



Llywodraeth Cymru
Welsh Government

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**WEP STRATEGIC PARTNERING
AGREEMENT**

**July 2019
(Standard Form Version 1)**

STANDARD FORM WEP STRATEGIC PARTNERING AGREEMENT

STANDARD FORM VERSION 1

IMPORTANT NOTICE

This is the first version of the Welsh Education Partnership ("**WEP**") Strategic Partnering Agreement ("**SPA**") the intention of which is to minimise the time and costs of dealing with legal issues relating to the WEP Strategic Partnering Delivery Model. The Welsh Government expect the standard form SPA to be used substantially un-amended. A certain degree of customisation of the standard form SPA will be necessary to reflect the features of the developed scheme. However project specific justification must be given to any such customisation and must be approved by the Welsh Government.

Users of this standard form should be aware of the following points:

1. The standard form contract contains a number of footnotes identifying certain key issues that the parties will need to consider when using it. However, this is not an exhaustive list, and the standard form SPA will therefore need to be analysed and reviewed in detail to ensure that it is tailored to the requirements of the developed scheme and that its terms (and their impact) are clearly understood by the Participant(s). Customisation should not however extend to the parties seeking to change the substance of commercial terms or making unnecessary drafting amendments. All changes to the standard form contract require the prior approval of Welsh Government.
2. All parties are reminded that the WEP Strategic Partnering Delivery Model is a true partnership in every sense of the word and the value of further debate over insubstantial issues should be considered in this light. The public sector shall be positively motivated to work with the private sector to avoid or mitigate the impact of any issues that may arise over the lifetime of the partnering.
3. The standard form SPA is not a replacement for independent, specialist advice and parties must ensure that they have taken appropriate legal, financial and technical advice before using this document.
4. The standard form SPA shall be used in conjunction with any guidance issued by the Welsh Government from time to time.
5. This notice and the footnotes should be removed as appropriate before finalisation of the document for execution.

Should you have any questions on the draft you are asked to contact MIMEducation@gov.wales

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THIS AGREEMENT is made on the day of

AMONG:

- (1) [◆] **LIMITED**, a company registered under number [◆] whose registered office is at [◆] ("**WEPCo**");
- (2) [] of [];
- (3) [] of [];
- (4) [] of [];
- (5) [] of [];
- (6) [] of []; and
- (7) [] of [].

RECITALS:

- (A) [The Participants which are [*appropriate references to public sector Participants to be inserted*] have agreed to enter into this Agreement pursuant to their powers contained in [*specific reference*].]
- (B) This Agreement establishes the long-term strategic partnering between WEPCo and the Participants relating, inter alia, to the delivery of improved Education Sector Services and, in certain instances, Community Services, in the Region.

NOW IT IS HEREBY AGREED as follows:

1. **DEFINITIONS, INTERPRETATION AND CONSTRUCTION**

This Agreement shall be interpreted according to the provisions of Schedule 1 (*Definitions, Interpretation and Construction*).

2. **PURPOSE AND CONDUCT OF THE PARTIES**

Aim

- 2.1 The purpose of this Agreement, the Shareholders' Agreements and the Project Agreements is to establish a long-term partnering relationship between WEPCo and the Participants and for WEPCo to provide or procure, across the Region as a whole, the provision of appropriate accommodation and related services to the Participants and others involved in providing Education Sector Services and/or Community Services with the aim of:
 - 2.1.1 improving the efficiency of delivery of community and education based facilities;
 - 2.1.2 making the best use of public resources; and
 - 2.1.3 providing continuous improvement in both cost and quality in public procurement.
- 2.2 The aim of this Clause 2 is to identify the high level principles which underpin the delivery of the Parties' obligations under this Agreement and to set out key factors for a successful relationship between the Parties. Whilst it is recognised that these principles are difficult to measure in isolation, the successful implementation of the Project Agreements, the Shareholders' Agreements and this Agreement will depend on the Participants' ability effectively to co-ordinate and combine their expertise, manpower and resources in order to deliver an integrated approach to Education

Sector Services and, in certain instances, Community Services in the Region, under this Agreement.

Principles

2.3 The principles referred to in Clause 2.2 are:

- 2.3.1 to develop close working relationships between WEPCo and the Participants at all levels;
- 2.3.2 to focus on achieving the best value for money operational performance within agreed timescales;
- 2.3.3 to set in place business and cultural processes to enable the Participants and WEPCo to establish and agree challenging time and performance objectives, and to meet or better them;
- 2.3.4 to recognise each other's needs, constraints, limitations, capabilities, roles and responsibilities to achieve mutually beneficial outcomes;
- 2.3.5 to identify, by regular monitoring, weaknesses and strengths in the relationship between and amongst the Participants and WEPCo and to work together to overcome the weaknesses and to build on the strengths;
- 2.3.6 to commit to the early recognition and resolution of differences, conflicts and disputes between and amongst the Participants and WEPCo in a 'no surprises' environment;
- 2.3.7 to appoint within each of the Participants and WEPCo, co-ordinators at senior level who will support, defend and promote the long-term strategic partnering between them and its principles of operation;
- 2.3.8 to develop openness and trust in a transparent information and data sharing environment; and
- 2.3.9 in accordance with the Equality Requirements to positively promote equal opportunities and the Ethical Employment Code by combating discrimination on the grounds of race, ethnicity, religion, nationality, gender, disability, age or sexuality and promoting good relations between all sections of the community in 'everything we do' including:
 - (a) delivering high quality Education Sector Services and (where relevant) Community Services for end users; and
 - (b) working with the local community and partners in the public, private or voluntary sectors.

Mutual Objectives

2.4 This Agreement, under which, inter alia, a contractual structure is established for the delivery of a range of services designed to assist in the integrated delivery of Education Sector Services and, in certain cases, Community Services in the Region, aims to ensure that the following essential components are embraced and adhered to by WEPCo and the Participants:

2.4.1 WEPCo and the Participants agree and commit themselves to:

- (a) the agreed mutual aims set out in Clause 2.1, and the WEP Objectives;
- (b) [making their individual long-term goals known to the other Parties (these long-term goals shall include the goals and aspirations set out from time to time in the [◆]), to the extent such goals and aspirations are relevant to the purpose of this Agreement as set out in Clause 2.1;] and

- (c) understanding the other Parties' long-term goals and working towards them in accordance with the principles set out in Clause 2.3;
- 2.4.2 these mutual objectives are kept under review through meetings and effective communications;
- 2.4.3 WEPCo and the Participants benefit from 'open book' relationships in accordance with Clause 36 (*Records and Open Book Accounting*);
- 2.4.4 in its dealings with Supply Chain Members for the delivery of individual Projects, WEPCo will seek to act in a manner consistent with the principles in Clause 2.3 and will seek to ensure that each of such parties is aware of and is able to contribute to the mutual objectives agreed with the Participants from time to time in accordance with this Clause 2.4; and
- 2.4.5 without prejudice to the provisions of Clause 30 (*Confidentiality*), all discussions between the Parties are treated with mutual confidentiality.

Problem Resolution

- 2.5 WEPCo and the Participants adopt an agreed systematic approach to problem resolution which recognises the principles contained in Clause 2.3.6 and:
 - 2.5.1 seeks solutions without apportioning blame;
 - 2.5.2 is based on mutually beneficial outcomes;
 - 2.5.3 treats WEPCo and the Participants as equal parties in the dispute resolution process;
 - 2.5.4 contains a mutual acceptance that adversarial attitudes waste time and money; and
 - 2.5.5 relies on more and better discussion - with less paperwork and more constructive correspondence.

Improvement

- 2.6 WEPCo and the Participants will commit themselves to the achievement of continuous, measurable and measured improvement by:
 - 2.6.1 agreeing quantitative and qualitative targets (pursuant to Clause 14.17 (*Managing WEPCo Performance*) and Section 3 (*Performance Measurement*) of Schedule 3 (*Partnering Services*) which relate to the purpose and aim of this Agreement and the Parties' mutual objectives and which:
 - (a) are specific;
 - (b) are challenging;
 - (c) add value; and
 - (d) eliminate waste;
 - 2.6.2 measuring and reviewing contractual performance against the Key Performance Indicators in accordance with this Agreement; and
 - 2.6.3 identifying and following best practice.

Non-binding effect of this Clause 2

2.7 The Parties recognise and agree that the partnering ethos, principles and objectives described and set out in this Clause 2 are aspirational and shall not and are not intended to give rise to legally binding rights and obligations between the Parties.

3. **COMMENCEMENT, DURATION AND EXPIRY OF THIS CONTRACT**

Contract Term and Expiry

3.1 Subject to Clause 3.2 and to earlier termination in accordance with its terms, this Agreement will commence on the Commencement Date and will expire on the date ten (10) years after the Commencement Date (the "**Initial Expiry Date**"). For the avoidance of doubt, WEPCo shall not be entitled to any compensation for termination of this Agreement on expiry on the Initial Expiry Date or on the Extended Expiry Date, as the case may be, nor on any extension to this Agreement beyond the Initial Expiry Date.

3.2 The term of this Agreement may be extended for an additional five (5) years after the Initial Expiry Date in the circumstances and in accordance with procedure set out in this Clause 3.2:

3.2.1 twelve (12) months before the Initial Expiry Date the SPB shall meet to review:

- (a) the performance of the Parties under this Agreement and, in particular, the performance of WEPCo in delivering the Partnering Services to the performance standards set out in Clause 8.1 (*Services Obligations*);
- (b) the Education Sector Services and Community Services needs of the population within the Region; and
- (c) whether it would be beneficial to the provision of all or any of the Education Sector Services and/or Community Services in the Region to extend this Agreement for a further five (5) year period from the Initial Expiry Date;

3.2.2 if WEPCo and one or more of the Participants (the "**Continuing Participants**") agree that it would be beneficial to the provision of all or any of the Education Sector Services and/or Community Services in the Region to extend this Agreement, the Continuing Participants shall serve a written notice upon WEPCo at least six (6) months before the Initial Expiry Date the effect of which shall be to extend the term of this Agreement by five (5) years from the Initial Expiry Date as between WEPCo and the Continuing Participants. In relation to any Participant who is not a Continuing Participant, this Agreement shall expire on the Initial Expiry Date and nothing in this Clause 3.2.2 shall extend or increase the liability of any such Participants.

3.3 Upon expiry or earlier termination of this Agreement, the following clauses shall continue in force until the expiry or earlier termination of the last Project Agreement to be in force which was entered into pursuant to this Agreement:

Clause number(s)	Description
1	<i>Definitions, Interpretation and Construction</i>
2	<i>Purpose and conduct of the parties</i>
5.2 - 5.5 (inclusive)	<i>Disposal of properties and/or shares</i>
8.1 (excluding Clause 8.1.5 and Clause 8.1.6), 8.4 (to the extent relevant following expiry of this Agreement)	<i>Service Obligations</i>
12	<i>Parties' Representatives</i>

Clause number(s)	Description
14 (excluding Clause 14.4)	<i>Management of WEPCo's performance</i>
16-20 (but, in the case of Clauses 20.3 to 20.8 (inclusive) only to the extent relevant following expiry of this Agreement)	<i>Indemnities; Insurance; Intellectual Property rights; Transfer of employment; Site security and personnel issues</i>
22	<i>Participant default</i>
23	<i>WEPCo events of default</i>
24	<i>Force Majeure</i>
25	<i>Corrupt gifts and fraudulent payments</i>
27	<i>Agency and Participants' statutory authority</i>
28	<i>Assignment and sub-contracting</i>
29	<i>Performance of subcontractors</i>
30-32	<i>Confidentiality; Freedom of Information; Change in parties to the partnering agreement</i>
33-52	<i>Dispute resolution; Order of precedence of documents; No recourse to public funds; Records and open book accounting; Personal Data; Liability of the Participants; Prohibited activities; Notices; Amendments; Waiver; No agency; Entire agreement; Severability; No double recovery; Costs and expenses; Third Party Rights; Mitigation; Further assurance; Governing law and jurisdiction; General assistance and cooperation and Participant undertakings</i>

4. **DELIVERABLES**

4.1 On or prior to execution of this Agreement:

4.1.1 WEPCo shall deliver to each Participant's Representative the documents referred to in Section 1 (*Documents to be delivered by WEPCo*) of Schedule 2 (*Completion Documents*) (save to the extent the requirement to deliver any such document is waived by the relevant Participant's Representative(s) by written notice to WEPCo); and

4.1.2 each Participant shall deliver to WEPCo the relevant documents referred to in Section 2 (*Documents to be delivered by the Participants*) of Schedule 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by WEPCo by written notice to the relevant Participant(s)).

5. **PLANNING MATTERS AND INTERESTS IN PROPERTY**

5.1 **Planning matters**

5.1.1 It is the intention of the Parties that, where Planning Permission is required for any Approved Project, that detailed Planning Permission is obtained prior to execution of the

Project Agreement in respect of the relevant Approved Project. In such cases the provisions of Schedule 12 (*Planning Matters*) and Schedule 13 (*Unreasonable Conditions*) shall have full effect in respect of such Approved Project. WEPCo's performance of its obligations under Schedule 12 (*Planning Matters*) in respect of a specific Approved Project shall be deemed to be part of the Project Development Partnering Services and the costs incurred relative thereto shall be included as part of the Project Development Fee.

- 5.1.2 In exceptional circumstances, in terms of the relevant Stage 2 Approval, detailed Planning Permission may not be required to be obtained prior to execution of the relevant Project Agreement. In such cases the provisions of Schedule 12 (*Planning Matters*) and Schedule 13 (*Unreasonable Conditions*) shall, subject to Clause 5.1.4, have effect in respect of the relevant Approved Project until such time as a Project Agreement is executed whereupon such matters as relate to the development which is the subject of that Project Agreement shall become the responsibility of the Project Service Provider under that Project Agreement and, save as agreed to the contrary between the Project Service Provider and the relevant Project Agreement Counterparty, the appropriate provisions from Schedule 12 (*Planning Matters*) and Schedule 13 (*Unreasonable Conditions*) shall be included within the relevant Project Agreement.
- 5.1.3 WEPCo shall provide all such assistance as is required by any Project Service Provider under a Project Agreement to ensure a smooth transition of planning matters including but not limited to all Consents, Planning Permissions, Planning Agreements and Infrastructure Agreements which are the subject of that Project Agreement.
- 5.1.4 The requirements of paragraphs 1.1.1, 1.1.2 and 1.1.3 of Schedule 12 (*Planning Matters*) shall continue to apply in respect of any Project the subject of a Project Agreement notwithstanding the execution of the relevant Project Agreement.

Disposal of properties and/or shares

- 5.2 WEPCo shall not take or permit to be taken any action which would result in a loss of control (direct or indirect) by WEPCo of any Subsidiary of WEPCo which is a Project Service Provider without the approval of the SPB. If, subject to Clause 5.5, WEPCo or any Subsidiary of WEPCo proposes to sell, transfer or otherwise dispose of any legal, beneficial or equitable interest in share capital which would result in a loss of control by WEPCo of any Subsidiary of WEPCo which is a Project Service Provider, WEPCo shall notify the SPB in writing of its intention (or the intention of its Subsidiary) and such notification shall be accompanied by proposals setting out how, if the proposed transaction were to proceed, the relevant Project Agreement Counterparties' rights under the relevant Project Agreement(s), together with the wider protection afforded to the Project Agreement Counterparties as a consequence of the inter-relation between that Project Agreement, the WEPCo Shareholders' Agreement and this Agreement, would or could be preserved or enhanced.
- 5.3 In deciding whether to approve any proposed action notified under Clause 5.2, the SPB shall act reasonably and without undue delay, taking into account any proposals put forward pursuant to Clause 5.2. If the SPB does not approve the proposed action, WEPCo shall not, and shall use all reasonable endeavours to procure that its Subsidiary and/or the relevant Project Service Provider shall not, proceed with that proposed action.
- 5.4 If any Project Service Provider takes any action under its Project Agreement which, in terms of such agreement, requires the SPB's consent without such consent having first been obtained, or if WEPCo or any Subsidiary of WEPCo takes any action which requires the SPB's consent or agreement under this Agreement without such consent or agreement having first been obtained, such action shall be deemed to constitute a material breach by WEPCo of its obligations hereunder for the purposes of Clause 23.1.3.
- 5.5 Clause 5.2 shall not apply to the sale, transfer or other disposition of a legal, beneficial or equitable interest in the share capital of a Subsidiary of WEPCo which is a Project Service Provider where:

- 5.5.1 such sale, transfer or disposition is required by the Funders in response to a default by the Project Service Provider under the relevant Funding Agreements; or
- 5.5.2 the disposition is the grant of security for any loan made to the Project Service Provider under the relevant Funding Agreements.

6. **NEW PROJECTS**

- 6.1 The Parties' obligations in relation to the identification, approval and delivery of New Projects which are Qualifying Projects are contained in Schedule 5 (*Approval Process for New Projects*).
- 6.2 In respect of each Approved Project (including where Clause 9.3.5 applies) WEPCo shall, or shall procure that a Project Service Provider shall enter into a Project Agreement either:
 - 6.2.1 substantially in the form of the relevant Template Project Agreement completed in accordance with the "IMPORTANT NOTICE" set out on such Template Project Agreement to reflect such amendments as may be required in the circumstances of that particular Project Agreement and as may be agreed between WEPCo and the Relevant Participant(s) and approved by the Welsh Government; or
 - 6.2.2 in the case of an Approved Project for FM Services only, or a D&B Project for Community Services only, in such form as may be agreed between the Relevant Participant(s) and WEPCo and approved by the Welsh Government.
- 6.3 In respect of each Approved Project that is a MIM Project (including where Clause 9.3.5 applies), WEPCo shall procure that a Project Service Provider shall enter into a Project Co Shareholders' Agreement substantially in the form of the Template Project Co Shareholders' Agreement, completed in accordance with the "IMPORTANT NOTICE" set out on such Template Project Co Shareholders' Agreement to reflect such amendments as may be required in the circumstances of that particular project as agreed among the Project Service Provider, PSDP and WGCo and approved by the Relevant Participant(s) and Welsh Government.

7. **EXISTING SERVICE PROVIDERS**

- 7.1 WEPCo acknowledges that the Participants' accommodation requirements and associated services are, at the Commencement Date, delivered using a variety of service providers including, in some cases, persons employed by the Participants.
- 7.2 The Parties recognise that during the term of this Agreement it is envisaged that WEPCo will be providing or procuring the provision of an increasing proportion of the Participants' accommodation requirements and associated services under the terms of this Agreement and (via the Project Service Providers) the Project Agreements.
- 7.3 WEPCo and each Participant will work together to ensure that the existing service providers are treated fairly as a consequence of the operation of this Agreement and, without prejudice to the operation of Law and the requirements of Clause 19 (*Transfer of Employment*), WEPCo shall endeavour, where it is practicable and consistent with achieving the Participant's requirements from time to time, to employ or procure employment by a Project Service Provider of those individuals engaged in carrying out activities for the benefit of that Participant for which WEPCo or any Project Service Provider under a Project Agreement subsequently becomes responsible under the Agreement or any Project Agreement.

8. **SERVICES OBLIGATIONS**

- 8.1 WEPCo shall procure that the Partnering Services are at all times performed:
 - 8.1.1 with that degree of skill and care that would reasonably be expected of a competent professional provider of the relevant Partnering Service having regard to the nature and extent of that service;

- 8.1.2 in accordance with all relevant Law and codes of practice (including Local Government Requirements where applicable);
- 8.1.3 in accordance with all Consents;
- 8.1.4 in a manner which is not likely to be injurious to health or cause damage to property;
- 8.1.5 in accordance with paragraphs 1.1.1 and 1.1.2 and all other applicable provisions of Section 1 (*Specification*) of Schedule 3 (*Partnering Services*);
- 8.1.6 in accordance with the applicable provisions of the Partnering Services Method Statements;
- 8.1.7 in so far as not in conflict with an express obligation of WEPCo under this Agreement, or where in relation to a matter there is no express obligation or standard imposed on WEPCo under this Agreement, in accordance with Good Industry Practice; and
- 8.1.8 in a manner:
 - (a) consistent with the Participants discharging their statutory duties and/or other functions undertaken by them as the same may be notified to WEPCo from time to time; and
 - (b) that recognises the Participants' (and prospective Project Agreement Counterparties') needs for flexibility of occupation of premises to be provided and/or serviced under Project Agreements, particularly with regard to:
 - (i) providing Facilities which have potential for alternative uses to those to which they are initially intended to be put;
 - (ii) meeting the future accommodation requirements of Participants and other community stakeholders in the Region by taking into account the flexibility contained in any Project Agreements existing for the time being and, in particular, the terms and conditions of such Project Agreements and the remaining duration of such Project Agreements; and
 - (iii) the manner in which New Projects are identified and brought forward under the SDP and the terms of this Agreement.

8.2 To avoid doubt, the obligations in Clause 8.1 are independent obligations. In particular compliance by WEPCo with Section 5 (*Partnering Services Method Statements*) of Schedule 3 (*Partnering Services*) shall not be a defence to an allegation that WEPCo has not complied with any other requirement of Clause 8.1. In the event of any conflict between any provision of any of the Partnering Services Method Statements and any other requirement of this Agreement including Clause 8.1, WEPCo shall amend (at its own cost) the relevant provisions of the Partnering Services Method Statements so as to remove the conflict and provide an updated version of the same for approval by the Participants. Once the updated version has the approval of the Participants, it shall replace the relevant part of Section 5 (*Partnering Services Method Statements*) of Schedule 3 (*Partnering Services*).

8.3 Subject to Clause 28.2, and the Participants' rights under Clause 23 (*WEPCo Events of Default*) WEPCo shall be free to sub-contract the whole or any part of the provision of the Partnering Services to a Partnering Subcontractor, notwithstanding which it shall remain solely responsible to the relevant Participant(s) for the provision of the relevant Partnering Services in accordance with this Agreement.

8.4 The Parties agree that it is fundamental to the successful operation of this Agreement that WEPCo devotes sufficient resource and expertise to providing the Partnering Services in a competent and

timely manner and otherwise in accordance with the standards set out in Clause 8.1 (*Service Obligations*).

9. EXCLUSIVE NATURE OF THIS AGREEMENT

- 9.1 Subject to Clauses 9.3, 9.7, 9.10, 22.2, 22.6, 23.3 and 23.10, WEPCo shall have the sole and exclusive right and obligation for a period of ten (10) years from the Commencement Date to provide all of the services which comprise the Ongoing Partnering Services and the Project Development Partnering Services to each of the Participants on the terms and subject to the conditions of this Agreement and in particular subject to the Partnering Services Costs being recoverable only in accordance with Clause 10.2. In respect of the Project Development Partnering Services, such exclusivity relates only to Qualifying Projects.
- 9.2 Subject to Clauses 9.3, 9.6, 9.7, 9.10, 22.2, 22.6, 23.3 and 23.10 and the provisions of Schedule 5 (*Approval Process for New Projects*), WEPCo shall have the sole and exclusive right for a period of ten (10) years from the Commencement Date to provide itself, or nominate its wholly owned Subsidiaries or, in the case of MIM Projects nominate a PSDP Related Party, to provide Project Services (in each case as Project Service Provider) to each of the Participants in relation to those Qualifying Projects that become Approved Projects within such ten (10) year period and each Participant shall ensure that, subject to the terms of this Agreement, they contract with WEPCo or its nominees as aforesaid under a Project Agreement for the provision of Project Services in relation to all such Qualifying Projects which become Approved Projects, in each case on the terms and subject to the conditions of this Agreement.
- 9.3 Subject to Clause 9.10, WEPCo shall have no right or obligation, but may be requested by any Participant, subject to the agreement of appropriate terms and conditions and subject to applicable Law prevailing at the relevant time and applicable procurement rules and guidance, to provide itself, or nominate its wholly owned Subsidiaries or, in the case of MIM Projects under Clause 9.3.5 to nominate a PSDP Related Party, to provide (in each case as Project Service Provider) to the Participants (or any of them):
- 9.3.1 Project Services in relation to capital projects identified by a Participant as required for the provision of Education Sector Services (where such projects have been expressly designated and Approved under a Strategic Outline Programme) and/or Community Services, in the Region;
 - 9.3.2 Project Services in relation to the provision of FM Services that are not provided as part of any Qualifying Project, but are required in relation to capital projects procured under Clause 9.3.1 in the Region;
 - 9.3.3 Strategic Support Partnering Services;
 - 9.3.4 Ongoing Partnering Services and/or Project Development Partnering Services after the date falling ten (10) years from the Commencement Date, where the term of this Agreement has been extended beyond the Initial Expiry Date in accordance with Clause 3.2;
 - 9.3.5 Project Services in respect of Qualifying Projects which become Approved Projects after the date falling ten (10) years from the Commencement Date, where the term of this Agreement has been extended beyond the Initial Expiry Date in accordance with Clause 3.2; and/or
 - 9.3.6 Project Development Partnering Services in respect of potential New Projects which are not Qualifying Projects but are requested by a Participant pursuant to Clause 9.3.1 or Clause 9.3.2.
- 9.4 All Project Services to be provided to Participants or to any other person(s) pursuant to Clause 9.3 (excluding Clause 9.3.5 to which Clause 6.1 shall apply) shall be provided pursuant to a Project Agreement either:

- 9.4.1 substantially in the form of the relevant Template Project Agreement completed in accordance with the "IMPORTANT NOTICE" set out on such Template Project Agreement to reflect such amendments as may be required in the circumstances of that particular Project Agreement and as may be agreed between WEPCo and the Relevant Participant(s) and approved by the Welsh Government; or
- 9.4.2 in the case of Project Services for FM Services only, or a D&B Project for Community Services only, in such form as may be agreed between WEPCo and the Relevant Participant(s) and approved by the Welsh Government.
- 9.5 The Participants shall work together with each other and with WEPCo with the aim of ensuring that the Project Services at all of their Facilities are provided under the terms of this Agreement and the Project Agreements.
- 9.6 Subject to Clauses 9.3, 9.7, 9.10, 22.2, 22.6, 23.3 and 23.10 and the provisions of Schedule 5 (*Approval Process for New Projects*), each of the Participants undertake to WEPCo, that they shall not enter into any transactions for the provision of Qualifying Projects in the Region in furtherance of their statutory duties or otherwise, other than pursuant to a Project Agreement entered into pursuant to this Agreement. The undertaking contained in this Clause 9.6 shall cease to be effective and binding on the expiry of ten (10) years from the Commencement Date.
- 9.7 The exclusivity granted pursuant to Clause 9.1 and/or Clause 9.2 may be suspended in respect of any Participant during any period where WEPCo has failed the Track Record Test by such Participant serving written notice of such suspension on WEPCo. Without prejudice to the rights of the Participants under Clauses 23.3 and 23.10, any such suspension shall expire:
- 9.7.1 following written notice to that effect being served on WEPCo by the Participant in question, copied to the SPB; or
- 9.7.2 automatically where WEPCo passes a subsequent Track Record Test or where Clause 23.12.2(b) applies.
- 9.8 No breach of Clause 9.1 or Clause 9.2 shall arise as a result of the provision of Partnering Services or Project Services by a third party to any Participant who serves a suspension notice in circumstances where they are entitled to do so under this Agreement, to the extent such services are instructed during such period of suspension.
- 9.9 Where a suspension of exclusivity by a Participant occurs (whether pursuant to Clause 9.7, Clause 23.3 or Clause 23.10) and WEPCo has commenced the New Project Approval Process for a New Project for which such Participant is a Relevant Participant but has not obtained a Stage 1 Approval or Stage 2 Approval (as the case may be), then, subject to the terms of Schedule 5 (*Approval Process for New Projects*), WEPCo shall continue to provide the Project Development Partnering Services comprised within the relevant stage(s) of the New Project Approval Process for such New Project unless and until notice is served pursuant to paragraph 7 of Schedule 5 (*Approval Process for New Projects*) by the Relevant Participant in respect of such New Project.
- 9.10 WEPCo's rights and obligations under this Clause 9 shall be subject always to a maximum combined value of Partnering Services and Project Services of one billion, five hundred million pounds sterling (£1,500,000,000).

10. **PRICE AND PAYMENT FOR THE SERVICES**

Payment for Partnering Services

- 10.1 WEPCo shall prepare and maintain accurate records of the Partnering Services Costs (and details of the proposed New Projects in relation to which such costs are incurred, where relevant).
- 10.2 Save in the circumstances set out in Clause 22 (*Participant Default*) and Schedule 5 (*Approval Process for New Projects*), WEPCo shall recover its Partnering Services Costs in respect of Ongoing Partnering Services and Project Development Partnering Services as provided in

Schedule 4 (*Partnering Services Costs*). As regards Strategic Support Partnering Services then, subject always to Clause 22 (*Participant Default*), these shall be provided by WEPCo and paid for by the relevant Participant(s) (within 30 days of valid invoice therefor) at rates and prices quoted by WEPCo and accepted by the relevant Participant(s) in advance. These rates and prices should be in accordance with Section 4 (*Partnering Services Costs Rates*) of Schedule 3 (*Partnering Services*) as updated from time to time in accordance with this Agreement, subject to whatever adjustments as may be agreed between WEPCo and the relevant Participant(s) in each case.

- 10.3 All payments under this Agreement shall be made in pounds sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified in the relevant invoice, quoting the invoice number against which payment is made. Subject to Section 3 (*Payment and Interest*) of Schedule 14 (*Compensation on Participant Event of Default and Termination*), all valid invoices shall be payable within 30 days of receipt.
- 10.4 If any Party (acting in good faith) disputes all or any part of any sum payable hereunder, the undisputed amount shall be paid by the relevant Party in accordance with Clause 10.3 and the provisions of the Dispute Resolution Procedure shall apply in respect of the disputed part. Following resolution of the dispute, any amount agreed or determined to have been payable shall be paid forthwith by the relevant Party to the recipient, together with interest on such amount calculated in accordance with Clause 10.5 (*Late Payment*).

Late Payment

- 10.5 Each Party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not made on its due date, calculated from day to day at a rate per annum equal to the Default Interest Rate from the day after the date on which payment was due up to and including the date of payment.

Set-Off

- 10.6 Whenever any sum of money shall be agreed, or determined, as due and payable by WEPCo to a Participant, such sum may at that Participant's discretion be deducted from or applied to reduce the amount of any sum then due to WEPCo from the Participant under this Agreement or which, prior to payment of such sum by WEPCo may so become due, provided that Participant has given WEPCo not less than five (5) Business Days written notice of its intention to deduct or apply such sum.
- 10.7 Whenever any sum of money shall be agreed, or determined as due and payable by a Participant to WEPCo, such sum may at WEPCo's discretion be deducted from or applied to reduce the amount of any sum then due from WEPCo to that Participant under this Agreement or which, prior to payment of such sum by the Participant, may so become due, provided that WEPCo has given that Participant not less than five (5) Business Days written notice of its intention to deduct or apply such sum.

VAT

- 10.8 All amounts stated to be payable by any party under this Agreement shall be exclusive of any VAT properly chargeable on any amount.
- 10.9 Each party shall pay to the relevant other party any VAT properly chargeable on any supply made to it under this Agreement provided that it shall first have received from the other party a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.
- 10.10 If any Party (the "**First Party**") considers that any VAT which another Party (the "**Second Party**") claims to be properly chargeable to the First Party in connection with this Agreement is not in fact properly so chargeable, the First Party shall be entitled to require the Second Party to obtain a clearance from HM Revenue and Customs (or, if relevant, such other body as is charged at the time with the collection and management of VAT) as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request HM Revenue and Customs for such a clearance.

- 10.11 The following further provisions shall apply in respect of the applications for a clearance in accordance with Clause 10.10:
- 10.11.1 prior to submitting its request for such clearance and any further communication to HM Revenue and Customs in connection with the obtaining of the clearance, the Second Party shall first obtain the agreement of the First Party to the contents of such request and any such further communication, such agreement not to be unreasonably withheld or delayed;
 - 10.11.2 the Second Party shall provide to the First Party copies of all communications received from HM Revenue and Customs in connection with the application for clearance as soon as practicable after receipt; and
 - 10.11.3 the Second Party shall use all reasonable endeavours (including without limitation the provision of such additional information as HM Revenue and Customs may require) to obtain such clearance as soon as reasonably practicable following the initial request.
- 10.12 If clearance is required by the First Party under Clause 10.10, the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until clearance is received from HM Revenue and Customs which states that a sum of VAT (the "**VAT Sum**") is properly so chargeable or HM Revenue and Customs state that they are not prepared to give clearance on the matter. In this case, then subject to Clauses 10.13 and 10.14 and provided that the First Party shall first have received a valid tax invoice which complies with the requirements of Part III VAT Regulations 1995 and which states the VAT Sum to be the amount of VAT chargeable to the First Party, the First Party shall pay the VAT Sum (and any interest or penalties attributable to the VAT Sum) to the Second Party.
- 10.13 If the First Party disagrees with any clearance obtained pursuant to Clause 10.10 by the Second Party from HM Revenue and Customs, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs and expenses including interest and penalties which it may incur in relation thereto) shall take such action and give such information and assistance to the First Party as the First Party may require to challenge such clearance or otherwise to resist or avoid the imposition of VAT on the relevant supply.
- 10.14 The following further provisions shall apply if the First Party shall exercise its rights under Clause 10.13:
- 10.14.1 the action which that First Party shall be entitled to require the Second Party to take shall include (without limitation) contesting any assessment to VAT or other relevant determination of HM Revenue and Customs before any VAT tribunal or court of competent jurisdiction and appealing any judgement or decision of any such tribunal or court;
 - 10.14.2 if the Second Party shall be required to pay to or deposit with HM Revenue and Customs a sum equal to the VAT assessed as a condition precedent to its pursuing any appeal, the First Party shall, at its election, either pay such sum to HM Revenue and Customs on behalf of the Second Party or on receipt of proof in a form reasonably satisfactory to the First Party that the Second Party has paid such sum to or deposited such sum with HM Revenue and Customs the First Party shall pay such sum to the Second Party;
 - 10.14.3 save as specifically provided in Clause 10.12, the First Party shall not be obliged to pay to the Second Party any sum in respect of the VAT in dispute to the Second Party or in respect of VAT on any further supplies made by the Second Party to the First Party which are the same type and raise the same issues as the supplies which are the subject of the relevant dispute unless and until the final outcome of the relevant dispute is that it is either determined or agreed that VAT is properly chargeable on the relevant supply or supplies; and
 - 10.14.4 the Second Party shall account to the First Party for any costs awarded to the Second Party on any appeal, for any sum paid to or deposited with HM Revenue and Customs in

accordance with Clause 10.14.2 which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

11. **NOT USED**

12. **PARTIES' REPRESENTATIVES**

Representatives of the Participants

12.1 The respective Participants' Representatives shall be

[insert name of each Participant's Representative and Participant in respect of which they are to act]

or such other persons appointed by each Participant from time to time pursuant to this clause. Each Participant's Representative shall exercise the functions and powers of that Participant in relation to the operation of this Agreement and the WEPCo Operations which are identified in this Agreement as functions or powers to be carried out by the Participant's Representative. Each Participant's Representative shall also exercise such other functions and powers of that Participant under this Agreement as that Participant may notify to WEPCo in writing from time to time. Each Participant's Representative shall represent that Participant only and shall have no power to delay anything in relation to or exercise the functions or powers of any other Participant.

12.2 Each Participant's Representative shall be entitled at any time, by written notice to WEPCo, to authorise any other person to exercise the functions and powers of that Participant delegated to him pursuant to this clause as set out in such notice, either generally or specifically. Any act of any such person shall, for the purposes of this Agreement, constitute an act of that Participant's Representative and all references to the Participant's Representative in this Agreement (apart from this Clause 12.2) shall be taken as references to such person so far as they concern matters within the scope of such person's authority (as so notified in writing to WEPCo).

12.3 Each Participant may by written notice to WEPCo and the other Participants change the identity of their Participant's Representative. Each Participant shall (as far as practicable) consult with WEPCo and the other Participants prior to the appointment of any replacement for its Participant's Representative, taking account of the need for liaison and continuity in respect of this Agreement. Such change shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to WEPCo in the execution of its obligations under this Agreement).

12.4 During any period when no Participant's Representative has been appointed in relation to one or more Participants (or when a Participant's Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement) the affected Participant shall carry out the functions which would otherwise be performed by that Participant's Representative.

12.5 No act or omission of a Participant's Representative or any officer, employee or other person engaged by a Participant shall, except as otherwise expressly provided in this Agreement:

12.5.1 in any way relieve or absolve WEPCo from, modify, or act as a waiver of any claim in respect of, any liability, responsibility, obligation or duty of WEPCo arising out of this Agreement; or

12.5.2 in the absence of an express order or authorisation under this Agreement constitute or authorise a variation hereto.

12.6 Except as previously notified in writing before such act by a Participant to WEPCo, WEPCo and WEPCo's Representative shall be entitled to treat any act of that Participant's Representative which is authorised by this Agreement as being expressly authorised by that Participant and WEPCo and WEPCo's Representative shall not be required to determine whether an express authority has in fact been given.

Representative of WEPCo

12.7 WEPCo's Representative shall be [*Insert the name of the WEPCo representative*] or such other person appointed from time to time pursuant to this clause. WEPCo's Representative shall have full authority to act on behalf of WEPCo for all purposes of this Agreement. Except as previously notified in writing before such act by WEPCo to the Participants, the Participants and the Participants' Representatives shall be entitled to treat any act of WEPCo's Representative in connection with this Agreement as being expressly authorised by WEPCo and the Participants' Representatives shall not be required to determine whether any express authority has in fact been given.

12.8 WEPCo may, by written notice to the Participants, change WEPCo's Representative. Where WEPCo wishes to do so it shall by written notice to the Participants' Representatives propose a replacement for approval, taking account of the need for liaison and continuity in respect of this Agreement. Such appointment shall be subject to the approval of the Participants (not to be unreasonably withheld or delayed).

13. VALUE FOR MONEY

13.1 The procedure by which WEPCo shall produce evidence as to whether or not its proposals in respect of a New Project which is a Qualifying Project deliver value for money is as set out in Schedule 5 (*Approval Process for New Projects*), Schedule 6 (*New Project Pricing Report*) and the relevant provisions of Section 5B (*Partnering Services Method Statements - Project Development Partnering Services*) of Schedule 3 (*Partnering Services*).

13.2 WEPCo shall ensure that the procedures implemented pursuant to this Agreement in order to demonstrate value for money and continuous improvement in value for money will be carried out at all times openly, fairly and with full transparency and in a manner such that the Participants are able to check compliance with the requirements in this Clause 13 (*Value for money*).

13.3 Throughout the course of this Agreement and of all Projects carried out pursuant to or arising out of this Agreement, WEPCo shall monitor and record in writing the predicted capital and, where applicable, whole life cost to the Project Agreement Counterparty for each Project and any increases or reductions in such estimated cost from time to time together with the reasons for all such increases or reductions.

13.4 WEPCo shall also record the final cost for:

13.4.1 the design and construction of each Project; and

13.4.2 as the information becomes available over time, the actual cost of maintaining and repairing each Project throughout the duration of the relevant Project Agreement,

in either case where such design and construction and/or maintenance and repair is the responsibility of the Project Service Provider under the relevant Project Agreement.

13.5 WEPCo will benchmark the costs referred to in Clause 13.4 in respect of each individual Project against such costs for all Projects. WEPCo will also break down such costs into comparable units of costs for different components of such Projects as agreed with, or as reasonably requested by, the Participants, so that a comparison can be made between the costs of similar projects and similar components from similar and different projects under the WEP Strategic Partnering Delivery Model.

13.6 Without prejudice to Section 3 (*Performance Measurement*) of Schedule 3 (*Partnering Services*), by *inter alia* benchmarking costs in accordance with Clause 13.5, and disregarding any effects of inflation, WEPCo will be expected to be able to demonstrate in the WEPCo Performance Report and at the Annual Reviews (and at such other times as may be reasonably requested by the Participants) lower costs and/or greater value for money to the Participants in the delivery of Projects in accordance with this Agreement over the term of this Agreement.

13.7 In relation to any proposed changes under any Project Agreement (whether the proposed change is as a result of change in law, a change requested by the Project Agreement Counterparty or otherwise) or any other matter affecting the relevant Project which may have an equivalent effect on other Projects, WEPCo shall work with the relevant Project Service Providers to achieve the best value solution for the Participants and Project Agreement Counterparties across the relevant Projects in respect of such proposed changes or other matter.

14. **MANAGEMENT OF WEPCO'S PERFORMANCE**

14.1 A strategic partnering board ("**SPB**") will be established by the Parties comprising:

14.1.1 one representative from each of the Participants from time to time who shall, in each case, be that Participant's Representative or any other person authorised by that Participant's Representative¹;

14.1.2 one representative of WEPCo, nominated by the board of directors of WEPCo;

14.1.3 one additional representative of Welsh Government (at Welsh Government's discretion), as notified from time to time in writing to the Chairman; and

14.1.4 such other reasonable number of representatives of stakeholders interested in or affected by Education Sector Services and/or Community Services and any other co-opted person as the Participants may from time to time agree (having first consulted with WEPCo) ("**Stakeholder Representatives**"). The Participants shall ensure that the Stakeholder Representatives are bound by the same obligations of confidentiality to WEPCo and to the Participants as if they were a party to this Agreement.

Neither the WEPCo representative, nor the Stakeholder Representatives shall be entitled to vote in meetings of the SPB.

14.2 The SPB shall meet regularly (and at least every three (3) months) to provide strategic input into how the partnering established by this Agreement is operating and to review:

14.2.1 financial; and

14.2.2 operating (including performance),

issues and to give guidance on and approve the order in which New Projects should be progressed, and to give guidance on by whom and on what basis such New Projects should be progressed.

14.3 The SPB will serve as a forum for the open exchange of ideas and enable the Participants to discuss their forthcoming accommodation and service delivery requirements to ensure an integrated co-ordinated approach to fulfilling such requirements. The SPB also has a number of rights and obligations as expressly set out in this Agreement.

14.4 The SPB shall be required to approve the SDP put forward annually in accordance with Section 2 (*Updated SDP*) of Schedule 11 (*Strategic Delivery Plan*) and shall ensure that WEPCo's proposals for New Projects are consistent with delivery of the latest SDP.

14.5 Decisions of the SPB will be taken by the majority vote. In the event of deadlock, no one has a casting vote unless expressly set out in this Agreement. Decisions of the SPB which Affect any Participant will bind that Participant only where that Participant's Representative on the SPB has voted in favour of the decision on that Participant's behalf.

¹

It is anticipated the Representatives on the SPB will be senior representatives.

- 14.6 A chair of the SPB ("**Chairman**") shall be appointed in accordance with this Clause 14.6.
- 14.6.1 The Chairman will be appointed on an annual basis from amongst the Participants' Representatives.
- 14.6.2 Save where agreed to the contrary by the Participants, it is intended that the post of Chairman shall rotate annually amongst the Participants' Representatives in turn.
- 14.6.3 The first Participant's Representative to hold the post of Chairman (from the Commencement Date until the first anniversary thereof) shall be the Participant's Representative appointed by [*insert first Chairman appointing Participant*]. The order of rotation thereafter shall be as agreed between the Participants.
- 14.6.4 The Chairman will be non-voting in his capacity as Chairman.
- 14.7 SPB meetings will take place at such places and (subject to Clause 14.2) times as the Parties shall decide. Agendas will be circulated on behalf of the Chairman five (5) Business Days in advance (with supporting papers) and any Party wishing to raise other agenda items (including an item under "Any other business") will notify all other Parties (with supporting papers) in writing no later than three (3) Business Days in advance.
- 14.8 A quorum for the proper and valid conduct of any business of the SPB shall be [five (5)] Participants' Representatives (one of whom must be a representative from Welsh Government) and the WEPCo Representative, in each case appointed pursuant to Clause 14.1.
- 14.9 If a quorum is not present at any meeting of the SPB within 30 minutes of that meeting's start time, it shall be adjourned to the same time and place on the date which is five (5) Business Days later.
- 14.10 The Participants shall arrange for a person to take minutes of all SPB meetings and circulate the same to all representatives appointed at such time pursuant to Clause 14.1 and the Chairman (whether or not the same were in attendance of the meeting) within five (5) Business Days after the relevant meeting.
- 14.11 Each of the Parties shall use all its reasonable endeavours to ensure their regular attendance at all meetings of the SPB and each Participant will, unless unavoidable, ensure that its representative on the SPB is appropriately empowered to agree matters on its behalf.
- 14.12 Each Participant shall use all its reasonable endeavours to ensure that its representative on the SPB conducts himself in accordance with the partnering principles contained in Clause 2.3 and in a manner intended to ensure (insofar as each Participant is able) that the SPB complies with its obligations and carries out its functions in a timely manner.
- 14.13 A telephone conference call or video conference or a combination of the same, at which all participants are able to speak to and hear each of the other participants and at which for all times at that meeting a quorum of the SPB is able to so participate, shall be valid as a meeting of the SPB.

Managing WEPCo performance

- 14.14 The SPB will act as the primary mechanism for managing WEPCo's performance.
- 14.15 WEPCo shall regularly monitor and report to the SPB on the performance of WEPCo (and its Partnering Subcontractors) under this Agreement and of the Project Service Providers and the Supply Chain Members under Project Agreements.
- 14.16 WEPCo shall, within twenty (20) Business Days of each Review Date, complete and issue to the SPB the WEPCo Performance Report. The WEPCo Performance Report shall include a review of each of the Key Performance Indicators, detailing, in each case, whether or not the relevant Key Performance Indicator has been met together with a summary of the data and scoring supporting each of the Key Performance Indicators (which data and scoring shall be as up to date as

reasonably practicable as at the Review Date and in any event shall be up to date as at the date thirty (30) Business Days prior to the Review Date). If any change is made to the WEPCo Performance Report pursuant to the procedure in Clause 14.18, then references to the WEPCo Performance Report shall be read as references to the WEPCo Performance Report as updated or amended by agreement with WEPCo or as a result of agreement or determination pursuant to the Dispute Resolution Procedure.

- 14.17 The Participants and WEPCo shall meet annually following each Review Date to consider whether the Key Performance Indicators remain the most appropriate measure of WEPCo's performance of the Services, having regard in particular to the principle that a continuous improvement in WEPCo's performance should be incentivised through the Key Performance Indicators and the requirement to comply with prevailing Law and applicable governmental policy, and shall act reasonably in seeking to agree any amendment to the Key Performance Indicators and consequential changes to the Partnering Services Method Statements.
- 14.18 In each year, as soon as reasonably practicable after receipt of the WEPCo Performance Report and in any event not later than one (1) month thereafter (or failing receipt of the WEPCo Performance Report, within two (2) months after the Review Date in that year), the SPB will hold a formal annual review (the "**Annual Review**") of the operation of this Agreement and WEPCo's performance in the context of the targets and objectives in the SDP and the Key Performance Indicators. The requirements in relation to the content and conduct of the review will be agreed from time to time by the Parties. As part of this review, the SPB (excluding for such purposes WEPCo's representative) will review WEPCo's progress against the partnership objectives in this Agreement and the WEPCo Performance Report and the SPB (excluding for such purposes WEPCo's representative) and WEPCo shall seek to agree, in good faith, any key findings from such review together with the implications thereof in relation to the WEPCo's future activities. The Participants and/or the SPB shall be entitled to require information and/or clarification from WEPCo in relation to the WEPCo Performance Report including as to whether or not the Track Record Test has been passed and, to the extent relevant, any Significant Performance Failure has occurred. Any dispute in relation to the WEPCo Performance Report (including whether or not the Track Record Test has been passed in accordance with the methodology set out at Table 5 of the Appendix to Section 3 (*Performance Measurement*) of Schedule 3 (*Partnering Services*) and, to the extent relevant, any Significant Performance Failure has occurred²) shall be resolved by reference to the Dispute Resolution Procedure.

15. **INFORMATION**

- 15.1 WEPCo shall not in any way be relieved from any obligation under this Agreement nor shall it be entitled to claim against the Participant on grounds that any information, whether obtained from the Participant or otherwise (including information made available by the Participant) is incorrect or insufficient and shall make its own enquiries as to the accuracy and adequacy of that information.
- 15.2 Save to the extent expressly provided in a Project Agreement:
- 15.2.1 none of the Participants nor any of their respective agents, servants or advisers shall be liable to WEPCo (whether in contract, tort or otherwise and whether or not arising out of any negligence on the part of the Participants or any of their respective agents, servants or advisers) in respect of any inadequacy of any kind whatsoever in Works and Facilities Information;
- 15.2.2 no Participant shall be deemed to have given any warranty or undertaking that Works and Facilities Information represents all of the information in its possession or power relevant or material to any New Project; and

² WG will wish to explore with Bidders during dialogue the extent to which other Significant Performance Failures can arise at other points in time.

- 15.2.3 none of the Participants nor any of their respective agents, servants or advisers shall be liable to WEPCo, any Project Service Provider or any Supply Chain Member in respect of any failure (whether before or after execution of the relevant Project Agreement) to:
- (a) disclose or make available to WEPCo, a Project Service Provider or any Supply Chain Member any information, documents or data; or
 - (b) keep Works and Facilities Information up to date; or
 - (c) inform WEPCo, any Project Service Provider or any Supply Chain Member of any inaccuracy, error, omission, unfitness for purpose, defects or inadequacy in Works and Facilities Information.

15.3 WEPCo acknowledges and confirms, for itself, the Project Service Providers and Supply Chain Members that:

15.3.1 before execution of each Project Agreement, they shall have conducted their own analysis and review of the relevant Works and Facilities Information and as such shall be deemed to have satisfied themselves as to the accuracy, completeness and fitness for purpose of all such Works and Facilities Information upon which they place reliance; and

15.3.2 save to the extent expressly provided in a Project Agreement, they shall not be entitled to make any claim against any of the Participants or any of their respective agents, servants or advisers, whether in damages or for extensions of time or additional payments under the Project Agreement, on the grounds of any misunderstanding or misapprehension in respect of the relevant Works and Facilities Information or on the grounds that incorrect or insufficient information relating thereto or to any Site was given to it by any person whether or not in the employ of the Participants, nor shall they be relieved from any risks or obligations imposed on or undertaken by them under the Project Agreements on any such ground.

16. **INDEMNITIES**

WEPCo indemnities to Participants

16.1 WEPCo shall indemnify and keep each of the Participants indemnified at all times from and against all Direct Losses sustained by such Participant in consequence of:

16.1.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, WEPCo or any WEPCo Party notwithstanding any act or omission of the Participants or any Participant Party;

16.1.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 16.1.1 or Clause 16.2.1) arising out of, or in the course of, the WEPCo Operations, save to the extent caused (or contributed to) by any negligent act or omission by that Participant (or a Participant Party relating to that Participant) in respect of the performance or non-performance of the Participant's obligations hereunder or breach of any express provision of this Agreement by that Participant (or relevant Participant Party);

16.1.3 any physical loss of or damage to the Participant's assets arising by reason of any act or omission of WEPCo or any WEPCo Party, save to the extent that such loss or damage arises out of any negligent act or omission by that Participant (or a Participant Party relating to that Participant) relating to the performance or non-performance of the Participant's obligations hereunder or breach of any express provision of this Agreement by that Participant (or relevant Participant Party); and

16.1.4 any loss of or damage to property or assets of any third party arising by reason of any act or omission of WEPCo or any WEPCo Party, save to the extent that such loss or damage arises out of any negligent act or omission by that Participant (or a Participant Party

relating to that Participant) relating to the performance or non-performance of the Participant's obligations hereunder or breach of any express provision of this Agreement by that Participant (or relevant Participant Party),

PROVIDED THAT in the case of Clauses 16.1.3 and 16.1.4 to the extent the loss or damage referred to has been caused by a negligent act or omission of the Participant or relevant Participant Party then the Participant shall be responsible for the deductibles under any policy of insurance required under this Agreement and any amount over the maximum amount required to be insured under such insurance policy.

Participants' indemnities to WEPCo

16.2 Each Participant shall indemnify and keep WEPCo indemnified at all times from and against all Direct Losses sustained by WEPCo in the course of or arising out of the conduct of the WEPCo Operations as a consequence of:

- (a) any negligent act or omission by that Participant (or a Participant Party relating to that Participant) relating to the performance or non-performance of the Participant's obligations hereunder; or
- (b) breach of any express provision of this Agreement by that Participant (or relevant Participant Party),

which results in:

16.2.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, that Participant or a Participant Party relating to that Participant notwithstanding any act or omission of WEPCo or any WEPCo Party;

16.2.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 16.1.1 or Clause 16.2.1), save to the extent caused (or contributed to) by any act or omission of WEPCo or any WEPCo Party;

16.2.3 any physical damage to any part of the Facilities or any assets or other property of WEPCo or any WEPCo Party, save to the extent caused (or contributed to) by any act or omission of WEPCo or any WEPCo Party; or

16.2.4 any loss of or damage to property or assets of any third party, save to the extent caused (or contributed to) by any act or omission of WEPCo or any WEPCo Party,

PROVIDED THAT, in the case of Clauses 16.2.3 and 16.2.4:

- (a) there shall be excluded from the indemnity given by the each of Participants any liability for the occurrence of risks against which WEPCo is bound to insure under this Agreement or which any Project Service Provider is required to insure under a Project Agreement; and
- (b) where and to the extent the loss or damage referred to has been caused by a negligent act or omission by a Participant (or a Participant Party relating to that Participant) relating to the performance or non-performance of the Participant's obligations hereunder or by any breach of any express provision of this Agreement by a Participant (or relevant Participant Party) then that Participant shall be responsible for the deductible under any policy of insurance required under this Agreement and any amount over the maximum amount required to be insured under such insurance policy.

