 The Specialist's liability to the Employer arising out of or under this Agreement is limited to the amount of, and subject to the exceptions to, the Liability Cap in the Main Contract provided that the amount of the Specialist's liability shall be reduced commensurate with the amount of any payment made to the Employer by the Contractor or any other "Specialist" in satisfaction of each such party's or parties' liability to the Employer under the Main Contract or any collateral warranty, as applicable.

IN WITNESS WHEREOF the parties have executed this Agreement the day and date first above written.

Signed on behalf of

Name of Employer

--

Signature of authorised person

--

In the presence of

Name of witness

--

Signature of witness

--

Given under the Specialist's common seal

Affix Specialist's common seal

--

*Signatures of persons authorised
to authenticate the seal*

--

OR

Signed and delivered as a Deed by

Name of attorney

--

Signature of attorney

--

As lawful attorney of the Specialist under a power of attorney dated

--

In the presence of

Name of witness

--

Signature of witness

--

Witness's occupation

--

Witness's address

--

OR

Signed on behalf of

Name of Specialist

--

Signature of authorised person

--

In the presence of

Name of witness

--

Signature of witness

--

Witness's occupation

--

Witness's address

--

OR (if the Specialist is an individual)

Signed and delivered as a Deed by

<i>Name of Specialist</i>	
<i>Signature of Specialist</i>	

In the presence of

<i>Signature of witness</i>	
<i>Name of witness</i>	
<i>Witness's occupation</i>	
<i>Witness's address</i>	

OR

Signed by

<i>Name of Specialist</i>	
<i>Signature of Specialist</i>	

In the presence of

<i>Signature of witness</i>	
<i>Name of witness</i>	
<i>Witness's occupation</i>	
<i>Witness's address</i>	

Signed on behalf of

<i>Name of Contractor</i>	
<i>Signature of authorised person</i>	

In the presence of

<i>Name of witness</i>	
<i>Signature of witness</i>	
<i>Witness's occupation</i>	
<i>Witness's address</i>	