Conduct of claims

16.3 This sub-clause shall apply to the conduct by a party from whom an indemnity is sought under this Agreement, of claims made by a third person against a party having (or claiming to have) the benefit of the indemnity. The party having, or claiming to have, the benefit of the indemnity is

referred to as the "**Beneficiary**" and the party giving the indemnity is referred to as the "**Indemnifier**". Accordingly:

- 16.3.1 if the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become, entitled to indemnification under this Agreement, the Beneficiary shall give notice in writing to the Indemnifier as soon as reasonably practicable and in any event within twenty (20) Business Days of receipt of the same;
- 16.3.2 subject to Clauses 16.3.3, 16.3.4 and 16.3.5 below, on the giving of a notice by the Beneficiary pursuant to Clause 16.3.1 above, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all (but not part only) of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with a secured indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim;
- 16.3.3 with respect to any claim conducted by the Indemnifier pursuant to Clause 16.3.2 above:
- (a) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
 - (b) the Indemnifier shall not bring the name of the Beneficiary into disrepute; and
 - (c) the Indemnifier shall not pay or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;
- 16.3.4 the Beneficiary shall be free to pay or settle any claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if:
- (a) the Indemnifier is not entitled to take conduct of the claim in accordance with Clause 16.3.2 above; or
 - (b) the Indemnifier fails to notify the Beneficiary in writing of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Beneficiary under Clause 16.3.1 above or notifies the Beneficiary in writing that it does not intend to take conduct of the claim; or
 - (c) the Indemnifier fails to comply in any material respect with the provisions of Clause 16.3.3 above;
- 16.3.5 the Beneficiary shall be free at any time to give notice in writing to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any claim (or of any incidental negotiations) to which Clause 16.3.2 applies. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice in writing pursuant to this paragraph, then the Indemnifier shall be released from any liability under its indemnity under Clause 16.1 or Clause 16.2 (as the case may be) and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to Clause 16.3.2 in respect of such claim;
- 16.3.6 if the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the fact, matter, event or

circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:

- (a) an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out of pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and
- (b) the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity,

PROVIDED THAT there shall be no obligation on the Beneficiary to pursue such recovery and the Indemnifier shall be repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Indemnifier exceeds any loss sustained by the Beneficiary (including for this purpose indirect or consequential losses or claims for loss of profits which are excluded by this Agreement from being recovered from the Indemnifier); and

- 16.3.7 any person taking any of the steps contemplated by Clauses 16.3.1 to 16.3.5 (inclusive) shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

Mitigation - indemnity claims

- 16.4 To avoid doubt the provisions of Clause 49 (*Mitigation*) apply to any indemnity given under this Agreement and any such indemnity shall not extend to Direct Losses which could have been reduced or avoided by the Beneficiary complying with the provisions of such clause.

Taxation

- 16.5 If any payment by one party under an indemnity in this Agreement is subject to income tax or corporation tax (or any tax replacing them) in the hands of the recipient, the recipient may demand in writing to the party making the payment that the payment shall be increased by such amount (the "**Additional Amount**") as would ensure that, after taking into account any such tax payable in respect of the Additional Amount and any credit or saving that may arise as a result of paying the Additional Amount, the recipient receives and retains a net sum equal to the amount it would have otherwise received had the payment not been subject to such tax, with the result that it is left in no better or worse tax position. The party making the payment shall pay the Additional Amount within ten (10) Business Days of receipt of such demand.

Limitations

- 16.6 The indemnities under this Agreement shall not apply and there shall be no right to claim damages for breach of this Agreement, in tort (including negligence), restitution or on any other basis whatsoever to the extent that any loss claimed by either party is for Indirect Losses suffered or allegedly suffered by any party.
- 16.7 Subject to the provisions relating to Participants' negligence in Clauses 16.1 and 16.2 no Participant shall be liable in tort, (including negligence), restitution to WEPCo or any WEPCo Party in respect of any negligent act or omission of the Participants or any Participant Party relating to or in connection with this Agreement and WEPCo shall procure that no WEPCo Party shall bring such a claim against the Participants. WEPCo has accepted this on the basis that it and each WEPCo Party will cover the risk of negligent acts or omissions by insurance or in such other manner as it (or they) may think fit.

17. INSURANCE

The Insurances

- 17.1 WEPCo shall procure at its own cost that the insurances, details of which are set out in Schedule 9 (*Insurances*), are taken out and are maintained for the term of this Agreement provided that

WEPCo shall not be required to maintain such of those insurances as are unavailable within the worldwide insurance market with reputable insurers of good standing (provided always such unavailability is not caused by the actions of WEPCo) or which are offered on terms such that the risk is not generally being insured against in the worldwide insurance market.

17.2 Without prejudice to the other provisions of this clause, WEPCo shall, at all relevant times, at its own cost, effect and maintain in full force those insurances which it is required to effect by any applicable Law.

17.3 All Insurances shall:

17.3.1 be placed with insurers who are:

- (a) insurers of good financial standing;
- (b) appropriately regulated;
- (c) of good repute in the international insurance market; and
- (d) acceptable to the Participants (such acceptance not to be unreasonably withheld or delayed, taking into account Clause 17.3.1(a) to (c) above); and

17.3.2 comply with the relevant provisions of Schedule 9 (*Insurances*).

Subrogation and vitiation

17.4 WEPCo shall procure that all policies of insurance referred to in paragraphs 3 and 4 of Schedule 9 (*Insurance*) to be effected by it pursuant to this Clause 17 (*Insurance*) shall contain a provision to the effect that the insurers have agreed to waive all rights of subrogation against each of the Participants (and all Participant Parties) save to the extent that a Participant has vitiated the policy by a deliberate act or omission.

17.5 Where WEPCo is obliged to effect insurance (other than those insurances referred to in paragraph 3 of Schedule 9 (*Insurances*)) under this Clause 17, not bring any claim or action against any of the Participants (or any Participant Party) in respect of any loss or damage in circumstances where WEPCo could recover such loss or damage under such insurance (whether or not such insurance has in fact been effected or, if effected, has been vitiated as a result of any act or omission of WEPCo (or any WEPCo Party), including but not limited to non-disclosure or under-insurance).

17.6 WEPCo shall ensure that the public and products liability policy shall contain an indemnity to principals clause under which the Participants shall be indemnified in respect of claims made against the Participants in respect of death or bodily injury or third party property damage arising out of or in connection with the Partnering Services and for which WEPCo is legally liable.

17.7 WEPCo shall not take any action or fail to take any reasonable action or (in so far as it is reasonably within its power) permit or allow others to take or fail to take any action (including failure to disclose any fact) as a result of which any of the Insurances may be rendered void, voidable, unenforceable or suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

Evidence of the Insurances

17.8 WEPCo shall, as soon as it is available, supply the Participants with written evidence that the Insurances are in force on or before the effective date or date of renewal of every policy of Insurance (or such other evidence of insurances as may be reasonably required).

17.9 Receipt of such evidence by the Participants shall not in itself constitute acceptance by the Participants or relieve WEPCo of any of its liabilities or obligations under this Agreement.

Acceptance and compliance

- 17.10 Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall relieve WEPCo of its liabilities and obligations under this Agreement.

Uninsurable risks under Project Agreements

- 17.11 Without prejudice to the rights of a Project Agreement Counterparty under its Project Agreement, where a Project Service Provider for a MIM Project has notified a Project Agreement Counterparty of a risk becoming an Uninsurable Risk pursuant to the provisions of the relevant Project Agreement, the Participants and WEPCo shall co-operate so as to ensure that a meeting of the SPB is held as soon as is reasonably practicable (and in any event within seven (7) Business Days of receipt by the Project Agreement Counterparty of such notice). At that meeting the SPB shall consider the situation and the parties will work together to use all their respective reasonable endeavours to obtain an agreed position from the SPB in relation to the risk becoming an Uninsurable Risk within twenty (20) Business Days of the Project Service Provider notifying the Project Agreement Counterparty as described above.

18. INTELLECTUAL PROPERTY RIGHTS

Partnering Services Data

- 18.1 WEPCo shall make available to each Participant free of charge (and hereby irrevocably licenses each Participant to use) all rights it may have to use the Partnering Services Data that might reasonably be required by that Participant and WEPCo shall ensure that it obtains all necessary licences, permissions and consents to ensure that it can make such rights it may have to use the Partnering Services Data available to each Participant on these terms, for the Approved Purposes and in this clause "**use**" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "**the right to use**" shall be construed accordingly.

Maintenance of data³

- 18.2 To the extent that any of the data, materials and documents referred to in this Clause 18 (*Intellectual Property Rights*) are generated by or maintained on a computer or similar system, WEPCo shall:
- 18.2.1 use all reasonable endeavours to procure for the benefit of each Participant, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable each Participant or its nominee to access and otherwise use (subject to the payment by the relevant Participant of the relevant fee, if any) such data for the Approved Purposes. As an alternative, WEPCo may provide such data, materials or documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format; and
 - 18.2.2 enter into the NCC's then current multi-licence escrow deposit agreement or standard single licence escrow deposit agreement as appropriate in each case.
- 18.3 WEPCo shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Clause 18.2 in accordance with Good Industry Practice. Without prejudice to this obligation, WEPCo shall submit to the Participants for approval its proposals for the back-up and storage in safe custody of such data, materials and documents and any Participant shall be entitled to object if the same is not in accordance with Good Industry Practice. WEPCo shall comply, and shall cause all WEPCo Parties to comply, with all procedures to which the Participants have given their approval. WEPCo may vary its procedures for such back-up and

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If any party is to be given access to any of the other party's computer systems, as a matter of good practice and also to clarify potential liability for unauthorised access to those systems under the Computer Misuse Act 1990, the scope of each party's authorisation to access each other's computer systems will need to be defined clearly. The terms of such authorisation will be project specific.

storage subject to submitting its proposals for change to the Participants, who shall be entitled to object on the basis set out above.

Intellectual Property Rights

18.4 WEPCo:

18.4.1 hereby grants to each Participant, free of charge, an irrevocable, non-exclusive and transferable licence (carrying the right to grant sub licences) to use the Intellectual Property Rights which are or become vested in WEPCo; and

18.4.2 shall, where any Intellectual Property Rights are or become vested in a third party, use all reasonable endeavours to procure the grant of a like licence to that referred to in Clause 18.4.1 above to each Participant,

in both cases, solely for the Approved Purposes.

18.5 WEPCo shall use all reasonable endeavours to ensure that any Intellectual Property Rights created, brought into existence or acquired during the term of this Agreement vest, and remain vested throughout the term of this Agreement, in WEPCo and WEPCo shall use best endeavours to enter into appropriate agreements with any WEPCo Party (or other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

18.6 WEPCo shall on request provide to each Participant with written absolute waivers from all authors of the Intellectual Property Rights in relation to all their moral rights arising under the Copyright, Designs and Patents Act 1988 in relation to the Intellectual Property Rights and, as far as is legally possible, any broadly equivalent rights such authors may have in any territory of the world.

Claims

18.7 Where a claim or proceeding is made or brought against any Participant which arises out of the infringement of any rights in or to any Intellectual Property (other than any Disclosed Data) or because the use of any materials, plant, machinery or equipment in connection with the WEPCo Operations or Project Services infringes any rights in or to any Intellectual Property of a third party then, unless such infringement has arisen out of the use of any Intellectual Property by or on behalf of such Participant otherwise than in accordance with the terms of this Agreement, WEPCo shall indemnify such Participant at all times from and against all such claims and proceedings and the provisions of Clause 16.3 (*Conduct of Claims*) to Clause 16.7 shall apply.

19. TRANSFER OF EMPLOYMENT

19.1 [Whilst, at the Commencement Date, the Parties do not envisage that a Relevant Transfer will apply in relation to the provision of the Partnering Services by or on behalf of WEPCo or as a result of it carrying out its general business activities]⁴ the provisions of Schedule 15 (*Transfer of Employment and Pensions*) shall apply in relation to any transfers of staff to WEPCo or any Partnering Subcontractor pursuant to or necessitated by this Agreement (excluding transfers pursuant to or necessitated by a Project Agreement to which such Project Agreement shall apply). It is the Parties' intention that the costs of such transfers should be fully recovered through Project Development Fees to be received after the date of that transfer or as otherwise agreed between the Parties.

19.2 WEPCo shall be obliged to act in such a manner and to manage its affairs to ensure, to the extent it is within its powers, that the effect of Clause 19.1 upon each of the Participants is mitigated.

19.3 The provisions of Schedule 20 (*Handover on Expiry or Termination*) shall apply in relation to any transfers of staff on expiry or termination of this Agreement.

⁴ Review and consider whether appropriate in light of Tenderers solution.

20. **SITE SECURITY AND PERSONNEL ISSUES**

- 20.1 Each Participant shall have the right to refuse admittance to, or order the removal from any premises of that Participant or from the Facilities of any person employed by (or acting on behalf of) WEPCo who such Participant has reasonable grounds for believing is not a fit and proper person to be in such premises or the Facilities.
- 20.2 Any action taken under Clause 20.1 shall forthwith be confirmed in writing by the relevant Participant to WEPCo and, to avoid doubt, shall not relieve WEPCo of any of its obligations under this Agreement.

Resources and training

- 20.3 WEPCo shall procure that:
- 20.3.1 there shall at all times be a sufficient number of staff (including all relevant grades of supervisory staff) engaged in the provision of the Partnering Services with the requisite level of skill and experience. To avoid doubt, this obligation shall include ensuring that there are sufficient staff to cover periods of holiday, sickness, other absence and anticipated and actual peaks in demand for each of the Partnering Services; and
- 20.3.2 all staff receive such training and supervision as is necessary to ensure the proper performance of this Agreement and compliance with all health and safety rules, procedures and requirements.
- 20.4 Each Participant agrees to permit and arrange for prospective Transferring Employees who are employees of that Participant, prior to the relevant Transfer Date, to receive training and to make familiarisation visits to any relevant premises of WEPCo or a Partnering Subcontractor (all as reasonably requested by WEPCo and in such manner as to ensure that there is no material adverse effect on the operations of the Participant as a result of the same).

Convictions and disciplinary action

- 20.5 WEPCo (to the extent permitted by Law) shall procure that all potential staff or persons performing any of the Partnering Services who may reasonably be expected in the course of their employment or engagement to have access to children, the elderly or vulnerable adults (each a "**Named Employee**"):
- 20.5.1 (other than Transferring Participant Employees):
- (a) are questioned concerning their Convictions prior to commencing such employment or engagement; and
 - (b) obtains a check of the most extensive available kind made with the Disclosure and Barring Service.
- 20.5.2 are questioned during the term of their employment or engagement concerning any Convictions which arise during the term of their employment or engagement.
- 20.6 WEPCo shall procure that (other than Transferring Participant Employees) no person who discloses any Convictions, or who appears on a Barred List following the results of a Disclosure and Barring Service check, is employed without the Participants' Representatives prior written consent (such consent not to be unreasonably withheld or delayed).
- 20.7 Subject always to having the prior written consent of the relevant individual, WEPCo shall procure that the Participants are kept advised at all times of any member of staff who, subsequent to his/her commencement of employment as a member of staff, receives a Conviction or whose previous Convictions become known to WEPCo (or any employee of a Partnering Subcontractor). WEPCo shall procure the removal of such persons who subsequently receive a Conviction (or whose previous Convictions become known to WEPCo) from the relevant facilities either:

20.7.1 at the Participant's request (where the information has been provided to the Participant);
and

20.7.2 in all cases, where the relevant information has not been provided to the Participant.

20.8 Any Participant's Representative (acting reasonably) may instruct WEPCo to procure that appropriate disciplinary action is taken against any employee of WEPCo or any Partnering Subcontractor (in accordance with the terms and conditions of employment of the employee concerned) who misconducts himself or is incompetent or negligent in his duties or who any Participant has reasonable grounds for believing that their presence or conduct on the Facilities or at work is otherwise undesirable. The Participants shall co-operate with any such disciplinary proceedings and shall be advised in writing by WEPCo of the outcome.

20.9 WEPCo shall procure that there are set up and maintained, by it and by all Partnering Subcontractors, personnel policies and procedures covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). WEPCo shall procure that the terms and the implementation of such policies and procedures comply with Law and Good Industry Practice and that they are published in written form and that copies of them (and any revisions and amendments to them) are forthwith issued to the Participants.

Lists and Records

20.10 WEPCo shall procure that the Participants' Representatives shall at all reasonable times have consent to access to all material details in respect of all employees of WEPCo or any Partnering Subcontractors including numbers and categories of staff employed to perform the Partnering Services and including in respect of each such employee:

20.10.1 details of qualifications; and

20.10.2 details of training undertaken by the employee.

21. TRANSITION/HANDOVER ON EXPIRY AND TERMINATION

21.1 WEPCo shall co-operate to ensure a smooth transition and handover of the Partnering Services on the expiry or earlier termination of this Agreement.

22. PARTICIPANT DEFAULT

22.1 For the purposes of this Agreement, each of the following is a Participant Event of Default :

22.1.1 one or more Participants:

(a) committing a material breach of the terms of Clauses 9.1, 9.2 and 9.6, provided that the renewal or extension of a lease of premises currently occupied by a Participant or the taking of a short term lease by a Participant to cover the short term needs of that Participant pending completion of Required Facilities pursuant to a Project Agreement shall not comprise a material breach by that Participant of the provisions of Clauses 9.1, 9.2 and/or 9.6; and/or

(b) failing to perform its obligations under Clause 14.11 (to the extent that such breach is not an event or circumstance falling under the terms of Clause 22.1.2) where such breach of Clause 14.11 has a material adverse effect on WEPCo or any Project Service Provider;

22.1.2 one or more Participants acting in a manner in breach of this Agreement which shall have delayed by more than forty (40) Business Days the date for execution of any Project Agreement in relation to an Approved Project (as such date was agreed between WEPCo and the Relevant Participants as part of the Stage 2 Approval for that Approved Project);

- 22.1.3 an expropriation, sequestration, nationalisation or requisition of any Facilities or a material part of the Facilities or a material part of the assets and/or shares of WEPCo or its Holding Company or a Project Service Provider by a Participant or any other Relevant Authority;
- 22.1.4 non-payment by any Participant(s) of amounts due under this Agreement (which are not in dispute) exceeding £100,000 (index linked) sixty (60) Business Days after a written notice is served on all the relevant Participant(s), copied to the other Participants stating the amount due and the date when such amount becomes due,

PROVIDED THAT a rejection of a New Project in accordance with the terms of Clause 13.1 and/or Schedule 5 (*Approval Process for New Projects*) shall not comprise a Participant Event of Default. In the event that a Participant Event of Default under Clause 22.1.3 occurs as a result of the actions of a Relevant Authority other than a Participant, all Participants shall be deemed to be responsible for such Participant Event of Default.

- 22.2 On the occurrence of a Participant Event of Default or within a reasonable time after WEPCo becomes aware of the same, and while the same is still subsisting, WEPCo may, at its option:
 - 22.2.1 suspend performance by it of all or part of its obligations under this Agreement to the Participant(s) responsible for the Participant Event of Default until such time as such Participant(s) have demonstrated to WEPCo's reasonable satisfaction that they will perform and are capable of performing their obligations under this Agreement; or
 - 22.2.2 serve written notice on Participant(s) responsible for the Participant Event of Default (copied to the other Participants) of the occurrence and (specifying details) of such Participant Event of Default. If the relevant matter or circumstance is capable of remedy (and, for the avoidance of doubt, a delay referred to in Clause 22.1.2 and breach of the provisions of Clause 14.11 shall each be deemed to be capable of remedy) and has not been remedied by the responsible Participant(s) (or otherwise) within thirty (30) Business Days of such notice, or, if it is not capable of remedy, with immediate effect, WEPCo may:
 - (a) serve a written notice on each Participant responsible for the Participant Event of Default terminating this Agreement with immediate effect insofar as it relates to such Participant; or
 - (b) serve a written notice on each Participant responsible for the Participant Event of Default (copied to the other Participants) specifying the effect such Participant Event of Default has had (and continues to have) on WEPCo (a "**Participant Default Notice**").
- 22.3 WEPCo shall not exercise or purport to exercise any right to terminate this Agreement except as expressly set out herein.
- 22.4 Where WEPCo has served a Participant Default Notice and/or terminates this Agreement in accordance with Clause 22.2 in respect of a Participant as a result of a Participant Event of Default, the Participant(s) responsible for the Participant Event of Default shall pay compensation to WEPCo calculated in accordance with Section 1 (*Participant Event of Default Compensation Sum*) of Schedule 14(*Compensation on Participant Event of Default and Termination*).
- 22.5 Where, as a result of termination in accordance with Clause 22.2 in respect of a Participant Event of Default, WEPCo has terminated this Agreement in its entirety, the Participant(s) responsible for the Participant Event of Default shall, in addition to liability under Section 1 (*Participant Event of Default Compensation Sum*) of Schedule 14 (*Compensation on Participant Event of Default and Termination*), pay compensation to WEPCo calculated in accordance with Section 2 (*Participant Event of Default Termination Sum*) of Schedule 14 (*Compensation on Participant Event of Default and Termination*).
- 22.6 Where WEPCo has validly served a Participant Default Notice more than once in any twelve (12) month period in respect of the same Participant, it shall not be required to provide either the

Project Development Partnering Services or any Strategic Support Partnering Services to that Participant under this Agreement except on terms which provide, inter alia, for the payment by such Participant of all Partnering Services Costs (other than those which are already being paid via Project Agreements) monthly in arrears.

23. WEPCO EVENTS OF DEFAULT

WEPCo Events of Default

23.1 For the purposes of this Agreement, each of the following is a WEPCo Event of Default :

23.1.1 the occurrence of any Project Co Event of Default or D&B Co Event of Default, in each case as defined in the relevant Project Agreement (other than one resulting from an Insolvency Event (or equivalent event under the relevant Project Agreement) in relation to the Project Service Provider, or any right of the Project Agreement Counterparty to terminate as a result of a "*Prohibited Act*" as defined in the relevant Project Agreement) in respect of one or more Project Agreements provided that, where the event in question is one which is capable of remedy in terms of the applicable Project Agreement, such event shall comprise a WEPCo Event of Default:

- (a) at the instance of any Participant who is a Project Agreement Counterparty or is otherwise directly affected by such event by virtue of an interest or involvement in the relevant Facilities, on its occurrence; and
- (b) at the instance of any other Participant, on the expiry of any remedy period permitted under the applicable Project Agreement without it being remedied;

23.1.2 the occurrence of a Significant Performance Failure;

23.1.3 WEPCo committing a material breach of its obligations under this Agreement (other than as a consequence of a breach by one or more of the Participants of their obligations under this Agreement) including:

- (a) failure to take out and maintain the Insurances in accordance with Clause 17.1; and/or
- (b) any breach arising pursuant to Clause 5.4;

23.1.4 WEPCo ceasing to provide or procure the provision of all or a substantial part of the Partnering Services in accordance with this Agreement (other than as a consequence of a breach by one or more of the Participants of their obligations under this Agreement);

23.1.5 WEPCo commits a material breach of its obligations under this Agreement (other than as a consequence of a breach by one or more of the Participants of their obligations under this Agreement) which results in the criminal prosecution and conviction of WEPCo or any WEPCo Party under the Health and Safety Regime (an "**H&S Conviction**") provided that an H&S Conviction of a WEPCo Party shall not constitute a WEPCo Event of Default if either:

- (a) within ninety (90) Business Days from the date of the H&S Conviction (or, in the case of H&S Conviction which is subject to an appeal or any further judicial process and where such appeal or further judicial process does not result in the successful appeal against or quashing of the H&S Conviction, within sixty (60) Business Days of the date of the decision of such appeal or judicial process), the involvement in this Agreement of each relevant WEPCo Party (which in the case of an individual director, officer or employee shall be deemed (if it is reasonable to so deem) to include the WEPCo Party of which that person is a director, officer or employee) is terminated and a replacement is appointed by WEPCo in accordance with Clause 28.2 below; or

- (b) within forty (40) Business Days of the H&S Conviction WEPCo puts forward a method statement which specifies in sufficient detail the changes to working practices that will be implemented to prevent any recurrence of the events leading up to the H&S Conviction and that method statement is approved by the Participants, such approval not to be unreasonably withheld or delayed;
- 23.1.6 WEPCo failing to comply with the provisions of Clause 28 (*Assignment and sub-contracting*);
- 23.1.7 WEPCo failing to pay any sum or sums due to the Participants (or any of them) under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) £10,000 (index linked) and such failure continues for sixty (60) Business Days from receipt by WEPCo of a written notice of non-payment from the Participants;
- 23.1.8 an Insolvency Event occurs in relation to WEPCo;
- 23.1.9 an Insolvency Event (or equivalent event in terms of the relevant Project Agreement) occurs in relation to a Project Service Provider other than WEPCo;
- 23.1.10 any Project Service Provider fails (after having received a valid notice from its relevant Project Agreement Counterparty) to terminate any Supply Chain Agreement to which it is a party and to procure that a replacement Supply Chain Member is appointed in accordance with the provisions of the relevant Project Agreement;
- 23.1.11 WEPCo has, at the date of this Agreement, been in one of the situations referred to in regulation 57(1) of the Public Contracts Regulations 2015 (S.I. 2015/102), including as a result of the application of regulation 57(2) of the Public Contract Regulations 2015 (S.I 2015/102) and should therefore have been excluded from the procurement proceedings;
- 23.1.12 In the circumstances described in Clauses 26.5.5(a), 26.6 and 26.7; and
- 23.1.13 a Prohibited Act, giving rise to a right to terminate pursuant to Clause 25 or the relevant Project Agreement.
- 23.2 Each Party shall notify the others in writing of the occurrence, and details, of any WEPCo Event of Default promptly on such Party becoming aware of its occurrence, and WEPCo shall notify the Participants in writing of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to a WEPCo Event of Default promptly on WEPCo becoming aware of such event or circumstance.
- 23.3 On the occurrence of a WEPCo Event of Default, without prejudice to the rights of the Participants (acting through Welsh Government) pursuant to Clause 23.4 to 23.13, each Participant may elect to suspend the exclusivity granted to WEPCo by it pursuant to Clause 9.1 and/or Clause 9.2 by serving written notice of such suspension on WEPCo (which shall include, for the avoidance of doubt, the suspension of exclusivity in respect of any of the Participant's batched New Projects that have not achieved Stage 2 Approval, pursuant to paragraph 1.3.1(a) of Section 1 of Schedule 3 (*Partnering Services*)). Without prejudice to the rights of each of the Participants under Clause 9.7, any such suspension shall expire:
 - 23.3.1 following written notice to that effect being served on WEPCo by the Participant in question, copied to the SPB; and
 - 23.3.2 automatically where the WEPCo Event of Default has been remedied or where Clause 23.12.2(b) applies.

23.4 On the occurrence of a WEPCo Event of Default, or within a reasonable time after the Participants (or any one of them) become aware of the same, and while the same is subsisting, the Participants may (acting through Welsh Government):

23.4.1 in the case of any WEPCo Event of Default referred to in Clauses 23.1.1 to 23.1.4 (inclusive) and 23.1.6 either (in their absolute discretion):

- (a) exercise their rights under Clause 23.6; or
- (b) serve written notice of default on WEPCo requiring WEPCo at WEPCo's option either:
 - (i) to remedy the WEPCo Event of Default referred to in such notice of default (if the same is continuing) within twenty (20) Business Days of such notice of default; or
 - (ii) to put forward within twenty (20) Business Days of such notice of default a programme to the reasonable satisfaction of the Participants (acting through Welsh Government) (set out, if appropriate, in stages) for remedying the WEPCo Event of Default (a "**Remediation Programme**") or in the case of a Significant Performance Failure, to satisfy the Participants that the events or circumstances that gave rise to the Significant Performance Failure will not recur or has/have otherwise been addressed to the Participants' satisfaction (an "**Improvement Programme**"). In either case, such programme may include the PSDP proposing the replacement of a shareholder who holds shares directly or indirectly in the PSDP pursuant to Clause 9.8 of the WEPCo Shareholders Agreement.

A Remediation Programme shall specify in reasonable detail the manner in, and the latest date by, which such WEPCo Event of Default will be remedied.

An Improvement Programme shall set out such detail so as to satisfy the Participants that the events or circumstances that gave rise to the Significant Performance Failure will not recur or has/have otherwise been addressed within the timescale as agreed in the Improvement Programme.

WEPCo shall only have the option of putting forward a Remediation Programme or an Improvement Programme (as the case may be) in accordance with this sub-clause if it first notifies the Participants within ten (10) Business Days of such notice of default that it proposes to do so.

For the avoidance of doubt the reversal of any action that was done without SPB consent shall remedy that breach provided that WEPCo shall indemnify each of the Participants in respect of all losses, costs and expenses incurred as a result of that action being so carried out.

If WEPCo fails:

- (1) to remedy the WEPCo Event of Default in accordance with Clause 23.4.1(b)(i) and does not put forward a Remediation Programme or an Improvement Programme (as the case may be) in accordance with Clause 23.4.1(b)(ii), in either case within twenty (20) Business Days of the notice referred to in Clause 23.4.1(b); or

- (2) (in the case of a Remediation Programme) to remedy the WEPCo Event of Default within the agreed time period(s) specified in the Remediation Programme; or
- (3) (in the case of an Improvement Programme) to implement the material steps identified in the Improvement Programme to the reasonable satisfaction of the Participants within the relevant time period(s) specified in the Improvement Programme so as to satisfy the Participants (in their absolute discretion) that the events or circumstances that gave rise to the Significant Performance Failure will not recur or has/have otherwise been addressed within the timescales as agreed in the Improvement Programme,

the Participants shall be entitled to exercise their rights under Clause 23.6 and/or Clause 23.10;

23.4.2 in the case of any WEPCo Event of Default referred to in Clauses 23.1.5, 23.1.7, 23.1.8, 23.1.11, 23.1.12 or 23.1.13, exercise their rights under Clause 23.10; or

23.4.3 in the case of a WEPCo Event of Default referred to in Clause 23.1.9 or 23.1.10 (each a "**Project Service Provider Default**") exercise their rights under Clause 23.9.

23.5 Where WEPCo puts forward a Remediation Programme or an Improvement Programme in accordance with Clause 23.4.1(b)(ii), the Participants shall have twenty (20) Business Days from receipt of the same within which to notify WEPCo in writing (in their absolute discretion) that they do not accept the programme, failing which the Participants shall be deemed to have accepted the programme. Where the Participants notify WEPCo that they do not accept the programme, the Participants may elect to exercise their rights under Clause 23.6.

23.6 Where the Participants are entitled to exercise their rights under this Clause 23.6, the Participants may, in their absolute discretion (acting through Welsh Government):

23.6.1 require WEPCo by written notice to terminate a Supply Chain Agreement to which it is a party or, as the case may be, procure the termination of any Supply Chain Agreement to which any Project Service Provider or Partnering Subcontractor is a party as employer which has caused or materially contributed to the occurrence of the WEPCo Event of Default and to procure that a replacement Supply Chain Member is appointed in accordance with the provisions of this Agreement or the relevant Project Agreement as the case may be; or

23.6.2 where WEPCo itself has been providing the Services in respect of which the WEPCo Event of Default occurred, require WEPCo to cease providing the relevant Services and procure that a replacement Supply Chain Member is appointed in accordance with Clause 28 (*Assignment and sub-contracting*) to provide such Services within sixty (60) Business Days.

23.7 If the Participants exercise their rights under Clause 23.6 in relation to a WEPCo Event of Default affecting provision of the Partnering Services, WEPCo shall forthwith put forward proposals for the interim management or provision of the relevant Partnering Services until such time as an alternative Supply Chain Member can be engaged by WEPCo. If WEPCo fails to do so (or its proposals if implemented are not reasonably likely to give adequate provision of the relevant Partnering Services) then without prejudice to the other rights of the Participants in this Clause 23 (*WEPCo Events of Default*), the Participants (or any of them) may perform, or procure a third party to perform, such Partnering Services themselves and WEPCo shall indemnify each of the Participants in respect of their costs in so doing.

23.8 If WEPCo fails to terminate or procure the termination of the relevant Supply Chain Agreement to which it or any Project Service Provider or Partnering Subcontractor is a party as employer and to procure that a replacement Supply Chain Member is appointed in accordance with the provisions of Clause 23.6, the Participants shall be entitled at their option to exercise their rights in accordance with the provisions of Clause 23.10.

- 23.9 Where a Project Service Provider Default has occurred the following shall apply:
- 23.9.1 where the Project Service Provider Default is not capable of remedy, the Participants (acting through Welsh Government) shall be entitled to exercise the rights set out in Clause 23.10; and
- 23.9.2 where the Project Service Provider Default is capable of remedy, the Participants (acting through Welsh Government) may serve written notice of default on WEPCo requiring WEPCo to put forward within twenty (20) Business Days of such notice of default a reasonable programme (set out, if appropriate, in stages) for remedying the Project Service Provider Default and ensuring that such Project Service Provider Default does not recur (the "**PSP Rectification Programme**"), in which case:
- (a) where WEPCo fails to put forward such PSP Rectification Programme in the twenty (20) Business Day period, the Participants (acting through Welsh Government) shall be entitled to exercise the rights set out in Clause 23.10; and
 - (b) where WEPCo puts forward a PSP Rectification Programme within the twenty (20) Business Day period:
 - (i) the PSP Rectification Programme shall specify in reasonable detail the manner in, and the latest date by, which the Project Service Provider Default is proposed to be remedied (where such default is capable of remedy) and the procedures and practices which WEPCo and/or the Project Service Providers propose to put in place to ensure that such Project Service Provider Default does not recur;
 - (ii) the Participants shall consider the PSP Rectification Programme and liaise with WEPCo to discuss its contents and, in particular, whether the Participants consider it to be sufficient that, if properly implemented by WEPCo and/or the Project Service Providers it would prevent the Project Service Provider Default from recurring. The Participants shall, in considering whether or not to approve a PSP Rectification Programme under consideration, be entitled to take into account the performance of WEPCo and/or the relevant Project Service Provider in implementing the provisions of any previous PSP Rectification Programme agreed in relation to a breach or breaches substantially similar to the breach or breaches which have given rise to the PSP Rectification Programme then under consideration;
 - (iii) the Participants and WEPCo shall use their respective best endeavours to ensure that such liaison as is appropriate takes place so as to ensure that the Participants are in a position to determine whether they are satisfied with the PSP Rectification Programme within twenty (20) Business Days after receipt by the Participants of the PSP Rectification Programme; and
 - (iv) where the Participants are not satisfied that the PSP Rectification Programme meets the requirements set out in Clause 23.9.2(b)(i) or agreement cannot be reached between the Participants and WEPCo as to the terms of a PSP Rectification Programme, the Participants (acting through Welsh Government) shall be entitled to exercise the rights set out in Clause 23.10.
- 23.10 Subject to Clause 23.12, where the Participants are entitled to exercise their rights under this Clause 23.10, the Participants may (acting through Welsh Government):
- 23.10.1 suspend WEPCo's exclusivity by notice in writing to WEPCo (a "**Suspension Notice**") until further notice (if any) (any such notice reinstating exclusivity being a "**Reinstatement Notice**");

- 23.10.2 during the period of any such suspension serve an SPA Material Default Notice; and
- 23.10.3 at any time (whether or not a Suspension Notice has been served on WEPCo) elect to treat such circumstances as an SPA Material Default by notice in writing to WEPCo (an "**SPA Material Default Notice**") in accordance with Clause 23.12.

If a Suspension Notice is served and no Reinstatement Notice has been served by the Participants within six (6) months of the date of the Suspension Notice then a SPA Material Default Notice shall be deemed to have been served on WEPCo on the expiry of such six (6) month period.

23.11 In the event of the Participants exercising their right under Clause 23.10.1:

- 23.11.1 none of the Participants shall have any liability whatsoever whether under this Agreement or in tort, restitution or at common law to WEPCo or any WEPCo Party save for in respect of any antecedent breach of this Agreement by that Participant; and
- 23.11.2 WEPCo shall no longer be required to provide the Partnering Services for the period of the suspension, provided that:
- (a) the Participants (or any of them) may require WEPCo to provide all or any part of the Partnering Services and, if WEPCo agrees, such Partnering Services shall be provided on the terms set out in Clause 8 (*Services Obligations*) and Clause 10.2 (*Payment for Partnering Service*); and
 - (b) WEPCo shall recommence the provision of the Partnering Services on receipt of a Reinstatement Notice.

The provisions of Clause 23.12.1 and 23.12.2(a) shall apply mutatis mutandis to any Participant serving a notice of suspension under Clause 9.7 or Clause 23.3.

23.12 If the Participants serve an SPA Material Default Notice on WEPCo pursuant to Clause 23.10.3 (or are deemed to have served such an SPA Material Default Notice pursuant to Clause 23.10) (together an "**SPA Material Default**") then an SPA Material Default shall be deemed to have occurred whereupon:

- 23.12.1 the Participants (acting through Welsh Government) shall be entitled to terminate this Agreement with immediate effect by notice in writing to WEPCo (a "**Default Termination Notice**");
- 23.12.2 if no Default Termination Notice is given by the Participants pursuant to Clause 23.12.1 within twenty (20) Business Days of the deemed occurrence of the SPA Material Default then:
- (a) the provisions of Clauses 9.3 to 9.10 of the WEP Co Shareholders Agreement shall apply; and
 - (b) if an SPA Material Default Notice is served at a time when WEPCo's exclusivity has been suspended pursuant to Clauses 9.7, 23.3 or 23.10.1 or where the SPA Material Default Notice is deemed to have been given pursuant to Clause 23.10, then a Reinstatement Notice (and/or notice revoking such suspension in the case of Clauses 9.7 and 23.3) shall be deemed to have been given immediately on completion of the sale (at the end of the procedure in Clauses 9.3 to 9.10 of the WEPCo Shareholders Agreement and the related provisions in the Articles of Association of WEPCo), of all the shares held by the PSDP in WEPCo to WGPCo and/or a third party purchaser.

Participants' costs

23.13 WEPCo shall reimburse each Participant for all reasonable costs incurred by that Participant as a result of WEPCo's breach of any of its obligations under this Agreement or their exercise of their

rights under this Agreement in respect of such breach (including, without limitation, any relevant increased administrative expenses and the reasonable and proper costs of the Participant incurred under this Agreement and the WEPCo Shareholders Agreement resulting from the occurrence of a termination of this Agreement pursuant to this Clause 23 (the "**Participants' Costs**")).

24. **FORCE MAJEURE**

24.1 Save as otherwise expressly provided in this Agreement, none of WEPCo or the Participants shall be relieved from any liability under this Agreement to the extent that by reason of Force Majeure it is not able to perform its obligations under this Agreement.

24.2 None of WEPCo or the Participants shall be entitled to any compensation or other payment by reason of the occurrence of an event of Force Majeure.

25. **CORRUPT GIFTS AND FRAUDULENT PAYMENTS**

Warranty

25.1 WEPCo warrants that in entering into this Agreement it has not committed any Prohibited Act.

Remedies

25.2 If WEPCo or any WEPCo Party (or anyone employed by or acting on behalf of them) commits any Prohibited Act, then the Participants shall be entitled to act in accordance with Clauses 25.2.1 to 25.2.6 below:

25.2.1 if a Prohibited Act is committed by WEPCo or by an employee not acting independently of WEPCo then each of the Participants may terminate this Agreement with immediate effect with respect to that Participant by giving written notice to WEPCo, and this Agreement will terminate with respect to that Participant;

25.2.2 if the Prohibited Act is committed by an employee of WEPCo acting independently of WEPCo, then each of the Participants may give written notice to WEPCo of termination of this Agreement with respect to that Participant and this Agreement will so terminate, unless within twenty (20) Business Days of receipt of such notice WEPCo terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Services by another person;

25.2.3 if the Prohibited Act is committed by a Contractor and/or Service Provider or by an employee of a Contractor and/or Service Provider not acting independently of that Contractor and/or Service Provider then each of the Participants may give written notice to WEPCo of termination of this Agreement with respect to that Participant and this Agreement will so terminate, unless within twenty (20) Business Days of receipt of such notice WEPCo terminates the relevant Supply Chain Agreement and procures the performance of the relevant part of the Services by another person, where relevant, in accordance with Clause 28 (*Assignment and sub-contracting*);

25.2.4 if the Prohibited Act is committed by an employee of a Contractor and/or Service Provider acting independently of that Contractor and/or Service Provider then each of the Participants may give written notice to WEPCo of termination of this Agreement with respect to that Participant and this Agreement will so terminate, unless within twenty (20) Business Days of receipt of such notice WEPCo procures the removal of the employee from any and all WEPCo Operations and (if necessary) procures the performance of the relevant part of the WEPCo Operations by another person;

25.2.5 if the Prohibited Act is committed by any other person involved in the provision of WEPCo Operations not specified in Clauses 25.2.1 to 25.2.4 above then each of the Participants may give written notice to WEPCo of termination of this Agreement with respect to that Participant and this Agreement will so terminate unless within twenty (20) Business Days WEPCo procures the removal of such person from any and all WEPCo Operations and

the termination of the appointment of their employer (where such person is not employed by WEPCo) and (if necessary) procures the performance of the relevant part of the Services by another person; and

25.2.6 any notice of termination under this sub-clause shall specify:

- (a) the nature of the Prohibited Act;
- (b) the identity of the party who the Participant(s) believe has committed the Prohibited Act; and
- (c) the date on which this Agreement will terminate in accordance with the applicable provisions of this sub-clause.

25.3 Without prejudice to their other rights or remedies under this clause:

25.3.1 the Participants shall be entitled to recover from WEPCo the amount or value of any such gift, consideration or commission; and

25.3.2 each Participant shall be entitled to recover from WEPCo any other loss sustained in consequence of any breach of this clause.

Permitted Payments

25.4 Nothing contained in this clause shall prevent WEPCo from paying any proper commission or bonus to its employees within the agreed terms of their employment.

Notification

25.5 WEPCo shall notify the Participants in writing of the occurrence (and details) of any Prohibited Act promptly on WEPCo becoming aware of its occurrence.

Interim Management

25.6 Where WEPCo is required to replace any Supply Chain Member with which it has contracted pursuant to this clause, the provisions of Clause 23 (*WEPCo Events of Default*) shall apply and be construed accordingly.

26. TAX COMPLIANCE

26.1 WEPCo represents and warrants to the Participants that at the date of this Agreement, it has notified the Participants in writing of any Occasions of Tax Non-Compliance and any litigation in connection with any Occasions of Tax Non-Compliance that it or, so far as it is aware having made reasonable enquiries, any of the Shareholders (other than WGC) is involved in.

26.2 If at any time an Occasion of Tax Non-Compliance occurs in relation to it or any Shareholder other than WGC (a "**Non-Compliant Shareholder**"), WEPCo shall:

26.2.1 notify the Participants in writing of such fact within five (5) Business Days of it becoming aware of that occurrence; and

26.2.2 provide to the Participants:

- (a) promptly, and in any event within twenty (20) Business Days of its becoming aware of that occurrence, details of the steps which it, or as the case may be, the Non-Compliant Shareholder is taking to address the Occasion of Tax Non-Compliance and to prevent the same from recurring, together with any mitigating factors that it considers relevant (together "**Proposed Mitigating Measures**"); and

- (b) such other information in relation to the Occasion of Tax Non-Compliance as the Participants may reasonably require within five (5) Business Days of receipt of notice from the Participants to do so.

26.3 The Participants will notify WEPCo in writing if the Proposed Mitigating Measures are acceptable to it, in its reasonable opinion, within fifteen (15) Business Days of receipt of all information required to be provided in accordance with Clause 26.2.

26.4 Where the Participants have notified WEPCo that the Proposed Mitigating Measures are not acceptable, the Participants may, in that notice, request that WEPCo provides details of further measures it, or as the case may be, the Non-Compliant Shareholder, would take to prevent the same from recurring, together with any further mitigating factors that it considers relevant. Within twenty (20) Business Days of receipt of a notice from the Participants requesting further measures, WEPCo will either provide details of the further measures it, or as the case may be, the Non-Compliant Shareholder, is willing to take or notify the Participants that it is not willing to take further measures. The Participants will consider any further measures proposed by WEPCo and notify WEPCo within fifteen (15) Business Days if those further measures, taken together with the Proposed Mitigating Measures, are acceptable to the Participants, acting reasonably.

26.5 If:

26.5.1 the warranty by WEPCo contained in Clause 26.1 is untrue and Proposed Mitigating Measures are not agreed in accordance with Clauses 26.3 to 26.4 (inclusive); and/or

26.5.2 WEPCo commits a material breach of its obligation to notify the Participants of any Occasion of Tax Non-Compliance and / or WEPCo fails to provide details of Proposed Mitigating Measures each as required by Clause 26.2; and/or

26.5.3 the Participants otherwise becomes aware that an Occasion of Tax Non-Compliance has occurred in relation to WEPCo or a Shareholder (other than WCo) and WEPCo fails to provide details of Proposed Mitigating Measures within twenty (20) Business Days of its being required by the Participants to do so; and/or

26.5.4 the Participants notify WEPCo under Clause 26.4 that the Proposed Mitigating Measures are not acceptable and, if WEPCo is requested to provide details of further measures pursuant to Clause 26.4 the further measures (if any) are not acceptable to the Participants, in its reasonable opinion and the Participants notify WEPCo to that effect; and / or

26.5.5 in any such case WEPCo fails to implement, or procure the implementation by a Non-Compliant Shareholder of, any Proposed Mitigating Measures agreed to by the Participants in any material respect (including as to timetable),

then the Participants shall be entitled to give to WEPCo:

(a) where the Occasion of Tax Non-Compliance has occurred in relation to WEPCo, a notice under Clause 23.1.12; and

(b) where the Occasion of Tax Non-Compliance has occurred in relation to a Shareholder, a notice under Clause 26.6 (*Shareholder Tax Non-Compliance Notice*).

26.6 Subject to Clause 26.7, where the Occasion of Tax Non-Compliance applies to a Non-Compliant Shareholder, the Participants may by written notice (a "**Shareholder Tax Non-compliance Notice**") require that the Non-Compliant Shareholder transfers all its shares and Shareholder loan notes in WEPCo to a person who is not an Unsuitable Person within one hundred and eighty (180) days commencing on the date the Shareholder Tax Non-compliance Notice is served. If the Non-Compliant Shareholder does not effect such transfer of shares and Shareholder loan notes in WEPCo to a person who is not an Unsuitable Person within such one hundred and eighty (180)

day period (or such longer period as may be agreed by the Participants in its absolute discretion) then the Participants will be entitled to give a notice to WEPCo under Clause 23.1.12.

- 26.7 If WEPCo fails to implement, or procure the implementation by a Non-Compliant Shareholder of, any Proposed Mitigating Measures agreed to by the Participants in any material respect (including as to timetable) following an Occasion of Tax Non-Compliance which applies to a Non-Compliant Shareholder, the Participants may by written notice (a "**Shareholder Tax Mitigation Measures Non-Compliance Notice**") require that the Non-Compliant Shareholder transfers all its shares and Shareholder loan notes in WEPCo to a person who is not an Unsuitable Person within ninety (90) days commencing on the date the Shareholder Tax Mitigation Measures Non-Compliance Notice is served. If the Non-Compliant Shareholder does not effect such transfer of shares and Shareholder loan notes to a person who is not an Unsuitable Person within such ninety (90) day period (or such longer period as may be agreed by the Participants in its absolute discretion) then the Participants will be entitled to give a notice to WEPCo under Clause 23.1.12.

27. **AGENCY AND PARTICIPANTS' STATUTORY AUTHORITY**

Nothing in this Agreement shall be construed as a fetter or restriction on the exercise of a Participant's planning or highways function nor, without prejudice to WEPCo's rights and remedies under this Agreement, on the exercise of any other statutory function by or on behalf of any Participant.

28. **ASSIGNMENT AND SUB-CONTRACTING**

Assignment and sub-contracting

- 28.1 This Agreement and any other agreements to which WEPCo and at least one of the Participants are a party shall be binding on, and shall enure to the benefit of, WEPCo and the relevant Participants and their respective successors and permitted transferees and assignees. In the case of the Participants, their successors shall include any person to whom the Welsh Ministers or other Relevant Authority, in exercising their statutory powers to transfer property, rights and liabilities of any Participant upon such Participant ceasing to exist, transfers the property, rights and obligations of the Participants under this Agreement and any other agreements to which WEPCo and that Participant are a party.
- 28.2 Subject to Clause 28.3, WEPCo shall not, without the prior written consent of the Participants or, in the case of specific subcontracts for Strategic Support Partnering Services to be provided to individual Participants or Project Development Partnering Services in respect of identified New Projects, the written consent of the relevant Participant (such consent in the case of any proposed sub-contracting not to be unreasonably delayed and may only be withheld in circumstances where the obligations to be subcontracted are material obligations and the proposed sub-contractor is an Unsuitable Person), assign, transfer, subcontract or otherwise dispose of any interest in this Agreement and any other contract entered into by WEPCo for the purposes of performing its obligations under this Agreement.
- 28.3 The provisions of Clause 28.2 do not apply to the grant or exercise of any security rights, in a form approved by the Participants prior to its grant (such approval not to be unreasonably withheld or delayed), for any loan made to WEPCo under any Funding Agreement. The Participants may make any approval conditional upon the execution by such assignee of a Funders' Direct Agreement in relation to the exercise of its rights.
- 28.4 A Participant shall not assign or otherwise dispose of the benefit of the whole or part of this Agreement to any person, save:
- 28.4.1 to the Welsh Ministers or a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975, or any other person or body replacing any of the foregoing (or to whom the Welsh Ministers or the Government exercising their statutory rights would be entitled to transfer such benefits); or

- 28.4.2 to any department, office, instrumentality or agency of the Welsh Ministers or Government or any Local Authority which (in any such case) has the legal capacity and sufficient financial resources to perform the obligations of the Participant hereunder and any other agreement (including a Project Agreement) to which such assignment, transfer or disposal relates;
- 28.4.3 in the case of any Further Education Corporation or Designated Institution (as defined in the Further and Higher Education Act 1992) any other Further Education Corporation or Designated Institution who has the legal capacity and sufficient financial resources to perform the obligations of the Participant hereunder and/or any other agreement (including a Project Agreement) to which such assignment, transfer or disposal relates and/or whose obligations are validly and enforceably guaranteed by the Welsh Ministers or Government; and/or
- 28.4.4 to any person who has the legal capacity and sufficient financial resources to perform the obligations of the Participant hereunder and whose obligations are validly and enforceably guaranteed by the Participant, a Local Authority, or the Welsh Ministers or Government or by any department, office, instrumentality or agency of the Government,

PROVIDED THAT nothing in this sub-clause shall restrict the rights of the Welsh Ministers or the Government to effect a statutory transfer. For the purposes of this Clause 28.4, an obligation shall be deemed to be validly and enforceably guaranteed by a Participant, Local Authority, the Government or any department, office, instrumentality or agency of the Welsh Ministers or Government (in any such case) if that Participant, Local Authority, the Government or any department or office, instrumentality or agency of the Government (as the case may be) has delivered a legal opinion stating that the guarantee is fully valid and enforceable in accordance with its terms subject to customary qualifications and assumptions from a reputable firm of solicitors approved in advance by WEPCo (such approval not to be unreasonably withheld or delayed) having appropriate experience of the matters opined upon.

28.5 Where WEPCo enters into a contract with a Partnering Subcontractor for the purposes of performing the Partnering Services under this Agreement, WEPCo shall cause a term to be included in such contract:

28.5.1 which requires payment to be made to the Partnering Subcontractor within a specified period not exceeding thirty (30) days from receipt of a valid application for payment as defined by the contract requirements and provides that, for the purpose of payment alone, where the relevant Participant responsible for payment for the Partnering Services has made payment to WEPCo and the Partnering Subcontractor's application for payment includes Partnering Services in relation to which payment has been made by the relevant Participant then, to the extent that it relates to such Partnering Services, the invoice shall be treated as valid and payment shall be made to the sub-contractor without deduction (but without prejudice to any right to deduct or set off validly arising under the terms of the contract with the Partnering Subcontractor); and

28.5.2 which notifies the Partnering Subcontractor that the contract forms part of a larger contract for the benefit of the relevant Participant and that should the Partnering Subcontractor have any difficulty in securing the timely payment of an invoice that matter may be referred by the Partnering Subcontractor to [*insert the contact name and address of relevant Participant procuring the Partnering Services*]; and

28.5.3 in the same terms as this Clause 28.5 (including for the avoidance of doubt this Clause 28.5.3) subject only to modification to refer to the correct designation of the equivalent party as the supplier and recipient of the services, as the case may be.

29. **PERFORMANCE OF SUBCONTRACTORS**

29.1 WEPCo will be responsible for ensuring the due performance by the Supply Chain Members with whom it has contracted (if any) and its subcontractors of any tier of their obligations under the relevant Supply Chain Agreements and subcontracts (as the case may be).

30. **CONFIDENTIALITY**

Confidential Information

- 30.1 The Parties agree that the provisions of this Agreement shall, subject to Clause 30.2 below, not be treated as Confidential Information and may be disclosed without restriction.
- 30.2 Clause 30.1 above shall not apply to provisions of this Agreement designated as Commercially Sensitive Information and listed in Section 1 (*Commercially Sensitive Information*) of Schedule 19 (*Confidential Information*) which shall, subject to Clause 30.4, be kept confidential for the periods specified in that Section.
- 30.3 The Parties shall keep confidential all Confidential Information received by one Party from another Party relating to or in connection with this Agreement and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

Permitted Disclosure

- 30.4 Clauses 30.1 and 30.3 shall not apply to:
- 30.4.1 any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under this Agreement for the performance of those obligations;
- 30.4.2 any matter which a party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause;
- 30.4.3 any disclosure to enable a determination to be made in accordance with Schedule 22(*Dispute Resolution Procedure*) or in connection with a dispute between WEPCo and any of its subcontractors;
- 30.4.4 any disclosure which is required pursuant to any Law or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or, if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- 30.4.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 30.4.6 any provision of information to the Parties' own professional advisers or insurance advisers or insurers or to any Funders or any Funders' professional advisers or insurance advisers or, where it is proposed that a persons should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to WEPCo to enable it to carry out its obligations under this Agreement, or may wish to acquire shares in WEPCo in accordance with provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- 30.4.7 any disclosure by a Participant of information as may be reasonably required for the purpose of conducting a due diligence exercise, to any person in connection with the operation of Schedule 6 (*New Project Pricing Report*);
- 30.4.8 any registration or recording of the Consents and property registration required;
- 30.4.9 any disclosure of information by a Participant to the Welsh Government or any department, office or agency of the Welsh Government or their respective advisers or to any person engaged in providing services to a Participant for any purpose related to or ancillary to this Agreement;

30.4.10 any disclosure for the purpose of:

- (a) the examination and certification of a Participant's or WEPCo's accounts;
- (b) any examination pursuant to section 6(1) of the National Audit Act 1983 or study pursuant to section 145A Government of Wales Act 1998 of the economy, efficiency and effectiveness with which a Participant has used its resources;
- (c) complying with a proper request from a Party's insurance adviser, or insurer on placing or renewing any insurance;
- (d) (without prejudice to the generality of Clause 30.4.4 above) compliance with the FOIA and/or the Environmental Information Regulations; or
- (e) [compliance with the Local Government Wales Measure 2009]; or

30.4.11 disclosure pursuant to Clause 30.12 (*Departmental Disclosure*),

PROVIDED THAT to avoid doubt, neither Clause 30.4.10(d) nor Clause 30.4.4 above shall permit disclosure of Confidential Information otherwise prohibited by Clause 30.3 (*Confidential Information*) where that information is exempt from disclosure under section 41 of the FOIA.

30.5 Where disclosure is permitted under Clause 30.4 (*Permitted Disclosure*), other than under Clauses 30.4.2, 30.4.4, 30.4.5, 30.4.8 and 30.10, the party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.

30.6 WEPCo shall not make use of this Agreement or any information issued or provided by or on behalf of a Participant in connection with this Agreement otherwise than for the purpose of this Agreement, except with the written consent of the relevant Participant.

30.7 Where WEPCo, in carrying out its obligations under this Agreement, is provided with information relating to the users of any Facility, WEPCo shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless WEPCo has sought the prior written consent of that person and had obtained the prior written consent of the relevant Participant.

30.8 On or before the Initial Expiry Date or, where applicable, the Extended Expiry Date, WEPCo shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any user of any Facility including any documents in the possession, custody or control of a Supply Chain Member, are delivered up to the relevant Participant.

30.9 The Parties acknowledge that both the National Audit Office and Wales Audit Office have the right to publish details of this Agreement (including Commercially Sensitive Information) in their relevant reports.

30.10 The provisions of this Clause 30 (*Confidentiality*) are without prejudice to the application of the Official Secrets Act 1911 to 1989.

Announcements

30.11 Unless otherwise required by any Law or any regulatory or governmental authority (but only to that extent), no Party shall make or permit or procure to be made any public announcement or disclosure (whether for publication in the press, the radio, television screen or any other medium) of any Confidential Information or in the case of WEPCo of its (or of any WEPCo Party's) interest in any Project or, in any such case, any matters relating thereto, without the prior written consent of the other Parties (which shall not be unreasonably withheld or delayed).

Departmental Disclosure

30.12 Each of the Participants shall be free to disclose the terms of this Agreement to the Welsh Government, the Auditor General for Wales, the Wales Audit Office and Relevant Government Departments.

31. FREEDOM OF INFORMATION

31.1 WEPCo acknowledges that a Participant is subject to the requirements of the FOIA and the Environmental Information Regulations and shall assist and cooperate with a Participant (at WEPCo's expense) to enable the Participant to comply with any Information disclosure requirements.

31.2 In the event that a Request for Information is received by WEPCo, WEPCo will transfer the Request for Information to the Participant as soon as practicable after receipt and in any event within two (2) Business Days of receiving the request.

31.3 In the event that a Request for Information is received by a Participant in relation to Information that WEPCo is holding on its behalf and which the Participant does not hold itself the Participant shall refer to WEPCo such Request for Information as soon as practicable and in any event within five (5) Business Days of receiving such Request for Information and WEPCo shall:

31.3.1 provide the Participant with a copy of all Information in its possession or power in the form that the Participant requires within five (5) Business Days (or such other period as the Participant may specify) of the Participant requesting that Information; and

31.3.2 provide all necessary assistance as reasonably requested by the Participant to enable the Participant to respond to the Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.

31.4 Following notification under Clause 31.3, and up until such time as WEPCo has provided the Participant with all the Information specified in Clause 31.3 WEPCo may make representations to the Participant as to whether or not or on what basis Information requested should be disclosed, provided always that the Participant shall be responsible for determining at its absolute discretion:

31.4.1 whether Information is exempt from disclosure in accordance with the provisions of the FOIA or the Environmental Information Regulations;

31.4.2 whether Information is to be disclosed in response to a Request for Information, and

in no event shall WEPCo respond directly to a Request for Information unless expressly authorised to do so by the Participant.

31.5 WEPCo shall ensure that all Information produced in the course of this Agreement or relating to this Agreement is retained for disclosure for as long as is reasonably necessary for the purposes of this Agreement and shall permit the Participant to inspect such records as requested from time to time.

31.6 WEPCo acknowledges that any lists or schedules provided by it outlining Commercially Sensitive Information are of indicative value only and that the Participant may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of the FOIA and the Environmental Information Regulations.

31.7 WEPCo acknowledges that (notwithstanding the provisions of Clause 30 (*Confidentiality*)) a Participant may, acting in accordance with the Secretary of State's Code of Practice on the Discharge of Functions of Public Authorities under Part 1 of the Freedom of Information Act 2000 (the "**FOIA Code**") and/or having full regard to any guidance or briefings issued by the Information Commissioner or the Welsh Government, be obliged under the FOIA, or the Environmental

Information Regulations to disclose Information concerning WEPCo, the Partnering Services or any Project:

31.7.1 in certain circumstances without consulting with WEPCo; or

31.7.2 following consultation with WEPCo and having taken their views into account,

provided always that where Clause 31.7.1 above applies a Participant shall, in accordance with the recommendations of the FOIA Code, draw this to the attention of WEPCo prior to any disclosure.

31.8 In the event that WEPCo is or becomes subject to Environmental Information Regulations or FOIA it shall comply with its obligations under Environmental Information Regulations and FOIA. It will use reasonable endeavours to consult the Participant before disclosing Information about them.

31.9 WEPCo shall ensure that all Information held on behalf of a Participant is retained for disclosure for at least the number of years (from the date it is acquired) specified in the relevant Participant Policy relating to records retention and shall permit a Participant to inspect such Information as requested from time to time.

32. **CHANGE IN PARTIES TO THE PARTNERING AGREEMENT**

32.1 [Subject to complying with applicable Law, the following public bodies may become Participants under this Agreement where the Participants and WEPCo jointly so agree in writing: [■]⁵

32.2 The Participants shall procure that any new Participant shall execute a deed of adherence in substantially the form of the draft attached at Schedule 10 (*Deed of Adherence*.)]

33. **DISPUTE RESOLUTION**

Except where expressly provided otherwise in this Agreement, any dispute between the Parties or any of them arising out of or in connection with this Agreement shall be resolved in accordance with the procedure set out in Schedule 22 (*Dispute Resolution Procedure*).

34. **ORDER OF PRECEDENCE OF DOCUMENTS**

34.1 Inconsistencies between any contract documents in relation to which two or more Parties are party to two or more contract documents shall be resolved in the following order of precedence:

34.1.1 this Agreement; followed by

34.1.2 Project Agreements; followed by

34.1.3 Shareholders Agreements; followed by

34.1.4 all other contract documents to which the relevant Parties are a party.

35. **NO RECOURSE TO PUBLIC FUNDS**

35.1 WEPCo shall at all times perform its obligations under this Agreement at its own risk and procure that the Project Service Providers perform their obligations under any Project Agreement at their own risk and in each case without recourse to Government or other public funds or guarantees save:

35.1.1 as otherwise expressly provided for elsewhere in this Agreement or the Shareholders Agreements; or

35.1.2 with the prior written consent of any Affected Participant;

⁵ Insert List of any Participants named in contract notice (by reference to the Descriptive Document) who do not enter into the SPA at the Commencement Date.

35.1.3 in relation to any New Project, in terms of the approvals obtained pursuant to Schedule 5 (*Approval Process for New Projects*) (for Qualifying Projects) or as otherwise agreed between WEPCo and the relevant Project Agreement Counterparty (for all other Projects).

35.2 WEPCo confirms that it has not applied, and, save in implementation of the SDP, has no intention (as at the date of execution of this Agreement) of applying for any Government or European Union grants or funding or any other public funds or guarantees for the purpose of performing its obligations (or those of its subsidiaries or other Project Service Providers) under this Agreement or any Project Agreement. If WEPCo (or any of its subsidiaries or any other Project Service Providers) is or becomes entitled to apply for any such grants or funding in relation to the carrying out of any of the Services it shall obtain consent from the relevant Participant(s) before submitting the relevant application. The consent of the relevant Participant(s) to WEPCo's (or the relevant subsidiaries' or other Project Service Providers') application may be given on conditions, including a condition that, should WEPCo (or the relevant subsidiaries or other Project Service Provider) receive any such grant or funding, the payments made the relevant Participant(s) to WEPCo (or the relevant subsidiaries or other Project Service Provider, as the case may be) in accordance with this Agreement and/or any Project Agreement will be reduced by the amount of the grant or funding or such lesser amount as the relevant Participant(s) may determine.

36. **RECORDS AND OPEN BOOK ACCOUNTING**

Maintenance and provision of records

36.1 WEPCo shall, and shall procure that each WEPCo Party and Project Service Provider shall, maintain a true and complete set of records of personnel and all activities relating to the performance of this Agreement or any Project Agreement and all transactions related thereto and a complete up to date and orderly documentary record of all transactions entered into by WEPCo, such WEPCo Party or Project Service Provider, as the case may be for the purposes of Supply Chain Agreements including copies of all Supply Chain Agreements and all such other information reasonably required by any of the Participants and/or specified in any Agreement.

Audit and review

36.2 WEPCo shall ensure that:

36.2.1 all documents kept pursuant to Clause 36.1 shall be kept in good order and shall be available at all reasonable times for inspection by the Participants, the Participants' Representatives and any third party identified by the Participants, including any Governmental audit organisation, and WEPCo shall make available (or, as the case may be, procure the availability of) such items of clarification or substantiation as may be required by any of the Participants in relation thereto including such oral or written explanations as may be considered necessary by any of the Participants (acting reasonably); and

36.2.2 WEPCo and any WEPCo Party and Project Service Provider shall provide any Participant with a copy of any or all of the documents referred to in Clause 36.1 free of charge within five (5) Business Days of the Participant's request for the same.

Duration of Retention of Records

36.3 WEPCo shall, and shall procure that each WEPCo Party and Project Service Provider shall, retain all documents referred to in Clause 36.1 (and any other records WEPCo or such WEPCo Party or Project Service Provider, as the case may be, is required to keep under any Project Agreement or Supply Chain Agreement) for a period of not less than six (6) years from that document's creation or coming into that party's possession, whichever is the later. Each of the Participants shall have the right to audit any and all such records at any reasonable time on reasonable written notice during the term of this Agreement and during the six (6) year period following the expiry or termination of this Agreement, whichever is the earlier.

Support to the Participants

- 36.4 WEPCo shall maintain such contemporaneous records and other documentation as shall be required by any of the Participants to support the Participants in any criminal or civil proceedings by or against the Participants. WEPCo shall ensure that all such records and other documentation are complete and accurate and shall provide all reasonable assistance as may be required by any of the Participants to support any such criminal or civil proceedings. The provisions of this Clause 36.4 shall not apply to proceedings initiated by or against WEPCo under Schedule 22 (*Dispute Resolution Procedure*) or Clause 51.2.
- 36.5 For the purposes of:
- 36.5.1 the audit, examination and certification of the Participants' accounts;
- 36.5.2 any examination or study pursuant to the Public Audit (Wales) Act 2004 of the economy, efficiency and effectiveness with which the Participant has used its resources; or
- 36.5.3 [an assessment under the Local Government Wales Measure 2009],
- the Auditor General for Wales, the Public Accounts Committee of Wales and the Wales Audit Office may examine such documents as they may reasonably require which are owned, held or otherwise within the control of WEPCo (and WEPCo shall procure that any person acting on its behalf who has such documents and/or other information shall also provide access) and may require WEPCo to produce such oral or written explanation as he considers necessary.
- 36.6 WEPCo shall provide and shall procure that the Supply Chain Members shall provide such information as any of the Participants may reasonably require from time to time to enable them to meet their obligations to provide reports and returns pursuant to regulations, directions or guidance applicable to Participants (in each case as amended, replaced or consolidated from time to time) or as required by external agencies including, without limitation, reports and returns regarding the physical condition of buildings occupied by the Participants, health and safety, under the Regulatory Reform (Fire Safety) Order 2005, relating to environmental health.

37. PERSONAL DATA

- 37.1 In this Clause 37, the terms "**Controller**", "**Data Subject**", "**Personal Data Breach**", "**Process**", "**Processor**" and "**Special Categories of Personal Data**" shall have the meanings given to them by the Data Protection Laws. "**Data Loss Event**" shall mean any event that results, or may result, in unauthorised access to Personal Data held under this Agreement, and/or actual or potential loss and/or destruction of Personal Data in breach of this Agreement, including any Personal Data Breach.
- 37.2 WEPCo undertakes to each of the Participants that it shall comply at all times with its obligations as a separate Controller under the Data Protection Laws. In particular (but without prejudice to the generality of the foregoing) WEPCo:
- 37.2.1 warrants that it has, or will have at all material times, (and shall use best endeavours to procure that all Supply Chain Members and their agents and sub-contractors of any tier have or will have at all material times) Protective Measures in place to protect against unauthorised or unlawful Processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data held or Processed by it and that it has taken, or will take at all material times, all reasonable steps to ensure the reliability of any of its staff which will have access to Personal Data Processed as part of the WEPCo Operations;
- 37.2.2 undertakes that it will only obtain, hold, process, use, store and disclose Personal Data as is necessary (and only for so long as is necessary) to perform its obligations under and in connection with this Agreement and that such data will be held, processed, used, stored and disclosed in accordance with the Data Protection Laws and any other applicable Law;

- 37.2.3 notify the relevant Participant(s) without undue delay upon becoming aware of any Data Loss Event in respect of the Personal Data;
- 37.2.4 co-operate with the relevant Participant(s), to the extent reasonably requested, in relation to any notifications to the Information Commissioner or to Data Subjects which any Party is required to make following a Personal Data Breach;
- 37.2.5 co-operate with the relevant Participant(s), to the extent reasonably requested in relation to:
 - (a) a request to a Participant from a Data Subject to exercise any right under the Data Protection Laws;
 - (b) any other communication from a Data Subject to a Participant concerning the Processing of their Personal Data; and
 - (c) any communication from the Information Commissioner concerning the Processing of Personal Data, or compliance with the Data Protection Laws.
- 37.2.6 undertakes that it will allow each of the Participants access to any relevant premises on reasonable written notice to inspect its procedures described at Clause 36.2.1 above; and
- 37.2.7 pay an annual fee to the Information Commissioner in accordance with the Data Protection (Charges and Information) Regulations 2018 (unless exempt from the requirement to do so); and
- 37.2.8 undertakes that it will indemnify and keep indemnified each of the Participants against all losses, claims, compensation awards, damages, liabilities, costs and expense (including without limitation, reasonable legal investigatory and consultancy fees and expenses) incurred by them which arises from:
 - (a) any breach of this Clause 37 (*Personal Data*) by WEPCo, any WEPCo Party or the Supply Chain Members or their agents and subcontractors of any tier; and/or
 - (b) any act or omission of WEPCo, any WEPCo Party or the Supply Chain Members or their agents and subcontractors of any tier which results in a breach by a Participant of Clause 37.

38. LIABILITY OF THE PARTICIPANTS

Subject to paragraph 2.3 of Section 2 (*Participant Event of Default Compensation Sum*) of Schedule 14 (*Compensation on Participant Event of Default and Termination*), the liability of each of the Participants under this Agreement is several and no act or omission (including any default or waiver) of any Participant shall bind any other Participant save as expressly set out herein.

39. PROHIBITED ACTIVITIES

WEPCo shall not (and shall procure that none of its Associates shall) during the period when this Agreement is in force carry out any activities which in the reasonable opinion of any of the Participants are incompatible with the provision of Education Sector Services and/or Community Services, as appropriate.

40. **NOTICES**

40.1 All notices under this Agreement shall be in writing and all certificates, notices or written instructions to be given under the terms of this Agreement shall be served by sending the same by first class recorded post, email or by hand, leaving the same at:

40.1.1 If to WEPCo; c/o [*Insert address*]

40.1.2 If to the Participants: [*Insert respective addresses*]

40.2 Any Party may change its nominated address or email address by prior written notice to the other Parties.

40.3 Notices given:

40.3.1 by first class recorded post shall be effective upon the earlier of (i) actual receipt, and (ii) three (3) Business Days after mailing, provided that a notice or other communication is received on a non-Business Day or after 5pm in the place of receipt shall be deemed to be received at 9am on the next following Business Day in such place;

40.3.2 by hand shall be effective upon delivery, provided that a notice or other communication is received on a non-Business Day or after 5pm in the place of receipt shall be deemed to be received at 9am on the next following Business Day in such place; and

40.3.3 by e-mail shall be deemed to have been received:

(a) at the time the e-mail enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the e-mail address specified in Clause 40.1 or notified from time to time under Clause 40.2) if on a Business Day between the hours of 9am and 4pm,

(b) by 11am on the next following Business Day, if the time the email enters the intended recipient's relevant Information System after 4pm, on a Business Day but before 9am on that next following Business Day,

and provided that no error message indicating failure to deliver has been received by the sender and provided further that within 24 hours of transmission a hard copy of the e-mail signed by or on behalf of the person giving it is sent by post or delivered by hand to the intended recipient in accordance with the provisions of Clause 40.1.

41. **AMENDMENTS**

This Agreement may not be varied except by an agreement in writing signed by duly authorised representatives of all the Parties.

42. **WAIVER**

42.1 Any relaxation, forbearance, indulgence or delay (together "**indulgence**") of any Party in exercising any right shall not be construed as a waiver of the right and shall not affect the ability of that Party subsequently to exercise that right or to pursue any remedy, nor shall any indulgence constitute a waiver of any other right (whether against that Party or any other person).

42.2 The Parties agree that no waiver shall occur or be deemed to have occurred unless or until clear and unequivocal express waiver of a clearly identified default is contained in a written notice by the waiving Party to the defaulting Party expressly for the purpose of effecting such waiver.

42.3 No waiver under Clause 42.2 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and then only to the extent) expressly stated in that waiver.

43. **NO AGENCY**

43.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Participants (or any of them) and WEPCo.

43.2 Save as expressly provided otherwise in this Agreement, WEPCo shall not be, and shall not be deemed to be, an agent of the Participants or any of them and WEPCo shall not hold itself out as having authority or power to bind the Participants or any of them in any way.

43.3 Without limitation to its actual knowledge, WEPCo shall for all purposes of this Agreement, be deemed to have such knowledge in respect of the Project as is held (or ought reasonably to be held) by WEPCo or any WEPCo Party.

44. **ENTIRE AGREEMENT**

44.1 Except where expressly provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

44.2 Each of the Parties acknowledge that:

44.2.1 it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a party to this Agreement or not) except those expressly repeated or referred to in this Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Agreement; and

44.2.2 Clauses 15.1 and this Clause 44.2 shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Agreement.

45. **SEVERABILITY**

If any provision of this Agreement shall be held to be invalid, unenforceable or unlawful to any extent by the courts of any jurisdiction to which it is subject, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability or legality of the remaining provisions of this Agreement or any other documents referred to in it.

46. **NO DOUBLE RECOVERY**

Notwithstanding any other provisions of this Agreement, no Party shall be entitled to recover or make a claim under this Agreement in respect of any loss or damage that it has incurred to the extent that such Party or, in the case of WEPCo, a Project Service Provider, has previously recovered in respect of such loss pursuant to this Agreement or otherwise.

47. **COSTS AND EXPENSES**

Each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

48. **THIRD PARTY RIGHTS**

It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provision contained in this Agreement save to the extent expressly provided in this Agreement and, to avoid doubt, without prejudice to the terms of the Funders' Direct Agreement or the rights of any permitted successor to the rights of WEPCo or of any permitted assignee.

49. **MITIGATION**

Each of the Participants and WEPCo shall at all times take all reasonable steps to minimise and mitigate any loss and/or costs and/or expenses for which the relevant Party is entitled to bring a claim against any other Party pursuant to this Agreement and to take all reasonable steps to minimise and mitigate any effects or circumstances and/or events adversely affecting the performance of their obligations under this Agreement which would otherwise entitle that Party to relief and/or to claim compensation hereunder.

50. **FURTHER ASSURANCE**

Each Party shall do all things and execute all further documents necessary to give full effect to this Agreement.

51. **GOVERNING LAW AND JURISDICTION**

51.1 This Agreement shall be considered as a contract made in England and Wales and shall be subject to the laws of England and Wales.

51.2 Subject to the provisions of the Dispute Resolution Procedure, both parties agree that the courts of England and Wales shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of those courts.

52. **GENERAL ASSISTANCE AND CO-OPERATION AND PARTICIPANT UNDERTAKINGS**

52.1 Each Party undertakes to co-operate in good faith with the others to facilitate the proper performance of this Agreement and in particular will:

52.1.1 use all reasonable endeavours to avoid unnecessary disputes and claims against the other Parties;

52.1.2 not interfere with the rights of any other Party and its servants, agents, representatives, contractors or sub-contractors (of any tier) on its behalf in performing its obligations under this Agreement nor in any other way hinder or prevent such other Party or its servants, agents, representatives, or sub-contractors (of any tier) on its behalf from performing those obligations; and

52.1.3 (subject to Clause 52.2) assist the other Parties (and their servants, agents, representatives, or sub-contractors (of any tier)) in performing those obligations so far as is reasonably practicable.

52.2 Nothing in Clause 52.1 shall:

52.2.1 interfere with the right of each of the Parties to arrange its affairs in whatever manner it considers fit in order to perform its obligations under this Agreement in the manner in which it considers to be the most effective and efficient;

52.2.2 oblige any Party to incur any additional cost or expense or suffer any loss of profit in excess of that required by its proper performance of its obligations under this Agreement; or

52.2.3 relieve any Party from any obligation under any indemnity contained in this Agreement or from any obligation to pay any debt due or payable under this Agreement.

52.3 Without prejudice to WEPCo's obligation to provide information pursuant to other terms of this Agreement a party (the "**Providing Party**") shall (provided that fulfilling its obligations under this Clause 52.3 does not require it to commit expenditure or time resources of its employees over a level which it considers to be material) supply to any other Party (the "**Requesting Party**") such information as may from time to time be reasonably required by the Requesting Party in relation to the performance of the Requesting Party's obligations under this Agreement and which is within the Providing Party's care and control subject to compliance by the Requesting Party with the provisions of Clause 30 (*Confidentiality*) and save to the extent that the Providing Party is restricted by Law or by any binding confidentiality obligation or undertaking from supplying such information.

52.4 Each of the Participants severally undertakes to WEPCo that it shall:

52.4.1 subject to the provisions of this Agreement, comply with all Laws, Local Government Requirements and Consents applicable to it which relate to the WEPCo Operations;

52.4.2 not wilfully impede WEPCo in the performance of its obligations under this Agreement (having regard always to the interactive nature of the activities of the Participants and of WEPCo and to the Participants' use of the Facilities and Sites to carry out any operations or activities carried out by any of the Participants on or at any Site for the purposes contemplated by this Agreement or any of the Participant's statutory functions);

52.4.3 inform WEPCo as soon as reasonably practicable if at any time it becomes unable to meet any of its financial obligations and in such case inform, and keep WEPCo informed, of any course of action to remedy the situation recommended or required by the [Welsh] Government or other competent authority; and

52.4.4 to the extent permitted by Law, supply to WEPCo within sixty (60) Business Days of their publication, a copy of the Participants' Annual Report and Financial Statement,

PROVIDED THAT, to avoid doubt, nothing in this sub-clause shall in any way fetter the discretion of any of the Participants in fulfilling their statutory functions.

IN WITNESS WHEREOF the parties have executed this Agreement as a Deed the day and year first above written.

SCHEDULES

SCHEDULE 1 - DEFINITIONS, INTERPRETATION AND CONSTRUCTION

1. DEFINITIONS

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

"21st Century Schools and Colleges (Band B) Programme" means phase 2 of the 21st Century Schools and Colleges strategic investment programme, led by Welsh Government in collaboration with the Welsh Local Government Association, local authorities, colleges and dioceses;

"21st Century Schools and Colleges (Band B) MIM Programme" means projects comprised within the 21st Century Schools and Colleges (Band B) Programme, where such projects have been expressly approved for funding through MIM, as identified in the draft programme attached at Part 1 of Schedule 8 (*Draft 21st Century Schools and Colleges (Band B) MIM Programme*) and as may be adjusted from time to time to reflect revised funding allocations under the 21st Century Schools and Colleges (Band B) Programme;

"ACBR Enhancements" has the meaning given in the Template Project Agreement;

"Additional Amount" has the meaning given to it in Clause 16.5;

["Additional Benefits" means the community benefits listed in Table 3 of the Appendix to Section 3 of Schedule 3 (*Key Performance Indicators*);]

"Additional Community Benefit Project Co Proposals" has the meaning given in the Template Project Agreement;

"Administering Authority" means the administering authority for each relevant LGPS Fund and the Fund which they administer;

"Admission Body" means a transferee admission body for the purposes of regulations 5 of the LGPS Regulations;

"Affect" in relation to a Participant, a decision of the SPB affects that Participant if:

- (a) it requires expenditure to be incurred by that Participant;
- (b) it requires that Participant to incur an actual or contingent liability;
- (c) it has an adverse impact upon the manner in which that Participant discharges a statutory function,

and '**Affected Participant**' shall be construed accordingly;

"Affected Authority" means a Participant in relation to whose land and/or facilities Planning Permission and/or a Planning Agreement and/or an Infrastructure Agreement is required to enable Project Services to proceed on or at such land and/or facilities;

"Affordable"	means within the capital funding envelope and/or revenue resource parameters, as appropriate determined by the Relevant Participant(s) as available for a proposed New Project;
"Affordability Cap"	has the meaning given to it in paragraph 3.1 of Schedule 5 (<i>Approval Process for New Projects</i>);
"Agreement"	means this agreement;
"Annual Review"	has the meaning given to it in Clause 14.18;
"Approval Criteria"	has the meaning given to it in paragraph 5.5 of Schedule 5 (<i>Approval Process for New Projects</i>);
"Approved"	means any project or group of potential projects referred to in a Strategic Outline Programme that has, in either case, fulfilled the Strategic Outline Case Requirements and has been requested by a Participant pursuant to Clause 9.3.1, after the Initial Period;
"Approved Project"	means a New Project which is a Qualifying Project and which has Stage 2 Approval;
"Approved Purposes"	means such purposes as any Participant may consider appropriate from time to time, including: <ul style="list-style-type: none"> (a) each of the Participants carrying out their duties under this Agreement and/or any statutory functions which each of the Participants may have; and (b) following termination of this Agreement and/or the exercise by the Participants of their rights under Clause 23.7, the carrying out of operations the same as, or similar to, the WEPCo Operations, the design and/or construction of the Facilities and/or the operation, maintenance or improvement of the Facilities;
"Asbestos"	has the meaning given to it in the Control of Asbestos Regulations 2012;
"Asbestos Management Survey"	means a Management Survey as described in Guidance Note HSG264 (<i>Asbestos: The Survey Guide</i>) published by the Health & Safety Executive;
"Asbestos Provisional Sum and Programme"	has the meaning given to it in paragraph 4.10.3 of Schedule 5 (<i>Approval Process for New Projects</i>);
"Asbestos Schedule"	means the asbestos schedule, in the form set out in Schedule Schedule 21 (<i>Asbestos Schedule</i>) together with any adjustments that WEPCo and the Relevant Participant agree are necessary for each New Project, in advance of the appointment of the Asbestos Surveyor.
"Asbestos Surveyor"	means a licensed asbestos surveyor appointed in accordance with paragraph 4.10.1 of Schedule 5 (<i>Approval Process for New Projects</i>);
"Asbestos Management Survey Report"	means a report prepared by the Asbestos Surveyor on the results of an Asbestos Management Survey, which report shall include the Asbestos Schedule and WEPCo's assessment of the Asbestos

Provisional Sum and Programme required for the removal of Asbestos materials identified in the Asbestos Management Survey, pursuant to paragraph 4.10.3 of Schedule 5 (*Approval Process for New Projects*);

"Assigned Staff" has the meaning given to it in paragraph 1.2 of Schedule 20 (*Handover On Expiry Or Termination*);

"Associate" means:

- (a) in respect of any body corporate:
 - (i) any other body corporate which is a subsidiary undertaking or a parent undertaking of such body corporate or a subsidiary undertaking of any parent undertaking of such body corporate;
 - (ii) any other body corporate of which that body corporate is a director;
 - (iii) any body corporate in the same group as such body corporate; and
 - (iv) any employee or director of that body corporate or of any body corporate in the same group;
- (b) in respect of a partnership that is a legal person under the law by which it is governed:
 - (i) any body corporate of which that partnership is a director;
 - (ii) any employee of or partner in that partnership; and
 - (iii) any person who is an associate of a partner in that partnership;
- (c) in respect of a partnership which is not a legal person under the law by which it is governed, any person who is an associate of any of the partners;

(in this definition in relation to a limited liability partnership for "director" read "member") and in the case of WEPCo shall also include each of the Shareholders and the B Shareholder Members (and their respective Associates);

"Authority's Community Benefit Requirement KPIs" has the meaning given in the Template Project Agreement;

"B Shareholder Member" has the meaning given in the WEP Co Shareholders' Agreement;

"Barred List" means the barred lists provided for under the Safeguarding Vulnerable Groups Act 2006, as amended by the Protection of Freedoms Act 2012;

"BCIS TPI" means the Tender Price Index as published by the Building Cost Information Service from time to time, or failing such publication,

such other index as the parties may agree, or as may be determined in accordance with Schedule 22 (*Dispute Resolution Procedure*), most closely resembles such index;]

"Beneficiary"	has the meaning given to it in Clause 16.3;
"BIM Execution Plan"	means: <ul style="list-style-type: none">(a) in respect of Stage 1, a BIM Execution Plan in the form of the Construction Project Information Committee's (CPIC) Pre-Contract BIM Execution Plan; and(b) in respect of Stage 2, a BIM Execution Plan in the form of the Construction Project Information Committee's (CPIC) Post-Contract BIM Execution Plan;
"BREEAM"	means the Building Research Establishment Environmental Assessment Method used to assess and rate infrastructure's sustainability outcomes;
"Broadly Comparable Scheme"	means the pension scheme or schemes nominated by WEPCo (or any relevant Partnering Subcontractor) in accordance with paragraph 2.7 of Section 1 (<i>General</i>) of Schedule 15 (<i>Transfer of Employment and Pensions</i>);
"BIM"	Building Information Modelling;
"Business Day"	means a day other than a Saturday, Sunday or a bank holiday in Wales;
"Business Plan"	has the meaning given to it in the WEPCo Shareholders' Agreement;
["CBR Enhancement"	means the community benefits listed in the Appendix to Section 3 of Schedule 3 (<i>Key Performance Indicators</i>);]
"CDM Regulations"	means the Construction (Design and Management) Regulations 2015 together with the recommendations contained in the most recent official guidance relating to such regulations or any amendment to or re-enactment of the same (and " CDM Regulation " shall be construed accordingly);
"CEDR"	has the meaning given to it in paragraph 4.4 of Schedule 22;
"Cessation Date"	means any date on which WEPCo (or any relevant Partnering Subcontractor) ceases to be an Admission Body other than as a result of the termination or expiry of this Agreement or because it ceases to employ any LGPS Participant Employees or any New Employees who join the LGPS pursuant to paragraph 1.34.1 of Section 1 (<i>General</i>) of Schedule 15 (<i>Transfer of Employment and Pensions</i>);
"Chairman"	has the meaning given to it in Clause 14.6;
"Code"	means the Welsh Authorities Staff Transfers (Pensions) Direction 2012; and/or any such similar protocol, requirements or guidance issued and with which the Participants, WEPCo, or relevant Supply Chain Members

may be required to comply;

- "Code Obligations"** means the express obligations of WEPCo in paragraphs 1.1 to 1.35 of Section 1 of Schedule 15 (*Transfer of Employment and Pensions*);
- "Commencement Date"** means *[date to be inserted]*⁶;
- "Commercially Sensitive Information"** means the sub set of Confidential Information listed in column 1 of Section 1 (*Commercially Sensitive Contractual Provisions*) and column 1 of Section 2 (*Commercially Sensitive Material*) of Schedule 19 (*Commercially Sensitive Information*) in each case for the period specified in column 2 of Section 1 and Section 2 of Schedule 19 (*Commercially Sensitive Information*);
- "Community Benefit Requirement KPIs"** means the community benefits listed in the Appendix to Section 3 of Schedule 3 (*Key Performance Indicators*);
- "Community Services"** means library services, leisure services, children's services and other educational community based services to the public within the Region, where such services are strategically related to projects that have been Approved under a Strategic Outline Programme pursuant to Clause 9.3.1, or Project Services delivered (or to be delivered) pursuant to Clause 9.2 or Clause 9.3.5;
- "Comparator"** means the relevant element(s) and/or component(s) of the relevant project(s) from the Pricing Data which are:
- (a) agreed between WEPCo and the Relevant Participants pursuant to paragraphs 2.2.11 and 2.3 of Schedule 5 (*Approval Process for New Projects*) or determined by the SPB pursuant to paragraph 2.4 of Schedule 5 (*Approval Process for New Projects*) for the purpose of determining the Project Development Fee Cap for a New Project; and/or
 - (b) agreed between WEPCo and the Relevant Participants pursuant to paragraph 3.1.1 of Schedule 6 (*New Project Pricing Report*) for the purposes of determining the appropriate cap for stages of New Projects to apply pursuant to paragraph 3.2 of Schedule 6 (*New Project Pricing Report*);
- it being recognised that the Comparators for specific elements or components of a New Project may be from different projects within the Pricing Data;
- "Confidential Information"** means:
- (a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interest of any person, trade secrets, Intellectual Property Rights and know-how of either party and all Personal Data within the meaning of the Data Protection Laws; and

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Complete with commencement date prior to contract award.

(b) Commercially Sensitive Information;

"Consents"	means all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorisations required by Law, and all necessary consents and agreements from any third parties needed to carry out the Partnering Services in accordance with this Agreement;
"Continuing Participants"	has the meaning given in Clause 3.2.2;
"Contractor"	means a person engaged by a Project Service Provider to carry out design, construction, testing, commissioning and completion of any premises (including any temporary works) and the installation of any equipment pursuant to a Project Agreement;
"Contract Year"	means in respect of the period from the Commencement Date to the following 31 March and subsequently each period of twelve (12) calendar months commencing on 1 April, until the final Contract Year which is the period from the 1 April prior to the Initial Expiry Date or, where applicable, the Extended Expiry Date;
"Convictions"	means, other than in relation to minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding-overs (including any spent convictions as contemplated by section 1(1) of The Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of Schedule Part 1 of the Rehabilitation of Offenders Act 1974 (Exemptions) Order 1975 (SI 1975/1023) or any replacement or amendment to that Order);
"Dashboard Template"	has the meaning given to it in the Template Project Agreement;
"Data Loss Event"	has the meaning given in Clause 37.1;
"Data Protection Laws"	means applicable legislation protecting the fundamental rights and freedoms of individuals, in respect of their right to privacy and the processing of their personal data, as amended from time to time, including, Regulation (EU) 2016/679, 'the General Data Protection Regulation' (" GDPR "), the Data Protection Act 2018 and the Privacy and Electronic Communications Regulations 2003, together with decisions, guidelines, guidance notes and codes of practice issued from time to time by courts, data protection authorities and other applicable Government authorities;
"D&B Project"	means a design and build Project, and, where such Project relates to the provision of Education Sector Services, for which the Project Agreement is based on the Template Project Agreement set out at Section 2 (<i>Design and Build Development Agreement</i>) of Schedule 7 (<i>Template Project Agreements</i>);
"Default Interest Rate"	means [◆];
"Default Termination Notice"	has the meaning given in Clause 23.12.1;
"Design Data"	means all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing and/or operation of a Site;
"Development Amount"	has the meaning given to it in the Template Project Agreement set out at Section 2 (<i>Design and Build Development Agreement</i>) of

"Analysis"		Schedule 7 (<i>Template Project Agreements</i>);
"Direct Losses"		means, subject to the provisions of Clause 16 (<i>Indemnities</i>), all damage, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an agent/client, client paying basis), proceedings, demands and charges whether arising under statute, contract or at common law but, to avoid doubt, excluding Indirect Losses;
"Directive"		means EC Council Directive 2001/23/EC;
"Disclosed Data"		means any data defined as such in Schedule Part 1 of each Project Agreement;
"Disclosure and Barring Service"		the non-departmental public body established pursuant to the Protection of Freedoms Act 2012;
"Dispute"		has the meaning given to it in Schedule 22 (<i>Dispute Resolution Procedure</i>);
"Dispute Procedure"	Resolution	means the procedure set out in Clause 33 (<i>Dispute Resolution</i>) and Schedule 22 (<i>Dispute Resolution Procedure</i>);
"DOTAS"		means the Disclosure of Tax Avoidance Schemes rules which require a promoter of tax schemes to tell HM Revenue & Customs of any specified notifiable arrangements or proposals and to provide prescribed information on those arrangements or proposals within set time limits as contained in Part 7 of the Finance Act 2004 and in secondary legislation made under vires contained in Part 7 of the Finance Act 2004 and as extended to National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868 made under s.132A of the Social Security Administration Act 1992;
"Education Services"	Sector	means education (including pre-school, primary, secondary and/or further education) services to the public within the Region;
"Employee Information"	Liability	the employee liability information to be provided pursuant to Regulation 11 of the Transfer Regulations;
"Environmental Information Regulations"		means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such regulations;
"Equal Pay Ruling"		has the meaning given to it in paragraph 1.18 of Schedule 15 (<i>Transfer of Employment and Pensions</i>);
"Equality Requirements"		means Equal Pay Act 1970, Sex Discrimination Act 1975, the Race Relations Act 1976, the Equality Act 2010, the Human Rights Act 1998, the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, the Employment Equality (Sexual Orientation) Regulations 2003, the Employment Equality (Religion or Belief) Regulations 2003 and the Employment Equality (Age) Regulations 2006;
"Ethical Code"	Employment	means the Code of Practice - Ethical Employment in Supply Chains issued by the Welsh Government on [◆];

"Extended Expiry Date"	means the date falling five (5) years from the Initial Expiry Date in the event written notice is served in accordance with Clause 3.2;
"Facilities"	<p>means the buildings and other facilities, together with all supporting infrastructure (including Plant and [Group 1 Equipment]), and amenities located at any Site as required to be provided by a Project Service Provider or in respect of which FM Services are to be provided by a Project Service Provider in terms of any Project Agreement, to enable:</p> <p>(a) WEPCo to comply with its obligations under this Agreement and any Project Service Provider to comply with its obligations under its Project Agreements all as the same may be varied, amended or supplemented from time to time in accordance with this Agreement or the relevant Project Agreements;</p> <p>(b) WEPCo or any Project Service Provider to comply with any agreement between WEPCo and a Participant in terms of Clause 9.3;</p>
"Facilities Requirements"	means the construction and general facilities requirements of the particular Project Agreement Counterparty, being the "Authority's Construction Requirements" as defined in and set out in each relevant Project Agreement;
"FBC"	means the Full Business Case in relation to a Stage 2 Approval;
"First Party"	has the meaning given to it in Clause 10.10;
"FM Services"	means "hard" facilities management services, including building maintenanceservices;
"FOIA"	means the Freedom of Information Act 2000 and any subordinate legislation (as defined in section 84 of the Freedom of Information Act 2000 made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such Act);
"FOIA Code"	has the meaning given to it in Clause 31.7;
"Force Majeure"	<p>means any of the following events or circumstances:</p> <p>(a) war, civil war, armed conflict or terrorism; or</p> <p>(b) nuclear contamination unless in any case the party claiming the benefit of relief (or a WEPCo Party or Participant Party as the case may be) is the source or cause of the contamination; or</p> <p>(c) chemical or biological contamination of the Works and/or the Facilities and/or the Site from any of the events referred to in paragraph (a) above; or</p> <p>(d) pressure waves caused by devices travelling at supersonic speeds,</p> <p>which directly causes any party to be unable to comply with all or a</p>

material part of its obligations under this Agreement;

"Funders' Agreement"	Direct	means, where applicable, the agreement to be entered into between the Funders and each Project Service Provider substantially in the form set out in the Template Project Agreement at Section 1 (<i>Design, Build, Finance and Maintain</i>) of Schedule 7 (<i>Template Project Agreements</i>);
"Funders"		means all or any of the persons who provide senior financing or senior funding in respect of Project Services under the Funding Agreements including, where the context so permits, prospective senior financiers or senior funders, excluding Project Agreement Counterparties in respect of payments made by them under Project Agreements;
"Funding Agreements"		means all or any of the agreements or instruments to be entered into by a Project Service Provider or any of their Associates relating to the financing of its business of providing services pursuant to the terms of any Project Agreements, excluding always the Project Agreements themselves;
"Future Service Provider"		means any service provider who shall provide any services equivalent to the Partnering Services immediately after termination or expiry of this Agreement or suspension of exclusivity in respect of such Partnering Services;
"General Rule"	Anti-Abuse	means: (a) the legislation in Part 5 of the Finance Act 2013; and (b) any future legislation introduced into parliament to counteract tax advantages arising from abusive arrangements to avoid national insurance contributions;
"Good Industry Practice"		means using standards, practices, methods and procedures conforming to the Law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under the same or similar circumstances;
"Government"		means the government of the United Kingdom and/or the Welsh Government;
["Group 1 Equipment"		has the meaning given to it, where applicable, in the Project Agreements;]
"Halifax Abuse Principle"		means the principle explained in the CJEU Case C-255/02 Halifax and Others;
"H&S Conviction"		has the meaning given in Clause 23.1.5;
"Health and Safety Regime"	Safety	means the Food Safety Act 1990 (and associated regulations), the Health & Safety at Work etc Act 1974 (and associated regulations), the Fire Precautions Act 1971, the Environmental Protection Act 1990, the Water Industry Act 1991, the Water Resources Act 1991 and any similar or analogous health, safety or environmental legislation in force from time to time;

"Holding Company"	shall be construed in accordance with section 1159 and 1173 of the Companies Act 2006;
"HSE"	means the Health and Safety Executive;
"Identified Projects"	means [<i>insert names of Projects listed as Identified Projects in the ITPDSB</i>] ⁷ ;
"Improvement Programme"	has the meaning given in Clause 23.4.1(b)(ii);
"Incurred Development Fee"	Project has the meaning given to it in paragraph 1.9 of Schedule 4 (<i>Partnering Services Costs</i>);
"Indemnifier"	has the meaning given to it in Clause 16.3;
"Indirect Losses"	means loss of profits, loss of use, loss of production, loss of business or loss of business opportunity or any consequential loss or indirect loss of any nature;
"Indulgence"	has the meaning given to it Clause 42.1;
"Information"	has the meaning given to it under section 84 of the Freedom of Information Act 2000;
"Information Commissioner"	has the meaning given to it in the Data Protection Laws;
"Information System"	means a system for generating, sending, receiving, storing or otherwise processing electronic communications;
"Infrastructure Agreement"	means an agreement with any highways authority, public or private utility drainage, sewerage, water, electricity, gas or telecommunications undertaker, authority or company or with any service provider or company body or authority for the requisitioning, design, commissioning, installation, laying, relaying, construction, repair, maintenance, adoption use or diversion and/or connection to any services and service and/or conducting media of any kind including without prejudice to the generality thereof gas, water, electricity, television, signals and pulses, telecommunications, drainage, roads, sewers, footways, footpaths, bridle ways, pipes, drains, sewers, wires, cables, conduits and apparatus;
"Initial Period"	means the period from the Commencement Date until [1 June 2024];
"Initial Expiry Date"	has the meaning given to it in Clause 3.1;
"Insolvency Event"	means, in respect of any company, any of the following: <ul style="list-style-type: none"> (a) any arrangement or composition with or for the benefit of its creditors which does not involve a continuation of its business in the same or substantially the same form (including any voluntary arrangement as defined in the Insolvency Act 1986) being entered into by or in relation to

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Please refer to section 2.3.3.1 of the Descriptive Document.

the person in question;

- (b) a supervisor, receiver, administrator, administrative receiver or other encumbrances taking possession or being appointed over, or any distress, execution or other process being levied or enforced (and not being discharged within ten (10) Business Days) upon, the whole or part of the assets of the company;
- (c) the company ceasing to carry on business;
- (d) a petition being presented (and not being discharged within twenty (20) Business Days) or a resolution being passed or an order being made for the administration or the administration, winding-up, bankruptcy or dissolution of the company; and
- (e) the company suffering any event analogous to any of the foregoing in any jurisdiction in which it is incorporated, established or resident;

"Insurances" means, as the context requires, all or any of the insurances required to be maintained by WEPCo pursuant to this Agreement;

"Intellectual Property" means all registered or unregistered trade marks, service marks, goodwill and the right to sue for passing off, patents, rights in designs, utility models, copyrights, rights in computer software, domain names, database rights, trade secrets and other confidential information or know-how and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world;

"Intellectual Property Rights" means the Intellectual Property which (or the subject matter of which) is created, brought into existence, acquired, used or intended to be used by WEPCo, any WEPCo Party or by other third parties (for the use by or on behalf of or for the benefit of WEPCo) for the purposes of the Partnering Services, the design or construction of the Facilities, the operation, maintenance, improvement and/or testing of the Facilities or the conduct of any other Project Services or otherwise for the purposes of this Agreement;

"Key Performance Indicators" means, subject to Clause 14.17, the key performance indicators set out in Section 3 (*Performance Measurement*) of Schedule 3 (*Partnering Services*);

"Law" means:

- (a) any applicable statute or proclamation or any delegated or subordinate legislation;
- (b) [any enforceable community right within the meaning of section 2(1) European Communities Act 1972;]
- (c) any applicable guidance, direction or determination with which any of the Participants and/or WEPCo is bound to

comply (including the Welsh Language Standards) to the extent that the same are published and publicly available or the existence or the contents of them have been notified to WEPCo by the Participants; and

(d) any applicable judgement of a relevant court of law which is a binding precedent in England and Wales;

"LGPS"		means the Local Government Pension Scheme established pursuant to regulations made in exercise of powers under sections 7 and 12 and Schedule 3 of the Superannuation Act 1972;
"LGPS Regulations"		means the Local Government Pension Scheme Regulations 2013
"LGPS (Compensation) Regulations"		means the Local Government (Discretionary Payments and Injury Benefits) Regulations 2011;
"LGPS Participant Employee"	Participant	means a Transferring Employee who is a member of or who is entitled to be a member of the LGPS on or immediately before the Transfer Date;
"Local Authority"		means a local authority established under the Local Government Act 1972;
"Local Government Requirements"	Government	means all local government circulars, guidance, official requests or requirements for the time being in force, but only to the extent that the same are published and publicly available or the existence and contents of them have been notified to WEPCo by a Participant;
"Local Participant Authority"	Authority	means a Participant that is a Local Authority;
"Local Authority Planning"	Planning	means the planning authority to whom pursuant to the provisions of the Planning Act, a Planning Application should be made in respect of proposed Works;
"Mediator(s)"		has the meaning given to it in paragraph 4.3 of Schedule 22
"MIM"		means Welsh Government's Mutual Investment Model;
"MIM Project"		means a design, build, finance and maintain Project being procured using MIM for which the Project Agreement is based on the Template Project Agreement set out at Section 1 (<i>Design, Build, Finance and Maintain</i>) of Schedule 7 (<i>Template Project Agreements</i>);
"MMP"		has the meaning given to it in paragraph 4.4 of Schedule 22;
"Named Employee"		has the meaning given to it in Clause 20.5;
"NCC"		means NCC Group plc (or any body that may supersede or replace it from time to time);
"New Employee Dispute Resolution Procedure"		means the procedure set out in Appendix 1 (<i>New Employee Dispute Resolution Procedure</i>) to Schedule 15 (<i>Transfer of Employment and Pensions</i>);
"New Employees"		those employees engaged by WEPCo and/or any Partnering Subcontractor to provide the Partnering Services (excluding for the avoidance of doubt any Transferring Employees) who will be

working alongside the Transferring Employees;

"New Project"

means:

- (a) a requirement for Required Facilities by the Participants; and
- (b) any requirement for Project Services pursuant to Clause 9.3 which does not relate to Required Facilities;

"New Project Approval Process"

means the process for obtaining approval of New Projects as detailed in Schedule 5 (*Approval Process for New Projects*);

"New Project Request"

has the meaning given to it in paragraph 3.1 of Schedule 5 (*Approval Process for New Projects*);

"New Project Specific Project Agreement"

means the Template Project Agreement, as adjusted by the Relevant Participant for the relevant New Project;

"Non-Compliant Shareholder"

has the meaning given to it in Clause 26.2 (*Tax Compliance*);

"Non Scheduled Costs"

has the meaning given to it in Section 4 (*Partnering Services Costs Rates*) of Schedule 3 (*Partnering Services*);

"Notice"

has the meaning given to it in paragraph 5.2 of Schedule 22;

"Notice to Mediate"

has the meaning given to it in paragraph 4.7 of Schedule 22;

"Occasions of Tax Non-Compliance"

means:

- (a) any tax return of WEPCo or a Shareholder submitted to a Relevant Tax Authority on or after 1 October 2012 is found to be incorrect as a result of:
 - (i) a Relevant Tax Authority successfully challenging WEPCo or the relevant Shareholder under the General Anti-Abuse Rule or the Halifax Abuse Principle or under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax Abuse Principle;
 - (ii) the failure of an avoidance scheme which WEPCo or the relevant Shareholder was involved in, and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime; and/or
- (b) WEPCo's or the relevant Shareholder's tax affairs giving rise on or after 1 April 2013 to a criminal conviction in any jurisdiction for tax-related offences which is not spent at the date of this Agreement or to a penalty for civil fraud or

evasion;

"OH&S"		has the meaning give to it in Section 2.1.1 of Schedule 3;
"Ongoing Services"	Partnering	means the Partnering Services listed in paragraph 1.1.3(a) of Section 1 (<i>Specification</i>) of Schedule 3 (<i>Partnering Services</i>);
"Original Dispute"		has the meaning given to it in paragraph 8.1 of Schedule 22;
"Participant"		means any party to this Agreement from time to time (other than WEPCo);
"Participant Notice"	Default	has the meaning given to it in Clause 22.2.2(b);
"Participant Default"	Event of	has the meaning given to it in Clause 22.1;
"Participant Default Compensation Sum"	Event of	has the meaning given to it in paragraph 2 of Section 1 (<i>Participant Event of Default Compensation Sum</i>) of Schedule 14 (<i>Compensation on Participant Event of Default and Termination</i>);
"Participant Default Termination Sum"	Event of	has the meaning given to it in paragraph 2 of Section 2 (<i>Participant Event of Default Termination Sum</i>) of Schedule 14 (<i>Compensation on Participant Event of Default and Termination</i>);
"Participant Party"		means any of a Participant's agents (including a Participant's Representative), contractors and subcontractors of any tier and its or their directors, officers and employees but excluding WEPCo and any WEPCo Party, any Project Service Provider or Supply Chain Member (in their capacity as such) and " Participant Parties " shall be construed accordingly;
"Participants' Costs"		has the meaning given in Clause 23.13;
"Participants' Policies"		means those policies of any Participant intimated in writing to WEPCo in the event of a Relevant Transfer as amended from time to time and " Participant Policy " shall be construed accordingly;
"Participants' Representatives"		means the persons appointed by each of the Participants in accordance with Clause 12, and Participant's Representative shall be construed accordingly;
"Parties"		means each of WEPCo and the Participants and " Party " means any of them;
"Partner Admission Agreement"	Admission	means an admission agreement entered into in accordance with Part 3 of Schedule 2 of the LGPS Regulations by the Administering Authority and WEPCo or any relevant Partnering Subcontractor (as appropriate) and a template for which is set out at Schedule 18 (<i>Partner Admission Agreement</i>);
"Partnering Services"		means the services to be delivered under this Agreement set out in paragraphs 1.2 to 1.4 (inclusive) of Section 1 (<i>Specification</i>) of Schedule 3 (<i>Partnering Services</i>) and the performance by WEPCo of its obligations hereunder;

"Partnering Costs"	Services	means the costs of WEPCo in providing the Partnering Services, including all out of pocket expenses and disbursements reasonably, properly and necessarily incurred in connection therewith;
"Partnering Data"	Services	means: <ul style="list-style-type: none"> (a) all drawings, reports, documents, plans, software, formulae, calculations and all other data relating to or arising out of the provision of the Partnering Services; and (b) any other materials, documents and or data acquired, brought into existence or used in relation to the WEPCo Operations or this Agreement;
"Partnering Method Statement"	Services	means, in respect of any Partnering Service, the applicable procedures and methods for delivery of such Partnering Service, as set out at Section 5 (<i>Partnering Services Method Statements</i>) of Schedule 3 (<i>Partnering Services</i>);
"Partnering Supply Chain Refresh"	Services	has the meaning given in paragraph 1.2.2(b)(iii) of Section 1 of Schedule 3 (<i>Partnering Services</i>);
"Partnering Subcontractor"		means any subcontractor (of any tier) of WEPCo engaged from time to time as may be permitted by this Agreement to provide all or any of the Partnering Services;
"Pathfinder Project"		means [◆];
"Personal Data"		has the meaning given to it in the Data Protection Laws, and refers to personal data processed by any Party in connection with its respective rights and obligations under this Agreement;
"Planning Act"		means the Town and Country Planning Act 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Wales) Act 2015 and the Planning (Hazardous Substances) Act 1990;
"Planning Advocate"		means a practising member of the Bar with at least ten (10) years post-call experience in advising in respect of planning law agreed by the parties or, in default of agreement within fourteen (14) days of one Party making a request to the others as to the identity of such person, appointed following the application of any Party by the President for the Law Society of England and Wales;
"Planning Agreement"		means an agreement, undertaking or obligation pursuant to the provisions of section 106 Town and Country Planning Act 1990 or section 111 of the Local Government Act 1972, section 33 of the Local Government (Miscellaneous Provisions) Act 1982 or an infrastructure agreement pursuant to section 38 or section 278 of the Highways Act 1980 or the section 104 of the Water Industry Act 1991;
"Planning Appeal"		means an appeal to the Welsh Ministers pursuant to the provisions of section 78 of the Town and Country Planning Act 1990 and/or section 20 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and/or section 21 of the Planning (Hazardous Substances) Act 1990 in respect of or arising out of a Planning Application;

"Planning Application"	means an application/s for Planning Permission as may be necessary for the carrying out of Project Services and/or use or operation of Facilities;
"Planning Call-In"	means a direction by the Welsh Ministers under the provisions of section 77 of the Town and Country Planning Act 1990 and/or section 12 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and/or section 20 of Planning (Hazardous Substances) Act 1990 to recover jurisdiction over a Planning Application from the Local Planning Authority;
"Planning Permission"	means any planning permission, planning permission in principle, approval, consent or agreement required by a condition imposed on a grant of planning permission in principle, listed buildings consent, conservation area consent, hazardous substance consent and/or other consent or approval reasonably required from time to time for the provision of Project Services or the grant of an approval by the Welsh Ministers on a Planning Appeal or by the Welsh Ministers on Planning Call-In;
"Planning Proceedings"	<p>(a) an application for judicial review under Part 54 of the Civil Procedure Rules made by any third party arising from the grant of a Planning Permission by the Local Planning Authority including any appeals in that regard to a higher court following a judgment of a lower court;</p> <p>(b) an application pursuant to section 288 of the Town and Country Planning Act 1990 and/or section 63 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and/or section 22 of Planning (Hazardous Substances) Act 1990 arising from the grant of a Planning Permission or a refusal of Planning Permission by the Welsh Ministers, including any appeals in that regard to a higher court following a judgment of a lower court;</p> <p>(c) an application (within the meaning of sub-paragraph (a) or (b) of this definition above) arising from the grant of a Planning Permission or a refusal of Planning Permission following any reconsideration by the Local Planning Authority or the Welsh Ministers of a Planning Application or by the Welsh Ministers of a Planning Appeal (as the case may be) following the quashing of a previous Planning Permission or a refusal of Planning Permission pursuant to an application within the meaning of sub-paragraphs (a) or (b) of this definition and the matter being remitted to the Local Planning Authority or the Welsh Ministers (as the case may be);</p>
"Plant"	has the meaning given to it, where applicable, in the Project Agreements;
"Pricing Data"	the data set out at Appendix 1 (<i>Pricing Data</i>) to Schedule 4 (<i>Partnering Services Costs</i>);
"Pricing Report"	has the meaning given in Schedule 6 (<i>New Project Pricing Report</i>);
"Principal Designer"	has the meaning given in the CDM Regulations;
"Proforma 1"	means [◆];
"Proforma 2"	means [◆];

"Prohibited Act"

means:

- (a) offering, giving or agreeing to give to any Participant or any other public body or to any person employed by or on behalf of any Participant or any other public body any gift or consideration of any kind as an inducement or reward:
 - (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other agreement with any Participant or any other public body; or
 - (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with any Participant or any other public body;
- (b) entering into this Agreement or any other agreement with any Participant or any other public body in connection with which commission has been paid or has been agreed to be paid by WEPCo or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to that Participant;
- (c) committing any offence:
 - (i) under the Bribery Act 2010;
 - (ii) under any Law creating offences in respect of fraudulent acts; or
 - (iii) at common law, in respect of fraudulent acts in relation to this Agreement or any other agreement with any Participant or any other public body; or
- (d) defrauding or attempting to defraud or conspiring to defraud any Participant or any other public body;
- (e) committing a breach of the Employment Regulations 1999 Act (Blacklists Regulations) 2010 or section [137] of the Trade Union and Labour Regulations (Consolidation) Act 1992; or
- (f) committing any breach of the Data Protection Laws by unlawfully processing Personal Data in connection with blacklisting activities; or
- (g) committing any offence under the Data Protection Act 2018 in respect of Personal Data;

"Prohibited Amendments"

means:

- (a) in respect of a New Project Specific Project Agreement, amendments, caveats and/or qualifications which (i) have not been raised during the Stage 1 or Stage 2 process; (ii)

have not been agreed by the Relevant Participant and approved by Welsh Government, due to the number and/or significance of deviations from the Template Project Agreement (taking account of guidance in the "IMPORTANT NOTICE"); and/or (iii) the Relevant Participant or Welsh Government reasonably considers may individually or cumulatively have an adverse effect on "off-balance sheet" statistical classification of the Project by ONS/EUROSTAT]; and

- (b) in respect of a Project Co Shareholders' Agreement, amendments, caveats and/or qualifications which (i) have not been raised during the Stage 1 or Stage 2 process; (ii) have not been agreed by the Relevant Participant and approved by Welsh Government, due to the number and/or significance of deviations from the Template Project Co Shareholders' Agreement (taking account of guidance in the "IMPORTANT NOTICE"); and/or (iii) the Relevant Participant or Welsh Government reasonably considers may individually or cumulatively have an adverse effect on "off-balance sheet" statistical classification of the Project by ONS/EUROSTAT];

"Project"	means the carrying out of any works and the provision of services under a Project Agreement;
"Project Agreement"	means the agreement entered into or to be entered into between a Project Service Provider and the relevant Project Agreement Counterparty or other third party for the provision by the Project Service Provider of Project Services, provided that, following its execution, each such agreement shall cease to be a Project Agreement for purposes of this Agreement in the event that the contracting party thereunder (not being a Project Agreement Counterparty) ceases to be a Project Service Provider in accordance with the terms of the Project Agreement;
"Project Agreement Counterparty"	means the Relevant Participant(s) who is/are party to a Project Agreement;
"Project BIM Agreement"	means an agreement, substantially in the form of the Template Project BIM Agreement entered into (or to be entered into) between WEPCo and the Relevant Participant in respect of each New Project;
"Project Co Shareholders' Agreement"	means an agreement or agreements dated on or around today's date among a Project Service Provider and its Holding Company, the PSDP(s) and WGCo, including any agreement relating to the subscription of equity (or other shareholder funding) by the shareholders of the Project Service Provider and its Holding Company;
"Project Development Fee"	means the fee payable to WEPCo in respect of the provision of Project Development Partnering Services in respect of a specific New Project, determined in accordance with Schedule 4 (<i>Partnering Services Costs</i>) and Schedule 5 (<i>Approval Process for New Projects</i>);
"Project Development Fee Cap"	means, in respect of:

	<ul style="list-style-type: none"> (a) the New Project Approval Process for each New Project; (b) the work carried out so as to obtain Stage 1 Approval for each New Project; (c) the work carried out so as to obtain Stage 2 Approval for each New Project; and (d) each relevant element or component of the Project Development Partnering Services (as shown in Proforma 2 within the Pricing Data),
	as the case may be, the level of maximum Project Development Fee that can be charged by WEPCo, calculated in accordance with paragraph 2 of Schedule 4 (<i>Partnering Services Costs</i>);
"Project Development Partnering Services"	means the Partnering Services listed in paragraph 1.1.3(b) of Section 1 (<i>Specification</i>) of Schedule 3 (<i>Partnering Services</i>);
"Project Execution Plan"	has the meaning given in paragraph 1.3.1(b)(i)(3) of Section 1 (<i>Specification</i>) of Schedule 3 (<i>Partnering Services</i>);
"Project Service Provider"	means any person that is obliged, pursuant to a Project Agreement, to provide the Project Services thereunder and, where not WEPCo, is a Subsidiary of WEPCo, or is a PSDP Related Party in the case of MIM Projects;
"Project Service Provider Default"	has the meaning given to it in Clause 23.4.3;
"Project Services"	means: <ul style="list-style-type: none"> (a) services required to be provided in relation to the design, construction, testing, commissioning and completion of premises (including any temporary works) and the installation of equipment; and/or (b) the provision of FM Services; <p>whether or not in relation to Required Facilities;</p>
"Proposed Mitigating Measures"	has the meaning given in Clause 26.2.2(a) (<i>Tax Compliance</i>);
"Protective Measures"	means appropriate technical and organisational measures which may include: pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of such measures;
"Providing Party"	has the meaning given to it in Clause 52.3;
"PSDP(s)"	[◆] Limited (registered No [◆]) whose registered office is at [◆];
"PSDP Related Party"	[means a company which the PSDP holds the majority of the voting

		rights in, or a Subsidiary of such company;]
"PSP Rectification Programme"		has the meaning given in Clause 23.9.2;
"Qualifying Projects"		means:
	(a)	the Identified Projects; and
	(b)	all other 21st Century Schools and Colleges (Band B) MIM Programme projects, where such project has been identified by a Participant as being required to enable them to provide education based services in the Region;
"Recognition Agreement"		means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations relating to the recognition of a trade union or unions by an employer to any extent for the purposes of collective bargaining (as defined by section 178(2) of the Trade Union and Labour Relations (Consolidation) Act 1992);
"Related Dispute"		has the meaning given to it in paragraph 8.1 of Schedule 22;
"Related Dispute Notice"		has the meaning given to it in paragraph 8.2 of Schedule 22;
"Region"		means Wales;
"Reinstatement Notice"		has the meaning given in Clause 23.10.1;
"Relevant Authority"		means any court with jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official, public or statutory person of the government of the United Kingdom or the European Union or of the Welsh Ministers or the National Assembly of Wales;
"Relevant Government Departments"		means any Government department;
"Relevant Participant(s)"		has the meaning given to it in paragraph 3.1 of Schedule 5 (<i>Approval Process for New Projects</i>);
"Relevant Service Transfer Date"		has the meaning given to it in paragraph 1.1 of Section 1 (<i>General</i>) of Schedule 15 (<i>Transfer of Employment and Pensions</i>);
"Relevant Tax Authority"		means HM Revenue and Customs or, if applicable, a tax authority in the jurisdiction in which WEPCo, or, as the case may be, the relevant person is established;
"Relevant Transfer"		means a relevant transfer for the purposes of the Transfer Regulations;
"Relief Event"		has the meaning given to it in the relevant Project Agreement;
"Remediation Programme"		has the meaning given in Clause 23.4.1(b)(ii);
"Requesting Party"		has the meaning given to it in Clause 52.3;
"Requests for"		shall have the meaning set out in the FOIA or the Environmental

"Information"		Information Regulations as relevant (where the meaning set out for the term "request" shall apply);
"Required Facilities"		means Facilities to be provided or in respect of which services are to be provided pursuant to Qualifying Projects;
"Retendering Information"		has the meaning given to it in paragraph 1.9 of Schedule 20 (<i>Handover On Expiry Or Termination</i>);
"Review Date"		means each anniversary of the Commencement Date;
["RPIX"		means the Retail Prices Index (All Items Excluding Mortgage Interest) as published by the Office for National Statistics from time to time, or failing such publication, such other index as the parties may agree, or as may be determined in accordance with Schedule 22 (<i>Dispute Resolution Procedure</i>), most closely resembles such index;]
"Satisfactory Permission"	Planning	means a Planning Permission which is not subject to an Unreasonable Condition;
"SDP" or "Delivery Plan"	"Strategic	means the Strategic Delivery Plan as set out at Section 1 (<i>Initial SDP</i>) of Schedule 11 (<i>Strategic Delivery Plan</i>) and approved by the SPB as amended from time to time pursuant to Section 2 (<i>Updated SDP</i>) of Schedule 11 and approved by the SPB;
"Second Party"		has the meaning given to it in Clause 10.10;
"Service Specifications"	Level	has the meaning given to it in Schedule Part 1 of each relevant Project Agreement;
"Service Provider"		means any person engaged from time to time as may be permitted by this Agreement and/or any Project Agreement to procure the provision of the Services (or any of them);
"Services"		means the Partnering Services and the Project Services;
"Shareholder"		means a shareholder in WEPCo from time to time;
"Shareholders Agreements"		means the WEPCo Shareholders' Agreement and Project Co Shareholders' Agreement;
"Shareholder Tax Mitigation Measures Non-Compliance Notice"		has the meaning given to it in Clause 26.7;
"Shareholder Tax Non-Compliance Notice"		has the meaning given to it in Clause 26.6;
"Significant Performance Failure"		means an event identified as such in Section 3 (<i>Performance Measurement</i>) of Schedule 3 (<i>Partnering Services</i>) ⁸ , disregarding the extent to which such failure is attributable to a Relief Event or the occurrence of Force Majeure;

8

Relevant KPI's and calibrations to be agreed with Tenderers during dialogue. It is anticipated that, as a minimum this will provide good coverage across the Ongoing Partnering Services, the Project Development Partnering Services and Project Services. Section 3 of Part 3 of Schedule 3 must be self-contained and capable of clearly identifying what constitutes a Significant Performance Failure and at what frequency these could arise – including whether or not these are assessed annually or more frequently.

"Site"		has the meaning given to it in the relevant Project Agreement;
"SPA Material Default"		has the meaning given to it in Clause 23.12;
"SPA Material Default Notice"		has the meaning given to it in Clause 23.10.3;
"SPB"		means the strategic partnering board as defined in Clause 14.1;
"Specific Requirement"		has the meaning given to it in paragraph 3.1.2 of Schedule 5 (<i>Approval Process for New Projects</i>);
"Stage 1 Approval"		has the meaning given to it in paragraph 4 of Schedule 5 (<i>Approval of New Projects</i>);
"Stage 2 Approval"		has the meaning given to it in paragraph 5.7.1 of Schedule 5 (<i>Approval of New Projects</i>);
"Stage 1 Submission"		has the meaning given to it in paragraph 4.1 of Schedule 5 (<i>Approval Process for New Projects</i>);
"Stage 2 Submission"		has the meaning given to it in paragraph 5.1 of Schedule 5 (<i>Approval Process for New Projects</i>);
"Stakeholder Representatives"		has the meaning given to it in Clause 14.1.4;
"Strategic Outline Case Requirements"		means Welsh Government's requirements from time to time for approval of a Strategic Outline Case;
"Strategic Programme"	Outline	means a Strategic Outline Programme listing projects to be included in the 21 st Century Schools and Colleges (Band B) Programme, submitted by Participants to Welsh Government dated with a base date of July 2017, as updated from time to time;
"Strategic Partnering Services"	Support	means the Partnering Services listed in paragraph 1.1.3(c) of Section 1 (<i>Specification</i>) of Schedule 3 (<i>Partnering Services</i>);
"Subsidiary"		shall be construed in accordance with section 1159 and 1173 of the Companies Act 2006;
"Supply Chain Agreement Dispute"		has the meaning given to it in paragraph 6.1 of Schedule 22;
"Supply Chain Agreements"	Chain	means the agreements between: <ul style="list-style-type: none"> (a) WEPCo and its direct Partnering Subcontractors; (b) a Partnering Subcontractor and its subcontractors in relation to Partnering Services; and (c) any Project Service Provider and its Service Providers and Contractors, from time to time;
"Supply Member(s)"	Chain	means any party (except WEPCo or a Project Service Provider) to a Supply Chain Agreement;
"Suspension Notice"		has the meaning given in Clause 23.10.1;

"Template Agreement"	Project	means the relevant form of agreement set out at Sections 1 and 2 of Schedule 7 (<i>Template Project Agreements</i>);
"Template Agreement"	Project BIM	means the relevant form of agreement set out at Schedule 16 (<i>Template Project BIM Agreement</i>);
"Template Shareholders' Agreement"	Project Co	means the relevant form of agreement set out at Section 4 of Schedule 7 (<i>Template Project Co Shareholders' Agreement</i>);
"Template Shareholders' Agreement"	WEPCo	means the relevant form of agreement set out at Section 3 of Schedule 7 (<i>Template WEPCo Shareholders' Agreement</i>);
"Tender Process"		has the meaning set out in Schedule 6 (<i>New Project Pricing Report</i>) and "Tendering" shall be construed accordingly;
"Track Record Test"		means, assessment of whether the most recent WEPCo Performance Report shows that the WEPCo has met the requirements identified as relevant in [column 6 of Tables 1 to 3 and column 5 of Table 4] of Section 3 (<i>Performance Measurement</i>) of Schedule 3 (<i>Partnering Services</i>) ⁹ ;
"Transfer Date"		means the date on which a Relevant Transfer occurs;
"Transfer Event"		means the occurrence of a Relevant Transfer upon expiry or termination of this Agreement;
"Transfer Regulations"		means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI No 246);
"Transferring Employee"		means any Transferring Participant Employee or Transferring Non-Participant Employee;
"Transferring Non-Participant Employee"		means in relation to any service equivalent to a Partnering Service, any persons employed by any organisation or body other than a Participant (including for the avoidance of doubt, any sub-contractor or agent engaged by the Participants) who is wholly or mainly engaged in the provision of that service as at the Transfer Date and who will become an employee of WEPCo or a Partnering Subcontractor on the Transfer Date in accordance with the provisions of paragraph 1 of Section 1 (<i>General</i>) of Schedule 15 (<i>Transfer of Employment and Pensions</i>);

⁹

Relevant KPIs and calibrations to be agreed with Bidders during dialogue – Section 3 of Part 3 of the Schedule 3 must be self-contained and capable of clearly identifying what constitutes a pass or failure on the Track Record Test (see Table 5 in this regard).

- "Transferring Participant Employee"** means in relation to any service equivalent to a Partnering Service, all those persons employed by any of the Participants under a contract of employment (excluding, to avoid doubt (without limitation), any person engaged by any of the Participants as an independent contractor or persons employed by any sub-contractor engaged by any of the Participants) who are wholly or substantially engaged in the provision of that service as at the Transfer Date;¹⁰
- "Uninsurable Risk"** in respect of a MIM Project, has the meaning given to it in the relevant Project Agreement;
- "Unreasonable Conditions"** means any condition, requirement or obligation whether in or proposed to be in a Planning Permission, a Planning Agreement or an Infrastructure Agreement as set out in Schedule 13 (*Unreasonable Conditions*) PROVIDED ALWAYS that for the purposes of this Agreement, none of the following constitute an Unreasonable Condition:
- (a) any condition, requirement or obligation which has been volunteered in writing by the parties or has been acknowledged to be acceptable by them in writing prior to its imposition; or
 - (b) any condition, requirement or obligation which is agreed or deemed or determined pursuant to the provisions of this Agreement not to be an Unreasonable Condition;
- "Unsuitable Person"** means either:
- (a) any person who has a material interest in the manufacture, production, sale or distribution of [pornography,] [arms and weapons or] tobacco products and/or alcoholic drinks; or
 - (b) [any person whose tax returns submitted on or after 1 October 2012 have been found to be incorrect as a result of:
 - (i) HM Revenue and Customs successfully challenging it under the General Anti-Abuse Rule ("**GAAR**") or the Halifax Abuse Principle;
 - (ii) the Relevant Tax Authority challenging it under any tax rules or legislation that have an effect equivalent or similar to the GAAR or the Halifax Abuse Principle; and/ or
 - (iii) the failure of an avoidance scheme which the person was involved in and which was, or should have been, notified under the DOTAS or any equivalent or similar regime in a jurisdiction in which the person is established;
 - (c) any person whose activities are, in the reasonable opinion of the Participants, incompatible with the provision of Education Sector Services and/or Community Services

¹⁰

Schedule 15 is drafted on the basis that the employer of the Transferring Employees is a party to the Strategic Partnering Agreement. In the event that the employer is not a party to the Strategic Partnering Agreement, then any employees who are to transfer will be considered to be Transferring Non-Participant Employees for the purposes of these provisions. This will need to be considered further on a case-by-case basis.

(as applicable) in the Region; or

- (d) any person whose activities, in the reasonable opinion of the Participants, pose or could pose a threat to national security;

"VAT"	means value added tax at the rate prevailing at the time of the relevant supply charged in accordance with the provisions of the Value Added Tax Act 1994;
"VAT Sum"	has the meaning given to it in Clause 10.12;
"Welsh Government"	means the government of Wales, established pursuant to the Government of Wales Act 2006;
"Welsh Standards" Language	means the [Welsh Language Standards (No.1) Regulations 2015]; ¹¹
"Welsh Ministers"	means the Welsh Ministers, appointed pursuant to Section 48 of the Government of Wales Act 2006 and their successors;
"WEPCo Board"	means the board of directors from time to time of WEPCo, as constituted in accordance with the WEPCo Shareholders' Agreement;
"WEPCo Event of Default"	has the meaning given to it in Clause 23.1;
"WEPCo Operations"	means the management and provision of the Partnering Services and the performance of all other obligations of WEPCo under this Agreement from time to time;
"WEPCo Party"	means any of WEPCo's agents (including WEPCo's Representative), subsidiaries and contractors (including without limitation any Partnering Subcontractor and any Project Service Provider) and its or their subcontractors of any tier and its or their directors, officers, employees and workers in relation to the provision of Services arising out of this Agreement and " WEPCo Parties " shall be construed accordingly;
"WEPCo Performance Report"	means a report to be issued by WEPCo reporting on WEPCo's performance and the performance of Partnering Subcontractors, Project Service Providers and Supply Chain Members against the Key Performance Indicators, in respect of the period ending on the most recent Review Date, including analysis of whether the Track Record Test has been passed or failed and identifying any Significant Performance Failures or potential Significant Performance Failures;
"WEPCo's Representative"	means the person appointed by WEPCo pursuant to Clause 12;
"WEPCo Shareholder"	means a shareholder in WEPCo from time to time;
"WEPCo Shareholders' Agreement"	means an agreement dated on or around today's date among WEPCo, PSDP(s) and WGCo, including any agreement relating to the subscription of equity (or other shareholder funding) by the shareholders of WEPCo in WEPCo or any Holding Company of

¹¹ Include reference to relevant Regulations under Welsh Language (Wales) Measure 2011.

WEPCo;

"WEP Objectives"

means the following key objectives of the WEP Strategic Partnering Delivery Model across Wales:

- (a) the achievement of well-being goals under the Well-being of Future Generations (Wales) Act 2015, to improve the social, economic, environmental and cultural well-being of Wales through infrastructure development;
- (b) to provide enhanced local services by increasing the scale of joint service working and integration across Wales to deliver greater efficiency in procurement and better outcomes at the point of service delivery;
- (c) to deliver a sustained programme of joint asset management and investment into education and community based facilities and developments;
- (d) to establish a more efficient and sustainable procurement methodology for public sector bodies that:
 - (i) reinforces joint strategic planning and delivery;
 - (ii) is stable and long-term;
 - (iii) delivers demonstrably better value for money than current procurement arrangements;
 - (iv) is flexible in its ability to respond to evolving service strategies and in being able to deliver through different contractual/ funding routes;
 - (v) is able to generate sufficient project size, volume and deal flow to attract private finance into the delivery and long-term management of the service;
 - (vi) increases opportunities for local employment and training; and
 - (vii) provides a focus for community engagement;
- (e) to share learning and improve the procurement process;
- (f) to deliver facilities that meet public sector policy objectives for design quality and sustainability; and
- (g) to facilitate and improve the level of stakeholder engagement in the planning of services and development of facilities for Education Sector Services and Community Services;

"WGCo"

means [◆];

"Works"

means the design (including the preparation of all Design Data), construction, testing, commissioning and completion of Facilities (including any temporary works) and the installation of any equipment to be performed in accordance with a Project Agreement

(as varied or supplemented from time to time in accordance with the provisions of the relevant Project Agreement);

"Works and Facilities Information" means all materials, documents and data relating to the proposed design or construction of Works, the operation and maintenance of Facilities and other matters relevant thereto supplied or made available to WEPCo or any of its nominees or any Project Service Provider by or on behalf of any of the Participants from time to time;

2. INTERPRETATION

This Agreement shall be interpreted according to the following provisions, unless the context requires a different meaning.

- 2.1 The headings and marginal notes and references to them in this Agreement shall be deemed not to be part of this Agreement and shall not be taken into consideration in the interpretation of this Agreement.
- 2.2 Except where the context expressly requires otherwise, references to:
 - 2.2.1 clauses, sub-clauses, and Schedules are references to clauses, sub-clauses of and Schedules to this Agreement;
 - 2.2.2 references to paragraphs, sub-paragraphs, and Appendices are references to paragraphs and sub-paragraphs of and appendices to Schedules (or Sections of Schedules) to this Agreement;
 - 2.2.3 Sections are references to sections of Schedules to this Agreement; and
 - 2.2.4 Attachments (if any) are references to attachments to or contained in this Agreement.
- 2.3 The Schedules and any Appendices or Attachments to this Agreement are an integral part of this Agreement and a reference to this Agreement includes a reference to the Schedules, Appendices and the Attachments.
- 2.4 Words importing persons shall, where the context so requires or admits, include individuals, firms, partnerships, trusts, corporations, governments, governmental bodies, authorities, agencies, unincorporated bodies of persons or associations and any organisations having legal capacity.
- 2.5 Where the context so requires words importing the singular only also include the plural and vice versa and words importing the masculine shall be construed as including the feminine or the neuter or vice versa.
- 2.6 The language of this Agreement is English. All correspondence, notices, drawings, test reports, certificates, specifications and information shall be in English. All operating and maintenance instructions, name plates, identification labels, instructions and notices to the public and staff and all other written, printed or electronically readable matter required in accordance with, or for purposes envisaged by, this Agreement shall comply with Welsh Language Standards (including any amending, supplemental or replacement law from time to time) and shall be bilingual (in English and Welsh), where required by the Participants, provided that all operating and maintenance instructions (and any other complex technical documents) are permitted in English only.
- 2.7 References to any agreement or document include (subject to all relevant approvals and any other provisions of this Agreement concerning amendments to agreements or documents) a reference to that agreement or document as amended, supplemented, substituted, novated or assigned.
- 2.8 References to any Law are to be construed as references to that Law as from time to time amended or to any Law from time to time replacing, extending, consolidating or amending the same.

- 2.9 References to a public organisation (other than a Participant) shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the functions and responsibilities of such public organisation. References to other persons (other than WEPCo or a Participant) shall include their successors and assignees.
- 2.10 References to a deliberate act or omission of a Participant or any Participant Party shall be construed having regard to the interactive nature of the activities of the Participants and of WEPCo and the expression shall exclude acts or omissions which were within the contemplation of the parties or which were otherwise provided for in this Agreement or in any Project Agreement.
- 2.11 The words in this Agreement shall bear their natural meaning. The parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore, be construed contra proferentem.
- 2.12 Reference to "Parties" means the parties to this Agreement and references to a "Party" mean one of the parties to this Agreement.
- 2.13 In construing this Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word "other" or "including" or "in particular" shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
- 2.14 All of WEPCo's obligations, duties and responsibilities shall be construed as separate obligations, duties and responsibilities owed to the Participants (or a Participant, as the case may be) and to be performed at WEPCo's own cost and expense.
- 2.15 References to amounts or sums expressed to be "index linked" are, unless expressly stated otherwise, references to amounts or sums in []¹² prices which require to be adjusted whenever the provision containing the amount or sum is given effect in accordance with this Agreement to reflect the effects of inflation after that date. The adjustment shall be measured by changes in the relevant index published for that Contract Year as calculated in accordance with the following formula:

$$\text{Amount or sum [] prices} \times \frac{\text{RPI}_d}{\text{RPI}_0} (\text{RPIX}_d / \text{RPIX}_0)$$

Where RPIX_d is the value of the Retail Prices Index (All Items Excl Mortgage Interest) published or determined with respect to the month most recently preceding the date when the provision in question is to be given effect and RPIX₀ is the value of the Retail Prices Index (All Items Excl Mortgage Interest) in respect of [].

- 2.16 [Reference to a document being in the "agreed form" is a reference to the form of the relevant document agreed between the parties and for the purpose of identification initialled by each of them or on their behalf.]
- 2.17 Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a stipulated date or event which is a prescribed number of Business Days after a stipulated date or event, the latest time for performance shall be noon on the last Business Day for performance of the obligations concerned.
- 2.18 Where this Agreement states that an obligation shall be performed "no later than" or "by" a prescribed number of Business Days before a base date or "by" a date which is a prescribed number of Business Days before a base date, the latest time for performance shall be noon on the last Business Day for performance of the obligations concerned.

¹²

Complete to reflect terms of ITPDSB.

- 2.19 References to this Agreement, a Project Agreement or a Shareholders' Agreement or to a provision thereof shall be construed at a particular time as a reference to it as it may have been amended, varied, supplemented, modified or appended.
- 2.20 A person, being a company, shall be "controlled" by another person if that other person owns a majority of the voting equity of that person or controls the majority of the votes at meeting of the board of directors of that person.
- 2.21 A "**parent undertaking**" or "**subsidiary undertaking**" has the meaning set out in section 1162 and Schedule 7 of the Companies Act 2006.
- 2.22 A body corporate is in the "same group" as another body corporate where:
- 2.22.1 it is a subsidiary undertaking of such body corporate;
 - 2.22.2 it is a parent undertaking of such body corporate; or
 - 2.22.3 it is a subsidiary undertaking of the parent undertaking of such other body corporate.

SCHEDULE 2 - COMPLETION DOCUMENTS

SECTION 1 - DOCUMENTS TO BE DELIVERED BY WEPCO

1. Unless an original document is specifically requested, a copy (certified by an officer of WEPCo as being a true copy) of each of the following documents is to be delivered by WEPCo to each Participant's Representative:
 - 1.1 The WEPCo Shareholders' Agreement and certification from WEPCo that the WEPCo Shareholders' Agreement has become (or will become, simultaneously with delivery of the other documents referred to in this Schedule 2 (*Completion Documents*)) unconditional in accordance with its terms, accompanied by evidence of the same.
 - 1.2 Extracts from the minutes of the meeting of the board of directors (certified as true and accurate by a director or the secretary of the relevant company) of each of WEPCo and the PSDP, at which resolutions were passed approving the execution, delivery and performance of each relevant document to which such person is expressed to be a party and in each case authorising a named person or persons to execute and deliver each such document and any other documents to be delivered by it pursuant to it.
 - 1.3 Evidence of the share subscriptions required under the WEPCo Shareholders' Agreement having been made by the Shareholders in WEPCo.
 - 1.4 WEPCo's Certificate of incorporation and of any certificate of incorporation on change of name.
 - 1.5 The memorandum and articles of association of WEPCo.
 - 1.6 Evidence of the insurances required in accordance with Clause 17 (*Insurance*) having been taken out by WEPCo and that the policies comply with the requirements of this Agreement.
 - 1.7 [Management Services Agreement between WEPCo [and the PSDP] properly executed by each party thereto].
 - 1.8 Supply Chain Agreements in respect of delivery of the Partnering Services.¹³

¹³

It is expected any key supply chain agreements relating to the delivery of the Partnering Services (only) shall be in place with the execution of the SPA – exact details will be specific to the PSDP and completed during the Selected Bidder period.

SECTION 2 - DOCUMENTS TO BE DELIVERED BY THE PARTICIPANTS

1. Each Participant shall deliver to WEPCo a certified copy of the board or committee resolution of that Participant approving the execution, delivery and performance of this Agreement and in each case authorising a named person or persons to execute and deliver each such document and any documents to be delivered by it pursuant thereto.
2. [The Participants shall deliver to WEPCo a certified copy of WGCo's formal approval to sign the WEPCo Shareholders' Agreement.]

SCHEDULE 3 - PARTNERING SERVICES

SECTION 1 - SPECIFICATION

1. PARTNERING SERVICES OBLIGATIONS

1.1 General Requirements

1.1.1 Required Outcome

- (a) The provision of the Partnering Services in a collaborative fashion to achieve the WEP Objectives and the objectives set out in the SDP and in particular, the provision and demonstration of overall value for money of New Projects and Project Services, and in relation to Partnering Services continuous improvement and value for money:
 - (i) through synergy between WEPCo and the Participants;
 - (ii) through the identification and thorough appraisal of all practical options for the delivery of the SDP in order to ensure the optimal solution is applied in every case;
 - (iii) through effective supply chain management in the broadest sense;
 - (iv) by exploiting the benefit of repeat work as an incentive for efficiency and high quality performance wherever appropriate;
 - (v) through the efficient and effective development and delivery of New Projects;
 - (vi) by developing a joint commitment to common goals;
 - (vii) by accurately measuring and reporting performance; and
 - (viii) by adopting open-book accounting techniques.
- (b) WEPCo shall comply with Section 2 (*Quality Systems*) of this Schedule 3 (*Partnering Services*) and shall ensure that the Partnering Services are carried out in accordance with the plans referred to therein (save to the extent anything within the terms of such plans is in conflict with any provision of this Agreement, in which case WEPCo shall update said plans to remove the conflict forthwith).

1.1.2 Scope

- (a) Value planning shall be carried out to ensure that WEPCo and the Participants are mutually supportive and undertake only those tasks for which they are best suited and to ensure that:
 - (i) each of the Participants receive optimal value for money in the Partnering Services provided by WEPCo and its supply chain;
 - (ii) each of the Participants receive optimal value for money in all Approved Projects, and in particular Project Services procured from WEPCo and its supply chain;
 - (iii) risk allocation is, subject to the terms of this Agreement, equitable and appropriately apportioned between the parties; and

- (iv) openness and accountability can be demonstrated to the appropriate governance authorities for public sector organisations.

1.1.3 The services described in this Section 1 (*Specification*) of Schedule 3 (*Partnering Services*) are classified as follows:

- (a) Ongoing Partnering Services, being constant or recurring Partnering Services, which shall include:
 - (i) Partnering and Collaborative Working;
 - (ii) Partnering Service Supply Chain Establishment and Overall Management; and
 - (iii) Value for Money.
- (b) Project Development Partnering Services, being Partnering Services provided by WEPCo in connection with the development of New Projects, which shall include:
 - (i) New Project Development and Delivery;
 - (ii) Supply Chain Establishment for each New Project;
 - (iii) Funding; and
 - (iv) Value for Money.
- (c) Strategic Support Partnering Services that may be required by the Participants or any of them such as:
 - (i) Strategic Estate Planning;
 - (ii) Service Planning; and
 - (iii) Value for Money.

For the avoidance of doubt, the provisions of Clause 9.1 do not apply to this category of Partnering Services. Partnering Services of this classification may be individually procured by one or more Participant pursuant to Clause 9.3, on an ad-hoc basis on terms and conditions appropriate for the particular circumstances.

1.2 Ongoing Partnering Services

1.2.1 Partnering and Collaborative Working

- (a) **Required outcome**
 - (i) Successful development and delivery of the SDP as part of WEPCo's membership of the SPB.
 - (ii) The establishment and development of the SPB which effectively oversees, monitors, supports and reviews the development and achievement of the SDP over the term of this Agreement. The SPB shall serve as a forum for the open exchange of ideas and knowledge and to enable the Participants and WEPCo to discuss forthcoming accommodation and service delivery requirements to ensure an

integrated, co-ordinated and practical approach to fulfilling such requirements.

(b) **Scope**

- (i) WEPCo shall perform its obligations under Section 2 (*Updated SDP*) of Schedule 11 (*Strategic Delivery Plan*) in relation to the SDP.
- (ii) WEPCo shall ensure the effective delivery of the SDP in a manner which demonstrably provides value for money to the Participants.
- (iii) WEPCo shall support the development of the SPB through activities including, but not limited to:
 - (1) attending and actively contributing to each meeting of the SPB; and
 - (2) providing all necessary and adequate information, reports and documentation (including the information and reports required in terms of Clause 14).
- (iv) WEPCo shall work closely with the Participants to ensure continuous improvement in the delivery of WEPCo services in the Region and implement effective and measurable performance management.
- (v) Provide all necessary information to Participants in relation to the identification and development of Participants' New Project Requests.
- (vi) Develop and implement measures to ensure timely delivery of Approved Projects.

(c) **Ancillary activities**

It is anticipated that in order to support the development, regular update and delivery of the SDP, including stimulating and promoting community involvement in the delivery of the SDP (which are key aims and objectives of the Participants), WEPCo shall work with the Participants to successfully build and deliver a long-term partnership including;

- (i) developing and maintaining relationships and working closely with local stakeholders from each Participant, local authority departments, local businesses and the wider community to ensure ownership and support for the SDP;
- (ii) developing and maintaining close relationships with Participants and local stakeholders to understand their strategic and local drivers and constraints in order to support delivery of the SDP;
- (iii) developing and maintaining an awareness and understanding of the SDP, and how this fits into the Participants' corporate vision and strategy;
- (iv) developing and maintaining an awareness and understanding of Participants' sustainability strategies;
- (v) developing and maintaining an awareness and understanding of how shared community facilities and services may be appropriate and can contribute to delivering integrated services, community services and regeneration with the Region;

- (vi) developing and maintaining an understanding of national and local policies on major public sector strategic documents, policies, targets, timeframes etc and the impact they may have on New Projects;
- (vii) supporting the Participants in the efficient identification and maximisation of opportunities to acquire new sites or dispose of existing sites;
- (viii) maintaining an awareness of future changes in legislation that may impact the SDP and reporting these to the SPB in a timely manner;
- (ix) actively participating with each of the Participants and other stakeholders within other agencies and organisations in the identification of common goals for improving local communities through improved provision of services; and
- (x) building close working relationships with external agencies and other interested organisations as part of the SDP development process and in connection with the development of New Projects.

For the avoidance of doubt, such activities specified in this paragraph (c) shall be an integral part of WEPCo's overall service delivery but shall be excluded from the Clause 9.1 sole and exclusive right and obligation provision and shall not be subject to any specific or additional payment.

1.2.2 Partnering Services Supply Chain Establishment and Overall Management

(a) Required outcome

- (i) The establishment of a supply chain that has the experience, ability and resources to deliver, across the whole of the Region, the services required of Participants to deliver the SDP and all Approved Projects.
- (ii) Selection of supply chain partners and ongoing management of supply chain such that optimal performance and value for money is achieved.

(b) Scope

(i) Establish WEPCo's Supply Chain for Partnering Services

- (1) WEPCo shall select and appoint a supply chain commensurate with the Participants' values, goals and vision having regard to a number of areas including, but not limited to, health and safety, commitment to delivery of community benefits, quality and sustainability. Subject to the terms of this Agreement, the supply chain will be established and managed in a manner that will:
 - (A) optimise and clearly demonstrate value for money;
 - (B) ensure the effective performance of the Project Services and the other Partnering Services;
 - (C) provide optimal risk transfer to achieve certainty of delivery;
 - (D) mitigate the risk of time and/or cost overrun;

- (E) secure and maximise tangible benefits from repeat business and long-term business relationships, where appropriate;
 - (F) deliver and demonstrate continuous improvement in the delivery of the Partnering Services over the term of this Agreement; and
 - (G) be undertaken in a transparent and auditable manner with clearly identified selection criteria and evaluation methodology and so as to satisfy the SPB (under exclusion of WEPCo's representative) that decisions have been made on a proper, arm's length basis where WEPCo proposes to include within the supply chain any B Shareholder Member or any Associate of any of WEPCo, the PSDP or any B Shareholder Member.
- (2) The assessment and selection of supply chain partners shall be conducted following a robust and clear procedure with suitable levels of checking to ensure that supply chain partners are selected with the ability to demonstrate:
- (A) appropriate professional accreditation;
 - (B) financial robustness;
 - (C) capacity to undertake the required services;
 - (D) established and successful management systems including quality, environment and health and safety;
 - (E) sufficient resources;
 - (F) an appropriate level of support to the key resources;
 - (G) an appropriate level of quality in deliverables; and
 - (H) a proven track record in terms of relevant experience in relation to capital and revenue funded education and/or community projects, as appropriate.
- (3) WEPCo shall establish supply chain agreements based on goals common to those of WEPCo, the Participants and service users.

(ii) **Manage performance of Supply Chain partners**

- (1) Performance of supply chain partners shall be reviewed in accordance with WEPCo's continuous improvement targets and performance measurement requirements in Section 3 (*Performance Measurement*) of Schedule 3 (*Partnering Services*).
- (2) WEPCo shall, where appropriate, promote long-term high-quality working relationships between WEPCo and the

supply chain to benefit the Participants and service users in terms of quality outcomes and value for money.

- (3) WEPCo shall ensure the effective measurement of Supply Chain Member performance and implement robust, transparent, auditable and effective processes (clearly dealing with any conflicts of interest, potential or actual) for removal of under-performing supply chain partners from the supply chain.
- (4) The testing of performance of supply chain partners should be undertaken, as a minimum, on an annual basis, and should include, but not be limited to, their:
 - (A) performance against the supply chain selection criteria;
 - (B) ability to complete their agreed scope of works in accordance with WEPCo's [Quality System];
 - (C) ability to provide a service that continues to demonstrate value for money;
 - (D) capacity to undertake the required services in a manner which promotes partnership working; and
 - (E) continuing ability to demonstrate that their practices and principles are aligned with those of the Participants.
- (5) Reporting on performance of supply chain partners shall be undertaken annually.
- (6) The output of this annual review shall be reported to the SPB along with any proposed actions.
- (7) The output of the review will be used to ensure any lessons learned are communicated and applied with the supply chain partners and fed back into future New Projects in order to demonstrate continuous improvement.

(iii) **Partnering Services Supply Chain Refresh**

- (1) WEPCo shall develop and implement robust, transparent and auditable processes (clearly dealing with any conflicts of interest, potential or actual) for:
 - (A) performance measurement, performance management and periodic review of the Supply Chain Members;
 - (B) (not less than every two (2) years) carrying out a full review and assessment of the performance of incumbent Supply Chain Members and implementing a robust, transparent and auditable open-market exercise in respect of Partnering Services, to select the most appropriate new supply chain members so as to update its supply chain by the addition, removal, retention and/or substitution of its members from time to time (such

process being known as the "**Partnering Services Supply Chain Refresh**"),

in either case, so as to maintain a high quality and value for money service.

- (2) In reviewing the performance of individual supply chain partners, WEPCo shall consider the ongoing performance of the supply chain partner in comparison to the open market of suppliers able to provide the required services and to other supply chain partners providing comparable services.
- (3) The output of such periodic review shall be reported to the SPB along with any proposed actions.
- (4) WEPCo should ensure that its proposals for updating the supply chain (whether by removing, replacing or adding supply chain partners) take into account the whole range of consultants and suppliers who can demonstrate an ability to meet the requirements imposed under this Agreement in relation to the Region.
- (5) The review and updating of the supply chain (whether by removing, replacing or adding supply chain partners) from time to time, shall be undertaken in a transparent and auditable manner with clearly identified selection criteria and evaluation methodology and so as to satisfy the SPB (under exclusion of WEPCo's representative) that decisions have been made on a proper, arm's length basis where WEPCo proposes to retain or include within the supply chain the PSDP, any B Shareholder Member or any Associate of any of WEPCo, the PSDP or any B Shareholder Member from time to time.
- (6) The selection of new supply chain partners shall be commensurate with the principles and guidelines set-out in paragraph 1.2.2(b)(i) above.
- (7) The selection of new supply chain partners shall ensure that innovative, sustainable and cost effective approaches, if applicable, appropriate and add value, are rewarded.

1.2.3 **Value for Money**

(a) **Required outcome**

- (i) The provision of value for money to the Participants, and the wider community, over the term of this Agreement in relation to Ongoing Partnering Services.

(b) **Scope**

- (i) Achieve value for money in the delivery of Ongoing Partnering Services across the Region through the following:
 - (1) operating a planned and structured programme for reviewing and improving the ongoing performance of WEPCo and its supply chain;

- (2) effective monitoring and measurement of actual cost over the term of this Agreement including the collection and verification of actual cost data; and
 - (3) effective management of Partnering Services Costs and the Participants' transaction costs through the removal of unnecessary duplication, the development of close partnership working, the early engagement of Funders and the Supply Chain Members, and the appropriate use of standardisation and innovation.
- (ii) Continuous improvement in value for money over the term of this Agreement through measurable improvements in outcomes and/or reductions in the overall and elemental cost of Partnering Services over the term of this Agreement.
 - (iii) The review and, where value for money, refresh of the Partnering Services supply chain or other effective demonstration of value for money where appropriate, in all cases in accordance with the provisions of Section 4 (*Partnering Services Costs Rates*) of Schedule 3 (*Partnering Services*) and Schedule 4 (*Partnering Services Costs*).
 - (iv) The provision of elemental cost data (both estimated and actual) from each Approved Project as necessary for the demonstration of value for money and/or for inclusion in a WEP Strategic Partnering Delivery Model benchmarking database, all in accordance with Clause 13 (*Value for Money*).
 - (v) Contribute to improvements in Participants' value for money in the delivery of Education Sector Services and/or, where applicable. Community Services through improvements in efficiency and operating cost of facilities through economies of scale and/or any other measures applicable.

1.3 Project Development Partnering Services

1.3.1 New Project Development and Delivery

(a) Required Outcome

- (i) New Projects developed in a robust and transparent basis with clear understanding of Participant requirements as to risk, cost and programme.
- (ii) New Projects developed bringing leading edge design quality and innovation including clear emphasis on health and safety and sustainability.
- (iii) New Projects developed that enable improved education service delivery and optimal value for money to Participants.
- (iv) New Projects taken effectively and efficiently through optioneering, feasibility, outline business case, final business case and contract award (as required) in a planned, structured and managed process.
- (v) Improvement in the speed, quality and cost of delivering New Projects.

- (vi) The enhancement of affordability and value for money through shared use, the development of multi-purpose buildings and the attraction of private sector tenants and other third party incomes, where requested.
- (b) **Scope**
- (i) **Stage 1**
 - (1) The provision of all the information reasonably required to achieve Stage 1 Approval. This should comprise provision of choice to the Relevant Participants and sufficient information to inform that choice and to ensure the best available value for money option is identified in each case, including but not limited to:
 - (A) critical success factors for the New Project;
 - (B) site selection including location, acquisition and development cost, where requested;
 - (C) future flexibility and adaptability of the site;
 - (D) design of the facilities taking into account functionality, flexibility and whole life cost, together with suitable warranties allowing the Contractor and design team appointed at Stage 2 to rely on and use such concept designs;
 - (E) specific requirements for the development and operation of the facilities;
 - (F) interfaces with other public or private organisations and the impact this may have on the Facilities including any opportunity for improving efficiency of service through sharing of all, or parts, of the facilities; and
 - (G) facilities management and service delivery requirements.
 - (2) Consistency of approach to development and delivery of New Projects to measure, understand and work with each of the Participants to facilitate continued improvement.
 - (3) WEPCo shall provide a detailed Project execution plan including critical success factors for the New Project programme, stakeholder engagement plan, communication plan, BIM Execution Plan, deliverable list, roles and responsibility matrix and risk register covering the Stage 1 activities ("**Project Execution Plan**").
 - (4) WEPCo shall monitor their performance of New Project Stage 1 development and through appropriate and agreed measures, highlight lessons learnt and include these with that continuous improvement process.
 - (5) For the purposes of the CDM Regulations, conduct appropriate competency assessments of potential Principal Designers (who may be Supply Chain Members) on behalf of the Relevant Participant(s) in their capacity as "Client"

(which shall have the meaning ascribed to it in the CDM Regulations) for the potential New Project and so as to ensure the Relevant Participant(s) are able to discharge the relevant obligations of the Client under the CDM Regulations in that regard.

- (6) Recommend to the Relevant Participant(s) an appropriate person or persons whom the Relevant Participant(s) (or one of them) in their capacity as "Client" for purposes of the CDM Regulations may wish to appoint as Principal Designer in respect of the New Project as a whole (in this regard, all Parties recognising that the preference would be for the same Principal Designer to continue in role once the Project Service Provider takes over as "Client" pursuant to the relevant Project Agreement).
- (7) Where any activities to be carried out as referred to in paragraphs 4.2.3(b) to 4.2.3(g) of Schedule 5 (*Approval Process for New Projects*) are notifiable for purposes of the CDM Regulations, WEPCo shall elect to be the Client in respect of such works and shall discharge the roles and responsibilities incumbent on the Client in respect of such activities under the CDM Regulations. WEPCo shall ensure that the Relevant Participant(s) are timeously supplied with a copy of each and every health and safety file prepared by the relevant Principal Designer in respect of such notifiable activities.

(ii) **Stage 2**

- (1) WEPCo will update the Project Execution Plan for Stage 1 to include all Stage 2 activities.
- (2) WEPCo shall progress each New Project from Stage 1 Approval to Stage 2 Approval in an efficient, effective and timely manner.
- (3) WEPCo shall develop the Stage 1 designs, to include identification and, wherever appropriate, the realisation of every opportunity to:
 - (A) provide desirable extras;
 - (B) create a focal point for the community through mixed public use etc, where requested;
 - (C) attract complementary private sector business income;
 - (D) provide high-quality, well-located and appointed environments; and
 - (E) develop flexible, "future-proof" buildings which inspire staff and service users and provide a focal point for the community.
- (4) WEPCo shall work with the Relevant Participant(s) to develop and understand the facilities management (FM) requirements for New Projects.

- (5) Where required by the Relevant Participant(s), WEPCo shall develop specific proposals in relation to carrying out the FM services on a New Project.
- (6) Conduct, on behalf of the Relevant Participant(s) in their capacity as "Client" for purposes of the CDM Regulations appropriate competency assessments of any potential Principal Contractors so as to discharge the relevant obligations of the Client under the CDM Regulations in that regard.

(iii) **General**

For the avoidance of doubt, this paragraph (iii) applies to all stages throughout the development of New Projects.

(1) **Design Approach**

WEPCo shall:

- (a) have the expertise to carry out feasibility studies, option appraisals, and inspirational designs in line with the project requirements from the SDP, a brief or output specification;
- (b) utilise best practice on all New Projects and implement lessons learnt from the wider WEP Strategic Partnering Delivery Model and industry as a whole. This shall include lessons learnt and requirements identified by the Participants; and
 - (i) agree with the Participants, and adopt, appropriate and current design quality toolkits to support the design development of New Projects, such as BREEAM

(2) **Health and Safety**

- (ii) WEPCo shall take a leading role in ensuring that health and safety requirements are met during the development and construction of New Projects; and
- (iii) WEPCo shall advise and support the Relevant Participant(s) in their capacity as Client to perform its duties as a "client" pursuant to the CDM Regulations.

(3) **Community Inclusion**

- (a) WEPCo shall ensure that it includes local communities in the development of New Projects and associated community improvement initiatives.
- (b) WEPCo shall ensure the enhancement of user satisfaction by developing and designing facilities that present a focal point for the community through, where applicable, multi-use including

complementary businesses and services such as fitness centres, cafeterias etc.

- (c) WEPCo shall understand and have expertise in the management, operating and design implications of extended facilities and out-of-hours community use, including considerations for:
 - (i) good signage both external and internal;
 - (ii) access, external lighting and car parking;
 - (iii) heating controls for use outside normal hours;
 - (iv) changing facilities, reception and social areas for community use accessible for use outside normal hours; and
 - (v) facilities used for community use grouped for ease of access, security and zoned heating.

(4) **Facility Interaction**

WEPCo shall be fully aware, and have expert knowledge of, the relationships between operational infrastructure and the built environment and understand the specific issues within the New Project development that require specific solution regarding integration/separation and interface, including but not limited to:

- (a) Security;
- (b) Access;
- (c) ICT;
- (d) Fire Management;
- (e) Cleaning; and
- (f) Confidential or contaminated waste.

(5) **Innovation**

- (a) WEPCo shall ensure that appropriate consideration is given to innovation in the design and development of New Projects.
- (b) WEPCo shall:
 - (i) have the understanding and skills to develop creative and innovative solutions to facility organisation, design of facility buildings and provision of facilities, that are sustainable, and will deliver wider Community Services improvements;

- (ii) consider the provision of imaginatively designed solutions that will inspire staff and service users, provide flexibility of use and make a positive statement to the community;
- (iii) have the understanding and skills to develop and deliver new and different approaches in service provision that are transformational; and
- (iv) have an understanding of the changing ICT environment and the opportunities this provides in terms of space use flexibility and improved service delivery.

(6) **Sustainability**

- (a) WEPCo shall develop and implement specific requirements for sustainability and support the Participants' wider sustainability strategies.
- (b) WEPCo shall identify and consider the use of sustainable techniques, including energy efficiency and savings and measures to reduce construction waste, to be implemented on New Projects which are affordable, present value for money and have a positive impact on the facilities.

(7) **Community**

- (a) WEPCo shall give due consideration to, and compliance where appropriate, with local community improvement projects in the vicinity of New Projects and the wider strategic importance of these initiatives.
- (b) WEPCo shall undertake widespread consultation (on basis agreed with the Relevant Participant(s)) within the local community throughout the New Project process.

1.3.1 **Supply Chain Establishment for New Projects**

(a) **Required outcome**

Establishment of supply chain for a specific New Project or New Projects shall be carefully considered to ensure that services are provided by the most appropriate partner(s) and that optimal performance and value for money are achieved. A Relevant Participant may request supply chain assembly in respect of:

- (i) a New Project for a single Facility;
- (ii) a New Project for a group or batch of Facilities; or
- (iii) a group or batch of planned New Projects, in which case the Tender Process will be carried out in conjunction with the first of such New Projects but shall establish a supply chain for the prescribed number of New Projects, on the basis of terms that secure and maximise

tangible benefits from repeat business and long-term business relationships, subject always to Clause 23 and Appendix 1 of Schedule 6 (*New Project Pricing Report*).

(b) **Scope**

(i) WEPCo shall ensure the appropriate engagement of supply chain partners during (and before) the New Project Approvals Process, as appropriate, from conception to enable improved outcomes and best available value for money.

(ii) WEPCo shall review the suitability of supply chain partners to undertake services in relation to a New Project or New Projects, paying regard, but not limited to, the following:

(1) availability of resources, where appropriate, to progress the New Project through the design, construction and operation phases of the New Project; and

(2) ability to provide a level of service on a constant and recurring basis throughout the development of the New Project.

(iii) WEPCo shall select and appoint a supply chain commensurate with the Relevant Participants' values, goals and vision having regard to a number of areas including, but not limited to, health and safety, commitment to delivery of community benefits, quality and sustainability. Subject to the terms of this Agreement, the supply chain will be established and managed in a manner that will:

(A) optimise and clearly demonstrate value for money;

(B) ensure the effective performance of the Project Services;

(C) provide optimal risk transfer to achieve certainty of delivery;

(D) mitigate the risk of time and/or cost overrun;

(E) secure and maximise tangible benefits from repeat business and long-term business relationships, where appropriate; and

(G) be undertaken in a transparent and auditable manner with clearly identified selection criteria and evaluation methodology and so as to satisfy the SPB (under exclusion of WEPCo's representative) that decisions have been made on a proper, arm's length basis where WEPCo proposes to include within the supply chain any B Shareholder Member or any Associate of any of WEPCo, the PSDP or any B Shareholder Member.

(iv) The assessment and selection of supply chain partners shall be conducted following a robust and clear tender procedure with suitable levels of checking to ensure that supply chain partners are selected with the ability to demonstrate:

(A) appropriate professional accreditation;

(B) financial robustness;

- (C) capacity to undertake the required works or services;
 - (D) established and successful management systems including quality, environment and health and safety;
 - (E) sufficient resources;
 - (F) an appropriate level of support to the key resources;
 - (G) an appropriate level of quality in deliverables; and
 - (H) a proven track record in terms of relevant experience in relation to capital and revenue funded accommodation projects, as appropriate.
- (v) WEPCo shall maintain an awareness of any Relevant Participant targets in relation to recruitment and training initiatives and, where applicable and appropriate, shall take due cognisance of these in their supply chain resourcing plans. In partnership with the National Skills Academy for Construction and CITB (the Construction Industry Training Board) WEPCo will ensure it works with construction employers to embed skills and employment opportunities; maximising benefit to the sector and to local communities. WEPCo shall record and report how their supply chain resourcing activities are commensurate with, or impact upon, Participant recruitment and development targets.
 - (vi) WEPCo shall establish supply chain agreements based on goals common to those of WEPCo, the Participants and service users.

1.3.2 Funding

(a) Required Outcome

- (i) The ability to secure funding for a New Project or New Projects, if required, on terms which demonstrate the appropriate balance between funding costs, transaction costs and long-term flexibility.
- (ii) The achievement of improvements in funding terms wherever practicable through repeat business and/or the use of funding competitions and/or the appropriate use of WEPCo's existing and growing asset base over the term of this Agreement.
- (iii) The commitment to challenge Funders to provide innovation and flexibility in their approach to funding of individual projects. In so doing this should result in funding that is fit for purpose and which provides an ongoing value for money approach, with flexibility to acknowledge change at minimal cost and disruption to a Project whilst also applying the appropriate level of rigour in respect of due diligence on individual Projects.

- (b) **Scope**
 - (i) Where Project Services giving rise to capital expenditure are to be funded wholly or partly from revenue payments by the Project Agreement Counterparty, the selection and appointment of Funder(s) to finance each Project Agreement.
 - (ii) The development and agreement of funding terms which provide appropriate flexibility and demonstrates the best available value for money for the Participants.
 - (iii) The promotion of long-term effective working relationships between WEPCo and the Funder(s) where this can benefit the Participants, particularly in the development of New Projects and the provision of best available value for money.
 - (iv) Where appropriate (i.e. where a benefit to the Relevant Participants can be demonstrated), the active engagement of Funders in the New Project Approval Process from conception.

1.3.3 Value for Money

- (a) **Required outcome**

The provision of value for money to the Participants, and the wider community, over the term of this Agreement in relation to the development of New Projects.

- (b) **Scope**

Achieve value for money in the delivery of each New Project through the following:

- (i) effective options appraisal from the outset of each New Project to ensure the best available value for money outcome is selected and delivered in every case;
- (ii) provision and presentation of accurate, validated, transparent and detailed information in relation to the costs and other aspects of assessment of value for money of New Projects; and
- (iii) the development and use of effective methods of determining the value and the price of each New Project from the outset.

1.4 Strategic Support Partnering Services

1.4.1 Strategic Estate Planning

- (a) **Required outcome**

- (i) With prior approval of the relevant Participant, the informed review and investigation by WEPCo and any of the Participants of all the estate development options available to deliver the SDP before identifying which New Project(s) to progress.
- (ii) The thorough appraisal of all practical options to ensure the best available value for money is realised in every case.
- (iii) The development of practical and affordable proposals for improvement to the Participant's estate, which will provide value for

money for the Participant and facilitate the delivery of the services plan laid out in the latest revision of the SDP.

(b) **Scope**

Estate planning carried out by WEPCo, with the agreement of and in conjunction with the Participant will need to answer the following key strategic questions in respect of estate strategies for specific areas/sites proposed by the Participants:

- (i) where are we now? A comprehensive description of the current estate available for provision of Education Sector Services and, where requested, Community Services in terms of its condition, efficiency, statutory compliance, adequacy, capability and suitability;
- (ii) where do we want to be? Identification of the future estate requirements;
- (iii) how do we get there? Identification of the “gap” together with the provision of costed strategic options for closing it including as many alternatives as are appropriate in the particular circumstances to ensure the best available value for money option is identified in each case and/or estate masterplanning; and
- (iv) how will we know that we are making progress? A means of measuring progress towards the provision of the estate required to realise the SDP.

1.4.2 **Service Planning**

(a) **Required Outcome**

Successfully supporting the Participants to plan Education Sector Services and, where requested, Community Services across the Region.

(b) **Scope**

- (i) WEPCo shall work with the Participants to plan Education Sector Services and, where applicable, Community Services that meet the needs of the population in the Region.
- (ii) WEPCo shall support the Participants in the planning of education and Community Services across the Region to:
 - (1) help identify opportunities to improve the efficiency and cost effectiveness of the services to ensure they deliver value for money; and
 - (2) help support the Participants’ achieve their sustainability aims and targets in the delivery of education and Community Services.

1.4.3 **Value for Money**

WEPCo shall ensure that, where Strategic Support Partnering Services are provided to any of the Participants, value for money for the services can be clearly demonstrated.

SECTION 2 - MANAGEMENT SYSTEMS

1. GENERAL

- 1.1 WEPCo may operate the quality, health & safety and environmental management systems required by this Section 2 (*Management Systems*) as independent systems or integrate common elements to form a single system.
- 1.2 WEPCo shall ensure that:
 - 1.2.1 an audit of the system or systems required to be maintained pursuant to this Section 2 is carried out at regular intervals and the findings of such audit reported to the SPB; and
 - 1.2.2 such system or systems are reviewed at intervals agreed by the SPB (excluding WEPCo's representative) to ensure continued stability and effectiveness.

2. MANAGEMENT SYSTEM GENERAL REQUIREMENTS

- 2.1 WEPCo shall establish, document, implement and maintain:
 - 2.1.1 a quality management system for the purpose of ensuring and demonstrating that all aspects of the Partnering Services and all other matters for which WEPCo is responsible under this Agreement are carried out fully in conformity with the relevant provisions of this Agreement and WEPCo's quality management policies and objectives (as approved by the SPB from time to time);
 - 2.1.2 an appropriate system for implementing its occupational health and safety ("**OH&S**") policies and objectives (as approved by the SPB from time to time) to enable it to control its OH&S risks and improve its OH&S performance over time; and
 - 2.1.3 an appropriate system for achieving and demonstrating sound environmental performance by controlling the impacts of its activities, products and services on the environment, consistent with its environmental policy and objectives (as approved by the SPB from time to time).
- 2.2 Such management systems and relevant policies and objectives shall be reflected in:
 - 2.2.1 quality plans (to be contained in a quality manual) which shall, as a minimum, be consistent with BS EN 9001 or 9002 (as the case may be) or any equivalent standard which is generally recognised as having replaced them (or either of them);
 - 2.2.2 a health and safety manual which shall, as a minimum, be consistent with OHSAS 18001 or any equivalent standard which is generally recognised as having replaced it; and
 - 2.2.3 an environmental manual which shall, as a minimum, be consistent with ISO 14001 or any equivalent standard which is generally recognised as having replaced it,and otherwise be consistent with the terms of Appendix 1 (*Initial Management Systems*) to this Section 2.
- 2.3 Notwithstanding any other provisions of this Agreement, the manuals comprising WEPCo's management systems shall include the following or, as necessary, make reference to the location of documents describing:
 - 2.3.1 the quality, OH&S and environmental (as the case may be) policies and objectives of WEPCo;
 - 2.3.2 the scope of the relevant system;

- 2.3.3 organisational structure;
- 2.3.4 management arrangements;
- 2.3.5 responsibilities and authority of staff;
- 2.3.6 procedures for the control of documents and records;
- 2.3.7 procedures and method statements for the execution, measuring and valuing of the Partnering Services;
- 2.3.8 procedures for managing interfaces between WEPCo's own management systems and those of WEPCo's Supply Chain Members and, where applicable, Participants;
- 2.3.9 procedures for monitoring and measuring of performance against the Key Performance Indicators and, as necessary, other indicators to ensure conformity and to achieve value for money (including a procedure to monitor information relating to customer perception as to whether the WEPCo has met the Participants' Specific Requirements); and
- 2.3.10 the responsibilities and requirements for planning and conducting audits, and for reporting results and maintaining records at both WEPCo and Supply Chain Member level.

3. **MANAGEMENT SYSTEMS DIRECTOR**

3.1 WEPCo shall ensure that there is a suitably qualified, skilled and experienced individual fulfilling the role of WEPCo Management Systems Director as soon as reasonably practicable after the Commencement Date and in any case no later than [six months] after the Commencement Date. The Management Systems Director shall be responsible for:

- 3.1.1 ensuring that processes needed for WEPCo's management systems are established, implemented and maintained;
- 3.1.2 reporting to the WEPCo Board on the performance of WEPCo's management systems and any need for improvement; and
- 3.1.3 ensuring the promotion of awareness of customer requirements throughout the organisation.

3.2 **Audit**

- 3.2.1 The Management Systems Director shall arrange for internal audits to be conducted at planned intervals to determine whether WEPCo's management systems conform to the quality, OH&S and environmental management systems requirements established by WEPCo and are effectively implemented and maintained.
- 3.2.2 WEPCo shall ensure that actions are taken without undue delay to eliminate detected nonconformities and their causes. Follow-up activities shall include the verification of the actions taken and the reporting of verification results.

APPENDIX 1 - INITIAL MANAGEMENT SYSTEMS

The Initial Management Systems are attached hereto.¹⁴

¹⁴ Bidders to develop and to be agreed during dialogue.

SECTION 3 - PERFORMANCE MEASUREMENT

WEPCo shall, at its own cost and expense, regularly monitor and report the standard of performance of each of the Partnering Services and the Project Services and demonstrate continuous improvement wherever practicable in respect of Partnering Services. This will be achieved by the use of appropriate key performance indicators as set out below, as further developed in accordance with this Agreement from time to time.

APPENDIX - SCHEDULE OF KEY PERFORMANCE INDICATORS¹⁵

¹⁵ Refer to KPIs extract in the ITPDSB. Relevant KPIs, Significant Performance Failures, Track Record Tests and calibrations to be developed and agreed with Tenderers during dialogue and inserted prior to contract execution. The KPIs are described at high level for the purposes of dialogue and will be refined and developed at Selected Bidder stage (without altering the original purpose). Note the baseline community benefit requirements are mandatory and are not subject to dialogue.

SECTION 4 - PARTNERING SERVICES COSTS RATES¹⁶

1. Subject to paragraph 2, these rates and prices shall be index linked, with an annual adjustment to be made on each anniversary of the Commencement Date (reflecting movements in RPIX to the month preceding the month in which the anniversary of the Commencement Date occurs).
2. Additionally the rates and prices shall be reviewed by WEPCo on a date not earlier than three (3) months before the second anniversary of the Commencement Date (and annually thereafter) by reference to other relevant local and national trends and to the rates and prices actually paid by WEPCo for similar services (where WEPCo has used Good Industry Practice to secure best value in respect of those services) and taking into account of value for money objectives set out in the Key Performance Indicators and the outcomes of the Partnering Services Supply Chain Refresh. On completion of this review and in any event no later than one (1) month before the second (and each subsequent) anniversary of the Commencement Date, WEPCo shall provide to the Participants a report on such review confirming whether WEPCo proposes an increase or decrease of, or no change to, these rates and prices (taking into account any adjustment which would fall to be made pursuant to paragraph 1) and demonstrating that any such proposal to adjust and/or renew the supply chain (taken together with the effect of paragraph 1) represents value for money and continuous improvement in value for money, for approval by the SPB.
3. Following agreement by the SPB (acting reasonably and in the context of the required outcomes in Section 1 of Schedule 3 (*Partnering Services*) to any proposal submitted by WEPCo (or agreement on other terms between the Parties), the table below (as updated from time to time) shall be updated to reflect the agreed rates. In the absence of such agreement, the annual adjustment pursuant to paragraph 1 above shall continue to be made.
4. For the purposes of the calculation of any Partnering Services Costs where any component of the rates or costs included in the calculation are not included in the rates below (as updated from time to time) (such rates or costs being "**Non Scheduled Costs**"), the Participants and WEPCo shall seek to agree the relevant rates for the Non Scheduled Costs. Failing such agreement, the Non Scheduled Costs shall be Tendered in accordance with the provisions of paragraph 5 (*Tender Process*) of Schedule 6 (*New Project Pricing Report*) which shall apply *mutatis mutandis* in relation to the Tender Process thereof (subject to any amendments to such provisions as may be necessary to reflect the particular circumstances).

The table below (as updated from time to time pursuant to paragraphs 1 to 3 above) shall be updated to include the rates agreed or produced by such Tender Process.

Discipline	Grade Qualifications	and	Hourly Rate £	Day Rate £
WEPCo Staff				
Director/ Executive	Chief			

¹⁶ Partnering Services Cost Rates are solution specific and are to be developed and agreed with Bidders during dialogue. Partnering Services Cost Rates are expected to include rates for the development of New Project Requests through Stage 1 of the New Project Approvals Process.

Discipline	Grade Qualifications	and	Hourly Rate £	Day Rate £
Manager				
[Other]				
Feasibility & Design				
Architect	Director			
	Associate			
	Project Architect			
	Technician			
Engineer - C&S	Director			
	Associate			
	Project Engineer			
	Technician			
Engineer - M&E	Director			
	Associate			
	Project Engineer			
	Technician			
Quantity Surveyor	Director			
	Associate			
	Senior QS			
	Assistant QS			
Project Manager	Director			
	Associate			
	Senior PM			
	Assistant PM			
Energy Specialist				
Planning Advisor				
[Rates Advisor]				
[Other]				

Discipline	Grade Qualifications	and	Hourly Rate £	Day Rate £
Finance Support				
Financial Modellers				
Risk Specialist Advisor				
Tax Advisor				
Third Party Income Advisor				
External Financial Auditor				
[Other]				
Legals				
Company Secretary				
External Advice				
	Partner			
	Senior Associate			
	Junior Associate			
	Trainee/paralegal			
[Other]				

SECTION 5 - PARTNERING SERVICES METHOD STATEMENTS

5A - ONGOING PARTNERING SERVICES

The Ongoing Partnering Services Method Statement is attached hereto¹⁷.

¹⁷ Method Statements are solution specific and are to be developed and agreed with Bidders during dialogue. These should include method statements for delivery of Community Benefit Requirement KPIs, CBR Enhancements and Additional Benefits.

5B - PROJECT DEVELOPMENT PARTNERING SERVICES

The Project Development Partnering Services Method Statement is attached hereto.¹⁸

¹⁸ Method Statements are solution specific and are to be developed and agreed with Bidders during dialogue. These should include specific sections dealing with each of the following:

- Community Benefits - method statements for procurement of commitments to deliver the Authority's Community Benefit Requirement KPIs, ACBR Enhancements and Additional Community Benefit Project Co's Proposals.
- Tender Process - establishment of supply chain, achievement of value for money and management of costs from appointment of the successful tenderer and handling conflicts of interest.
- Tenderers to submit BIM delivery method statements.
- The approach to procuring a common Construction and Operational Panel as referred to Template Project Agreement should also be addressed.

5C - STRATEGIC SUPPORT PARTNERING SERVICES

The Strategic Support Partnering Services Method Statement is attached hereto.¹⁹

¹⁹ Method Statements are solution specific and are to be developed and agreed with Bidders during dialogue.

SCHEDULE 4- PARTNERING SERVICES COSTS

1. PAYMENT FOR PROJECT DEVELOPMENT PARTNERING SERVICES

1.1 Payment for Project Development Partnering Services shall be by Project Development Fees. The process for calculating and payment of such Project Development Fees in relation to:

1.1.1 Qualifying Projects; and

1.1.2 any other Projects in respect of which a Project Service Provider is to provide the relevant Project Services and which WEPCo and a Relevant Participant have agreed is to be subject to the approval process set out in Schedule 5 (*Approval Process for New Projects*),

is set out in this paragraph 1. For other Projects, the relevant Participant and WEPCo shall agree an appropriate Project Development Fee and mechanic of payment.

1.2 A proposed capped development fee for each proposed New Project (broken down for the entire New Project Approval Process, each stage of the New Project Approval Process and for each relevant component of the Project Development Partnering Services) must be submitted by WEPCo as part of the Stage 1 Submission using the Proforma 2 template and, once that New Project achieves Stage 1 Approval, such fee shall, subject to paragraph 1.3 and paragraph 1.4 below, be the Project Development Fee for that New Project. The Project Development Fee submitted as part of the Stage 1 Submission shall be determined as follows (without any double counting or double recovery between Stages):

1.2.1 subject to paragraph 1.2.2, the fee shall comprise the Partnering Services Costs associated with the provision of the Project Development Partnering Services relative to the New Project, to cover taking the proposed New Project through each stage of the New Project Approval Process (split between Stage 1 Approval and Stage 2 Approval) (for example, design costs, finance and legal advice, technical advice, planning costs, surveys (excluding any surveys specified in paragraph 4.2.3(b) to 4.2.3(q) of Schedule 5 (*Approval Process for New Projects*)) and costs associated with compliance with the requirements of Schedule 6 (*New Project Pricing Report*) in respect of the New Project) to financial close or contract award;

1.2.2 save to the extent adjustments are required and agreed between the Parties to give effect to Clause 19.1, the Project Development Fee for each element or component of the Project Development Partnering Services, for each stage of the New Project Approval process and in respect of the New Project as a whole, can in no circumstances exceed the relevant Project Development Fee Cap;

1.2.3 these costs will be computed based on WEPCo's estimate of the time involved in taking the New Project through to contract completion and execution (including time spent by WEPCo's own staff), applying the Partnering Services Cost rates or alternative basis as referred to in paragraph 1.3;

1.2.4 these costs may include:

(a) costs reasonably and properly incurred by WEPCo in doing work which would otherwise have been required for a Stage 1 Approval in advance of issue by the Relevant Participant(s) of a New Project Request, where such work was done "at risk" by WEPCo with the express agreement of the Relevant Participant(s) on the understanding such work would be captured pursuant to this paragraph 1.2.4 should a Stage 1 Approval be given for the New Project in question; and/or

- (b) with the agreement of the Relevant Participant, costs reasonably and properly incurred by WEPCo in relation to a New Project in relation to which a Stage 1 Submission has been submitted but which did not receive Stage 1 Approval (other than for reasons related to WEPCo's failure to meet the requirements of this Agreement) (such consent not to be unreasonably withheld or delayed where the costs incurred relate to a previous attempt to obtain Stage 1 Approval for the New Project for which Stage 1 Approval is being sought); and
- 1.2.5 WEPCo shall not be entitled to include or recover any Non Scheduled Costs as part of any Project Development Fee or Incurred Project Development Fee where such costs have not been agreed or Tendered in accordance with Section 4 (*Partnering Services Costs Rates*) of Schedule 3 (*Partnering Services*).
- 1.3 The actual costs for providing the Project Development Partnering Services shall be calculated utilising the Partnering Services Costs rates specified in Section 4 (*Partnering Services Costs Rates*) of Schedule 3 (*Partnering Services*) or, where more beneficial to the Relevant Participant(s), on any alternative basis (such as fixed prices or volume discounts) agreed between WEPCo and the relevant Supply Chain Member and approved by the Relevant Participant for this purpose. In the case of an Approved Project, the costs should include (as a fixed sum) those costs anticipated to be properly and reasonably incurred in achieving financial close or contract award.
- 1.4 Within twenty (20) Business Days of a New Project achieving Stage 1 Approval and then after it becomes an Approved Project, WEPCo shall notify the Relevant Participant(s) of the actual costs (calculated on the basis specified in paragraph 1.3 above) of providing the Project Development Partnering Services in respect of that New Project properly and reasonably incurred by WEPCo in obtaining such approvals (and, in the case of an Approved Project, anticipated to be properly and reasonably incurred in achieving financial close or contract award). WEPCo shall provide all necessary supporting information (including timesheets, invoices and the like) necessary to substantiate the levels of costs incurred (or anticipated to be incurred as aforesaid).
- 1.5 The Relevant Participant(s) and WEPCo shall seek to agree the costs to be paid within twenty (20) Business Days of WEPCo's notification, failing which WEPCo or the Relevant Participant(s) shall be entitled to refer the matter for consideration under the Dispute Resolution Procedure. Where such costs as agreed or determined are lower than the estimate for the relevant stage provided pursuant to paragraph 1.2 above, the Project Development Fee will be reduced accordingly. There shall be no increase to the Project Development Fee in the event that the agreed or determined actual costs exceed the estimate provided unless previously agreed by the Relevant Participant(s).
- 1.6 Subject to paragraphs 1.7 and 1.8, recovery of the full Project Development Fee is dependent on the relevant New Project becoming an Approved Project and a Project Agreement being entered into in relation to that Approved Project in which case WEPCo shall:
- 1.6.1 in MIM Projects, charge an amount equivalent to the Project Development Fee (under deduction of any sums paid under paragraph 1.7) as a lump sum to the Project Service Provider entering into the relevant Project Agreement and that Project Service Provider shall, in turn, recover such amount through the amounts to be paid to the Project Service Provider under the Project Agreement; and
- 1.6.2 for Approved Projects other than as referred to in paragraph 1.6.1, recover the Project Development Fee (under deduction of any sums paid under paragraph 1.7) in accordance with the terms of the relevant Project Agreement.
- 1.7 The Relevant Participant(s) shall pay WEPCo that part of the Project Development Fee in respect of a New Project which has obtained Stage 1 Approval that relates to the costs incurred in obtaining such Stage 1 Approval within thirty (30) Business Days of agreement

by the Relevant Participant(s) to the costs specified in paragraph 1.3 relative to such Stage 1 Approval.

- 1.8 WEPCo shall be entitled to reimbursement of the Incurred Project Development Fee in the circumstances referred to in paragraphs 4.8.2, 4.8.3, 5.10.1(a), 5.10.2(a), 6.1.2(a), 6.2 and 7 of Schedule 5 (*Approval Process for New Projects*) and/or (but without double counting or double recovery) as part of the Participant Event of Default Compensation Sum and/or Participant Event of Default Termination Sum.
- 1.9 The "**Incurred Project Development Fee**" is, in respect of each New Project, the actual development costs as referred to in paragraph 1.2.1 above (calculated on the basis specified in paragraph 1.3 above) properly and reasonably incurred by WEPCo as at the relevant date in seeking to develop a Stage 1 Submission and/or Stage 2 Submission (and which WEPCo is not already entitled to be paid pursuant to paragraph 1.7 above), but in no circumstances shall the Incurred Project Development Fee for:
 - 1.9.1 a specific element or component of the Project Development Partnering Services exceed the Project Development Fee for that element or component;
 - 1.9.2 a stage of the New Project Approval Process in respect of a New Project exceed the Project Development Fee for that stage; or
 - 1.9.3 a New Project exceed the Project Development Fee for that New Project set out in the Stage 1 Submission.

2. **PROJECT DEVELOPMENT FEE CAP**

The Project Development Fee Cap for each:

- 2.1 element or component of the Project Development Partnering Services in respect of a New Project shall be the relevant amount calculated for that element or component of the project from the Pricing Data, specified in the relevant row within Proforma 2 of the Pricing Data;
- 2.2 stage of the New Project Approval Process in respect of a New Project shall be the aggregate of all applicable elements and/or components of the Project Development Partnering Services, relevant for that stage, provided the Project Development Fee for each stage of the New Project Approval Process can in no circumstances exceed the cap specified in Tables 1 and 2 of Proforma 1 of the Pricing Data; and
- 2.3 New Project as a whole shall be the aggregate of the fee for each stage agreed or determined pursuant to paragraph 2.2 above,

in each case subject to such adjustment (carried out in accordance with the principles set out in Appendix 1 (*Pricing Data*) to this Schedule 4 (*Partnering Services Costs*)) as may be appropriate to reflect variances between the Comparator and the details of the Project, such adjustment to be agreed between the Relevant Participant and WEPCo.

3. **PAYMENT FOR ONGOING PARTNERING SERVICES**

- 3.1 Partnering Services Costs relative to the provision of Ongoing Partnering Services shall be paid through the sums payable by Project Agreement Counterparties under Project Agreements in the WEPCo portion payable as part of the Project Development Fee, calculated in accordance with the provisions of this Agreement.

APPENDIX 1 - PRICING DATA

1. The information set out in this Appendix 1 (as updated from time to time) comprises details of the information required to calculate the caps to be applied for the fixed cost elements (being the non-Tendered cost elements such as the Project Development Fees and equity returns) for New Projects coming forward through the New Project Approval Process.
2. Any adjustment to be made pursuant to this Agreement to the figures and/or percentages specified in this Appendix 1 (as updated from time to time) for the purposes of Schedule 4 (*Partnering Services Costs*) or Schedule 6 (*New Project Pricing Report*) shall be made in accordance with the following requirements:
 - 2.1 where adjustments are to be made, they shall be made on the basis that:
 - 2.1.1 both WEPCo and the Relevant Participant(s) shall act reasonably;
 - 2.1.2 the adjustment may be an increase or a decrease. Where an increase is required, the smallest practicable increase is to be made. Where a decrease is required, the greatest practicable decrease is to be made;
 - 2.1.3 full use is to be made of relevant benchmarking data for comparator projects or elements or components of comparator projects which are agreed between the Relevant Participants and WEPCo from time to time as being appropriate in accordance with Proforma 1;
 - 2.1.4 the best value for money to the Relevant Participant(s) and continuous improvement are to be obtained;
 - 2.1.5 WEPCo, insofar as is practicable, should be in a no better, no worse position as a result of such adjustment; and
 - 2.1.6 no adjustment shall be made to the "Project Equity Returns" specified in Proforma 1 until the seventh (7th) anniversary of the Commencement Date at which point adjustments may be made in accordance with this Appendix 1, save to the extent provided for in paragraph 2.2 or as required and agreed between the Parties to give effect to Clause 19.1;
 - 2.2 adjustments for inflation (other than in respect of the Partnering Services Costs, to which Section 4 (*Partnering Services Costs Rates*) of Schedule 3 (*Partnering Services*) shall apply) shall be made in accordance with the provisions of paragraph 2.15 of Schedule 1 (*Definitions, Interpretation and Construction*) on the basis that principal sums provided by WEPCo in the Proformas (but not sums determined by applying percentages to such sums) shall be index linked save that references in paragraph 2.15 of Schedule 1 (*Definitions, Interpretation and Construction*) to the Retail Prices Index (All Items Excluding Mortgage Interest) shall be construed as references to BCIS TPI or such other appropriate indices as may be agreed between the SPB and WEPCo (as agreed from time to time with the Relevant Participant(s));
 - 2.3 the Parties have agreed that only the following aspects may, on an individual New Project, be relevant considerations for suggesting adjustments to the figures or percentages specified in Proforma 1:²⁰
 - 2.3.1 **Complexity**

Where the specific details of a New Project in terms of design detailing, site specifics and/or buildability are materially more or less complex than

²⁰ Bidders are expected to provide proposals as to methodologies for producing such adjustments within the relevant Partnering Services Method Statement (but are not expected to increase the scope of the possible grounds of adjustment).

the information on which the Pricing Data was based, it may be appropriate to adjust the Project Development Fee Caps in Proforma 1.

2.3.2 **Pathfinders/Preparatory Work**

Where Relevant Participants have carried out desktop studies in advance of issuing New Project Requests, the Project Development Fee Caps in Proforma 1 shall be adjusted as set out in the Partnering Services Method Statements²¹.

Where the Relevant Participants have undertaken a significant degree of other preparatory work relative to a New Project which would reduce the scope of the Project Development Partnering Services in accordance with paragraph 3 of Schedule 5 (*Approval Process for New Projects*), the Project Development Fee Caps set out in Proforma 1 shall be adjusted as set out in the Partnering Services Method Statements.

2.3.3 **Planning Process**

Where the Site has been selected by the Relevant Participant notwithstanding advice by WEPCo that there is a there is a significant risk of any Planning Appeal, Planning Call-In or Planning Proceeding and, other than as a result of breach of this Agreement by WEPCo or any WEPCo Party or failure to comply with the Planning Act by WEPCo or any WEPCo Party, there is a significant risk of any Planning Appeal, Planning Call-In or Planning Proceeding, it may be appropriate to increase the Project Development Fee Caps specified in Proforma 1.

²¹Bidders are required to include specific details.

The Pricing Data is attached hereto.²²

Proforma 1

This Pricing Data shall be updated from time to time with benchmarking information agreed or determined, in accordance with the terms of this Agreement.

The total capped development fee for each proposed New Project shall be calculated by adding together the caps for Stage 1 and Stage 2 at Tables 1 and 2 below.

Table 1: Stage 1 Project Development Partnering Services Fee Caps²³

Scheme Type	Project Type	Capital Value	Stage 1 Fee Cap (£)
College	[Low Value Single Project]	[up to £30m]	£
	[Medium Value Single Project]	[£30m - £40m]	£
	[High Value Single Project]	[£40m +]	£
Secondary School	[Low Value Single Project]	[up to £30m]	£
	[Medium Value Single Project]	[£30m - £40m]	£
	[High Value Single Project]	[£40m +]	£
	[Batch of Projects]	[£15m - £40m]	£
All-through School	[Low Value Single Project]	[up to £30m]	£
	[Medium Value Single Project]	[£30m - £40m]	£
	[High Value Single Project]	[£40m +]	£
	[Batch of Projects]	[£15m - £40m]	£
Primary School	[Batch of Projects]	[£15m - £40m]	£
Mix	[Batch of Projects]	[£15m - £40m]	£

Table 2: Stage 2 Project Development Partnering Services Fee Caps

Scheme Type	Project Type	Capital Value	Stage 2 Fee Cap (%)
College	[Low Value Single Project]	[up to £30m]	%
	[Medium Value Single Project]	[£30m - £40m]	%
	[High Value Single Project]	[£40m - £50m]	%
Secondary School	[Low Value Single Project]	[up to £30m]	%
	[Medium Value Single Project]	[£30m - £40m]	%
	[High Value Single Project]	[£40m - £50m]	%
	[Batch of Projects]	[£15m - £40m]	%
All-through School	[Low Value Single Project]	[up to £30m]	%
	[Medium Value Single Project]	[£30m - £40m]	%
	[High Value Single Project]	[£40m - £50m]	%
	[Batch of Projects]	[£15m - £40m]	%
Primary School	[Batch of Projects]	[£15m - £40m]	%
Mix	[Batch of Projects]	[£15m - £40m]	%

Scheme Type	Project Type	Capital Value	Stage 2 Fee Cap (£)
College	[High Value Single Project]	[£50m +]	£
Secondary School	[High Value Single Project]	[£50m +]	£

²² Pricing Data is solution specific and is to be developed and agreed with Bidders during dialogue.

²³ Stage 1 fee caps are exclusive of survey costs specified in paragraph 4.2.3(b) to 4.2.4(q).

All-through School	[High Value Single Project]	[£50m +]	£
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Table 3: Project Equity Returns

The following caps apply until the seventh (7th) anniversary of the Commencement Date.

Scheme Type	Project Type	Capital Value	Nominal Blended Equity IRR (%)
College	[Low Value Single Project]	[up to £30m]	%
	[Medium Value Single Project]	[£30m - £40m]	%
	[High Value Single Project]	[£40m +]	%
Secondary School	[Low Value Single Project]	[up to £30m]	%
	[Medium Value Single Project]	[£30m - £40m]	%
	[High Value Single Project]	[£40m +]	%
	[Batch of Projects]	[£15m - £40m]	%
All-through School	[Low Value Single Project]	[up to £30m]	%
	[Medium Value Single Project]	[£30m - £40m]	%
	[High Value Single Project]	[£40m +]	%
	[Batch of Projects]	[£15m - £40m]	%
Primary School	[Batch of Projects]	[£15m - £40m]	%
Mix	[Batch of Projects]	[£15m - £40m]	%

Table 4: Annual Project Management Fee Cap

Scheme Type	Project Type	Capital Value	Fee Cap (£)
College	[Low Value Single Project]	[up to £30m]	£
	[Medium Value Single Project]	[£30m - £40m]	£
	[High Value Single Project]	[£40m +]	£
Secondary School	[Low Value Single Project]	[up to £30m]	£
	[Medium Value Single Project]	[£30m - £40m]	£
	[High Value Single Project]	[£40m +]	£
	[Batch of Projects]	[£15m - £40m]	£
All-through School	[Low Value Single Project]	[up to £30m]	£
	[Medium Value Single Project]	[£30m - £40m]	£
	[High Value Single Project]	[£40m +]	£
	[Batch of Projects]	[£15m - £40m]	£
Primary School	[Batch of Projects]	[£15m - £40m]	£
Mix	[Batch of Projects]	[£15m - £40m]	£

Proforma 2

The total capped development fee for each proposed New Project shall be calculated by adding together the caps for Stage 1 and Stage 2 at Tables 1 and 2 below.

Table 1 - Stage 1 Project Development Partnering Services

		Stage 1 Project Development Partnering Services												Total Fee
		(i) New Project Development			(ii) Supply Chain Establishment			(iii) Funding			(iv) Value for Money			
Discipline	Grade	Day Rate £	No. days	Fee £	Day Rate £	No. days	Fee £	Day Rate £	No. days	Fee £	Day Rate £	No. days	Fee £	
WEPCo Staff														
WEP Co Staff	Chief Executive													
	Manager													
	[Other]													
Feasibility & Design														
Architect	Director													
	Associate													
	Project Architect													
	Technician													
Engineer - C&S	Director													
	Associate													
	Project Engineer													
	Technician													
Engineer - M&E	Director													
	Associate													
	Project Engineer													
	Technician													
Quantity Surveyor	Director													
	Associate													
	Senior QS													
	Assistant QS													
Project Manager	Director													
	Associate													
	Senior PM													
	Assistant PM													
Energy Specialist	[TBC]													
Planning Advisor	[TBC]													
Transport Engineer/	[TBC]													

Adviser														
Rates Adviser	[TBC]													
[Other]	[TBC]													
Finance Support														
Financial Modellers	[TBC]													
Risk Specialist Advisor	[TBC]													
Tax Advisor	[TBC]													
Third Party Income Advisor	[TBC]													
External Financial Auditor	[TBC]													
[Other]	[TBC]													
Legals														
Company Secretary	[TBC]													
External Advice	Partner													
	Senior Associate													
	Junior Associate													
	Trainee/paralegal													
[Other]	[TBC]													
Other														
Building, Engineering and Construction	[TBC]													
Project Management	[TBC]													
[Other]	[TBC]													
Stage 1 Project Development Fee Estimate (£)														
Stage 1 Project Development Fee Cap (£)														

Table 2 – Stage 2 Project Development Partnering Services

		Stage 2 Project Development Partnering Services												Total Fee
Discipline	Grade	(i) New Project Development			(ii) Supply Chain Establishment			(iii) Funding			(iv) Value for Money			
		Day Rate £	No. days	Fee £	Day Rate £	No. days	Fee £	Day Rate £	No. days	Fee £	Day Rate £	No. days	Fee £	
WEPCo Staff														
WEP Co Staff	Chief Executive													
	Manager													
	[Other]													
Feasibility & Design														
Architect	Director													
	Associate													
	Project Architect													
	Technician													
Engineer - C&S	Director													
	Associate													
	Project Engineer													
	Technician													
Engineer - M&E	Director													
	Associate													
	Project Engineer													
	Technician													
Quantity Surveyor	Director													
	Associate													
	Senior QS													
	Assistant QS													
Project Manager	Director													
	Associate													
	Senior PM													
	Assistant PM													
Energy Specialist	[TBC]													
Planning Advisor	[TBC]													
Transport Engineer/ Adviser	[TBC]													
Rates Advisor	[TBC]													
[Other]	[TBC]													
Finance Support														

Financial Modellers	[TBC]													
Risk Specialist Advisor	[TBC]													
Tax Advisor	[TBC]													
Third Party Income Advisor	[TBC]													
External Financial Auditor	[TBC]													
[Other]	[TBC]													
Legals														
Company Secretary	[TBC]													
External Advice	Partner													
	Senior Associate													
	Junior Associate													
	Trainee/paralegal													
[Other]	[TBC]													
Other														
Building, Engineering and Construction	[TBC]													
Project Management	[TBC]													
[Other]	[TBC]													
Stage 2 Project Development Fee Estimate (£)														
Stage 2 Project Development Fee Cap (£)														

SCHEDULE 5 - APPROVAL PROCESS FOR NEW PROJECTS

1. PURPOSE

The purpose of this Schedule 5 (*Approval Process for New Projects*) is to set out how WEPCo and the Participants will work together to agree which New Projects will be taken forward and approved for development by WEPCo and on what basis. It sets out a two-stage approval process for New Projects. The provisions of paragraphs 3 to 6 of this Schedule 5 shall apply in relation to Qualifying Projects whether or not the period of ten (10) years from the Commencement Date has expired. The Parties may agree to utilise this process (amended as appropriate) in respect of other Project Services under Clause 9.3 but are not obliged to do so.

2. GENERAL OBLIGATIONS OF THE PARTIES

2.1 WEPCo will, as an integral part of its overall service delivery in relation to the development and approval of New Projects and without entitlement to specific or additional payment:

2.1.1 work with the Participants to develop local delivery plans which will then form the basis of the updated SDP; and

2.1.2 work with the Participants to review the applicability of the SDP to the provision of Education Sector Services and Community Services in the Region and to decide which New Projects to proceed with,

so that Participants can make informed decisions as to which projects may become New Projects.

2.2 WEPCo will, as an integral part of its overall service delivery in relation to the development and approval of New Projects and without entitlement to specific or additional payment, work with the Participants and other members of the SPB to:

2.2.1 identify, analyse and discuss the Participants' collective and individual accommodation requirements;

2.2.2 assist in the development of local delivery plans and review their applicability to the provision of Education Sector Services and Community Services in the Region;

2.2.3 develop further the SDP, in particular to further refine the proposals contained in the SDP;

2.2.4 prioritise New Projects on a basis consistent with the decisions from time to time of the SPB under Clause 14.2;

2.2.5 identify and appraise available options for meeting the Participants' accommodation requirements and thereby recommend (on the basis of best available value for money) which New Projects to progress;

2.2.6 advise how best to bundle accommodation requirements within a New Project to ensure that the New Project is Affordable, offers value for money and provides a solution with an appropriate level of flexibility;

2.2.7 take into consideration the views of relevant stakeholders in relation to the SDP and actual or potential New Projects;

2.2.8 develop the Participants' requirements in relation to New Projects which, in due course, during the Stage 2 Approval process set out at paragraph 5, will be developed further to enable it to form the basis for the agreement of the relevant Project Agreement;

2.2.9 analyse and discuss the range of potential funding options for New Projects including the feasibility of third party funding such as sponsorship when considering and developing a New Project;

- 2.2.10 assist in the preparation of outline business cases and obtaining all necessary approvals; and
- 2.2.11 in addition to the requirements of Schedule 6 (*New Project Pricing Report*), agree with potential Relevant Participant(s):
- (a) the appropriate Comparator for purposes of determining any adjustments to the Project Development Fee Cap
- pursuant to paragraph 2 of Schedule 4 (*Partnering Services Costs*) in respect of such Comparator; and
- (b) each part of the Project Development Fee Cap for each stage set out in Proforma 1,
- for any New Project in respect of which such Participant(s) has/have indicated an intention to submit a New Project Request.

2.3 Each Participant will co-operate with WEPCo in its performance of its obligations under paragraph 2.2 above, in relation to any New Project or potential New Project being developed by WEPCo, including (without limitation):

- 2.3.1 providing any information reasonably required by WEPCo to enable it to satisfy the requirements of paragraphs 4 and/or 5 ;
- 2.3.2 identifying whether any requirements under paragraph 4.2 and/or 5.4 may not be required or what additionally may be required by the Participants;
- 2.3.3 explaining any relevant considerations around the funding of and/or financial envelope for the proposed New Project;
- 2.3.4 identifying suitable benchmarks for the New Project; and
- 2.3.5 providing reasonable assistance to WEPCo in relation to the procurement by WEPCo of all relevant Consents and the entering into of Project Agreements,

and agreeing with WEPCo the matters referred to in paragraph 2.2.11 above.

2.4 Where the potential Relevant Participant(s) and WEPCo are unable to agree the matters referred to in paragraph 2.2.11 above within a period of three (3) months, the SPB shall determine such matters.

3. **NEW PROJECT REQUESTS**

3.1 Any Participant wishing to procure a New Project ("**Relevant Participant**") shall submit a written request for WEPCo to produce a Stage 1 Submission for that New Project, including:

- 3.1.1 indicative funding proposals setting out the maximum available capital and/or revenue which can be committed to that New Project, together with high level detail of assumptions associated with this calculation (the "**Affordability Cap**");
- 3.1.2 any requirements in relation to a New Project that must be satisfied as part of a Stage 1 Submission and/or Stage 2 Submission, including any governmental or similar approval requirements (for example the requirement to comply with the Welsh Government's ["Better Business Cases - using the Five Case Model"]), funding approvals or grant conditions ("**Specific Requirements**"); and
- 3.1.3 a clear, detailed Project brief setting out the scope of the work to be undertaken, supported by relevant information which is commensurate with any previous development

work undertaken on the New Project, together with any key aims and objectives related to the delivery of the New Project and the project specific requirements. This should include (i) details of the curriculum model; (ii) education brief (including any key programming requirements); (iii) site brief (including location, red line plan, title details and any "Reserved Rights" "Title Conditions", existing facilities and the extent of any engagement on planning matters and/or other consents); (iv) the New Project Specific Project Agreement, including the Site Specific Brief within the Authority's Construction Requirements, the Schedule of Accommodation, Area Data Sheets, the ICT requirements, Equipment requirements and Thermal and Energy Efficiency Testing Procedures, each as referred to in the Template Project Agreement; (iv) in the case of Pathfinder Projects, as a minimum, desktop surveys; (v) any initial agreement that may be in place between the Participant and any relevant Government body (whether pursuant to the Welsh Government's ["Better Business Cases - using the Five Case Model"] or otherwise); (vi) the Strategic Outline Case approved by Welsh Government; (vii) RIBA Stage 1 design information; (viii) any Well-being of Future Generations (Wales) Act 2015 policy objectives; (ix) the Project BIM Agreement relative to the New Project; and (x) details of approach to revenue/capital funding; and (xi) the anticipated position on staff transfers. As part of its preparation for each Pathfinder Project the Relevant Participant shall procure a desktop study of the relevant site or sites and report the results of such studies. Such report shall be accompanied by the requirements as to what, if any further studies or investigations should be carried out by WEPCo for the purposes of producing a Stage 1 Submission.

(a "**New Project Request**"). From time to time, the Relevant Participant(s) may have undertaken a significant degree of preparatory work relative to a New Project which would reduce the scope of the Project Development Partnering Services required to be provided for such New Project pursuant to this Schedule 5 (*Approval Process for New Projects*). In such circumstances:

- (a) the Relevant Participant(s) shall indicate this in the New Project Request and shall provide details of the work done to date, any revised requirements for the Stage 1 Submission and/or Stage 2 Submission (or, in relevant cases, whether a Stage 1 Submission is required at all) and any proposed risk allocation including proposals for novation or otherwise of the design and/or other consultancy contracts which the Relevant Participants may have in place;
- (b) WEPCo and the Relevant Participants shall agree the appropriate adjustments to the process set out in this Schedule 5 (*Approval Process for New Projects*) and Schedule 6 (*New Project Pricing Report*) necessary to reflect the circumstances of the Project, including timing and details of the proposed Project Development Fee (it being agreed that the Parties' intentions are for this process to be applied with least practicable adjustments); and
- (c) the period for WEPCo's confirmation under paragraph 3.3 shall be increased to thirty (30) Business Days.

3.2 WEPCo shall be entitled to raise queries and request clarifications from the Relevant Participant(s) following receipt of a New Project Request so that WEPCo is able to fully assess the request and provide a meaningful response. The Relevant Participant(s) shall provide all reasonable assistance and co-operation in this regard.

3.3 WEPCo shall confirm in writing within twenty (20) Business Days of receipt of a New Project Request whether or not it will submit a Stage 1 Submission to the Relevant Participant(s). If WEPCo confirms that it does not intend to submit a Stage 1 Submission (or fails to give the confirmation referred to in this paragraph 3.3):

- 3.3.1 where the reason for not proceeding is that the Affordability Cap provided by the Relevant Participants is unrealistically low, WEPCo and the Relevant Participant(s) shall work together in good faith to seek to agree an alternative Project brief and/or Affordability Cap which can form the basis for a revised New Project Request. Failing an agreement on such terms within six (6) months of WEPCo's original confirmation, the Relevant

Participant(s) shall be entitled to procure such New Project outside the terms of this Agreement and shall not be or be deemed to be in breach of Clause 9 (*Exclusive Nature of this Agreement*) unless such New Project is a Qualifying Project and they commence to procure such New Project prior to the expiry of ten (10) years from the Commencement Date at a substantially greater cost than the Affordability Cap (adjusted, for these purposes to reflect changes in BCIS TPI (as specified by the Relevant Participant(s)) from the date of the New Project Request); and

3.3.2 in all other cases, the Relevant Participant(s) shall be entitled to procure such New Project outside the terms of this Agreement and shall not be or be deemed to be in breach of Clause 9 (*Exclusive Nature of this Agreement*).

3.4 Any specific requirements of the Relevant Participant(s) for demonstrating value for money in respect of a specific New Project shall be notified to WEPCo as a Specific Requirement.

4. **STAGE 1 APPROVAL**

4.1 WEPCo will, as part of the Project Development Partnering Services produce outline proposals for New Projects (a "**Stage 1 Submission**") which develop and are consistent with the SDP where so requested pursuant to a New Project Request which they have accepted pursuant to paragraph 3.3 above.

4.2 All Stage 1 Submissions will be produced within three (3) months (or such longer period, up to a maximum of six (6) months, where reasonably necessary to allow for invasive surveys or ground investigation reports) of the relevant confirmation under paragraph 3.3 unless another period is agreed between WEPCo and the Relevant Participant(s). Without prejudice to the generality of Clause 8.1.6, a Stage 1 Submission shall be produced in accordance with the relevant Partnering Services Method Statement and contain, as a minimum, the following information in sufficient detail to allow all requisite approvals to be obtained by the Relevant Participant(s):

4.2.1 a value for money assessment in respect of the New Project Request:

- (a) containing:
 - (i) the relevant Pricing Report produced in accordance with Schedule 6 (*New Project Pricing Report*);
 - (ii) an elemental cost plan (including defined contingencies for identified risks and matters not known); and
 - (iii) an indicative financial model or indicative Development Amount Analysis, as the case may be;
- (b) explaining, in accordance with the relevant provisions of the Partnering Services Method Statement relative to the value for money requirements of the Project Development Partnering Services, why WEPCo's proposals demonstrate value for money, taking into account known costs and all other relevant factors (cost related or otherwise); and
- (c) confirming that such proposals would meet the relevant targets and commitments in the Key Performance Indicators;

4.2.2 concept design (to RIBA Stage 2) of the New Project sufficient to:

- (a) demonstrate that the Participant's requirements (including the Affordability Cap) are likely to be met;
- (b) establish that the New Project is likely to provide value for money; and

- (c) enable a cost estimate to be prepared with sufficient accuracy to establish whether or not the New Project can be delivered within the Affordability Cap (subject to the inclusion of identified contingencies for matters not yet known);

4.2.3 the results of the following:

- (a) (save in respect of Pathfinder Projects), a desktop study meeting the requirements of the Partnering Services Method Statements,

and, where applicable, in terms of paragraph 4.5,

- (b) topographical survey;
- (c) Underground utilities report;
- (d) Coal mining risk assessment report;
- (e) Flood risk report;
- (f) Unexploded Ordnance report;
- (g) Site Investigation studies;
- (h) Geotechnical report;
- (i) Drainage CCTV report;
- (j) Archaeological report;
- (k) Asbestos report in accordance with paragraph 4.10 of this Schedule 5 (*Approval Process for New Projects*);
- (l) Acoustic report;
- (m) Air quality report;
- (n) Ecology desktop study and further recommended reports;
- (o) Arboricultural report;
- (p) traffic study and transport assessment; and
- (q) environmental impact report,

together with suitable reliance and/or warranty protection in respect of such report in favour of the Project Service Provider, the Relevant Participant and (where applicable) Funders, from the relevant consultant;

4.2.4 whether the New Project requires the transfer of properties by Participant(s) to WEPCo to a Project Service Provider or to a wholly owned Subsidiary of WEPCo and, if so, proposed terms for such transfer and details of the extent of any agreement reached with such Participant(s);

4.2.5 a schedule of all material amendments required to the New Project Specific Project Agreement and in respect of a New Project that is a MIM Project, the Template Project Co Shareholders' Agreement together with a statement of benefit made available to the Relevant Participant(s) by such amendments, completed in accordance with the "IMPORTANT NOTICE" set out on the Template Project Agreement and Template Project Co Shareholders' Agreement and to reflect such amendments as may be required

in the circumstances of that particular project, taking account of the Approval Criteria at paragraphs 5.5.5 and 5.5.6;

- 4.2.6 the identity of the Participant(s) and/or other parties who will become Project Agreement Counterparties and where applicable an indication of any other parties which would become occupants in the Facilities to be provided under the New Project;
- 4.2.7 an explanation of how the New Project fits into the service delivery strategy as set out in the SDP and evidence of how the New Project meets the Relevant Participant(s)' requirements including the Specific Requirements;
- 4.2.8 the effect (if any) on any employees of the Relevant Participant(s) or relevant third party service providers, including any potential transfer of any such employees to any Project Service Provider or their Supply Chain Members;
- 4.2.9 a planning brief, including confirmation that the proposals are aligned with local planning policy and details of pre-planning application discussions and engagement with key stakeholders;
- 4.2.10 a maximum time period for submission of a Stage 2 Submission on the assumption that the New Project achieves Stage 1 Approval (and indicating time periods to accommodate the Tender Process required pursuant to Schedule 6 (*New Project Pricing Report*));
- 4.2.11 the proposed Project Development Fee referred to in paragraph 1.2 of Schedule 4 (*Partnering Services Costs*);
- 4.2.12 the proposed corporate structure of the Project Service Provider and, where not WEPCo, identifying the basis on which such Project Service Provider would be a PSDP Related Party or Subsidiary of WEPCo (as applicable) as at the date of execution of the relevant Project Agreement; and
- 4.2.13 a BIM Execution Plan,

and shall be accompanied by a copy of the most recent WEPCo Performance Report and confirmation whether or not the Track Record Test has been passed at the date of submission of the Stage 1 Submission.

4.3 In developing a Stage 1 Submission:

- 4.3.1 WEPCo shall liaise with the Relevant Participant(s) and relevant end users (in the case of end users, such end users to be such persons or organisations as the Relevant Participant(s) in consultation with WEPCo consider appropriate) as necessary to ensure the best available value for money is achieved through the appropriate consideration of all viable options and informed choices by WEPCo, stakeholders and the Relevant Participant(s); and
- 4.3.2 WEPCo shall be obliged to enter into the Project BIM Agreement for the New Project and comply with its obligations thereunder.

4.4 Without prejudice to the requirements of Schedule 6 (*New Project Pricing Report*), the Relevant Participant(s) shall provide WEPCo with such information as to its/their requirements (including the Specific Requirements) and other inputs as WEPCo may reasonably require and shall assist WEPCo in the review of any draft designs and broad proposals in relation to the Stage 1 Submission. Any and all information and other input or feedback so provided shall be provided without warranty and on the same basis as the provision of any information pursuant to Clauses 14.4 to 14.6 and shall be without prejudice to the rights of the Relevant Participant(s) to approve or not approve any New Project as they, in their absolute discretion, deem fit under this Schedule 5.

- 4.5 Save in respect of Pathfinder Projects, as part of its preparation for each Stage 1 Submission, WEPCo shall carry out a desktop study of the relevant site or sites and report (in advance of the Stage 1 Submission) to the Relevant Participant(s) of the results of such studies. Such report shall be accompanied by the recommendations of WEPCo as to what, if any further studies or investigations (as listed in paragraph 4.2.3 above) should be carried out by WEPCo for the purposes of producing a Stage 1 Submission. The Relevant Participant(s) shall confirm to WEPCo which if any such studies and/or investigations are required and WEPCo shall procure such studies and/or investigations on terms and at prices agreed with the Relevant Participants (which terms shall include the Relevant Participant(s) having the right to rely on the same). Such further surveys shall be carried out at the cost of the Relevant Participant(s) and shall not form part of the Project Development Fee unless the Relevant Participant(s) and WEPCo agree to the contrary.
- 4.6 Following receipt of a Stage 1 Submission, the Relevant Participant(s) shall have a period of two (2) months from the date of receipt of the Stage 1 Submission (or such longer period as they may have agreed with WEPCo in writing, all acting reasonably) in which to notify WEPCo that it approves or rejects the Stage 1 Submission. It is expected that the SPB will provide a forum for discussion of such Stage 1 Submission. If following the date of the New Project Request, WEPCo has failed the Track Record Test and, as a result, the Relevant Participants reject the Stage 1 Submission which otherwise meets the requirements of paragraph 4.2, then paragraphs 4.8.3 and 4.9 shall apply.
- 4.7 Where the Relevant Participant(s) approve a Stage 1 Submission, that New Project shall be known as a "**Stage 1 Approved Project**" or as having received "**Stage 1 Approval**", as the context requires.
- 4.8 If a New Project in respect of which a Stage 1 Submission has been submitted in accordance with this paragraph 4 does not become a Stage 1 Approved Project then WEPCo's costs in relation to the preparation of such Stage 1 Submission shall be borne by WEPCo unless:
- 4.8.1 the New Project subsequently becomes an Approved Project and the relevant costs are included as part of the Project Development Fee for such Approved Project in accordance with paragraph 1.2.4 of Schedule 4 (*Partnering Services Costs*); or
- 4.8.2 the Relevant Participant(s) have neither approved nor rejected the Stage 1 Submission within one (1) month of a notice (served no earlier than expiry of the two (2) months period specified in paragraph 4.6 (or such longer period as WEPCo may have agreed in writing, acting reasonably)) by WEPCo on the Relevant Participant(s) referring to this paragraph 4.8 and confirming that WEPCo intends to withdraw the Stage 1 Submission in the absence of approval by the Relevant Participant(s) within such further one (1) month period, in which case where WEPCo subsequently notifies the Relevant Participant(s) in writing of such withdrawal, WEPCo shall be entitled to the Incurred Project Development Fee in respect of such Stage 1 Submission calculated in accordance with paragraph 1.9 of Schedule 4 (*Partnering Services Costs*); or
- 4.8.3 such Stage 1 Submission is rejected by the Relevant Participant(s) solely on grounds that:
- (a) the Track Record Test has been failed; or
- (b) the Relevant Participant(s) have exercised a right to suspend exclusivity pursuant to Clause 23.3 or Clause 23.10.1,
- in which case WEPCo shall be entitled to the Incurred Project Development Fee relative to such Stage 1 Submission in respect of such Stage 1 Submission in accordance with paragraph 1.9 of Schedule 4 (*Partnering Services Costs*).

4.9 If a Stage 1 Submission submitted in accordance with this paragraph 4 does not become a Stage 1 Approved Project:

4.9.1 in relation to a Qualifying Project where the period of ten (10) years from the Commencement Date has not expired and the Stage 1 Submission is rejected because:

(a) WEPCo has failed the Track Record Test or the Relevant Participant(s) or any of them have exercised a right to suspend exclusivity pursuant to Clause 23.3 or Clause 23.10.1; or

(b) WEPCo has not:

(i) demonstrated to the satisfaction of the Relevant Participant(s) that the New Project provides value for money, including demonstration of continuous improvement in value for money where appropriate; or

(ii) met the requirements of paragraph 4.2 relative to such Stage 1 Submission; or

4.9.2 where the New Project in question is not a Qualifying Project; or

4.9.3 where the New Project in question is a Qualifying Project but the period of ten (10) years after the Commencement Date has expired,

then the Relevant Participant(s) shall be entitled to procure the New Project outside the terms of this Agreement and shall not be or be deemed to be in breach of the provisions of Clause 9 (*Exclusive Nature of this Agreement*) unless, in the case of paragraph 4.9.1(a), they seek to commence the procurement of such New Project during any period when exclusivity in respect of the Relevant Participant(s) has been reinstated pursuant to Clause 9.7, Clause 23.3 or Clause 23.10.1. In all other cases the Relevant Participant(s) shall not be entitled to procure the Required Facilities and/or the provision of the relevant Project Services outside the terms of this Agreement and, if they do so, such action shall and shall be deemed to be a breach of Clause 9 (*Exclusive Nature of this Agreement*).

4.10 Where in respect of a New Project demolition of an existing facility is anticipated within the scope of a New Project and an Asbestos Management Survey has not been undertaken by the Relevant Participant and included within the New Project Request, WEPCo shall procure an Asbestos Management Survey with the support and guidance of the Relevant Participant, in accordance with the following provisions:

4.10.1 WEPCo shall seek competitive tenders from a minimum of [three (3)] licensed Asbestos surveyors and shall appoint the tenderer with the most economically advantageous tender and the necessary skills, qualification and experience to carry out an Asbestos Management Survey and prepare an Asbestos Management Survey Report.

4.10.2 The Asbestos Surveyor will be required to carry out an Asbestos Management Survey and complete the relevant columns of the Asbestos Schedule, to include within an Asbestos Management Survey Report. The Asbestos Surveyor shall include details of the following within the Asbestos Schedule:

(a) Asbestos containing materials that are identified by the survey or surveys; and

(b) where Asbestos containing materials have been identified within a survey or surveys, a description of whether Asbestos is "strongly presumed" or "presumed", taking into account any access restrictions.

4.10.3 Under the direction of the Relevant Participant, WEPCo shall be required to:

(a) price the Asbestos Schedule using benchmarked rates, for the purposes of establishing a provisional sum; and

- (b) estimate the programme,

in each case for the removal of Asbestos materials identified in the Asbestos Management Survey Report, such rates and programme duration being based on Good Industry Practice (the "**Asbestos Provisional Sum and Programme**").

4.10.4 The Asbestos Management Survey Report and Asbestos Provisional Sum and Programme shall be included in the Stage 1 Submission and Stage 2 Submission. The Relevant Participant does not expect this amount or programme duration to change between the point the report is produced and execution of the Project Agreement.

4.10.5 The Asbestos Management Survey Report shall be included in the Project Agreement.

5. **STAGE 2 APPROVAL**

5.1 Following approval under paragraph 4 above, WEPCo will, when requested so to do in writing by the Relevant Participant(s), provide further Project Development Partnering Services to proceed regularly and diligently to develop a Stage 1 Approved Project into a detailed submission meeting the requirements of this paragraph 5, to be put to the Relevant Participant(s) (copied to the SPB) (a "**Stage 2 Submission**"). The Stage 2 Submission shall be presented to the Relevant Participant(s) as soon as reasonably practicable and in any case within the maximum period specified therefor in the Stage 1 Submission.

5.2 In developing a Stage 2 Submission:

5.2.1 WEPCo shall continue to liaise with the Relevant Participant(s) and relevant end users (in the case of end users, such end users to be such persons or organisations as the Relevant Participant(s) in consultation with WEPCo consider appropriate) as necessary to ensure the best available value for money is achieved through the appropriate consideration of all viable options and informed choices by WEPCo, stakeholders and the Relevant Participant(s); and

5.2.2 WEPCo shall be obliged to comply with its BIM protocol obligations under the Project BIM Agreement and submit a BIM Execution Plan to the Relevant Participant within one month of commencing Stage 2.

5.3 The Relevant Participant(s) shall, without prejudice to the requirements of Schedule 6 (*New Project Pricing Report*):

5.3.1 provide WEPCo with such information as to its/their requirements (including the Specific Requirements) and other inputs as WEPCo may reasonably require and shall assist WEPCo in the review of any draft designs and proposals in relation to the Stage 2 Submission. Any and all information and other input or feedback so provided shall be provided without warranty and on the same basis as the provision of any information pursuant to Clauses 14.4 to 14.6 and shall be without prejudice to the rights of the Relevant Participant(s) to approve or not approve any New Project as they, in their absolute discretion, deem fit under this Schedule 5; and

5.3.2 generally co-operate with WEPCo in relation to any Stage 2 Submission, including (without limitation) promptly providing:

- (a) written confirmation of the Affordability Cap and/or any Specific Requirements or any change to such Affordability Cap and/or Specific Requirements;
- (b) any information reasonably required by WEPCo enable it to satisfy the requirements of paragraph 5.4; and
- (c) reasonable assistance to WEPCo in relation to procurement by WEPCo of all relevant Consents (provided that this sub-paragraph shall not apply to a

Relevant Participant which is a Local Planning Authority exercising its functions as such).

- 5.4 Subject to paragraph 5.2, and without prejudice to the generality of Clause 8.1.6, WEPCo shall produce each Stage 2 Submission in accordance with the relevant Partnering Services Method Statement and shall procure that a Stage 2 Submission shall address all issues that have a potential impact on risk and/or price in respect of the proposed New Project and shall include as a minimum:
- 5.4.1 a value for money assessment in respect of the option given Stage 1 Approval:
- (a) containing:
 - (i) a Pricing Report prepared in accordance with Schedule 6 (*New Project Pricing Report*);
 - (ii) an elemental cost plan updating the information provided at Stage 1, firming up on contingencies against identified risks and matters not known; and
 - (iii) financial model or Development Amount Analysis, as the case may be;
 - (b) explaining, in accordance with the relevant provisions of the Partnering Services Method Statement applicable to the Project Development Partnering Services, why WEPCo's proposals demonstrate value for money, taking into account construction and design cost, FM costs, lifecycle costs and all other relevant factors (cost related or otherwise); and
 - (c) confirming that such proposals would meet the relevant objectives and commitments in the Key Performance Indicators;
- 5.4.2 where the transfer of properties by Participants or third parties to WEPCo or to Project Service Providers are required for the New Project, the terms for such transfers as agreed between WEPCo and the relevant Participants or third parties;
- 5.4.3 a mark up of the New Project Specific Project Agreement which contains, inter alia, the completed WEPCo's Proposals or "Project Co's Proposals" (as the case may be) (as defined in the relevant Project Agreement) which meet the Facilities Requirements and/or Service Level Specifications as applicable, and which reflects all proposed changes or amendments that have been proposed by WEPCo and agreed by the Relevant Participant and approved by Welsh Government, all in accordance with the "IMPORTANT NOTICE" set out on the Template Project Agreement and taking account of the Approval Criteria at paragraphs 5.5.5 and 5.5.6;
- 5.4.4 detailed design work (to RIBA Stage 4) and submission of relevant building warrant applications;
- 5.4.5 warrant applications;
- 5.4.6 plans and drawings;
- 5.4.7 requirements for planning approvals and all associated costs, including either evidence of the Planning Permission for the New Project, (including a report on all conditions attached to such Planning Permission setting out WEPCo's recommended strategy for dealing with the same) or a programme by which such Planning Permission will be obtained, taking into account the provisions of Clause 5.1 (*Planning Matters*);

- 5.4.8 without prejudice to paragraph 5.4.1, an explanation (together with appropriate supporting evidence) as to why the Stage 2 Submission meets the Approval Criteria (as defined in paragraph 5.5);
- 5.4.9 commitment letters from any proposed tenants or sub-tenants of the Facilities, where applicable;
- 5.4.10 an assessment of the effect (if any) on any employees of the Relevant Participants or proposed Project Agreement Counterparty, including any potential transfer of any such employees to any Project Service Provider or their Supply Chain Member and the cost implications of such transfer;
- 5.4.11 a timetable setting out the stages and timescales for the period between achieving Stage 2 Approval (as defined in paragraph 5.7.1) and the execution of the Project Agreement in relation to that New Project;
- 5.4.12 details of the competency assessments undertaken and the results of the same, in respect of the potential "Principal Contractor" for purposes of the CDM Regulations;
- 5.4.13 [Site Waste Management Plan], incorporating design stage and construction phase actions, including the estimated total mass of waste and the estimated recovery rate before mitigating actions, with a list of actions to reduce waste and increase the level of recovery (distinguishing construction, demolition/strip-out and excavation wastes as appropriate) and increase reused and recycled content;
- 5.4.14 the corporate structure of the Project Service Provider and where not WEPCo, confirming that:
 - (a) such Project Service Provider would be a PSDP Related Party or Subsidiary of WEPCo (as applicable) as at the date of execution of the relevant Project Agreement; and
 - (b) where the Project Service Provider is not WEPCo or a Subsidiary of WEPCo, that:
 - (i) WGCo shall be entitled to subscribe for up to twenty (20) per cent of the issued share capital in the Project Service Provider; and
 - (ii) the proposed shareholders in the Project Service Provider (or its parent company) shall be given the opportunity to provide initial subordinated debt or other shareholder funding to the Project Service Provider on a basis pro-rata to their proposed shareholding and otherwise consistent with the principles set out in the Template Project Co Shareholders' Agreement.
- 5.4.15 a draft Project Co Shareholders' Agreement relating to any New Project which is a MIM Project, which reflects all proposed changes or amendments that have been proposed by WEPCo, agreed by the Relevant Participant and approved by Welsh Government, all in accordance with the "IMPORTANT NOTICE" set out on the Template Project Co Shareholders' Agreement and taking account of the Approval Criteria at paragraph 5.5.6;
- 5.4.16 fully developed sub-contracts for each of the Contractor and (in the case of MIM Projects) the Service Provider and any relevant [Key Sub-Contractors], clearly demonstrating robust and deliverable risk allocation and in a form agreed by the Relevant Participant and approved by Welsh Government;
- 5.4.17 details of the proposed security package, including draft parent company guarantees through which the Project Service Provider will be protected against financial or other failure of the principal Contractor and/or (in the case of MIM Projects) Service Provider, in a form agreed by the Relevant Participant and approved by Welsh Government; and

- 5.4.18 in the case of MIM Projects, commitment letters from the senior funders confirming acceptance of the documents submitted by WEPCo pursuant to paragraphs 5.4.3, 5.4.15, 5.4.16 and 5.4.17.²⁴
- 5.5 For the purposes of this Schedule 5 (*Approval Process for New Projects*), "**Approval Criteria**" means the criteria against which any New Project is judged in determining whether it achieves Stage 2 Approval. The criteria are:
- 5.5.1 that the cost of the New Project is within the Affordability Cap or any increased Affordability Cap notified to WEPCo by the Relevant Participant(s);
 - 5.5.2 that it has been demonstrated to the satisfaction of the Relevant Participant(s) that the New Project provides value for money including demonstration of continuous improvement in value for money where appropriate;
 - 5.5.3 that the New Project meets the Specific Requirements and each of the Relevant Participant(s)' other requirements (including for the avoidance of doubt: design quality; sustainability; and terms and conditions of the Project Agreement) as identified at the time a New Project became a Stage 1 Approved Project;
 - 5.5.4 that the Stage 2 Submission contains all the information required pursuant to paragraph 5.4 and has been produced in accordance with the relevant Partnering Services Method Statement;
 - 5.5.5 in the case of MIM Projects and D&B Projects that any proposed changes or amendments to the relevant Template Project Agreement (other than amendments contained in the New Project Specific Project Agreement issued by the Relevant Participant with the New Project Request) for project specific reasons are in accordance with the "IMPORTANT NOTICE" set out on the Template Project Agreement and are not Prohibited Amendments;
 - 5.5.6 in the case of MIM Projects, that any proposed changes to the Template Project Co Shareholders' Agreement that have been proposed are in accordance with the "IMPORTANT NOTICE" set out on the Template Project Co Shareholders' Agreement and are not Prohibited Amendments.
 - 5.5.7 that the implementation of the New Project would not breach Law;
 - 5.5.8 that the Stage 2 Submission was submitted within the maximum period specified therefor in the Stage 1 Submission (failure to do so shall mean that the Relevant Participant(s) are entitled to deem that the Approval Criteria are not met);
 - 5.5.9 that the proposed Project Service Provider is a PSDP Related Party in the case of MIM Projects, or otherwise is WEPCo or a Subsidiary of WEPCo, as at the date of execution of the Project Agreement and the confirmation required under paragraph 5.4.14(b) has been properly provided; and
 - 5.5.10 that the Authority's Community Benefit Requirement KPIs are met.
- 5.6 WEPCo shall submit its Stage 2 Submission to the Relevant Participant(s), copied to the SPB. It is expected that the SPB will provide a forum for discussion of such Stage 2 Submission. The Relevant Participant(s) shall be entitled to call for such reasonable information as they consider appropriate to enable them to decide whether the Stage 2 Submission meets the Approval Criteria. WEPCo shall reply promptly to all such requests for further information and assistance. If, acting reasonably, the Relevant Participant(s) find that any material aspects of the Stage 2 Submission are unsatisfactory to them, the Relevant Participant(s) shall notify WEPCo of the same and offer reasonable assistance to WEPCo to address such deficiencies. If WEPCo addresses such

²⁴ The list represents Welsh Government's minimum requirements. Other items to be discussed during dialogue to align with Bidders method statements.

deficiencies to the satisfaction of the Relevant Participant(s), acting reasonably, paragraph 5.7.1 shall apply. If WEPCo is unable to resolve such deficiencies to the satisfaction of the Relevant Participant(s) (acting reasonably) paragraph 5.7.2 shall apply.

- 5.7 Within sixty (60) Business Days of the later of submission to the Relevant Participant(s) of a Stage 2 Submission and the date on which WEPCo provides them with all reasonable further information that has been requested and provided pursuant to 5.6, the Relevant Participant(s) shall give written notice of whether they:
- 5.7.1 approve the relevant New Project (in which case the New Project shall be deemed to have received "**Stage 2 Approval**"); or
 - 5.7.2 reject the New Project:
 - (a) on grounds other than those set out in paragraph (b), (c) or (d); or
 - (b) subject to paragraph (c), on the grounds that it has failed to meet one or more of the Approval Criteria;
 - (c) because of any change to the Affordability Cap from that originally notified in the New Project Request, the New Project is not Affordable despite being within the Affordability Cap as originally notified in the New Project Request; or
 - (d) because WEPCo has failed the Track Record Test or because the Relevant Participant(s) have exercised a right to suspend exclusivity pursuant to Clause 23.3 or Clause 23.10.1.

Where the Relevant Participant(s)/potential Project Agreement Counterparty have not received all relevant FBC and other funding approvals prior to a Stage 2 Submission, any approval under paragraph 5.7.1 shall be conditional upon the Relevant Participant/proposed Project Agreement Counterparty achieving all relevant FBC approvals. Where such FBC approvals are not received within a period agreed with WEPCo (being not less than four (4) months of the conditional Stage 2 Approval), the Relevant Participant(s) will be deemed to have rejected the New Project on grounds set out in paragraph 5.7.2(a).

- 5.8 If the Relevant Participant(s) fail to notify WEPCo of a decision within the period of sixty (60) Business Days referred to in paragraph 5.7, WEPCo shall notify the Relevant Participant(s) of that fact in writing, referring to this paragraph 5.8. If the Relevant Participant(s) have not notified WEPCo in writing of a decision to approve or reject the New Project within a further twenty (20) Business Days of such notification, they shall be deemed to have rejected the New Project on grounds set out in paragraph 5.7.2(a).
- 5.9 If the Relevant Participant(s) reject the New Project on the grounds set out in paragraph 5.7.2(b), the Relevant Participant(s) and WEPCo will work together to address the reasons for such failure and WEPCo will attempt in good faith to produce a revised Stage 2 Submission which WEPCo shall re-submit to the Relevant Participant(s) as soon as reasonably practicable and in any case within thirty (30) Business Days of such rejection, which re-submission shall be treated as a Stage 2 Submission. If no re-submission is made within the said (30) Business Day period or the resubmitted Stage 2 Submission is rejected by the Relevant Participant(s) on the grounds set out in paragraph 5.7.2(b) or 5.7.2(d), it shall be treated as having been rejected and, subject to paragraph 5.11, neither the Relevant Participant(s) nor WEPCo shall have any further obligations in relation to the relevant New Project under this paragraph 5.9.
- 5.10 Where the Relevant Participant(s) reject or are deemed to have rejected a Stage 2 Submission:
- 5.10.1 pursuant to paragraph 5.7.2(a) or paragraph 5.7.2(c):
 - (a) WEPCo's Incurred Project Development Fee relative to the Stage 2 Submission will be paid by the Relevant Participant(s) within ten (10) Business Days of the date on which WEPCo receives written notice of the rejection (or the expiry of

the four (4) month period referred to in paragraph 5.7 without the obtaining of all relevant FBC approvals for the Relevant Participant(s)/proposed Project Agreement Counterparty, if applicable); and

- (b) unless the period of ten (10) years after the Commencement Date has expired, to the extent the New Project in question is a Qualifying Project, the Relevant Participant(s) shall not be entitled to procure the Required Facilities and/or the provision of the Project Services outside the terms of this Agreement and, if they do so, such action shall and shall be deemed to be in breach of Clause 9 (*Exclusive Nature of this Agreement*); or

5.10.2 pursuant to paragraph 5.7.2(d):

- (a) WEPCo's Incurred Project Development Fee relative to the Stage 2 Submission will be paid by the Relevant Participant(s) within ten (10) Business Days of the date on which WEPCo receives written notice of the rejection; and
- (b) the Relevant Participant(s) shall be entitled to procure the New Project outside the terms of this Agreement and shall not be or be deemed to be in breach of the provisions of Clause 9 (*Exclusive Nature of this Agreement*) unless, prior to the expiry of ten (10) years after the Commencement Date, the New Project is a Qualifying Project and they seek to commence the procurement of such New Project after expiry of any suspension of exclusivity pursuant to Clause 9.7, Clause 23.3 or Clause 23.10.1.

5.11 Subject to paragraph 5.9, if the Relevant Participant(s) reject a New Project pursuant to the provisions of paragraph 5.7.2(b) in respect of which a Stage 2 Submission has been resubmitted, WEPCo shall be entitled to refer the matter for consideration under the Dispute Resolution Procedure within ten (10) Business Days after receiving written notice of the rejection by the Relevant Participant(s). If, following a referral to Schedule 22 (*Dispute Resolution Procedure*), it is agreed or determined that the New Project rejected by the Relevant Participant(s) pursuant to paragraph 5.7.2(b) met the Approval Criteria the Relevant Participant(s) shall either:

5.11.1 declare that the relevant New Project is an Approved Project and that such New Project shall proceed in accordance with paragraph 5.14; or

5.11.2 declare that its rejection of the relevant New Project be treated as a rejection pursuant to the provision of paragraph 5.7.2(a) and the relevant provisions of paragraph 5.10 shall apply.

5.12 If, following a referral to Schedule 22 (*Dispute Resolution Procedure*) under paragraph 5.11, it is agreed or determined that the New Project did not meet the Approval Criteria, or WEPCo does not refer the matter for consideration under the Dispute Resolution Procedure in accordance with paragraph 5.11, the provisions of paragraph 5.13 will apply.

5.13 Where, in terms of paragraph 5.12, this paragraph 5.13 applies, the Relevant Participant(s) shall be entitled either to procure the Required Facilities and/or the provision of the Project Services covered by the relevant Stage 2 Submission outside the terms of this Agreement (whether or not the New Project in question is a Qualifying Project and whether or not the period of ten (10) years from the Commencement Date has expired), or not to proceed with procurement of the Required Facilities/Project Services, and, for the avoidance of doubt shall not be or be deemed to be in breach of the provisions of Clause 9 (*Exclusive Nature of this Agreement*) in either case. In the event that the Relevant Participant(s) are so entitled pursuant to this paragraph 5.13, then where the Approval Criterion on Affordability has not been met, they shall not, prior to the expiry of the 10th anniversary of the Commencement Date, make any change to the Facilities Requirements which, had it been made prior to the submission of the relevant Stage 2 Submission, would have been reasonably likely to result in a material change in the sums payable by the relevant proposed Project Agreement Counterparty in respect of the Project.

- 5.14 If a New Project becomes an Approved Project, WEPCo will carry out further work to develop appropriate Project Agreements to implement the Approved Project on the terms of the Stage 2 Submission (as the same may be amended from time to time by agreement between WEPCo and the Relevant Participant(s)).
- 5.15 The Relevant Participant(s) shall notify WEPCo in writing as soon as they become aware of any matter which may adversely affect the viability of any New Project including any:
- 5.15.1 Unreasonable Conditions or other planning issues likely to cause a material delay in the anticipated programme for the New Project;
 - 5.15.2 material cost increases (whether on an aggregate basis or on a line by line basis); or
 - 5.15.3 changes to funding which any Relevant Participant receives or to the way in which funding may be applied, either or both which may affect whether a New Project is Affordable,

PROVIDED THAT this paragraph 5.15 shall not apply to a Relevant Participant which is a Local Planning Authority exercising its functions as such.

- 5.16 The Relevant Participant(s) shall provide reasonable assistance to WEPCo in relation to the procurement by WEPCo of all relevant Consents and the entering into of the relevant Project Agreement(s). This paragraph 5.16 and paragraph 5.15.1 shall not apply to a Relevant Participant which is a Local Planning Authority exercising its functions as such.
- 5.17 WEPCo shall be responsible for performing its obligations under Clause 5.1 (*Planning Matters*) in respect of such Approved Project.
- 5.18 WEPCo shall novate all of its past, present and future rights, obligations and liabilities under a Project BIM Agreement to the Project Service Provider on or prior to the date of execution of the Project Agreement for the Approved Project.

6. **CHANGES TO THE RELEVANT PARTICIPANT(S) REQUIREMENTS**

- 6.1 If the Specific Requirements, Affordability Cap or Approval Criteria are subject to any material variation in relation to a New Project by the Relevant Participant(s) after a Stage 1 Submission has been submitted then:
- 6.1.1 WEPCo and the Relevant Participant(s) shall negotiate in good faith as to the implications on the Stage 1 Submission and/or Stage 2 Submission (as the case may be) and shall seek to agree changes thereto to accommodate the variation (including any change to the Affordability Cap, the appropriate Comparators (or adjustments to Comparators) and/or to the Project Development Fee);
 - 6.1.2 save where such changes have been made as a result of the advice given by WEPCo, if agreement has not been reached pursuant to paragraph 6.1.1 within twenty (20) Business Days (or such longer period as the parties may agree) then:
 - (a) WEPCo shall be entitled by notice in writing to the Relevant Participant(s) to withdraw the Stage 1 Submission or the Stage 2 Submission or to decline to submit a Stage 2 Submission (as the case may be) and to be paid the Incurred Project Development Fee with the relevant date for calculation being the date the change was notified to WEPCo; and
 - (b) unless the period of ten (10) years after the Commencement Date has expired, to the extent the New Project in question is a Qualifying Project, the Relevant Participant(s) shall not be entitled to procure the Required Facilities and/or the provision of the Project Services outside the terms of this Agreement without recommencing this New Project Approval Process and, if they do so, such

action shall and shall be deemed to be in breach of Clause 9 (*Exclusive Nature of this Agreement*).

- 6.2 The Relevant Participant(s) may, at any time, give notice in writing to WEPCo that they propose to cancel a New Project (a Cancellation Notice) without completing the process set out in paragraphs 3 to 5, in which case the Relevant Participant(s) shall pay WEPCo the Incurred Project Development Fee in respect of the cancelled New Project with the relevant date for calculation being the date of the Cancellation Notice. In such circumstances, unless the period of ten (10) years after the Commencement Date has expired then, to the extent the New Project in question is a Qualifying Project, the Relevant Participant(s) shall not be entitled to procure the Required Facilities and/or the provision of the Project Services outside the terms of this Agreement without recommencing this New Project Approval Process and, if they do so, such action shall and shall be deemed to be in breach of Clause 9 (*Exclusive Nature of this Agreement*).

7. **SUSPENSION OF EXCLUSIVITY**

In circumstances where the Relevant Participant(s) exercise any right to suspend exclusivity pursuant to Clause 9.7, Clause 23.3 or Clause 23.10.1 while WEPCo is preparing a Stage 1 Submission or a Stage 2 Submission in respect of any New Project, the Relevant Participant(s) may (but shall not be obliged to) notify WEPCo at any time while such suspension subsists to cease work on producing the relevant Stage 1 Submission or Stage 2 Submission. In such circumstances WEPCo shall cease work forthwith and the Relevant Participant(s) shall pay WEPCo the Incurred Project Development Fee in respect of the relevant New Project with the relevant date for calculation being the date of the notice from the Relevant Participant(s).

SCHEDULE 6 - NEW PROJECT PRICING REPORT

1. DEFINITIONS

The following defined terms are used in this Schedule 6 (*New Project Pricing Report*):

"Associated Entity"	means, in relation to any body corporate: <ul style="list-style-type: none">(a) any Associate of that body corporate;(b) any member, director or partner of such body corporate or any of their Associates;(c) any partner in any partnership or any person who participates in any profit sharing or joint purse arrangement, in each case to which that body corporate or any person mentioned in paragraph (a) or (b) is also a party;(d) any member, director, officer or employee of any of the persons referred to in paragraphs (a) to (c) or any of those persons' spouses, children, step-children or partners; or(e) any body corporate of which any person referred to in (c) above is a member, director, officer or employee;
"Compliant Tender"	means a tender received from a Tenderer which complies with the Tender Requirements;
"MEA Tender"	[means a tender that complies with the Tender Requirements and represents the most economically advantageous tender for the Relevant Participant(s), as determined pursuant to the evaluation criteria and methodology applicable to the relevant Tender Process, in accordance with the terms of this Agreement;]
"Potentially Conflicted Entity"	means [WEPCo, any Associate of WEPCo and any sub-contractor of such an Associate, the PSDP or any B Shareholder Member];
"Preferred Tenderer"	means, following the Tender Process of any Tendered Element, any group of Tendered Elements or any part of any Tendered Element (as the case may be), the Tenderer selected to provide such services in accordance with the provisions of paragraph 5.2.4 below;
"Pricing Report"	means the report referred to in paragraph 4.1 below;
"Prohibited Act"	subject to paragraph 6 below, has the meaning given to it in Clause 25 (<i>Corrupt Gifts and Fraudulent Payments</i>);
"Prospective Tenderers"	means those persons who express an interest in being included in any Tender Process of Tendered Elements, group of Tendered Elements or any part of any Tendered Element (as the case may be);
"Relevant Employees"	means in relation to any service comprised within a Tendered Element for which a Tenderer is tendering, any persons employed by any of the Relevant Participant(s) or any other organisation or body (including, for the avoidance of doubt, any sub-contractor or

agent engaged by the Relevant Participant(s)) who will be wholly or mainly engaged in the provision of that service as at the relevant Transfer Date (as defined under any Project Agreement concluded in respect of the New Project in question should it become an Approved Project) and who will become an employee of the Project Service Provider or a Supply Chain Member providing the Tendered Element services in accordance with the relevant provisions of such Project Agreement;

"Tender Requirements"		means the form and requirements of the tender documents to be sent to Tenderers as agreed or determined in accordance with the Tender Process provisions of this Schedule 6 (<i>New Project Pricing Report</i>), in particular paragraph 5.2.1(a)(iv);
"Tender Validity Period"		means the period specified within the Tender Requirements as being the period within which final tenders from Tenderers must be received;
"Tendered Element"		means the element of a New Project [(whether a construction prime cost element, a construction non-prime cost element, design, funding, lifecycle, or facilities management services, management services cost elements or otherwise)] which would be required to be provided as part of the Project Services should the New Project in question become an Approved Project] ²⁵ ;
"Tendered Report"	Evaluation	has the meaning given to it in paragraph 5.2.1(b) of this Schedule 6 (<i>New Project Pricing Report</i>);
"Tender Process"		means the carrying out of an open market competitive tendering process in accordance with the provisions of this Schedule 6 (<i>New Project Pricing Report</i>) and "Tendering" shall be construed accordingly;
"Tenderers"		means those of the Prospective Tenderers that express an interest in the relevant Tender Process and that are invited to submit tenders following the pre-selection evaluation, in accordance with paragraph 5.2.2 and Appendix 1 below;
"TUPE Information"		means information relating to the terms and conditions, job title, age, length of service and benefits of the Relevant Employees;
"Welsh Standards"	Language	means the Welsh Language Standards (No.1) Regulations 2015.

2. PURPOSE

- 2.1 The purpose of this Schedule 6 (*New Project Pricing Report*) is to set out how WEPCo and the Relevant Participant(s) will work together to ensure that the Pricing Report to be produced in respect of each stage of the New Project Approval Process for each New Project provides Relevant Participants with robust, transparent, auditable information as to the costs, fees and prices included within WEPCo's proposals for such New Project, to assist the Relevant Participant(s) in making informed choices as to the best available value for money solution for their specified needs.

²⁵ Definition includes illustrative list of works/services to be competitively tendered. This will be refined during dialogue. In the case of MIM Projects, equity and sub-debt funding will not be competitively tendered and the equity IRR will be fixed for the first 7 years of the term of the Agreement.

- 2.2 In considering comparable projects to produce relevant benchmarking information and in determining adjustments to be made to Comparators, account shall be taken of inflation in respect of the Pricing Data, in accordance with:
- (a) Section 4 (*Partnering Services Costs Rates*) of Schedule 3 (*Partnering Services*) in respect of those elements of the project calculated by reference to the rates specified in said Section 4; and
 - (b) for all other elements of the project, the terms of Appendix 1 (*Pricing Data*) to Schedule 4 (*Partnering Services Costs*).

2.3 The proper costs of WEPCo reasonably incurred in meeting its obligations under this Schedule 6 (*New Project Pricing Report*) are Partnering Services Costs and shall be recovered in accordance with and subject to paragraph 1 of Schedule 4 (*Partnering Services Costs*).

3. **COMPARATORS AND PROGRAMME**

3.1 WEPCo and the Relevant Participant(s) shall, at the start of each stage of the New Project Approval Process for each New Project, agree a programme:

3.1.1 for WEPCo and the Relevant Participant(s) to meet and agree, no later than 4 weeks after the commencement of that stage:

- (a) in respect of each stage, the adjustment (if any) to be made to the relevant figure or percentage cap specified in Proforma 1 of the Pricing Data to reflect variances between the Comparator as identified in the Pricing Data and the details of the New Project, such adjustment to be carried out in accordance with the principles set out in Appendix 1 (*Comparator and Initial Pricing Information*) to Schedule 4 (*Partnering Services Costs*); and
- (b) where, for any one or more element or component of such New Project there is not an appropriate Comparator and in the case of all Tendered Elements, the approach and timescales for setting pricing, in accordance with the Tender Process set out in paragraph 5 and appropriate projects to act as a benchmark for production of the Pricing Report pursuant to paragraph 4.1.1(b) and paragraph 5.5,

and WEPCo and the Relevant Participant(s) shall attend such meetings and co-operate as may be necessary to reach agreement on said matters; and

3.1.2 for issue to the Relevant Participant(s) of a draft Pricing Report.

Where updated drafts of the Pricing Report are required to be submitted pursuant to paragraph 4.2, WEPCo and the Relevant Participant(s) shall agree the necessary changes to the programme to reflect such requirements.

3.2 The price proposed by WEPCo for each of the relevant stages of each New Project to which paragraph 3.1.1(a) above applies shall not exceed the relevant figure (or percentage if applicable) for the relevant Comparator specified in the Pricing Data as adjusted pursuant to paragraph 3.1.1 above.

4. **PRICING REPORT**

4.1 WEPCo shall produce a report for each New Project, which shall:

4.1.1 analyse:

- (a) for Stage 1 Approval, its predicted maximum cost of the relevant New Project (including all profit, overheads, contingencies and other costs chargeable to the relevant New Project);
- (b) for Stage 2 Approval, its predicted cost of the relevant New Project (including all profit, overheads, contingencies and other costs chargeable to that New Project),

based on appropriate assumptions provided with the report and in either case compared to:

- (i) the appropriate Comparators for the relevant elements or components of such overall cost (as adjusted pursuant to paragraph 3.1.1 above);
- (ii) the actual costs (and prices) of Approved Projects;
- (iii) other relevant projects agreed between the Relevant Participant(s) and WEPCo pursuant to paragraph 3 above;
- (iv) general market level of pricing, charges, costs and fees for all elements and components of similar projects;
- (v) other projects in the Region (outside of the WEP Strategic Partnering Delivery Model);
- (vi) other projects in the UK in the education sector or accommodation sector generally (outside of the WEP Strategic Partnering Delivery Model); and
- (vii) general market level of pricing, charges, costs and fees for all elements and components of similar projects in other territories, including information in respect of equivalent projects based on any benchmarking data and indices which may from time to time be provided by the Welsh Government,

and explain how such results, taking into account all aspects (whether or not cost related) of WEPCo's proposals for the New Project, demonstrate that the New Project would provide value for money to the Relevant Participant(s);

4.1.2 during Stage 1 include a fully costed risk register showing the allowances included within the predicted maximum cost to reflect matters which cannot be fully priced at that stage given the level of design development carried out to date or due to the fact they are Tendered Elements; and

4.1.3 during Stage 2 show how the matters included within the costed risk register submitted as part of the Pricing Report in the Stage 1 Submission have been resolved within the predicted cost.

The make up of the proposed costs for all elements and components of the New Project (as contained in the Pricing Report) shall be provided on an open book basis, with WEPCo providing evidence of the steps taken at each level of WEPCo's supply chain (including in relation to Funders, where applicable) to ensure value for money and, in the case of Project Development Partnering Services, continuous improvement in value for money (including those aspects of the proposed New Project which have been subject to a Partnering Services Supply Chain Refresh or the Tender Process).

4.2 WEPCo shall

provide the Relevant Participant(s) with drafts of the Pricing Report for comment in advance of the Stage 1 Submission or Stage 2 Submission, as the case may be, all in accordance with the programme referred to in paragraph 3.1.2 above.

4.3 At Stage 2 of the New Project Approval Process for each New Project, the costs contained in the Pricing Report shall, as a minimum, reflect the results of open book pricing exercise(s) undertaken by WEPCo from time to time pursuant to paragraph 1.2 of Section 1 (*Specification*) of Schedule 3 (*Partnering Services*).

4.3.1 WEPCo shall:

4.3.2 maintain a full record and audit trail of any benchmarking exercise and make all such records (including details of all tenders and information received) available for inspection by each Participants and its authorised representatives (including, without limitation, the National Audit Office and the Wales Audit Office) upon reasonable notice from that Participant; and

4.3.3 provide to the Relevant Participant(s) and the SPB, in a comprehensive and accurate manner, all information necessary to enable the Relevant Participant(s) and/or the SPB to review and assess all matters relating to the benchmarking exercises undertaken or commenced by WEPCo.

5. TENDER PROCESS

5.1 Subject to Clause 5.2, within [◆] Business Days of WEPCo being instructed to proceed with Stage 2 pursuant to paragraph 5 of Schedule 5 (*New Project Approval Process*), WEPCo shall carry out a Tender Process to establish supply chain and pricing for Tendered Elements and to secure commitment to contract terms at Supply Chain Agreement level, which align with the Approval Criteria. The Tender Process for each Tendered Element shall, notwithstanding any other provision of this Schedule 6 (*New Project Pricing Report*) (including, without limitation, the participation of the Relevant Participant(s) described in paragraph 5.2), be the responsibility of WEPCo (as between WEPCo and the Relevant Participant). WEPCo shall at all times establish and comply with arrangements that are reasonably satisfactory to the Relevant Participant(s) to ensure confidentiality of information in connection with any actual or potential Tender Process, in particular to ensure confidentiality as regards to any Potentially Conflicted Entity.

5.2 The requirements of this paragraph 5.2 shall apply in respect of every Tender Process to be carried out pursuant to the provisions of this Schedule 6 (*New Project Pricing Report*). The Relevant Participant may require WEPCo to carry out the Tender Process in respect of any single New Project (which of itself may include a number of batched facilities) or batch of New Projects.

5.2.1 Invitation to Tender and Tender Requirements

(a) WEPCo must obtain the approval of the Relevant Participant(s) in each case for:

(i) (subject to the provisions of paragraph 5.2.1(b)) any grouping or groupings of Tendered Elements or any division of any Tendered Elements into separate parts which will optimise the opportunity for the Participants to obtain best value for money;

(ii) the appropriate media for advertising the Tendered Elements and identifying the Prospective Tenderers (who should be wider than PSDP Associates but, for the avoidance of doubt, can include the PSDP and/or any PSDP Associate). Without prejudice to the Community Benefit Requirement KPIs relating to advertising of supply chain opportunities, WEPCo acknowledges the advertising requirements of [Procurement Policy Note "Supply Chain Visibility" dated 10 April 2018] and shall ensure that they are complied with in accordance with the principles of this Agreement;

(iii) the developed tender evaluation criteria and award criteria pursuant to which the Tenderers shall be selected by WEPCo from among the Prospective Tenderers;

- (iv) the Tender Requirements which shall include, without limitation:
- (1) a statement of the Tender Validity Period;
 - (2) requirements in respect of the possible grouping or groupings of Tendered Elements and any division of any Tendered Element into separate parts;
 - (3) details of the tender evaluation and award criteria, which shall:
 - (A) reflect the tender evaluation and award criteria methodology contained in Appendix 1 to this Schedule 6 (*New Project Pricing Report*); and
 - (B) be objective and impartial and must require Tenderers to demonstrate how they would conduct themselves as part of WEPCo's supply chain to ensure that the principles and objectives contained in Clause 2 (*Purpose and Conduct of the Parties*) are achieved;
 - (4) clarification request procedures and any requirement for draft tenders in advance of final tenders;
 - (5) any down-selection process;
 - (6) save where decided to the contrary by the Relevant Participant(s) (in their absolute discretion), a statement that Preferred Tenderers shall (where the Transfer Regulations do not otherwise apply) be required to offer employment to all employees who may qualify as Relevant Employees on terms and conditions as favourable as those they enjoy with their employer at the point of transfer;
 - (7) the TUPE Information (the Relevant Participant(s) shall procure that, in respect of any Tender Process, the employer of the Relevant Employees provides information for inclusion in the Tender Requirements to allow the consequences of the Transfer Regulations or compliance with the requirements relating to employees referred to in paragraph (4) to be assessed);
 - (8) in the case of construction and/or service related Tendered Elements, the form of Supply Chain Agreement(s) which the Preferred Tenderer will be required to accept, which shall reflect the principles set out in Clause 2 (*Purpose and Conduct of the Parties*) and the other requirements of this Agreement;
 - (9) the information Tenderers are required to provide by way of submission requirements, which shall include:
 - (A) in the case of construction and/or service related Tendered Elements, a requirement to submit details of the proposed security package, including draft parent company guarantees through which the Project Service Provider will be protected against financial or other failure of the principal Contractor

and/or (in the case of MIM Projects) Service Provider;

- (B) in the case of construction and/or service related Tendered Elements, acceptance of/ or a mark-up of the form of the Supply Chain Agreement (including developed technical schedules) approved pursuant to paragraph 5.2.1(c) below, on the basis that WEPCo shall be entitled to exclude any Tenderer from the Tender Process that submits amendments or modifications akin to Prohibited Amendments.
- (C) in the case of funding Tendered Elements, a term sheet and commitment letter from the Senior Funders confirming acceptance of the [Template Project Co Shareholders' Agreement and Template Project Agreement].²⁶

unless the Relevant Participant(s) otherwise agree in writing.

- (b) Unless WEPCo can demonstrate to the Relevant Participant(s) that it will optimise its ability to obtain best value for money for the Relevant Participant(s) if Tendered Elements are tendered separately or in particular groupings, or if any Tendered Element is divided into separate parts, the grouping of any Tendered Elements shall be limited to groupings of construction-related works, facility management related services and funding, and shall otherwise be left to the discretion of Tenderers on the basis that the Tender Requirements shall specify that:
 - (i) Tenderers may submit tenders for all or any of the groups within the Tendered Elements; and
 - (ii) where a Tenderer submits a tender for a group or groups of Tendered Elements, it may be required to provide all or any of the services in such group or groups and shall, in any event, provide separate pricing for each service in such group or groups.
- (c) The Tender Requirements and form of Supply Chain Agreement (including technical requirements and schedules) required under the terms of this Agreement, approved by the Relevant Participant(s), shall be used for the Tender Process.

5.2.2 Selection of Tenderers

- (a) WEPCo shall use a pre-selection questionnaire and interview or presentation process for all Prospective Tenderers to ensure gateway compliance and to enable it to shortlist Tenderers in accordance with this paragraph 5.2.2.
- (b) The Relevant Participants shall have the opportunity to provide input into any such questionnaire and may attend any such interviews or presentations.
- (c) WEPCo (as between WEPCo and the Relevant Participant(s)) shall be responsible for compiling the list of Prospective Tenderers and for ensuring that the Tenderers are selected from the list of Prospective Tenders on the basis of the following criteria:
 - (i) the financial standing of the Prospective Tenderers; and

²⁶ The list represents Welsh Government's minimum requirements. Other items to be discussed during dialogue to align with Tenderers method statements.

- (ii) the technical, managerial and other relevant experience and ability of the Prospective Tenders (taking into account any relevant customer references).

Three Tenderers shall be selected, unless otherwise agreed with the Relevant Participant.

- (d) The Relevant Participants shall have a right to object to the selection of any person as a Tenderer if such person does not (or could not reasonably be considered) to comply with any of the criteria referred to in 5.2.2(c) above.
- (e) To avoid doubt, an Potentially Conflicted Entity shall not be disqualified from selection as a Tenderer merely by virtue of the existence of the contractual relationship reflected in the WEPCo Shareholders Agreement, Project Agreements or Supply Chain Agreements where the requirements of the relevant provisions of the Partnering Services Method Statements²⁷ have been complied with, subject to:
 - (i) compliance with all Laws; and
 - (ii) the establishment of, and compliance with, arrangements reasonably satisfactory to the Participants to avoid any conflict of interest, breach of confidentiality or unfair advantage. Failure by WEPCo to comply with any such arrangements shall automatically lead to the disqualification of the Potentially Conflicted Entity and the provisions of paragraph 5.4 shall apply.
- (f) Without prejudice to paragraph 5.2.2(d) above, the Relevant Participant(s) shall, in their absolute discretion, have the right to veto the selection of any person as a Tenderer on the grounds that the Prospective Tenderer:
 - (i) has committed a Prohibited Act; or
 - (ii) [is directly responsible for WEPCo incurring a Significant Performance Failure or failing a Track Record Test;]
- (g) WEPCo shall (after consultation with the Relevant Participant(s)) procure that any Prospective Tenderer which is unsuccessful in being selected as a Tenderer is provided with an appropriate explanation of the reasons behind its non-selection, if so requested by the Prospective Tenderer in question.
- (h) Where, in respect of any Tendered Element or group of Tendered Elements or any part of any Tendered Element, there is only one Prospective Tenderer, WEPCo shall not be entitled to proceed with the Tender Process of the same without the prior written consent of the Relevant Participant(s), such consent not to be unreasonably withheld or delayed.

5.2.3 Tendering Process

- (a) WEPCo shall procure that:
 - (i) the Tender Process is managed and conducted in an efficient, fair and transparent manner in accordance with the requirements of this paragraph 5.2 and Appendix 1 and shall procure that only Tenderers

²⁷ See footnote at Section 5 of Schedule Schedule 3 regarding required content within Partnering Method Statements for dealing with supply chain assembly, tendering and conflicts of interest. Bidders will be expected to ensure that, where possible, the selection stage shall take account of whether a Bidder has a conflict of interest that may negatively affect performance under the relevant Supply Chain Agreement.

selected in accordance with this paragraph 5.2 and Appendix 1 are invited to submit tenders;

- (ii) the principle of equality of information to, and treatment of, Tenderers shall apply at all times;
 - (iii) all necessary documents and information (including, without limitation, the Tender Requirements) are sent to Tenderers in a timely manner;
 - (iv) Tenders are only assessed in respect of compliance with the Tender Requirements; and
 - (v) the Relevant Participant(s) are given the opportunity to attend any meetings held with Tenderers and, where applicable, to witness the opening of tenders.
- (b) The Parties agree that e-tendering is the preferred method for tenderers to submit their price. The e-tendering platform and associated protocols for this purpose shall be developed by or on behalf of WEPCo at its own cost and submitted to the Participants for their agreement.

5.2.4 Preferred Tenderers

- (a) Following expiry of the Tender Validity Period, WEPCo shall (subject to the provisions of this paragraph 5.2.4) conduct a tender evaluation in accordance with Appendix 1, to determine which Tenderer (the "**Preferred Tenderer**") offers the MEA Tender in respect of any Tendered Element, group of Tendered Elements or individual part of any Tendered Element.
- (b) Within [■] Business Days of the determination referred to in paragraph 5.2.4(a) being made, WEPCo shall supply to the Relevant Participant(s) a tender report (the "**Tender Evaluation Report**") which shall include, as a minimum:
- (i) a section setting out an introduction and the purpose of the report, which for the avoidance of doubt shall support the evaluation of the Stage 2 Submission;
 - (ii) a review of the invitation to tender and Tender Requirements;
 - (iii) the Tender Validity Period;
 - (iv) an overview of the tenders received;
 - (v) observations, remarks and qualifications of tenders;
 - (vi) amount of contingency within the pricing tendered;
 - (vii) conclusions and recommendations for award; and
 - (viii) a copy of the tender evaluation together with sufficient other supporting information concerning the tender evaluation, compliance checks and the breakdown of the price and quality scores, to enable the Relevant Participant(s) to analyse and understand the basis for such determination.
- (c) If the Relevant Participant(s) does not agree with the notified determination of the MEA Tender, the Relevant Participant(s) may, within fifteen (15) Business Days of being provided with the Tender Evaluation Report pursuant to paragraph 5.2.4(b) above, dispute such determination and, if the WEPCo and

the Relevant Participant(s) do not resolve such dispute within a further fifteen (15) Business Days, the dispute shall be referred for resolution in accordance with Schedule 22 (*Dispute Resolution Procedure*).

5.2.5 **Appointment**

- (a) Where the New Project receives Stage 2 Approval, WEPCo shall procure that all the Preferred Tenderers (as agreed or determined in accordance with paragraph 5.2.4 above and Appendix 1) are appointed by the Project Service Provider to provide the relevant Tendered Element or group of Tendered Elements or individual parts of any Tendered Element (as the case may be) on the basis set out in their MEA Tender.
- (b) Without prejudice to paragraph 5.2.2(h), where WEPCo believes that only one Compliant Tender is likely to be submitted, or where only one Compliant Tender is submitted, WEPCo shall not be entitled to proceed further with the Tender Process or (as the case may be) to appoint a Preferred Tenderer without the prior written approval of the Relevant Participants, such approval not to be unreasonably withheld or delayed.
- (c) WEPCo shall (after consultation with the Relevant Participant(s)) procure that any Tenderer which is unsuccessful in being selected as a Preferred Tenderer is provided with an appropriate explanation of the reasons behind its non-selection, if so requested by the party in question.

5.3 WEPCo shall:

- 5.3.1 maintain a full record and audit trail of each Tender Process and make all such records (including details of all tenders received) available for inspection by the Relevant Participants and their authorised representatives (including, without limitation, the National Audit Office and the Wales Audit Office) on reasonable written notice from the Relevant Participants;
- 5.3.2 provide to the Relevant Participant(s), in a comprehensive and accurate manner, all information necessary to enable the Relevant Participant(s) to review and assess all matters relating to the Tender Process;
- 5.3.3 certify to the Relevant Participant(s) within twenty (20) Business Days of expiry of the Tender Validity Period that:
 - (a) to the best of its knowledge and belief (having made due and diligent enquiry) no Potentially Conflicted Entity intends to or will obtain any direct or indirect financial or other benefit from such appointment (other than the benefit of the contract itself);
 - (b) to the best of its knowledge and belief (having made due and diligent enquiry) no Potentially Conflicted Entity has colluded in connection with the Tender Process; and
 - (c) there has been full compliance with all requirements relating to ensuring equality of information provided to, and treatment of, Tenderers.

5.4 WEPCo shall indemnify and keep each of the Relevant Participants fully indemnified at all times for and against all claims (including any claim made by any person (including any Prospective Tenderer, Tenderer or Preferred Tenderer) that is not awarded a contract), demands or notices which may be brought or alleged or threatened against any of the Participants or a Participant Party and from and against all Direct Losses or fines which that Relevant Participant or relative Participant Party may suffer or incur in relation to any such claims, demands or notices which occur as a result of or in connection with:

5.4.1 the implementation of this paragraph 5.4.1; and

5.4.2 any breach of the provisions of this paragraph 5.4.2,

save and to the extent that any such breach or claim results from any failure of the Participant to comply with the express provisions of this paragraph 5.4 (*Tender Process*) or from any failure of the Participants in carrying out the initial competition which resulted in the entering into of this Agreement by the Relevant Participants and WEPCo.

5.5 [In considering comparable projects to produce relevant benchmarking information to test the construction cost of Tendered Elements and in determining adjustments to be made to Comparators for Project Development Fees, account shall be taken of inflation in respect of the Pricing Data, in accordance with:

- (a) Section 4 (*Partnering Services Costs Rates*) of Schedule 3 (*Partnering Services*) in respect of those elements of the project calculated by reference to the rates specified in said Section 4; and
- (b) for all other elements of the project, the terms of Appendix 1 (*Pricing Data*) to Schedule 4 (*Partnering Services Costs*); and

and for benchmark projects, in respect of construction (and where appropriate, property) prices with reference to BCIS TPI (as agreed from time to time with the Relevant Participant(s)) and such other appropriate indices as may be agreed between the SPB and WEPCo since the date of the comparison data.]

6. IRREGULARITY IN AWARD OF CONTRACTS

6.1 Acceptance by WEPCo

Where WEPCo is required by this Agreement to carry out Tender Process or procure that Tender Process is carried out, then for the purpose of Clause 25 (*Corrupt Gifts and Fraudulent Payments*) it shall be an additional Prohibited Act for WEPCo or the relevant Supply Chain Member or proposed Supply Chain Member or any Associated Entity (or anyone acting on its behalf) to:

- 6.1.1 accept or agree to accept any gift or consideration of any kind as an inducement or reward:
 - (a) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of any Supply Chain Agreement; or
 - (b) for showing or not showing favour or disfavour to any person in relation to any Supply Chain Agreement; or
- 6.1.2 enter into any Supply Chain Agreement in connection with which commission has been paid or has been agreed to be paid unless, before the Supply Chain Agreement is made, particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Participants and they have consented to the same (in their absolute discretion),

and the provisions of Clause 25 (*Corrupt Gifts and Fraudulent Payments*) (changed according to context) shall apply and be construed accordingly.

6.2 Offer by Tenderer

- 6.2.1 Where WEPCo is required by this Agreement to carry out or procure the carrying out of Tender Process and any Prospective Tenderer or Tenderer (or anyone acting on its or their behalf or any of its or their directors, officers or employees) offers or agrees to give

to WEPCo or any Associated Entity any gift or consideration of any kind as inducement or reward:

6.2.2 for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of any Supply Chain Agreement; or

6.2.3 for showing or not showing favour or disfavour to any person in relation to any Supply Chain Agreement,

the Relevant Participant(s) may (without prejudice to any of their other rights) by written notice to WEPCo require WEPCo to procure, as soon as practicable, the termination of that person's involvement in the Tender Process or, if discovered after the award of the relevant contract, the termination of the relevant Supply Chain Agreement(s) (and the provisions of Clause 25 (*Corrupt Gifts and Fraudulent Payments*) shall apply and be construed accordingly).

6.3 Without prejudice to Clause 25 (*Corrupt Gifts and Fraudulent Payments*) WEPCo shall notify the Participants in writing of the occurrence (and details) of any Prohibited Act promptly on WEPCo becoming aware of its occurrence.

APPENDIX 1 - TENDER PROCESS METHODOLOGY

Purpose

The purpose of this Appendix is to provide an outline framework for any Tender Process. The key requirements outlined below are prescriptive but specific methodologies will be developed based on these key requirements for each individual Tender Process exercise.

1. RESPONSIBILITY

The [Chief Executive] of WEPCo will establish the Tender Process project team (including any external technical input or requirements) and take overall responsibility for the management of the Tender Evaluation process. The [Chief Executive] of WEPCo will ensure that due process is followed at all times and that sufficient and appropriate resources are made available to ensure that the process is completed in a timely and efficient manner ensuring that probity is achieved at all times.

2. CONTEXT

Value for money is the essential test against which any Tender Process exercise is to be justified. It is essential that the evaluation methodology offers a robust, objective, transparent and fair process against which tender submissions are evaluated and that inherent in the process is a clear and comprehensive audit trail.

3. AIMS OF THE TENDER PROCESS

3.1 Value for Money

A balanced assessment of quality standards, service benchmarks and price is to be carried out so as to ensure that the most economically advantageous tender is selected. In determining the most economically advantageous tender the award criteria shall assess Price and Quality of the tender. in accordance with paragraph 7 below.

3.2 Transparent Evaluation Regime

All tenders must be evaluated in a consistent manner against agreed evaluation criteria. WEPCo shall treat Prospective Tenderers and Tenderers equally and without discrimination and shall act in a transparent and proportionate manner. The design of the Tender Process shall not artificially narrow competition. [WEPCo shall ensure that any electronic portal or system for communication with Tenderers or Prospective Tenderers in respect of an EU Regulated procedure (including for the submission of tenders and requests to participate) shall comply with the requirements of regulation 22 of the Public Contract Regulations 2015 (as amended), including in respect of technical and security requirements.]

3.3 Welsh Language

WEPCo must comply with Welsh Language Standards when conducting a Tender Process.

4. PRE-SELECTION AND GATEWAY COMPLIANCE

A pre-selection process will be undertaken in respect of each Prospective Tenderer to ensure that they have the [financial and technical] capacity to comply with the requirements of the contract in accordance with paragraph 5.2.2 of Schedule 6 (*New Project Pricing Report*). Such assessment shall include as a minimum assessment of those terms listed at paragraph 5.2.2(c) of Schedule 6 (*New Project Pricing Report*) to determine those Prospective Tenderers that will continue in the Tender Process as Tenderers.

5. **INVITATION TO TENDER**

Following receipt of signed non-disclosure agreements, the Tenderers shall be issued with the invitation to tender for the relevant New Project, which shall include the background and overview of the Project, together with details of the Tender Process and Tender Requirements,

6. **TIMESCALES/RECEIPT OF TENDERS**

Tender packages will be returned to a nominated person [within the Tender Process team] on a date and time to be specified [and in any event within [◆] days of the expiry of the Tender Validity Period. The nominated person or their duly authorised deputies will open them. A tender opening form will be completed which will include such information as:

- date and time of opening;
- name of tenderer;
- tender price;
- any comments pertaining to the tender; and
- signatures of those opening the tender.

The bids will then be separated to remove pricing issues as far as is practical and issued to the respective members of the Tender Process team. In this way a qualitative evaluation can be made independent of any pricing considerations.

7. **EVALUATION METHODOLOGY**

The Tender Process project team will be responsible for ensuring a robust objective transparent and fair evaluation throughout the Tender Process (including the pre-selection stage) of all tenders submitted. A "**Tender Evaluation Plan**" will be developed and agreed which will cover the following topics:

- evaluation criteria;
- evaluation methodology;
- evaluation process; and
- evaluation timescales.

Evaluation will be by way of pass/fail tests and weighted scores. The scoring methodology shall ensure that each part of the tender to be scored provides an objective basis for ranking tenderers and shall provide a comprehensive audit trail of the process. Specifically, the evaluation of community benefits must also account for the following:

- (a) commitment to the relevant Authority's Community Benefit Requirement KPIs and robust, deliverable method statements for delivery, on a pass/fail basis;
- (b) scoring the value of any commitments toward ACBR Enhancements, together with assessment of the level of robustness and deliverability of method statements for delivery; and
- (c) scoring the scope and value of commitments toward Additional Community Benefit Project Co Proposals, including whether such proposals:
 - (i) are tangible and measurable KPIs, that set out a clear, objective and transparent method of calculation and target;

- (ii) are linked to the subject-matter of the Project Agreement (within the meaning of Regulation 67(5) of the Public Contract Regulations 2015);
- (iii) do not replicate the KPIs that are already captured in the Community Benefit Requirement KPIs (and are additional benefits in that sense); and
- (iv) set out the calculation on an open book basis, reflecting the cost of delivery of such proposals using verifiable information; and
- (v) achieve one or more of the Relevant Participant's Well-being of Future Generations (Wales) Act 2015 policy objectives outlined in the New Project Request (if any).

8. **PREFERRED TENDERER**

Following evaluation of tenders and clarification process the Tender Process panel will make a recommendation of Preferred Tenderer. The nominated person will notify the Preferred Tenderer and all unsuccessful Tenderers in writing. An opportunity for de-brief will be offered to all bidders.

9. **AUDIT**

A full documented audit trail will be maintained for each and every stage of the process.

SCHEDULE 7²⁸ - TEMPLATE PROJECT AGREEMENTS AND SHAREHOLDERS AGREEMENTS

SECTION 1 - MIM PROJECTS

THE PROJECT AGREEMENT FOR EDUCATION SECTOR MIM PROJECTS IS ATTACHED HERETO.

²⁸ Refer to ITPDSB. To be inserted before contract execution.

Section 2 - Design and Build Development Agreement²⁹

**THE DESIGN AND BUILD DEVELOPMENT AGREEMENT FOR EDUCATION SECTOR PROJECTS IS
ATTACHED HERETO.**

²⁹ Refer to ITPDSB. To be inserted before contract execution.

SECTION 3 - WEPKO SHAREHOLDERS' AGREEMENT³⁰

THE WEPKO SHAREHOLDERS' AGREEMENT IS ATTACHED HERETO.

³⁰ Refer to ITPDSB. To be inserted before contract execution.

SECTION 4 - PROJECT CO SHAREHOLDERS' AGREEMENT³¹

THE PROJECT CO SHAREHOLDERS' AGREEMENT IS ATTACHED HERETO.

³¹ Refer to ITPDSB. To be inserted before contract execution.

SCHEDULE 8

DRAFT 21ST CENTURY SCHOOLS AND COLLEGES (BAND B) MIM PROGRAMME³²

³² Please refer to Appendix 2 of the Descriptive Document. Draft programme to be inserted before contract execution.

SCHEDULE 9 - INSURANCES

1. LIMITS OF INDEMNITY

- 1.1 The limits of indemnity required by this Schedule 9 (*Insurances*) shall be increased in multiples of £5,000,000 as follows. If on a renewal date the limits of indemnity figures stated in this Schedule 9 (*Insurances*) (index linked) shall exceed the existing limits of indemnity by £3,000,000, then the level of indemnity required by this Schedule 9 (*Insurances*) shall be increased by £5,000,000. To avoid doubt if on a renewal date the limits of indemnity figures stated in this Schedule 9 (*Insurances*) (index linked) shall not exceed the existing limits of indemnity by £3,000,000, then the level of indemnity required by this Schedule 9 (*Insurances*) shall remain unchanged.

2. MAXIMUM DEDUCTIBLES

The maximum deductibles required by this Schedule 9 (*Insurances*) shall be increased in multiples of £5,000 as follows. If on a renewal date maximum deductibles figures stated in this Schedule 9 (*Insurances*) (index linked) shall exceed the existing maximum by £3,000, then the maximum deductibles required by this Schedule 9 (*Insurances*) shall be increased by £5,000. To avoid doubt if on a renewal date the maximum deductibles figures stated in this Schedule 9 (*Insurances*) (index linked) shall not exceed the existing limits of indemnity by £3,000,000 then the maximum deductibles required by this Schedule 9 (*Insurances*) shall remain unchanged.

3. THIRD PARTY LIABILITY (INCLUDING PRODUCTS LIABILITY)

3.1 Interest

Legal liability of the Insured for all sums (including claimants' costs and expenses) whether under contract or otherwise in respect of accidental:

- 3.1.1 death or bodily injury or illness or disease contracted by any person;
- 3.1.2 loss of or damage to property; including but not limited to Participants assets; and
- 3.1.3 interference to property or any easement, right of air, light, water or way or the enjoyment or use thereof by obstruction, trespass, loss of amenities, nuisance or any like cause,

happening or consequent upon a cause occurring during the Period of Insurance.

3.2 Insured

- 3.2.1 WEPCo.

3.3 Period of Insurance

From the Commencement Date until the expiry or earlier termination of this Agreement and renewable on an annual basis.

3.4 [Limit of Indemnity

- 3.4.1 Not less than £[10,000,000]³³ (index linked) any one occurrence, the number of occurrences being unlimited but in the annual aggregate in respect of pollution and products liability].

3.5 Maximum Deductibles

- 3.5.1 £10,000 (index linked) each and every occurrence of property damage (personal injury claims will be paid in full).

³³ To be confirmed.

3.6 Principal Extensions

- 3.6.1 Cross liabilities clause;
- 3.6.2 Contractual liability clause;
- 3.6.3 Worldwide jurisdiction;
- 3.6.4 Contingent motor;
- 3.6.5 Legal defence costs in addition to the limit of indemnity;
- 3.6.6 Indemnity to principals clause; and
- 3.6.7 Waiver of subrogation in favour of the Participants, their employees and agents.

3.7 Principal Exclusions

- 3.7.1 Liability of any insured to its own employees;
- 3.7.2 Fines, penalties, punitive or exemplary damages;
- 3.7.3 Liquidated damages;
- 3.7.4 War, invasion, acts of foreign enemies, hostilities (whether declared or not), civil war, rebellion, revolution, insurrection of military or usurped power;
- 3.7.5 Seepage, pollution or contamination unless caused by a sudden, unintended and unexpected happening;
- 3.7.6 Liability of each of the Participants arising from their clinical negligence;
- 3.7.7 Nuclear risks;
- 3.7.8 Such other exclusions as are generally applied as a matter of current market practice in the relevant insurance market from time to time; and
- 3.7.9 Liability arising out of asbestos.

4. **PROFESSIONAL INDEMNITY INSURANCE**

4.1 Interest

To indemnify the Insured for all sums which the Insured shall become legally liable to pay (including claimants costs and expenses) as a result of claims first made against the Insured during the period of insurance by reason of any negligent act, error and/or omission in connection with the provision of any advice or professional services in connection with the provision of the Partnering Services and in connection with this Agreement.

4.2 Insured

WEPCo

4.3 Period of insurance

From the Commencement Date (a) until the expiry or earlier termination of this Agreement and renewable on an annual basis unless agreed otherwise by the Participants in writing; and (b) for a period of 6 years thereafter.

4.4 Limit of indemnity

A limit of indemnity of not less than five million pounds (£5,000,000) in respect of any one claim without limit to the number of claims in any annual policy period, but five million pounds (£5,000,000) any one claim and in the aggregate per annum for liability arising out of pollution or contamination (to the extent insured by the relevant policy).

4.5 Maximum deductible threshold

Not to exceed £[**to be determined**] for each and every claim.

4.6 Cover features and extensions

4.6.1 Retroactive cover to apply to any "claims made policy wording" in respect of this Agreement or retroactive date to be no later than the Effective Date.

4.6.2 Legal defence costs in addition to the limit of indemnity.

4.6.3 Loss of documents.

4.7 Principal exclusions

4.7.1 War and related perils

4.7.2 Nuclear and radioactive risks]

5. **EMPLOYER'S LIABILITY**

5.1 In a form complying with current Law.

5.2 Minimum limit of liability - £10,000,000 (index linked), each and every occurrence, the number of occurrences being unlimited.

5.3 Incorporating a waiver of subrogation against the Participants, their employees and agents.

SCHEDULE 10 - DEED OF ADHERENCE

This is the Deed of Adherence referred to in Clause 32 (*Change in Parties to the Partnering Agreement*).

THIS AGREEMENT IS MADE ON

AMONG:

(1) [] **LIMITED**, a company registered in England and Wales (Company Registration Number []) whose registered office is at [] ("**WEPCo**");

(2) [] of [];

(3) [] of [];

each of (2) and (3) being the "**Continuing Participants**"; and

(4) [] of [].

IT IS AGREED AS FOLLOWS:

This Agreement is supplemental to the partnering agreement (the "**WEP Strategic Partnering Agreement**") dated [] 20[] between [WEPCo] and the Continuing Participants.

Words and expressions defined in the WEP Strategic Partnering Agreement have the same meanings when used in this Agreement.

[] hereby agrees with each other person who is or who becomes a party to the WEP Strategic Partnering Agreement at today's date that with effect on and from the date of its execution of this Agreement it is bound by the WEP Strategic Partnering Agreement in that capacity.

The address and details for notices of [name] for the purposes of Clause 40 (*Notices*) of the WEP Strategic Partnering Agreement are: [].

This Agreement is subject to and shall be construed in accordance with the law of England and Wales.

IN WITNESS WHEREOF the parties have executed this Agreement as a Deed the day and year first above written:

EXECUTED as a Deed)

by [] acting by)

[])

EXECUTED as a Deed)

by [] acting by)

[])

SCHEDULE 11 - STRATEGIC DELIVERY PLAN

Section 1 - Initial SDP³⁴

³⁴ Please refer to the Descriptive Document. To be inserted before contract execution.

Section 2 - Updated SDP

WEPCo shall prepare a draft SDP for submission to the SPB in accordance with Clause 14.4 taking into account the draft local plans and in accordance with Clause 8 (*Services Obligations*) and Schedule 3 (*Partnering Services*). The draft SDP shall identify proposed Qualifying Projects.

Where such Qualifying Projects do not fall within paragraphs (a) or (b) of the definition thereof, no such project shall be included within the SDP without the express written consent of the relevant Affected Participant(s) (which shall be provided to the SPB). Such consent will be subject to applicable Law prevailing at the relevant time and applicable procurement rules and guidance.

SCHEDULE 12 - PLANNING MATTERS

The provisions of this Schedule 12 (*Planning Matters*) are subject to Clause 5.1 (*Planning Matters*).

1. PLANNING MATTERS

- 1.1 Subject to the terms of specific Project Agreements, WEPCo shall be responsible for:
- 1.1.1 obtaining all Consents, Planning Permissions, Planning Agreements and Infrastructure Agreements which may be required for the performance of the Services;
 - 1.1.2 implementing or procuring that the relevant Project Service Provider and the relevant Supply Chain Members implement each Consent, Planning Permission, Planning Agreement and Infrastructure Agreement relevant to a Project Agreement within the period of its validity in accordance with its terms; and
 - 1.1.3 complying with or procuring that the relevant Project Service Provider and the relevant Supply Chain Members comply with the provisions of each Consent, Planning Permission, Planning Agreement and Infrastructure Agreement applicable pursuant to a Project Agreement,
- provided that to the extent that such Consents, Planning Permissions, Planning Agreements and Infrastructure Agreements can only be or, in terms of a Project Agreement, are required to be obtained, implemented and/or complied with by the Project Agreement Counterparty or any third party occupier of the Facilities and are not obtained, implemented and/or complied with, WEPCo shall not be in breach of this Agreement.
- 1.2 WEPCo shall use all reasonable endeavours to secure the grant of Satisfactory Planning Permission.
- 1.3 WEPCo shall not allow or agree with the Local Planning Authority any extension of the statutory period for determination of the Planning Application without the prior written consent of the Affected Authority (such consent not to be unreasonably withheld or delayed).
- 1.4 The Affected Authority hereby undertakes with WEPCo that subject to the provisions of this Schedule 12 it shall, at the request and cost of WEPCo, do all acts and things reasonably necessary and within the ability and control of the Affected Authority to facilitate a Planning Application and/or Planning Appeal and shall assist in dealing with a Planning Call In and/or Planning Proceedings and subject to the provisions of this Schedule 12 at all times at the request and cost of WEPCo support WEPCo in making pursuing and/or dealing with a Planning Application and/or Planning Appeal and/or Planning Call In and/or Planning Proceedings which WEPCo shall reasonably require to secure a Satisfactory Planning Permission.
- 1.5 WEPCo shall not object to or procure, support or encourage any other person to object to any Planning Application or Planning Appeal submitted by WEPCo or the Affected Authority in respect of any part or parts of the Affected Authority's land or its facilities or proposed facilities in respect of New Projects.
- 1.6 WEPCo shall comply with the provisions of a Satisfactory Planning Permission and any Planning Agreement entered into pursuant to the provisions of this Agreement. For the avoidance of doubt, to the extent that such Satisfactory Planning Permission and any Planning Agreements are not complied with by any third party occupier of the Facilities (including any Project Agreement Counterparty), WEPCo shall not be liable and there will be no breach of this paragraph 1.6 unless, in terms of the relevant Project Agreement, such third party occupier is the responsibility of the Project Service Provider.
- 1.7 WEPCo and any Affected Authority shall enter into, comply with and perform any Planning Agreement and/or any Infrastructure Agreement necessary to obtain a Satisfactory Planning Permission or to facilitate the carrying out of the Project Services in accordance with the provisions of this Agreement and the relevant Project Agreement (in so far as they do not contain any

Unreasonable Conditions that have not been resolved in accordance with this Agreement) with the intention and proviso that the Affected Authority shall only do so if it is necessary to do so in its capacity as the owner of the land concerned. Save where agreed to the contrary by the Affected Authority and approved by the Relevant Participant(s) as part of the New Project Approval Process WEPCo will be responsible for all costs involved in completing any Planning Agreement and Infrastructure Agreement including for the avoidance of doubt all legal and administrative costs of the Affected Authority.

1.8 The following procedure shall apply in relation to planning relating to an Affected Authority:

1.8.1 WEPCo shall prepare at its own expense and submit to the Affected Authority draft Planning Application(s) for the consideration and approval of the Affected Authority.

1.8.2 The Affected Authority shall within forty-two (42) Business Days of receipt of a draft Planning Application referred to in sub-paragraph 1.8.1 either approve the draft Planning Application or object to it in writing with details of the grounds of objection.

1.8.3 WEPCo shall consider the Affected Authority's objection(s) and shall use all reasonable endeavours to resolve the objections with twenty (20) Business Days and will submit to the Affected Authority an amended draft Planning Application(s) for approval.

1.8.4 In the event of any or all of the Affected Authority's objection(s) remaining unresolved after a period of twenty (20) Business Days of submission of the amended draft Application in accordance with sub-paragraph 1.8.3 WEPCo may refer any such objection to be dealt with pursuant to Schedule 22 (*Dispute Resolution Procedure*).

1.8.5 If the Affected Authority shall fail to so approve or fail to object to the same by notice in writing to WEPCo within sub-paragraphs 1.8.2 and 1.8.3 respectively, the draft Planning Application shall be deemed to have been approved by the Affected Authority.

1.8.6 WEPCo shall within five (5) Business Days of receipt of notification in writing from the Affected Authority of its approval of the draft Planning Application under sub-paragraph 1.8.2, 1.8.3 or 1.8.4 or within five (5) Business Days of the date of the deemed approval of the draft Planning Application pursuant to the terms of sub paragraph 1.8.5 above at its own expense submit a Planning Application in the form approved or deemed to have been approved of by the Affected Authority in the joint names of WEPCo and the Affected Authority to the appropriate Local Planning Authority and shall use all reasonable endeavours to obtain Satisfactory Planning Permission in respect thereof.

1.8.7 If a Planning Application is:

- (a) refused by the Local Planning Authority;
- (b) deemed to have been refused under section 78(2) of the Town and Country Planning Act 1990; or
- (c) the subject of a Planning Call-In,

WEPCo shall at its own expense as soon as practicable in the joint names of WEPCo and the Affected Authority lodge a Planning Appeal with the Welsh Ministers and prosecute the Planning Appeal (or in the case of a Planning Call-In, the Planning Application) to a conclusion with all reasonable speed and diligence and shall indemnify the Affected Authority in respect of any award of costs against the Affected Authority in its capacity as joint appellant, **UNLESS** a Planning Advocate has advised WEPCo and the Affected Authority that in all the circumstances, there is less than fifty (50%) percent chance of success of the Planning Appeal or of proceedings relating to a Planning Call-In resulting in the grant of a Satisfactory Planning Permission.

1.8.8 WEPCo shall keep the Affected Authority fully informed of the progress of any Planning Applications, Planning Agreements, Infrastructure Agreements or as the case may be a Planning Appeal, Planning Call-In or Planning Proceedings and in particular:

- (a) shall keep the Affected Authority advised of WEPCo's progress in prosecuting the Planning Appeal or as the case may be a Planning Call-In including where necessary securing a date for a hearing or inquiry into a Planning Appeal or as the case may be Planning Call-In and the date of that hearing or inquiry;
- (b) shall provide the Affected Authority with copies of all material correspondence in respect of any Planning Applications, Planning Agreements, Infrastructure Agreements, Planning Appeals, Planning Call-In or Planning Proceedings;
- (c) shall keep the Affected Authority advised of all meetings, discussions and negotiations in connection with a Planning Application or as the case may be a Planning Appeal, Planning Call-In or Planning Proceedings with the Local Planning Authority or any authority body or person consulted in connection with, or notified, of a Planning Application pursuant to the requirements of the Planning Act or with any third party or advisers and to allow the Affected Authority and such of its professional advisers as it shall direct to attend and to participate at all such meetings and to send to the Affected Authority and to such of its professional advisers as it shall direct copies of the minutes of all such meetings and copies of all correspondence with all such parties;
- (d) shall permit the Affected Authority and/or such of its professional advisers as it shall direct to attend and participate at all conferences or, as the case may be, consultations with the Planning Advocate and at all meetings between WEPCo and its professional advisers in connection with a Planning Application or as the case may be a Planning Appeal, Planning Call-In or Planning Proceedings and to supply to the Affected Authority a copy of all instructions to the Planning Advocate and copies of all documents referred to therein (including WEPCo's recognitions);
- (e) shall supply to the Affected Authority and such of its professional advisers as it shall direct a copy of all notes of conferences, or as the case may be, consultations with the Planning Advocate and minutes of all meetings between WEPCo and its professional advisers and all opinions and advice of the Planning Advocate and advice of WEPCo's experts in connection with a Planning Application or as the case may be a Planning Appeal, Planning Call-In or Planning Proceedings; and
- (f) shall supply to such of the Affected Authority and such of its professional advisers as it shall reasonably direct copies of:
 - (i) all Planning Applications and Planning Appeals and all material documents relevant to a Planning Application or as the case may be Planning Appeal or Planning Call-In including any statements, objections or reports accompanying a Planning Application or as the case may be a Planning Appeal and all statements produced by or on behalf of WEPCo or supplied by the Local Planning Authority or any third parties; and
 - (ii) all applications, affidavits, judgements and all other relevant documents in connection with any Planning Proceedings;

1.9 WEPCo shall within five (5) Business Days of receipt of a Planning Permission:

1.9.1 send a copy of the Planning Permission to the Affected Authority; and

- 1.9.2 within fifteen (15) Business Days of receipt of such aforesaid Planning Permission the parties shall give notice in writing to each other whether in their reasonable opinion acting reasonably they consider the Planning Permission to be a Satisfactory Planning Permission or whether it is subject to an Unreasonable Condition and if so specifying such condition and giving the reason why it constitutes an Unreasonable Condition.
- 1.9.3 If either Party fails to so notify the other Party within that period the Planning Permission shall be deemed to be satisfactory to that Party.
- 1.10 WEPCo shall within five (5) Business Days of receipt of a draft Planning Agreement or Infrastructure Agreement:
 - 1.10.1 send a copy of the draft Planning Agreement or Infrastructure Agreement to the Affected Authority; and
 - 1.10.2 within fifteen (15) Business Days of receipt of such aforesaid draft Planning Agreement or Infrastructure Agreement the parties shall give notice in writing to each other whether in their reasonable opinion acting reasonably they consider the draft Planning Agreement or Infrastructure Agreement is subject to an Unreasonable Condition and if so specifying such condition and giving the reason why it constitutes an Unreasonable Condition.
 - 1.10.3 If either Party fails to so notify the other Party within the period set out in paragraph 1.10.2 above the draft Planning Agreement or Infrastructure Agreement shall be deemed to be satisfactory to that Party;
- 1.11 If either WEPCo or the Affected Authority notify the other that it considers that the Planning Permission, Planning Agreement or Infrastructure Agreement contains an Unreasonable Condition and either the other party agrees that it is unreasonable or if the outcome of a referral of the dispute between the parties in accordance with Schedule 22 (*Dispute Resolution Procedure*) is that a condition is unreasonable, WEPCo shall at its own expense within twenty (20) Business Days of the agreement or determination either:
 - 1.11.1 submit an application pursuant to section 73 of the Town and Country Planning Act 1990 or section 96A of the Town and Country Planning Act 1990 or Section 19 of the Planning (Listed Buildings and Conservation Areas) Act 1990, or Section 13 of the Planning (Hazardous Substances) Act 1990 to vary the Planning Permission to remove the Unreasonable Condition or for the development of the WEPCo Operations without complying with an Unreasonable Condition or Unreasonable Conditions subject to which the Planning Permission was granted (such application to be in a form previously approved in writing by the Affected Authority) (and in the event that such an application is made such application shall for the purpose of this Agreement be treated as a Planning Application); or
 - 1.11.2 (if the Affected Authority has given its consent in writing) lodge a Planning Appeal in the joint names of WEPCo and the Affected Authority with the Welsh Ministers and shall use all reasonable endeavours to prosecute the Planning Appeal or the Planning Application (as the case may be) with all speed and diligence and shall indemnify the Affected Authority in respect of any award of costs against the Affected Authority in its capacity as a joint appellant.
- 1.12 WEPCo shall where necessary use all reasonable endeavours to secure the earliest available date for a hearing or inquiry into a Planning Appeal or Planning Call-In and, unless otherwise agreed in writing by the Affected Authority, WEPCo shall accept the first date offered by the Directorate for Planning Inspectorate and Environmental Appeals for a hearing inquiry into a Planning Appeal or Planning Call-In.
- 1.13 WEPCo shall obtain the prior written approval (such approval not to be unreasonably withheld or delayed) of the Affected Authority to the appointment of the Planning Advocate and other appropriate expert witnesses proposed to be instructed in connection with a Planning Appeal or Planning Call-In or Planning Proceedings.

- 1.14 Where an Affected Authority is also the Local Planning Authority, this Schedule 12 (*Planning Matters*) shall (for the avoidance of doubt) be subject to Clause 27 (*Agency and Participants' Statutory Authority*).

SCHEDULE 13 - UNREASONABLE CONDITIONS

1. Any limitation, restriction and/or prohibition of use on any land or property owned or occupied by the Affected Authority not the subject of a Planning Application.
2. Any limitation, reduction and/or restriction of the height, area or volume of any proposed building or structure to less than that specified in a Planning Application.
3. Any requirement whether expressed positively or restrictively to carry out any work or works of whatever description on any land or public road or both not included within the land the subject of a Planning Application.
4. Any restriction on the times during and/or days on which any of the WEPCo Operations, and/or facilities or proposed facilities of the Affected Authority whether or not the subject of a Planning Application may be used and/or occupied.
5. Any limitation, restriction and/or prohibition which in the opinion of the Affected Authority would interfere with or prevent the efficient use of the WEPCo Operations and/or facilities or proposed facilities of the Affected Authority.
6. Any requirement whether expressed positively or restrictively to provide a greater area of landscaping than that specified in a Planning Application.
7. Any requirement whether expressed positively or restrictively to provide more or less vehicle parking spaces or facilities proposed for vehicles delivering goods and/or personnel than as specified in a Planning Application.
8. Any restriction, limitation and/or prohibition of the occupation and/or use of the whole or any part of the land the subject of the Planning Application to or by a designated occupier.
9. Any limitation, restriction and/or prohibition on the level of noise emanating from any land the subject of a Planning Application with which it would be, in the opinion of the Affected Authority, impracticable to comply.
10. Any requirement, limitation, restriction and/or prohibition which in the opinion of the Affected Authority would increase the cost of construction and/or operation of the building, structure, engineering operation or use the subject of a Planning Application.
11. Any restriction on the internal operating height of any building or structure the subject of a Planning Application to less than that specified in the Planning Application.
12. Any restriction on the number, type or size of vehicles which may be used and parked on the land the subject of a Planning Application otherwise as specified in the Planning Application.

SCHEDULE 14 - COMPENSATION ON PARTICIPANT EVENT OF DEFAULT AND TERMINATION

SECTION 1 - PARTICIPANT EVENT OF DEFAULT COMPENSATION SUM

1. Where:
 - 1.1 WEPCo has served a Participant Default Notice; and/or
 - 1.2 WEPCo terminates this Agreement with respect to one or more Participants pursuant to Clause 22.2.2(a),

each Participant responsible for the Participant Event of Default giving rise to the service of the Participant Default Notice shall pay to WEPCo the relevant Participant Event of Default Compensation Sum (if any) calculated in accordance with paragraph 2.
2. The Participant Event of Default Compensation Sum payable by a Participant responsible (in whole or in part) for the Participant Event of Default in question shall be an amount equal to:
 - 2.1 the aggregate of the Partnering Service Costs (subject always to operation of the relevant Project Development Fee Caps) which WEPCo or the Supply Chain Members have properly and reasonably incurred in connection with the provision of Project Development Partnering Services to that Participant but which have not been paid by that Participant at the time of service of the Participant Default Notice ("**Unrecoverable Partnering Services Costs**") less an amount equal to the aggregate of:
 - 2.1.1 any such Partnering Service Costs so incurred which would, on the assumption that all Project Agreements continue in full force and effect for the full period of their respective terms, be recovered by Project Service Providers as part of the payments they receive under or in connection with such Project Agreements; and
 - 2.1.2 any sums which any Project Service Provider has received from any of the Participants or has received or is entitled to receive under any policy of insurance by way of payment of, reimbursement or compensation towards any Unrecoverable Partnering Services Costs;
 - 2.2 where the Participant Event of Default giving rise to a Participant Default Notice and/or termination is under Clause 22.1.2, interest at the Default Interest Rate on WEPCo's Partnering Services Costs properly incurred (subject always to the applicable Project Development Fee Cap) in relation to the Approved Project which is the subject of the delay referred to in Clause 22.1.2 for the period of such delay; and
 - 2.3 where the Agreement has been terminated with respect to that Participant as a result of a Participant Event of Default by that Participant under Clause 22.1.2:
 - 2.3.1 anticipated loss of profits for WEPCo on the 'lost' New Project (it being agreed that where more than one Participant has been responsible for the Participant Event of Default, each shall be jointly and severally liable to WEPCo for such lost profits, but WEPCo shall not be entitled to recover in total from all Participants any more than such anticipated loss of profits); and
 - 2.3.2 where the Participant in question would be the sole Relevant Participant for the next New Project projected to reach financial close or otherwise be subject to a concluded Project Agreement in terms of the most recent decision of the SPB in that regard, anticipated loss of profits of WEPCo on that New Project.
3. For the purposes of paragraph 2.3.2, where the next New Project is one of a number of New Projects which are due to reach financial close or otherwise be subject to a concluded Project Agreement at the same time, for which the Participant in question would be the sole Relevant Participant, the next New Project shall be the scheme with the highest capital cost.

4. Where more than one Participant is responsible for the Participant Event of Default, each such Participant shall be jointly liable for payment of the relevant Participant Event of Default Compensation Sum save as provided in paragraph 2.3.1 above.

SECTION 2 - PARTICIPANT EVENT OF DEFAULT TERMINATION SUM

1. If WEPCo's exercise of its rights pursuant to Clause 22.2 results in termination of this Agreement in its entirety, the Participant(s) responsible for the Participant Event of Default which gave rise to the termination shall, in addition to any liability under Section 1 (*Participant Event of Default Compensation Sum*) of this Schedule 14 (*Compensation on Participant Event of Default and Termination*), pay the Participant Event of Default Termination Sum as set out in paragraph 2.
2. The Participant Event of Default Termination Sum shall be an amount equal to the redundancy payments for employees of WEPCo that have been or will be reasonably incurred by WEPCo as a direct result of termination of this Agreement and any amounts payable to the Partnering Subcontractors under and in accordance with the relevant Supply Chain Agreements as a direct result of such termination.
3. The Participant(s) responsible for the Participant Event of Default in question shall be jointly and severally liable for payment of the Participant Event of Default Termination Sum.

SECTION 3 - PAYMENT AND INTEREST

1. PAYMENT AND INTEREST

1.1 In respect of the payments to be made pursuant to this Schedule 14 (*Compensation on Participant Event of Default and Termination*), as soon as practicable after, and in any event within twenty (20) Business Days of the date on which the Participant Default Notice is served, in the case of Section 1 of this Schedule 14 (*Compensation on Participant Event of Default and Termination*), or this Agreement is terminated, in the case of Section 2 (the "Invoice Date"), WEPCo shall give to the relevant Participant(s) an invoice for the relevant compensation or termination sum and sufficient supporting evidence, reasonably satisfactory to the Participant(s), justifying the amount of the relevant compensation or termination sum including a breakdown of each of the individual elements of such sum.

1.2 Each relevant Participant shall pay to WEPCo:

1.2.1 the relevant compensation or termination sum within forty (40) Business Days of the Invoice Date; and

1.2.2 interest on the relevant compensation or termination sum (or any part of such sum that remains outstanding) from the date on which the Participant Default Notice is served or on which this Agreement is terminated, as the case may be, in the case of Section 1 of this Schedule 14 (*Compensation on Participant Event of Default and Termination*), or this Agreement is terminated, in the case of Section 2 of this Schedule 14 (*Compensation on Participant Event of Default and Termination*), until the date of payment:

(a) at [◆]% for the period from (but excluding) the date on which the Participant Default Notice is served, in the case of Section 1 of this Schedule 14 (*Compensation on Participant Event of Default and Termination*), or this Agreement is terminated, in the case of Section 2 of this Schedule 14 (*Compensation on Participant Event of Default and Termination*), to (and including) the date which is forty (40) Business Days after the Invoice Date; and

(b) thereafter, at the Default Interest Rate.

2. EXCLUSIVITY OF REMEDY

The compensation payable under Sections 1 of this Schedule 14 (*Compensation on Participant Event of Default and Termination*) and Section 2 of this Schedule 14 (*Compensation on Participant Event of Default and Termination*) shall be the sole remedy of WEPCo against the Participants or any of them in connection with the termination of this Agreement but shall be without prejudice to any antecedent claims which any Party may have against any of the others pursuant to the terms of this Agreement.

3. NO DOUBLE RECOVERY

Where termination of this Agreement in respect of any Participant follows service of a Participant Default Notice in respect of such Participant, there shall be no double counting or double recovery pursuant to Section 1 (*Participant Event of Default Compensation Sum*) and 2 (*Participant Event of Default Termination Sum*) of this Schedule 14 (*Compensation on Participant Event of Default and Termination*) of any Partnering Services Costs or loss of profit.

SCHEDULE 15 - TRANSFER OF EMPLOYMENT AND PENSIONS

The provisions of this Schedule 15 shall apply in relation to each Relevant Transfer during the term of this Agreement. In relation to each such Relevant Transfer the provisions of this Schedule 15 shall apply save that WEPCo and the relevant Participant(s) (all acting reasonably) shall agree such amendments to the provisions of this Schedule 15 as are required to reflect the fact that any Transferring Employees may be Transferring Non-Participant Employees, but without imposing liability (actual, potential or contingent) on the relevant Participant in relation to any matter for which it does not have a corresponding right or remedy against the employer(s) of the Transferring Employees.

The provisions of this Schedule 15 shall not, save where expressly provided, apply on expiry or termination of this Agreement and the provisions of Schedule 20 (*Handover on Expiry or Termination*) shall apply in such regard.

Section 1 - General

1. TUPE AND EMPLOYMENT MATTERS³⁵

Relevant Transfer

- 1.1 WEPCo and the Participants agree that the Transfer Regulations may apply to the transfer on one or more dates agreed by the Parties (each a “**Relevant Service Transfer Date**”) to WEPCo of responsibility for provision of (or procuring the provision by any Partnering Subcontractor of) the Partnering Services in accordance with this Agreement and that a Relevant Transfer may take place on each Relevant Service Transfer Date (or such date as may be determined by Law). [The Relevant Service Transfer Date in respect of each of the Partnering Services is specified in Section 2 (*Relevant Service Transfer Dates*) of this Schedule 15 (*Transfer of Employment and Pensions*).]
- 1.2 In accordance with the Transfer Regulations, the contracts of employment of each Transferring Employee shall (subject to Regulation 4(7) of the Transfer Regulations) have effect after the relevant Transfer Date as if originally made between those employees and WEPCo or the relevant Partnering Subcontractor except insofar as such contracts relate to old age, invalidity or survivors benefit.
- 1.3 The Participants and WEPCo agree and intend and shall take all reasonable steps to procure that there shall be a Relevant Transfer on each occasion on which the identity of a service provider changes pursuant to this Agreement and that the contracts of employment of all those employees of the relevant service provider wholly or mainly engaged in the provision of the Partnering Services immediately before the change of identity of the service provider shall have effect (subject to Regulation 4(7) of the Transfer Regulations) thereafter as if originally made between those employees and the new service provider except insofar as such contracts relate to an occupational pension scheme and WEPCo shall and shall procure that both the former and the new service providers shall comply with their obligations under the Transfer Regulations.
- 1.4 Not used
- 1.5 Each of the Participants shall comply with their obligations under the Transfer Regulations in respect of each Relevant Transfer pursuant to this Agreement and WEPCo shall comply and shall procure that each Partnering Subcontractor shall comply with their obligations (including without limitation the obligation under Regulation 13(4) of the Transfer Regulations) in respect of each Relevant Transfer pursuant to this Agreement and each of the Participants shall indemnify WEPCo and WEPCo shall indemnify each Participant against any Direct Losses sustained as a result of any breach of this paragraph 1.5 by the party in default.

³⁵

These provisions are drafted on the basis that the employer of the Transferring Employees is a party to the Strategic Partnering Agreement (i.e. a Local Authority Participant). In the event that the employer is not a party to the Strategic Partnering Agreement, then any employees who are to transfer will be considered to be Transferring Non-Participant Employees for the purposes of these provisions. This will need to be considered further on a case-by-case basis.

Offer of Employment

- 1.6 If the Transfer Regulations do not apply to any person who is a Transferring Participant Employee, WEPCo shall offer to or shall procure the offer by the relevant Partnering Subcontractor to each and every such employee of a new contract of employment commencing on the relevant Transfer Date under which the terms and conditions including full continuity of employment shall not differ from those enjoyed immediately prior to the relevant Transfer Date (except insofar as such terms and conditions relate to an occupational pension scheme) and the offer shall be in writing, shall be open to acceptance for a period of not less than ten (10) Business Days and shall be made:
- 1.6.1 if it is believed that the Transfer Regulations will not apply to a Transferring Participant Employee, not less than ten (10) Business Days before the relevant Transfer Date; or
- 1.6.2 if it is believed that the Transfer Regulations apply to a Transferring Participant Employee but it is subsequently decided that the Transfer Regulations do not so apply, as soon as is practicable and in any event no later than ten (10) Business Days after that decision is known to WEPCo.
- 1.7 Where any such offer as referred to in paragraph 1.6 is accepted, each Participant shall indemnify and keep indemnified in full WEPCo on the same terms and conditions as those set out in paragraphs 1.14 to 1.17 inclusive as if there had been a Relevant Transfer in respect of each and every Transferring Participant Employee relative to that Participant who has accepted any such offer.
- 1.8 Where any such offer as referred to in paragraph 1.6 is accepted, WEPCo shall act and shall procure that each relevant Partnering Subcontractor shall act in all respects as if the Transfer Regulations had applied to each and every Transferring Participant Employee who has accepted any such offer and shall comply with paragraph 2 in respect of each and every such employee who was immediately before the relevant Transfer Date, an LGPS Participant Employee.

Provision of Information

- 1.9 Not used.
- 1.10 Not used.
- 1.11 Each Participant shall and WEPCo shall procure that each and every Partnering Subcontractor shall take all reasonable steps, including co-operation with reasonable Requests for Information, to ensure that each and every Relevant Transfer pursuant to this Agreement takes place smoothly with the least possible disruption to the services to the Participants including the Partnering Services and to the employees who transfer from or who are retained by any Participant.

Union Recognition

- 1.12 Each Participant shall procure if they have the contractual or legal powers to do so and shall otherwise use all reasonable endeavours to procure that every relevant sub-contractor of that Participant shall supply to WEPCo no later than five (5) Business Days prior to the relevant Transfer Date true copies of its Recognition Agreement(s) and WEPCo shall procure that each and every Partnering Subcontractor shall in accordance with the Transfer Regulations recognise the trade unions representing Transferring Employees (as relevant to WEPCo or its Partnering Subcontractors) after the transfer to the same extent as they were recognised by the relevant Participant or the relevant sub-contractor before the relevant Transfer Date.
- 1.13 WEPCo shall procure that, on each occasion on which the identity of a Partnering Subcontractor changes pursuant to this Agreement, in the event that there is a Relevant Transfer, the new Partnering Subcontractor shall in accordance with the Transfer Regulations recognise the trade unions representing the employees whose contracts of employment transfer to the new Partnering Subcontractor to the same extent as they were recognised before the change of identity of the Partnering Subcontractor in respect of the provision of the Partnering Services at any of the Participants' premises.

Participant Indemnities

- 1.14 Each Participant shall indemnify and keep indemnified in full WEPCo (for itself and for the benefit of each relevant Partnering Subcontractor) against all emoluments and all other contractual or statutory payments due to any relevant Transferring Participant Employee or former employee of that Participant in respect of his or her employment by that Participant or its termination by that Participant which relate to any period of employment prior to or on the relevant Transfer Date even if the liability to make any such payment does not arise until on or after the relevant Transfer Date (which shall include any backdated pay award by that Participant), and against all income tax and pension and national insurance contributions payable thereon.
- 1.15 Insofar as paragraph 1.14 does not apply, each Participant shall indemnify and keep indemnified in full WEPCo against all Direct Losses sustained by WEPCo in consequence of any liability which transfers to WEPCo or the Partnering Subcontractors in accordance with the Transfer Regulations and/or the Directive in relation to any relevant Transferring Participant Employee or former employee of that Participant in respect of his or her employment by that Participant or its termination by that Participant which arises as a result of any act or omission by the Participant occurring before or on the relevant Transfer Date. The provisions of this paragraph 1.15 and of paragraph 1.14 shall not apply in respect of any claim that the terms and conditions of employment relating to Pay (as defined in paragraph 1.19) of Transferring Employees contravene the Legislation (as defined in paragraph 1.19) including but not limited to any claim in respect of an Equal Pay Ruling (as defined in paragraph 1.18).
- 1.16 Where any liability in relation to any Transferring Participant Employee, or former employee of a Participant in respect of his or her employment by a Participant or its termination which transfers in whole or part in accordance with the Transfer Regulations and/or the Directive arises partly as a result of any act or omission occurring on or before the relevant Transfer Date and partly as a result of any act or omission occurring after the relevant Transfer Date, the relevant Participant shall indemnify and keep indemnified in full WEPCo against only such part of the Direct Losses sustained by WEPCo or any Partnering Subcontractor in consequence of the liability as is reasonably attributable to the act or omission occurring before the relevant Transfer Date.
- 1.17 The indemnities contained in paragraph 1.14 and paragraph 1.15 shall apply as if references in those paragraphs to any Transferring Participant Employee also included a reference to any Transferring Non-Participant Employee to the extent that the relevant Participant recovers any sum in respect of the subject matter of those indemnities from any sub-contractor of the Participant under any indemnity or other legal entitlement it has against such sub-contractor. Each Participant undertakes that it will use all reasonable endeavours to recover any sums under any such entitlement as is mentioned in this paragraph 1.17.
- 1.18 For the purposes of this paragraph 1:
- "Equal Pay Ruling"** means:
- (a) a determination by an employment tribunal or court of competent jurisdiction or the settlement or compromise to which the relevant Participant shall have consented in either case relating to any claim brought by any Transferring Participant Employee before the 1st anniversary of the Commencement Date against the Participant or WEPCo or the Partnering Subcontractor under the Legislation (as defined below) that the terms and conditions of employment relating to Pay (as defined below) of Transferring Participant Employees, contravene the Legislation; and/or
 - (b) in relation to any LGPS Participant Employee any alteration to salaries and pay scales prescribed by the Single Status Agreement in order to settle, address or compromise threatened or extant claims under the Legislation against the Local Authority Participant) and/or employers engaged as at

the Commencement Date or subsequently in the provision of services to the Local Authority Participant.

1.19 For the purposes of this paragraph 1:

"Legislation" means all and any anti-discrimination and equal pay opportunities laws, including but not limited to the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Equal Pay Directive (Council Directive 75/117/EEC), the Equal Treatment Directive (Council Directive 76/207/EEC), Article 141 of the Treaty of Rome, the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003

"Pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which a Transferring Participant Employee receives either directly or indirectly in respect of his or her employment, from his/her employer

1.20 If there is an Equal Pay Ruling relating to Transferring Participant Employees then in respect of the period up to and including the relevant Transfer Date relating to such employees, the cost of such Equal Pay Ruling shall be borne by the relevant Participant in the manner set out in paragraph 1.22 and in respect of any subsequent period the cost shall be borne by WEPCo and the relevant Partnering Subcontractor.

1.21 If there is an Equal Pay Ruling relating to any employee of a Participant other than one described in paragraph 1.20 then the cost of such Equal Pay Ruling shall be borne by the relevant Participant even if such Equal Pay Ruling arises from a change to the terms and conditions of an employee of WEPCo or a Partnering Subcontractor.

1.22 Where the costs of an Equal Pay Ruling are to be borne by a Participant pursuant to the provisions of paragraphs 1.20 or 1.21 the Participant shall indemnify WEPCo and keep it indemnified against Direct Losses arising out of or in connection with the Equal Pay Ruling.

1.23 To avoid doubt Clause 16.3 (*Conduct of Claims*) applies to the indemnities under paragraphs 1.5, 1.14, 1.15, 1.16 and 1.22.

1.24 To avoid doubt, nothing in paragraphs 1.5, 1.14, 1.15, 1.16 and 1.22 shall impose any liability upon any Participant for any part of any statutory or contractual redundancy payment to any Transferring Employee which is payable as a result of any termination of employment of a Transferring Employee occurring after the relevant Transfer Date.

Compliance with Legislation and Participant Policies

1.25 WEPCo shall comply and shall procure that each Partnering Subcontractor and all persons employed or engaged by a Partnering Subcontractor in connection with the provision of any Partnering Services shall comply at all times with the Law on health and safety at work and on anti-discrimination and equal opportunities.

1.26 WEPCo shall procure that each Partnering Subcontractor takes all reasonable steps to procure that all persons including any employed or engaged by a Partnering Subcontractor in connection with the provision of any Partnering Services shall, so far as applicable, comply with the Participants' Policies as regards health and safety at work (including the Participants' Policies regarding smoking) and with those relating to anti-discrimination and equal opportunities (including those relating to harassment) and WEPCo shall take and shall procure that every Partnering Subcontractor shall take all such steps as each of the Participants may reasonably require, which shall include co-operation with action proposed or taken by any of the Participants, to ensure that

each of the Participants comply with their duties under section 3(1) of the Health and Safety at Work etc Act 1974 regarding the conduct of the undertaking of that Participant.

WEPCo Indemnities

1.27 WEPCo shall indemnify and keep indemnified in full each of the Participants and, at any Participant's request, each and every Future Service Provider against:

1.27.1 claims in respect of all emoluments and all other contractual or statutory payments unpaid by WEPCo or a Partnering Subcontractor to any person entitled to such payments from WEPCo or a Partnering Subcontractor who is or has been employed or engaged by WEPCo or any Partnering Subcontractor in connection with the provision of any of the Partnering Services which relate to any period of employment or engagement with WEPCo or any Partnering Subcontractor on or after the relevant Transfer Date but prior to the date of expiry or termination of this Agreement (or suspension of exclusivity, as the case may be) and all income tax and pension and national insurance contributions payable thereon; and

1.27.2 insofar as paragraph 1.27.1 above does not apply, all Direct Losses sustained by that Participant in respect of any claim against the Participant incurred as a consequence of the Transfer Regulations or the provision of this paragraph 1, who is or has been employed or engaged by WEPCo or any Partnering Subcontractor in connection with the provision of any of the Partnering Services which arises as a result of any act or omission of WEPCo or the Partnering Subcontractor occurring before the expiry or termination of this Agreement but after the relevant Transfer Date,

but the indemnities in paragraphs 1.27.1 and 1.27.2 shall not apply:

- (a) in respect of any sum for which the Participant is obliged to indemnify WEPCo or a relevant Partnering Subcontractor pursuant to paragraphs 1.14, 1.15 or 1.16; or
- (b) to the extent that the claim arises from a wrongful act or omission of that Participant.

1.28 Clause 16.3 (*Conduct of Claims*) shall apply where any claim is made in respect of the indemnities given by WEPCo under paragraph 1.27.

Staff Records

1.29 Each Participant shall deliver, subject to the requirements of the Law, to WEPCo as soon as reasonably practicable after the relevant Transfer Date all those records relating to the relevant Transferring Employees which were in its possession or under its control at the relevant Transfer Date, which shall include all such records relating to competence, qualifications and training.

1.30 No Participant gives any warranty as to the accuracy or completeness of any records referred to in paragraph 1.29 except that each of the Participants warrants that they have maintained all those records relating to their respective Transferring Employees who were employees of that Participant which the Participant themselves (but not any sub-contractor, predecessor body or previous employer) is required by Law to maintain to the extent which the Law requires.

Compliance with Code Obligations

1.31 Each of the Participants and WEPCo shall and WEPCo shall procure that any relevant Partnering Subcontractor shall have regard to the Code in interpreting and applying the Code Obligations.

1.32 Subject to paragraph 1.34, WEPCo shall procure that any New Employees shall be employed on terms and conditions of employment which are overall fair and reasonable and no less favourable than those of the Transferring Employees engaged in the provision of the Partnering Services who are working alongside and holding the same or a similar position to the New Employees.

- 1.33 WEPCo shall procure that any relevant Partnering Subcontractor shall consult with the recognised trade unions and where there is no recognised trade union any other employee representatives on the terms to be offered to the New Employees pursuant to paragraph 1.32.
- 1.34 In addition to its obligations under paragraph 1.32 above, WEPCo shall and shall procure that any Partnering Subcontractor shall offer to the New Employees either:
- 1.34.1 membership of the LGPS where the employer has Admission Body status within the LGPS and makes the requisite contributions; or
- 1.34.2 membership of a good quality employer pension scheme, being either:
- (a) a contracted out final salary based defined benefit scheme; or
- (b) a defined contribution scheme under which the employer must match employee contributions up to six percent (6%); or
- 1.34.3 a stakeholder pension scheme, under which the employer matches employee contributions up to six percent (6%).
- 1.35 During the term of this Agreement, WEPCo shall on request by any of the Participants provide or procure that the Participants are provided with such accurate and complete information as reasonably requested by the Participant as soon as reasonably practicable, including the terms and conditions of employment of Transferring Employees and the New Employees, where this is required to monitor WEPCo's compliance with its Code Obligations.
- 1.36 WEPCo shall and shall procure that any relevant Partnering Subcontractor shall support any central Government sponsored review and monitoring obligation programme on the impact of the Code and on request by any of the Participants provide the Participants with such accurate and complete information as reasonably requested by the Participant as soon as reasonably practicable in order to assist the Participants in doing this.

Disputes Relating to the Code

- 1.37 Each of the Participants and WEPCo shall in the first instance seek to resolve by discussions between them any complaints from any employee or any recognised trade union in relation to compliance by WEPCo or any Partnering Subcontractor with its Code Obligations.
- 1.38 Where it appears to a Participant or WEPCo that it is not possible to resolve the matter by continuing discussions between them pursuant to paragraph 1.37 or where an employee of WEPCo or any Partnering Subcontractor or any recognised trade union writes to the relevant Participant to confirm that it has been unable to resolve its compliance directly with WEPCo or any Partnering Subcontractor in relation to WEPCo's or the Partnering Subcontractor's Code Obligations:
- 1.38.1 the Participant shall first write to WEPCo to seek an explanation for the alleged failure by WEPCo or any Partnering Subcontractor to comply with its Code Obligations. WEPCo shall or shall procure that the relevant Partnering Subcontractor shall provide such an explanation within five (5) Business Days of receipt of the request from the Participant;
- 1.38.2 if the response provided by WEPCo or Partnering Subcontractor satisfies the Participant that the Code Obligations have been met, then the Participant will inform the complainant of this and the matter will be deemed to have been concluded;
- 1.38.3 in the event that the Participant is not satisfied with the response provided by WEPCo or any Partnering Subcontractor, the Participant shall write to WEPCo within five (5) Business Days to require WEPCo to take immediate action to resolve the Dispute; and

- 1.38.4 if, following such a request by a Participant, WEPCo or any Partnering Subcontractor still appears to the Participant not to be complying with its Code Obligations, the matter shall be dealt with in accordance with the New Employee Dispute Resolution Procedure.

Provision of Details and Indemnity

- 1.39 WEPCo shall as soon as reasonably practicable and in any event within five (5) Business Days following a written request by any Participant to the Participant details of any measures which WEPCo or any Partnering Subcontractor envisages it or they will take in relation to any employees who are or who will be the subject of a Relevant Transfer, and if there are no measures, confirmation of that fact, and shall indemnify each of the Participants against all Direct Losses resulting from any failure by WEPCo to comply with this obligation.

2. **PENSION MATTERS**

LGPS PARTICIPANT EMPLOYEES

WEPCo to become an Admission Body

- 2.1 Where WEPCo (or any relevant Partnering Subcontractor) employs any LGPS Participant Employees from a Transfer Date and wishes to offer those LGPS Participant Employees membership of the LGPS, WEPCo shall procure that it (and/or any relevant Partnering Subcontractor) shall become an Admission Body. WEPCo shall before the Transfer Date execute (and procure that any relevant Partnering Subcontractor executes) a Partner Admission Agreement which will have effect from and including the Transfer Date.

Partner Admission Agreement

- 2.2 Each relevant Local Authority Participant shall before the Transfer Date execute each of the Partner Admission Agreements referred to in paragraph 2.1 [and shall use reasonable endeavours to ensure that the Administering Authority executes each such Partner Admission Agreement before the Transfer Date³⁶.]

Indemnity for a breach of the Partner Admission Agreement

- 2.3 WEPCo hereby indemnifies the relevant Local Authority Participants and/or any Future Service Provider and, in each case, their sub-contractors on demand from and against all Direct Losses suffered or incurred by it or them which arise from any breach by WEPCo (or any relevant Partnering Subcontractor) of the terms of the Partner Admission Agreement to the extent that such liability arises before or as a result of the termination (howsoever caused), suspension or expiry of this Agreement.

Indemnity or bond

- 2.4 WEPCo shall procure that it (and any relevant Partnering Subcontractor) shall as soon as reasonably practicable obtain the indemnity or bond required in accordance with the Partner Admission Agreements.³⁷

Right of Set Off

- 2.5 The relevant Local Authority Participant shall have a right to set off against any payments due to WEPCo under this Agreement an amount equal to any overdue employer and employee contributions and other payments (and interest payable under the LGPS Regulations) due from

³⁶ The relevant Local Authority Participant may also be the Administering Authority.

³⁷ Under Regulation 5(5)(a) of the LGPS (Administration) Regulations, the Local Authority (in the majority of cases) must carry out an assessment, taking account of actuarial advice, of the level of financial risk arising on premature termination of the provision of the service or assets by reason of the insolvency, winding up or liquidation of the transferee admission body and that where the level of risk identified by the assessment is such as to require it, the transferee admission body must provide an indemnity or bond to meet the level of risk identified.

WEPCo (or from any relevant Partnering Subcontractor (as applicable)) under the Partner Admission Agreement.³⁸

WEPCo ceases to be an Admission Body

2.6 If WEPCo or any relevant Partnering Subcontractor employs any LGPS Participant Employees from a Transfer Date and:

2.6.1 WEPCo (or any relevant Partnering Subcontractor) does not wish to offer those LGPS Participant Employees membership of the LGPS;

2.6.2 the relevant Local Authority Participant, WEPCo and/or any relevant Partnering Subcontractor are all of the opinion that it is not possible to operate the provisions of paragraph 2.1 to paragraph 2.5 inclusive; or

2.6.3 for any reason after the Transfer Date WEPCo or any relevant Partnering Subcontractor ceases to be an Admission Body other than on the date of termination or expiry of this Agreement or because it ceases to employ any LGPS Participant Employees (or any New Employees who join the LGPS pursuant to paragraph 1.34),

then the provisions of paragraph 2.1 to paragraph 2.5 shall not apply (without prejudice to any rights of the relevant Local Authority Participant under those clauses) and the relevant provisions of paragraph 2.7 shall apply in respect of the LGPS Participant Employees.

Membership of a Broadly Comparable Scheme for LGPS Participant Employees

2.7 The provisions of paragraphs 2.7.1 and 2.7.2 shall apply in relation to LGPS Participant Employees.

2.7.1 WEPCo shall procure that each LGPS Participant Employee shall on the Transfer Date or the Cessation Date (as applicable) be offered membership of a pension scheme for future service operated by WEPCo (or the relevant Partnering Subcontractor) which must be:

- (a) established within three (3) months of the Transfer Date or the Cessation Date (as the case may be) and maintained until any payment to be made under Schedule 17 (*LGPS Bulk Transfer Terms*) is made;
- (b) reasonably acceptable to the relevant Local Authority Participant (such acceptance not to be unreasonably withheld or delayed);
- (c) a registered pension scheme for the purposes of Part 4 of the Finance Act 2004; and
- (d) certified by the Government Actuary's Department as broadly comparable to the LGPS, assessed following the principles set out in the Statement of Practice issued by the Government Actuary's Department as current at the time.

2.7.2 WEPCo shall ensure that a certificate from the Government Actuary's Department referred to in paragraph 2.7.1(d) and 2.7.2(d) for the Broadly Comparable Scheme shall be delivered to the Participants on or before signature of this Agreement (or on or before the Cessation Date as applicable) and shall provide confirmation that the certificate(s) remain in force [three (3)] months before each Transfer Date or Cessation Date (as the case may be) in respect of each LGPS Participant Employee who is to be offered membership of the pension scheme to which the certificate relates.

³⁸

This clause seeks to mirror the right of set off which must be included in the Partner Admission Agreement under regulation 5(7) of the LGPS (Administration) Regulations.

GAD Certificate

- 2.8 each of the Participants shall provide WEPCo with such information as it (or any Partnering Subcontractor) may reasonably require in relation to the LGPS (as appropriate) to enable WEPCo (or any relevant Supply Chain Members providing any of the Partnering Services) to submit a proposal to the Government Actuary's Department to assess the comparability of the Broadly Comparable Scheme. The Participants may (at their option) provide such information directly to the Government Actuary's Department. WEPCo shall (and it shall procure that any Supply Chain Members providing any of the Partnering Services shall) provide such documentation as is required to enable the Government Actuary's Department to consider the question of comparability including, but not necessarily limited to, the Trust Deed and Rules of the Broadly Comparable Scheme, the latest actuarial valuation report, the latest trustees' report and accounts together with a statement giving details of the increases in pensions in payment and deferred pensions in each of the last ten years and details of any area where the trustees will operate discretion to improve benefits.

Liability for Costs

- 2.9 All costs incurred in connection with the Partner Admission Agreement and/or obtaining a certificate of broad comparability from the Government Actuary's Department shall be borne by WEPCo.

Bulk Transfers

- 2.10 WEPCo shall procure that each Broadly Comparable Scheme shall be able to accept bulk transfers from the LGPS (as appropriate). WEPCo shall comply with (and shall procure that each relevant Partnering Subcontractor shall comply with) the provisions of Schedule 17 (*LGPS Bulk Transfer Terms*) in respect of transfers from the LGPS following the Transfer Date and any subsequent bulk transfers on termination or expiry of this Agreement.

WEPCo Undertaking

- 2.11 WEPCo undertakes to each of the Participants (for the benefit of the Participants themselves and for the Participants as agent and trustee for the benefit of the LGPS Participant Employees) that it shall (and shall procure that any relevant Partnering Subcontractor shall) procure that:
- 2.11.1 the LGPS Participant Employees shall by three (3) months before the Transfer Date or the Cessation Date (as the case may be) be offered membership of the Broadly Comparable Scheme with effect from and including the Transfer Date (or Cessation Date (as the case may be)).
 - 2.11.2 the Broadly Comparable Scheme shall provide benefits in respect of the LGPS Participant Employees' periods of service on and after the Transfer Date (or Cessation Date (as the case may be)) which the Government Actuary's Department shall certify to be the same as, broadly comparable to, or better than the benefits which the LGPS Participant Employees were entitled to under the LGPS (as applicable) at the Transfer Date (or the Cessation Date (as the case may be)).
 - 2.11.3 if the Broadly Comparable Scheme is terminated, a replacement pension scheme shall be provided with immediate effect for those LGPS Participant Employees who are still employed by WEPCo or a relevant Partnering Subcontractor. The replacement scheme must comply with this paragraph 2.11 as if it were the Broadly Comparably Scheme.
 - 2.11.4 Where the Broadly Comparable Scheme has not been established by the Transfer Date (or Cessation Date (as the case may be)) the LGPS Participant Employees shall be provided with benefits in respect of death-in-service which are no less favourable than the death-in-service benefits provided by the LGPS (as applicable) before the Transfer Date (or Cessation Date (as the case may be)). Such benefits shall continue to be provided until death-in-service benefits are provided by the Broadly Comparable Scheme.

Subsequent Transfers

- 2.12 Where during the term of this Agreement the employment of any LGPS Participant Employee is transferred on a second and/or subsequent occasion as a result of a change of service provider, WEPCo shall procure that each LGPS Participant Employee who is a member of, or eligible for membership of, the outgoing employer's pension scheme shall be offered membership of a pension scheme operated by the new employer which, as a minimum:
- 2.12.1 for future service offers the benefits which enabled the outgoing employer's pension scheme to be certified as being broadly comparable in accordance with the provisions of paragraphs 2.7; and
 - 2.12.2 must be able to accept bulk transfers from the outgoing employer's pension scheme (where the pension schemes are different) in respect of benefits which the LGPS Participant Employee had accrued or been credited in the outgoing employer's pension scheme,

and WEPCo shall (and shall procure that any relevant Partnering Subcontractor) shall consult with and inform those employees of the pension provisions relating to the transfer.

Each of the Participants shall have the right, but not the obligation, on any second or subsequent transfer, to request the Government Actuary's Department to certify, in respect of any new employer's pension scheme, that the requirements of paragraph 2.7.1 or paragraph 2.7.2 as the case may be have been met. WEPCo shall procure that any new employer shall provide all such documentation as is required to enable the Government Actuary's Department to make the necessary assessment.

WEPCo shall further procure that where during the term of this Agreement the employment of any New Employee is transferred on a second and/or subsequent occasion as a result of a change of Partnering Subcontractor or any sub-contracting of the Partnering Services, the New Employee is offered membership of a pension scheme operated by the new employer which, as a minimum, complies with the requirements of paragraph 1.34.

Pension issues on Expiry or Termination

- 2.13 WEPCo shall (and shall procure than any relevant Partnering Subcontractor) shall:
- 2.13.1 maintain such documents and information as will be reasonably required to manage the pension aspects of any onward transfer of any person engaged or employed by WEPCo (or any relevant Partnering Subcontractor) in the provision of the Partnering Services on the expiry or termination of this Agreement (including without limitation identification of the LGPS Participant Employees and New Employees who have accepted the offer of pension provision pursuant to paragraph 1.34;
 - 2.13.2 provide to Participants such documents and information mentioned in sub-paragraph 2.13.1 which any of the Participants may reasonably request in advance of the expiry or termination of this Agreement; and
 - 2.13.3 fully co-operate (and procure that the trustees of the Broadly Comparably Scheme shall fully co-operate) with the reasonable requests of any of the Participants relating to any administrative tasks necessary to deal with the pension aspects of any onward transfer of any person engaged or employed by WEPCo (or any relevant Partnering Subcontractor) in the provision of the Partnering Services on the expiry or termination of this Agreement.

Discretionary Benefits

- 2.14 Where WEPCo (or a relevant Partnering Subcontractor) is an Admission Body, WEPCo shall (and/or shall procure that any relevant Partnering Subcontractor shall) award benefits (where permitted) to the LGPS Participant Employees under the LGPS (Compensation) Regulations and/

or the LGPS in circumstances where the LGPS Participant Employees would have received such benefits had they still been employed by the relevant Local Authority Participant.

- 2.15 Where the award of benefits in paragraph 2.14 is not permitted under the LGPS (Compensation) Regulations and/or the LGPS or where WEPCo (and/or a relevant Partnering Subcontractor) is not an Admission Body, WEPCo shall (and/or shall procure that any relevant Partnering Subcontractor shall) award benefits to the LGPS Participant Employees which are identical to the benefits the LGPS Participant Employees would have received under the LGPS (Compensation) Regulations and/or the LGPS in circumstances where the LGPS Participant Employees would have received such benefits had they still been employed by the relevant Local Authority Participant.
- 2.16 Where under paragraphs 1.1 and 2.14 such benefits are of a discretionary nature, they shall be awarded on the basis of the relevant Local Authority Participant's written policy in relation to such benefits at the time of the Transfer Date (which the relevant Local Authority Participant shall provide upon request). Where the payment of such benefits is not, for whatever reason, possible, WEPCo shall (and/or shall procure that any relevant Supply Chain Member providing any of the Partnering Services shall) compensate the LGPS Participant Employees in a manner which is broadly comparable or equivalent in cash terms.

[Section 2 - Relevant Service Transfer Dates]

[APPENDIX 1 - NEW EMPLOYEE DISPUTE RESOLUTION PROCEDURE]

1. INTRODUCTION

This Appendix 1 to Schedule 15 (*Transfer of Employment and Pensions*) sets out the procedure to be followed in resolving any disputes arising in respect of the compliance or otherwise by WEPCo or any Partnering Subcontractor and/or their subcontractors with the provisions of paragraphs 1.32 to 1.38 inclusive of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*). The parties agree that the procedure should be the last resort and will make their best efforts to resolve any dispute by agreement. The parties support the Government criteria that the Alternative Dispute Resolution procedure (ADR) should be fast, efficient and cost-effective.

2. THE NEED TO EXHAUST LOCAL PROCEDURES

2.1 The parties shall exhaust all normal local procedures before invoking the ADR contained in this Schedule 15 (*Transfer of Employment and Pensions*). For the avoidance of doubt, this shall mean that:

- 2.1.1 where any complaints arise from employees and/or recognised trade unions those organisations should, in the first instance, seek to resolve any such complaints directly with WEPCo or any Partnering Subcontractor and WEPCo or any Partnering Subcontractor and/or their subcontractors shall enter into discussions with such employees and/or recognised trade unions and shall use their best endeavours to resolve any such dispute;
- 2.1.2 where it appears to any of the Participants that WEPCo or any Partnering Subcontractor and/or their subcontractors are not meeting its obligations under paragraphs 1.32 to 1.38 of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*), or where an employee of WEPCo or a Partnering Subcontractor and/or their subcontractors or any recognised trade union writes to any of the Participants to confirm that it has been unable to resolve its complaint directly with WEPCo or any Partnering Subcontractor and/or their subcontractors under paragraph 2.1.1 above, the Participant shall first write to WEPCo to seek an explanation for alleged failure by WEPCo or any Partnering Subcontractor and/or their subcontractors to comply with paragraphs 1.32 to 1.38 inclusive of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*). WEPCo shall provide such an explanation in writing within three (3) Business Days of receipt of the request from the Participant pursuant to this paragraph 2.1.2.
- 2.1.3 if the response provided by WEPCo under paragraph 2.1.2 satisfies the Participant that the terms of paragraphs 1.32 to 1.38 inclusive of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*) have been followed, then the Participant will inform the complainant of this and the matter will be deemed to have been concluded;
- 2.1.4 in the event that the Participant is not satisfied with WEPCo's response provided pursuant to paragraph 2.1.2, the Participant shall write to WEPCo within five (5) Business Days to require WEPCo to take immediate action to resolve this dispute; and
- 2.1.5 if, following such a request by the Participant pursuant to paragraph 2.1.4, WEPCo or any Partnering Subcontractor and/or their subcontractors still appears to the Participant not to be complying with the requirements of paragraphs 1.32 to 1.38 inclusive of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*), the matter shall be dealt with in accordance with the procedure set out in paragraphs 3 and 4 below.

3. **RESPONSIBILITY FOR RESOLVING DISPUTES**

The ADR procedure set out in this Appendix 1 shall be under the supervision of an independent person (the “**Independent Person**”) appointed by the parties from an approved list supplied by ACAS. If the parties so agree, they may appoint two “wing members”, with one being from an employer background and one being from trade union background, to assist the Independent Person.

4. **THE DISPUTE RESOLUTION PROCESS**

Disputes will be resolved using the following three-stage procedure:

Stage 1: Initial reference to the Independent Person

4.1 The parties shall invite the Independent Person to answer three questions:

- (i) Is this a dispute about compliance with paragraphs 1.32 to 1.38 inclusive of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*)?

If the answer to question (i) is no, the matter can proceed no further. If the answer to question (i) is yes, then the Independent Person will move to question (ii).

- (ii) Have the parties exhausted local procedures?

If the answer to question (ii) is no, then the Independent Person shall invite the parties to make further local efforts to resolve the dispute. If the answer to question (ii) is yes, then the Independent Person will conduct an independent assessment, by answering question (iii) and giving reasons for their answer.

- (iii) Do the terms and conditions of employment on offer to new employees comply with the requirements of paragraphs 1.32 to 1.38 inclusive of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*)?

If the answer to question (iii) is yes following the assessment by the Independent Person, then the matter is deemed to be concluded and WEPCo and any Partnering Subcontractor can continue to offer the same package of conditions to new employees. If the answer to question (iii) is no, then the dispute will proceed to Stage 2.

The Time limit for Stage One of the procedure is twenty (20) Business Days.

Stage 2: Discussions with a view to reaching an agreement on compliant terms and conditions

4.2 At the commencement of Stage 2 of the ADR process, the parties will be invited by the Independent Person to seek to resolve the matter through further discussions.

4.2.1 The Independent Person will make themselves available to the parties to facilitate the process or to facilitate a mediation by the parties of the issues in dispute. The parties shall also have the option of establishing other arrangements for mediation as they shall deem appropriate.

4.2.2 If the parties can reach an agreement consistent with the terms of paragraphs 1.32 to 1.38 inclusive of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*) following such further discussions or mediation under paragraph 4.2.1, then the matter is closed and the new package of conditions of employment will be applied both to new starters and to those employed during the dispute.

4.2.3 If no agreement can be reached within the allotted time then the dispute will proceed to Stage 3.

The time limit for Stage Two of the procedure is ten (10) Business Days. The parties may, by the agreement of all the parties to the dispute and with the consent of the Independent Person extend the time limit for this stage of the procedure by up to a maximum of a further fifteen (15) Business Days.

Stage 3: Final Reference to the Independent Person

4.3 In the event that the matter cannot be resolved within the periods specified at Stage Two of the procedure, the Independent Person shall invite the parties to make final written submissions concerning the points of dispute.

4.3.1 If the Independent Person then believes it would be worthwhile, the parties may be given a short period of further discussion of up to five (5) Business Days although the Independent Person may increase this period at their discretion.

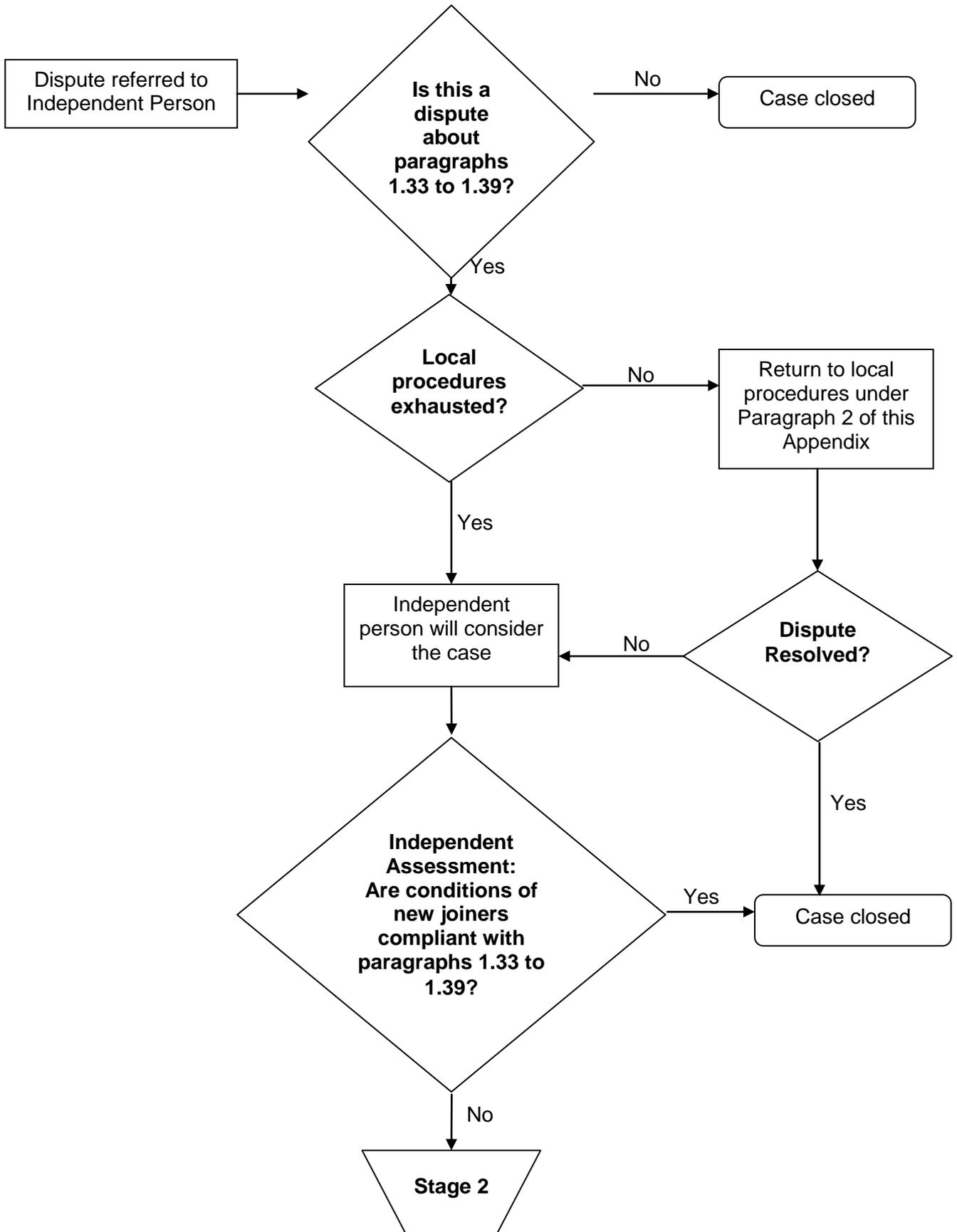
4.3.2 If the Independent Person does not believe that the matter will not be resolved by allowing a further period of discussion or if during any additional period allowed for discussion the parties are unable to agree on how to bring the matter to a successful conclusion, then the Independent Person will proceed to a final binding arbitration.

4.3.3 The Independent Person shall hear such further evidence as the parties may choose to advance (either in writing or by oral submission) and having heard such evidence and reached a conclusion the Independent Person will impose a revised package of terms and conditions applicable to each of the affected employees. The parties agree to be bound by the decision of the Independent Person and shall adhere to the requirements of their decision.

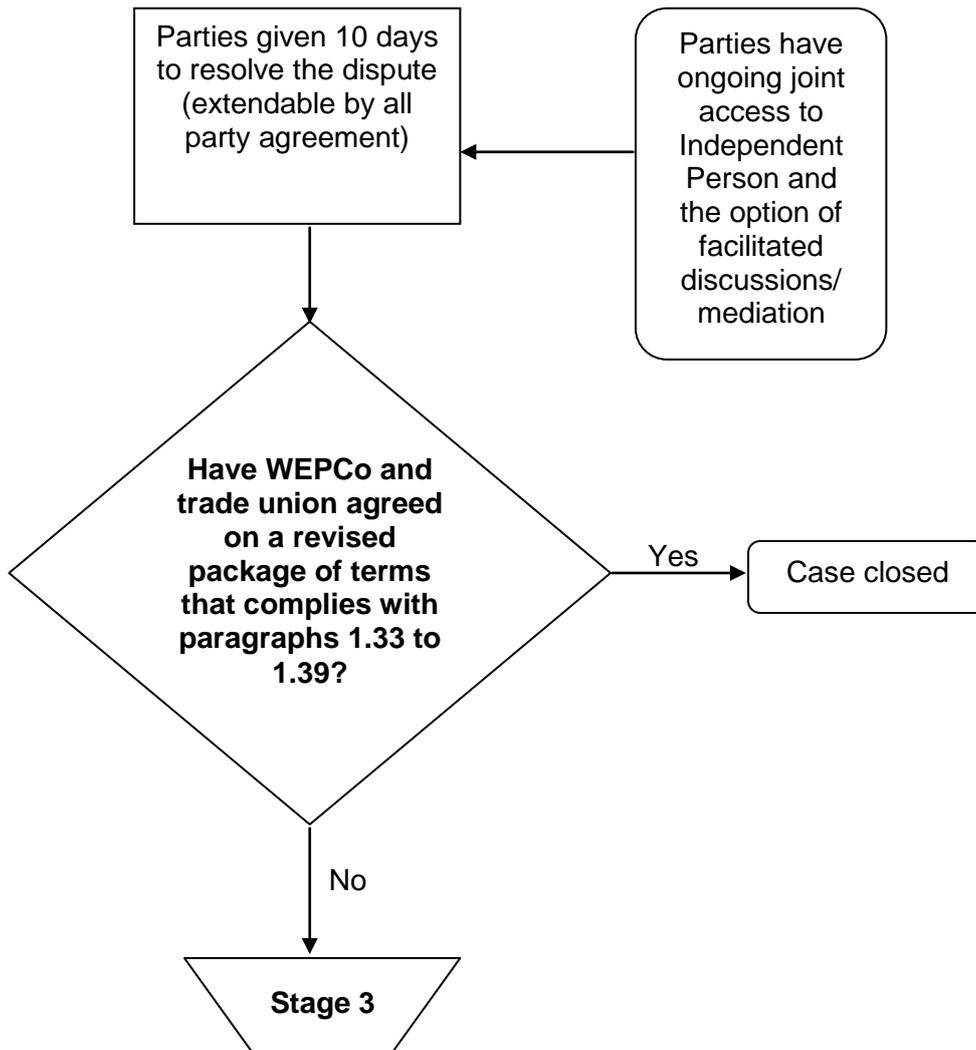
The time limit for this final stage of the procedure is ten (10) Business Days. This period may be extended at the discretion of the Independent Person.

4.4 For the avoidance of doubt, following the resolution of any dispute at any stage of the procedure set out above, then the new package of conditions of employment will be applied both to new starters and to those employed by WEPCo or any Partnering Subcontractor and/or their subcontractors engaged during the period during which the dispute was being resolved.

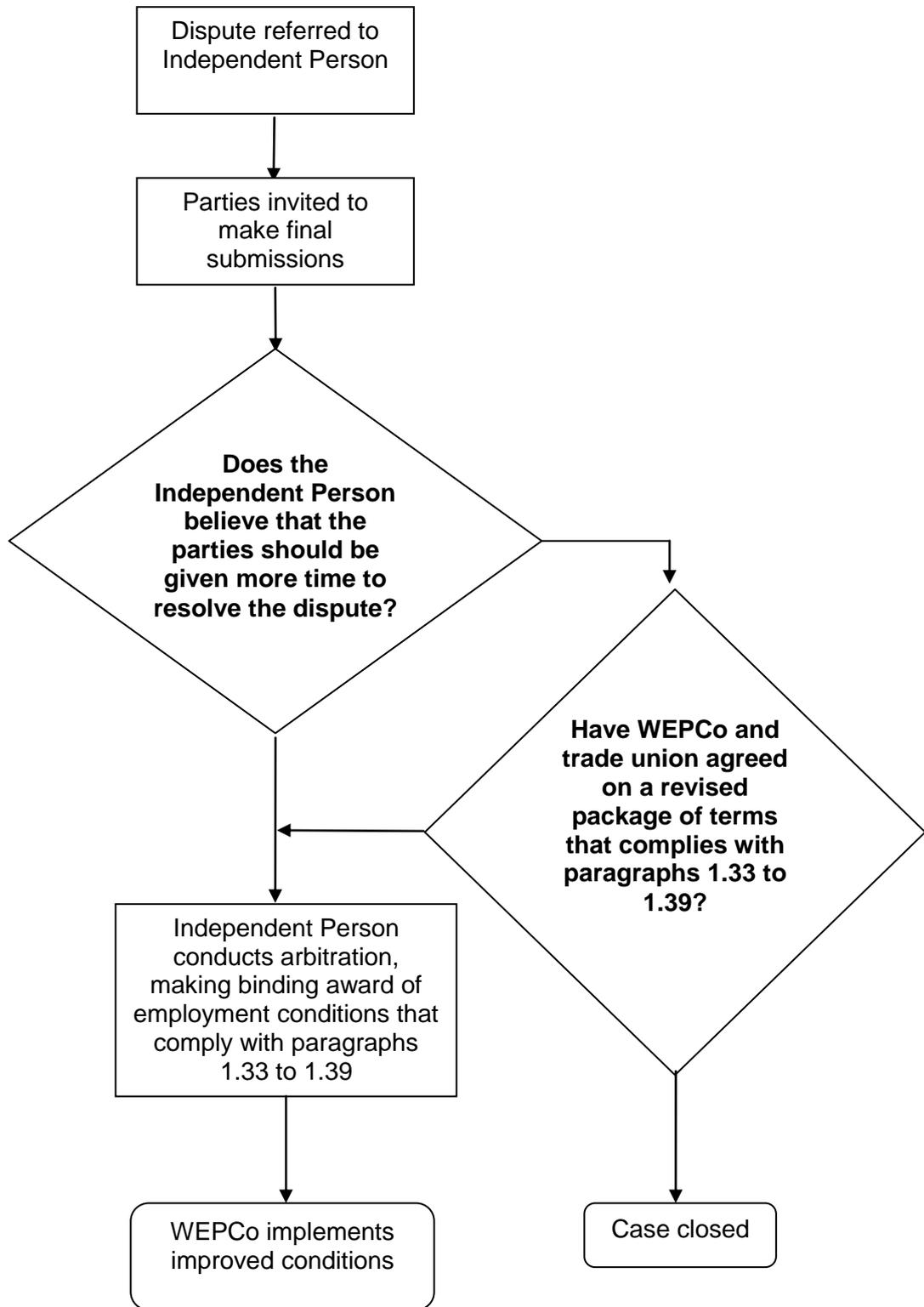
Stage 1: Referral to Independent Person and Execution of Independent Assessment (twenty (20) Business Days in total from the point when ADR is invoked)



Stage 2: Parties given time to resolve the dispute, with ongoing joint access to the Independent Person and with the option of mediation (ten (10) Business Days, extendable by agreement)



Stage 3: Final submissions and Arbitration (ten (10) Business Days)



SCHEDULE 16 - TEMPLATE PROJECT BIM AGREEMENT³⁹

³⁹ Welsh Government will share a draft of the Template Project BIM Agreement with bidders in the first round of dialogue. This will form the basis of dialogue with Bidders and Bidders responses will be evaluated.

SCHEDULE 17- [LGPS BULK TRANSFER TERMS]

The provisions of this Schedule 17 shall apply in relation to each Relevant Transfer during the term of this Agreement which affects LGPS Participant Employees. In relation to each such Relevant Transfer the provisions of this Schedule 17 shall apply save that WEPCo and the relevant Participant(s) (all acting reasonably) shall agree such amendments to the provisions of this Schedule 17 as are required to reflect the specifics of the transfer in terms of details of the Administering Authority's Actuary, the Funds, the Due Date and Actuary's Letter, the matters identified herein and any comments from the Administering Authority.

1. DEFINITIONS

1.1 In this Schedule 17 (*LGPS Bulk Transfer Terms*) the following expressions shall, unless the context otherwise requires, have the following meanings:

"Actuary's Letter"	means, in respect of each Fund, the letter from the Administering Authority's Actuary, stating the methods and assumptions to be used for the purposes of this Schedule 17 (<i>LGPS Bulk Transfer Terms</i>), a copy of which is set out as Appendix 1 (<i>Actuary's Letter</i>) to this Schedule 17 (<i>LGPS Bulk Transfer Terms</i>)
"Administering Authority's Actuary"	means [name of actuary] of [name of firm], or another actuary appointed by the relevant Administering Authority for the purposes of this Schedule 17 (<i>LGPS Bulk Transfer Terms</i>)
"AVCs"	means AVCs or SCAVCs as defined in the LGPS Regulations
"Broadly Comparable Scheme"	means the pension scheme or schemes to be provided by the Employer in accordance with paragraph 2.7.1 of Section 1 (<i>General</i>) of Schedule 15 (<i>Transfer of Employment and Pensions</i>) (or, where the context so requires, the trustees for the time being of such scheme)
"Due Date"	means the date [] days after the last of the conditions in paragraph 3.6 has been satisfied
"Employer"	means WEPCo and/or any Partnering Subcontractor who employs a LGPS Participant Employee from the Transfer Date
"Employer's Actuary"	means [name of actuary] of [name of firm], or another actuary appointed by the Employer for the purposes of this Schedule 17 (<i>LGPS Bulk Transfer Terms</i>)
"Fund"	means each of the [] and [] Funds within the LGPS ⁴⁰
"Transfer Amount"	means the amount or amounts referred to in paragraph 3.1
"Transferring Member"	means an LGPS Participant Employee who agrees to a transfer of benefits being made for him or her from the relevant Fund to the Broadly Comparable Scheme under paragraph 2

1.2 In this Schedule 17 (*LGPS Bulk Transfer Terms*) other defined terms shall, unless the context otherwise requires, have the meanings given to them in Schedule 1 (*Definitions, Interpretation and Construction*).

⁴⁰

Drafting will require to be reviewed and updated where there is more than one LGPS Participant Fund

2. THE BROADLY COMPARABLE SCHEME

WEPCo shall procure that the Employer shall invite each LGPS Participant Employee who joins the Broadly Comparable Scheme in accordance with paragraph 2.7.1 of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*) to consent to a transfer of benefits being made for him from the relevant Fund to the Broadly Comparable Scheme. The Employer must issue this invitation no later than [one] month after the Transfer Date. The invitation must be in a form that is acceptable to the relevant Local Authority Participant and the relevant Administering Authority (such acceptance not to be unreasonably withheld or delayed by the relevant Local Authority Participant) and that complies with any requirements of the LGPS Regulations. Any LGPS Participant Employee wishing to consent to a transfer of benefits must notify the Employer of this consent in writing no later than [three] months after the date of the invitation. The Employer shall provide the relevant Local Authority Participant and the relevant Administering Authority with the names of the Transferring Members no later than [four] months after the Transfer Date.

3. TRANSFER PAYMENT FROM THE FUND

3.1 In respect of its own LGPS Participant Employees, each Local Authority Participant shall use reasonable endeavours to ensure that the relevant Administering Authority transfers from the Fund to the Broadly Comparable Scheme on the Due Date an amount in respect of the relevant Transferring Members' service in the Fund before the Transfer Date calculated in accordance with the Actuary's Letter and Part 9 of the LGPS Regulations.

3.2 As soon as reasonably practicable following the Transfer Date, WEPCo shall procure that the Employer shall promptly provide all data within its possession or under its control which the relevant Administering Authority and the Administering Authority's Actuary may require for the calculation of the Transfer Amount and shall warrant that this data is in all material respects true, complete and accurate.

3.3 As soon as reasonably practicable following the Transfer Date, the relevant Local Authority Participant shall promptly provide all data within its possession or under its control which the relevant Administering Authority and the Administering Authority's Actuary may require for the calculation of the Transfer Amount In respect of its own Transferring Members, and shall warrant that this data is in all material respects true, complete and accurate.

3.4 The relevant Local Authority Participant shall use its reasonable endeavours to procure that:

3.4.1 as soon as reasonably practicable after the Administering Authority's Actuary has been provided with the necessary data and information, the Administering Authority's Actuary shall calculate the Transfer Amount In respect of its own Transferring Members, in accordance with the Actuary's Letter and the LGPS Regulations; and

3.4.2 within [one week] of completing this calculation, the Administering Authority's Actuary shall notify the Employer's Actuary in writing of the particulars of the calculation and the data on which the calculation is based.

The Employer's Actuary will then have [one month] (or such longer period as the parties may agree) from the date on which those particulars and data have been supplied to him in which to object in writing that the calculation is incorrect or not in accordance with the Actuary's Letter. The calculation shall be final and binding on the parties if the Employer's Actuary raises no objection within this stated period.

3.5 If the Employer's Actuary objects in writing under paragraph 3.4 and the Administering Authority's Actuary and the Employer's Actuary cannot subsequently agree the relevant Transfer Amount within [one] month (or such longer period as shall be agreed between the parties) of the objection, then the amount shall be determined by an independent actuary to be nominated by the relevant Administering Authority and the Employer jointly or, if they cannot agree, by the President of the Faculty of Actuaries on application by either party. The independent actuary shall act as an expert and not as an arbitrator, and his decision shall be final and binding on the parties. The independent actuary's costs shall be payable equally by the relevant Administering Authority and the Employer.

- 3.6 Payment to the Broadly Comparable Scheme of the Transfer Amount shall only be made on the following conditions:
- 3.6.1 the Transfer Amount has been agreed or determined under paragraph 3.4 or 3.5 and in accordance with the LGPS Regulations;
 - 3.6.2 the Employer has complied with all its obligations under this Schedule 17 (*LGPS Bulk Transfer Terms*); and
 - 3.6.3 the trustees of the Broadly Comparable Scheme have confirmed in writing that:
 - (a) a payment should be made in accordance with the LGPS Regulations and that they shall accept payment on the terms set out in paragraph 4;
 - (b) they shall accept liability for each Transferring Member's accrued contracted out rights under the Fund; and
 - (c) they shall accept the Transfer Amount in full and final settlement of all claims against the Fund in respect of each Transferring Member.
- 3.7 [The payment of the relevant Transfer Amount shall be satisfied by the transfer of readily marketable stocks and shares of the relevant Fund as agreed by the relevant Administering Authority and the trustees of the Broadly Comparable Scheme having a mid-market value on the day before the Due Date equal to the relevant Transfer Amount. If the relevant Administering Authority and the trustees of the Broadly Comparable Scheme are not able to agree some or all of the particular assets to be transferred, or the mid-market value of any such assets, the payment of the Transfer Amount (or the appropriate part of it) shall be satisfied by the relevant Fund transferring cash equal to []% of that part of the relevant Transfer Amount in respect of which there has been no agreement as to the assets to be transferred.]⁴¹

4. **PAST SERVICE BENEFITS**

- 4.1 WEPCo shall procure that the Employer shall ensure that:
- 4.1.1 the Broadly Comparable Scheme provides in respect of each Transferring Member such benefits as the Administering Authority's Actuary certifies to be of actuarially equivalent value [(in accordance with the Actuary's Letter)]⁴² to the benefits which would have been payable under the LGPS in respect of the Transferring Member's service before the Transfer Date if he had remained a member of the LGPS; [and
 - 4.1.2 the Transfer Amount will, subject only to any HM Revenue & Customs limits that may still apply, be wholly applied in the Broadly Comparable Scheme for the provision of the benefits mentioned in this paragraph 4.1⁴³] and
 - 4.1.3 the Broadly Comparable Scheme provides in respect of each Transferring Member such benefits as the Administering Authority's Actuary certifies to be of actuarially equivalent value [(in accordance with the Actuary's Letter)]⁴⁴ to the benefits which would have been payable under the LGPS in respect of the Transferring Member's service before the Transfer Date if he had remained a member of the LGPS.

⁴¹ The form of payment and discount for cash needs to be discussed with the Administering Authority. If this is to be covered in the Actuary's Letter, this clause can be deleted.

⁴² It may be necessary to refer to the Actuary's Letter to determine what 'actuarially equivalent value' means. 'Actuarially equivalent value' is the term used in the HM Treasury Guidance 'A Fair Deal for Staff Pensions : Procurement of Bulk Transfer Agreements and Related Issues'.

⁴³ The Local Authority may wish to consider whether it wants to seek to ring-fence any Transfer Amount within the Broadly Comparable Scheme. The Local Authority should consult with its professional advisers regarding this option.

⁴⁴ It may be necessary to refer to the Actuary's Letter to determine what 'actuarially equivalent value' means. 'Actuarially equivalent value' is the term used in the HM Treasury Guidance 'A Fair Deal for Staff Pensions : Procurement of Bulk Transfer Agreements and Related Issues'.

5. **ADDITIONAL VOLUNTARY CONTRIBUTIONS**

- 5.1 Nothing in this Schedule 17 (*LGPS Bulk Transfer Terms*) shall apply to AVCs or to benefits secured by them. However, the relevant Local Authority Participant shall use reasonable endeavours to ensure that the assets representing each Transferring Member's AVCs in the Fund (if any) shall be transferred to the Broadly Comparable Scheme. WEPCo shall procure that the Employer shall ensure that the Broadly Comparable Scheme provides benefits for each relevant Transferring Member which are equivalent to the assets transferred.

6. **NO ASSISTANCE**

- 6.1 WEPCo shall procure that the Employer shall not encourage or initiate or assist or facilitate any action or provide any financial assistance for the purpose of requiring the relevant Fund to pay an amount larger than the relevant Transfer Amount to the Broadly Comparable Scheme in respect of the Transferring Members.

7. **[EXIT PROVISIONS⁴⁵**

- 7.1 WEPCo undertakes on its own behalf and on behalf of the Employer to the relevant Local Authority Participant (for the benefit of the relevant Local Authority Participant itself and for the relevant Local Authority Participant as agent and trustee for the benefit of its LGPS Participant Employees)⁴⁶ that on:

- 7.1.1 the expiry or termination of this Agreement or of the relevant Supply Chain Agreement (in the case of Partnering Subcontractors); or
- 7.1.2 the employment of any LGPS Participant Employee transferring to a new employer in accordance with paragraph 2.12 of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*) (or otherwise),

WEPCo shall procure that the Employer shall procure that the trustees of the Broadly Comparable Scheme offer bulk transfer terms in respect of the relevant LGPS Participant Employees' service in the Broadly Comparable Scheme to the pension scheme of the relevant Local Authority Participant or any Future Service Provider (or their sub-contractors) which are no less favourable (in the opinion of the Administering Authority's Actuary or an actuary appointed by the relevant Local Authority Participant) than the bulk transfer terms set out in the Actuary's Letter, subject to a reasonable adjustment in respect of market fluctuations since the date of the Actuary's Letter.

- 7.2 If the transfer payment paid by the trustees of the Broadly Comparable Scheme is less (in the opinion of the Administering Authority's Actuary or an actuary appointed by the Local Authority) than the transfer payment which would have been paid had paragraph 7.1 been complied with, the Employer shall pay to the relevant Local Authority Participant or any Future Service Provider (or their sub-contractor) (as appropriate) (or as such person shall direct) the amount of the difference.^{47]}

⁴⁵ The exit provisions aim to reflect as far as possible the exit requirements of HM Treasury Guidance 'A Fair Deal for Staff Pensions : Procurement of Bulk Transfer Agreements and Related Issues'. The Local Authority could consult with its professional advisers regarding these provisions and the Guidance and the requirements it wishes to impose.

⁴⁶ HM Treasury have indicated that the exit provisions in HM Treasury Guidance 'A Fair Deal for Staff Pensions : Procurement of Bulk Transfer Agreements and Related Issues' may cover not only Transferring Members but also LGPS Participant Employees who did not transfer their benefits from the LGPS under the initial bulk transfer but did join the Broadly Comparable Scheme for future service only. The Local Authority should consult with its professional advisers regarding the scope of the employees it wishes to protect under this paragraph.

⁴⁷ HM Treasury Guidance 'A Fair Deal for Staff Pensions : Procurement of Bulk Transfer Agreements and Related Issues' provides that onward bulk transfer requirements can be imposed on the pension scheme and/or the sponsoring employer. The Local Authority will need to consider whether it wants to include a shortfall obligation of this type on the Employer.

APPENDIX 1 - [ACTUARY'S LETTER]

[To be inserted on a case by case basis for each Relevant Transfer to which this Schedule 17 applies]

SCHEDULE 18- [PARTNER ADMISSION AGREEMENT]

[To be inserted on a case by case basis for each Relevant Transfer requiring a Partner Admission Agreement]

SCHEDULE 19- CONFIDENTIAL INFORMATION

SECTION 1 - COMMERCIALLY SENSITIVE INFORMATION⁴⁸

Column 1

Commercially sensitive contract provisions

Column 2

For the period ending on the date below.

⁴⁸ To be completed at Selected Bidder stage.

SECTION 2 - COMMERCIALLY SENSITIVE MATERIAL⁴⁹

Column 1

Commercially sensitive material

Column 2

For the period ending on the date below

⁴⁹ To be completed at Selected Bidder stage.

SCHEDULE 20 - HANDOVER ON EXPIRY OR TERMINATION

1. PROVISIONS UPON TERMINATION

- 1.1 On the expiry or earlier termination of this Agreement, in respect of one or more Participant, each of the Participants and WEPCo agree that it is their intention that the Transfer Regulations shall apply in respect of the provision thereafter of any service equivalent to a Partnering Services but the position shall be determined in accordance with the Law at the date of expiry or termination as the case may be and this paragraph is without prejudice to such determination. For the avoidance of doubt, for the purposes of this Schedule 20 (*Handover on Expiry or Termination*), the term "Supply Chain Member" shall be construed as including any subcontractors engaged by WEPCo or any Supply Chain Member in connection with the delivery of the Partnering Services.
- 1.2 On the expiry or earlier termination of this Agreement in respect of one or more Participant, where the Transfer Regulations apply, the contracts of employment of all employees who immediately prior to the Transfer Event are wholly or mainly engaged on the service or services which are the Partnering Services and which are the subject of the Transfer Event ("**Assigned Staff**") shall transfer on the basis of the Transfer Regulations and have effect after the Transfer Event as if originally made between the Assigned Staff and the relevant Participant(s) and/or any new Contractor.
- 1.3 Where the Transfer Regulations apply as aforesaid, the relevant parties shall take all reasonable steps to ensure that a smooth transition is effected in respect of the transfer of the contracts of employment of the Assigned Staff from the Transfer Event and the relevant Participant shall comply and procure that, where appropriate, any new Contractors shall comply with their obligations under Regulation 13 of the Transfer Regulations.
- 1.4 If the Transfer Regulations do not apply on expiry or earlier termination of this Agreement in respect of one or more Participant, the relevant Participant(s) shall ensure that each new provider (if any) of a service equivalent to a Partnering Service on or after expiry or termination of this Agreement (including the relevant Participant(s)) shall offer employment to the persons employed by WEPCo or a Supply Chain Member providing any of the Partnering Service in the provision of the Partnering Services immediately before the expiry or termination of this Agreement and shall indemnify WEPCo or a Partnering Subcontractor for Direct Losses any of them suffer or incur as a result of its failure to do so, and for any costs, claims or liabilities for redundancy payments (whether statutory or contractual)⁵⁰.
- 1.5 If an offer of employment is made in accordance with paragraph 1.4 above, the employment shall be on the same terms and conditions (except for entitlement to membership of an occupational pension scheme, which shall be dealt with in accordance with paragraph 2 of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*) as applied immediately before the expiry or earlier termination of this Agreement including full continuity of employment, except that the relevant Participant(s) or other new service provider may at its absolute discretion not offer such terms and conditions if there has been any change to the terms and conditions of the persons concerned in breach of paragraph 1.9 below.
- 1.6 Save where any such Direct Losses are as a result of any act or omission of a Participant or its subcontractors, WEPCo shall indemnify, and keep indemnified, each Participant and, at the Participant's request, each and every service provider who shall provide any service equivalent to any of the Partnering Services after a Transfer Event against all Direct Losses sustained by the Participant arising in connection with:
- 1.6.1 any act or omission in respect of any of the Assigned Staff by WEPCo or a Partnering Subcontractor prior to the Transfer Event (including without limitation the employment or termination of the employment of any of the Assigned Staff), and WEPCo's or a Partnering Subcontractor's obligations under Regulation 13 of the Transfer Regulations but excluding in relation to any occupational pension scheme;

⁵⁰

Participants should ensure that this obligation is passed on to the new service provider by way of contract.

- 1.6.2 any claim by any person arising from any negligent act or omission of any of the Assigned Staff prior to the Transfer Event;
 - 1.6.3 any claim for personal injury sustained by any of the Assigned Staff the cause of action of which arose during their employment prior to the Transfer Event save that in this respect the indemnity given by WEPCo shall extend only to such sum as is referable to the period of employment with WEPCo or a Partnering Subcontractor;
 - 1.6.4 any employees or former employees of WEPCo or of any provider of a service or services which are Partnering Services who are not identified to the relevant Participant(s) as being Assigned Staff prior to the relevant Transfer Event arising out of any claim that their employment or any liability in respect of their employment or its termination has or should have transferred to the relevant Participant(s) and/or any new Contractor pursuant to the Transfer Regulations and/or the arrangements contemplated by the relevant agreement; and
 - 1.6.5 all emoluments and other contractual or statutory payments or parts thereof due to any Assigned Staff member arising before the Transfer Event or which fall due for payment after the Transfer Event but which relate to any period before that date (including, for the avoidance of doubt, any liabilities arising in relation to any equal pay claims relating to the Assigned Staff).
- 1.7 Clause 16.3 (*Conduct of Claims*) shall apply where any claim is made in respect of the indemnities given by WEPCo under paragraph 1.6.
- 1.8 For the avoidance of doubt, nothing in paragraph 1.6 shall impose any liability on WEPCo for any part of any statutory or contractual redundancy payment to any Assigned Staff member which is payable as a result of any termination of employment occurring on or after the Transfer Event.
- 1.9 Subject to its obligations under the Data Protection Act 2018 no less than twelve (12) months prior to a Transfer Event, WEPCo shall supply or shall procure the supply of details of the Assigned Staff to the relevant Participant(s) and/or at the direction of the relevant Participant(s), to any new Contractor, and shall advise the relevant Participant(s) and any new Contractor of any alteration thereto occurring prior to the Transfer Event. These details (being the “**Retendering Information**”) are to include the names of the Assigned Staff and in respect of each one, the:
- 1.9.1 terms of employment (including full particulars of emoluments and benefits);
 - 1.9.2 date of commencement of employment;
 - 1.9.3 current job title and details of proportion of time spent working on the Partnering Services;
 - 1.9.4 any professional bodies, trade unions and other bodies of which the Assigned Staff are members and the identity of any representatives of such bodies of which WEPCo and the relevant Partnering Subcontractor is aware; and
 - 1.9.5 full details of any actions, claims or disputes involving any Assigned Staff of which WEPCo and any of the Partnering Subcontractor is aware or anticipates.
- 1.10 WEPCo shall inform the Participants of any changes to the information given pursuant to this paragraph 1.10. WEPCo shall indemnify and keep indemnified in full each Participant and at the Participant's request any new Contractor against all Direct Losses arising from any claim by any party as a result of WEPCo or Partnering Subcontractor failing to provide or promptly to provide the Participant or at the Participant's request any new Contractor with any Retendering Information and/or Employee Liability Information or to provide full Retendering Information and/or Employee Liability Information or as a result of any material inaccuracy in or omission from the Retendering Information and/or Employee Liability Information.
- 1.11 From the later of the period beginning twelve (12) months prior to the Transfer Event or from the date on which notice of termination is served WEPCo shall not and shall procure that any Partnering Subcontractor shall not:

- 1.11.1 enter into any negotiation with or make any offer to the Assigned Staff or any of them concerning the terms of their employment other than in the normal course of business without the Participants' consent (which shall not be unreasonably withheld). Nothing in this paragraph shall prevent WEPCo or its Partnering Subcontractor from implementing any statutory requirements or any terms and conditions agreed with the workforce collectively prior to this period;
- 1.11.2 seek or make any alteration to the numbers of Assigned Staff or those employees identified as Assigned Staff without the Participant's consent (which shall not be unreasonably withheld) save in the event of resignation or dismissal for misconduct or poor performance;
- 1.11.3 transfer any of the Assigned Staff to another part of its business or move other employees from elsewhere in its or their business who have not previously been engaged in providing the Partnering Services to provide the Partnering Services save with the Participants' consent (which shall not be unreasonably withheld).

SCHEDULE 21 - ASBESTOS SCHEDULE

Asbestos Schedule															
Facility Details:													Contacts:		
Information to be provided															
Item Location and Description					Product Type	Provisional Sum				Contractor Tendered Sum				Comments /Notes	
Block (see Note 6)	Floor	Room Reference	Item Description	Type of Asbestos - Thermal Insulation / Asbestos / Insulation Board / Asbestos Cement / Woven Products etc.	Quantities identified within the Asbestos Management Survey Report(s) (see Notes 1, 3 and 6)	Unit of Measurement Nr. / m ²	WEPCo Benchmark Rate (See Note 4)	Total allowance	Quantities identified within the subsequent (post contract) Asbestos Refurbishment and Demolition Survey Report(s) (See Notes 2, 3 and 7)	Unit of Measurement Nr. / m ²	Tendered Rate (see Note 5)	Tendered amount			
1								£				£			
7								£				£			
8								£				£			
9								£				£			
						Provisional Sum		£	Total Tendered Sum			£			
10					Programme for Removal of Asbestos Materials included within this Section of the Blue Form (See Note 8)			Weeks	Tendered Programme for Removal of Asbestos Materials included within this Section of the Blue Form (See Note 9)		Weeks				

1. Where two or more Asbestos Management Survey Reports are in place then individual quantities columns should be included within the Schedule with each column headed to identify the particular contract asbestos survey report.

2. Where two or more Asbestos Refurbishment and Demolition Survey Reports are in place then individual quantities columns should be included within the Schedule with each column headed to identify the particular post contract asbestos survey report.
3. Where individual items are located within a common environment (for example, pipe lagging, debris and residue within a floor duct) then these should be grouped together for pricing purposes.
4. The benchmark rate will be provided by the WEPCo and will be based on library rates for comparable asbestos items.
5. Tendered rates to be obtained from three separate specialist sub-contractors.
6. In completing this section, the Asbestos Surveyor should consider including at least the following:
 - i. Asbestos containing materials that are identified within the Asbestos Management Survey.
 - ii. Asbestos containing materials that have been identified within the Asbestos Management Survey or surveys and described as strongly "presumed".

The Asbestos Surveyor must consider each individual asbestos item on a case by case basis and use their knowledge and experience to determine whether "presumed" asbestos identified in the survey report should be included. In drawing conclusions, the reasons why asbestos is "presumed" must be fully considered.
7. In completing this section, the contractor should include at least the following:
 - i. All Asbestos containing materials identified within the post contract survey or surveys and categorised as either identified or "strongly presumed".

The contractor must consider each survey on a case by case basis and use their knowledge and experience to determine whether "presumed" asbestos identified in the survey should be included. In drawing conclusions, the reasons why asbestos is "presumed" must be fully considered.
8. The overall programme to be entered is to be the period for the removal of asbestos materials included within this section of the "Blue Form" based on the scope of Asbestos materials identified within the Asbestos Management Survey Report including periods for the following activities which are to be separately programmed:
 - Procurement, instruction and the undertaking and reporting of an Asbestos Refurbishment and Demolition (R&D) Survey;
 - Tendering, Reporting and Instruction of the Asbestos Removal Works as identified by the Asbestos R&D Survey;
 - Preparation of Plans of Work; and
 - Statutory Notification Periods.

WEPCo is to separately show the above individual periods within this Programme.
9. The period to be entered is to be the varied tendered period for the removal of Asbestos materials included within this section of the "Blue Form" based on the scope of Asbestos materials identified within the Asbestos Refurbishment and Demolition Survey Report only.

SCHEDULE 22- DISPUTE RESOLUTION PROCEDURE

1. This Dispute Resolution Procedure shall apply to any dispute, claim or difference between any two or more Parties arising out of or relating to this Agreement ("**Dispute**").
2. This Dispute Resolution Procedure shall not impose any pre-condition on any party or otherwise prevent or delay any party from commencing proceedings in any court of competent jurisdiction in relation to any Dispute in which that party requires either:
 - 2.1 an order (whether interim or final) restraining the other party from doing any act or compelling the other party to do any act; or
 - 2.2 a judgement for a liquidated sum to which there is no arguable defence.
3. **CONSULTATION**
 - 3.1 Subject to paragraph 2 of this Schedule 22, if a Dispute arises, the relevant Parties shall first consult in good faith in an attempt to come to an agreement in relation to the disputed matter.
 - 3.2 If the relevant Parties fail to come to an agreement through such consultation, each relevant Party shall refer the matter to its [*Participants to confirm escalation point*]⁵¹ or, in the case of WEPCo, its [*Bidders to specify*] for resolution.
4. **MEDIATION**
 - 4.1 If the relevant Parties have been unable to resolve the Dispute within ten (10) Business Days of referral in accordance with paragraph 3.2 above, they may (if the relevant Parties so agree) refer the Dispute to mediation in accordance with this paragraph 4. Any mediation shall be completed within forty (40) Business Days (or such longer period as the Parties may agree, acting reasonably) of such referral and any agreement reached by the parties and recorded in writing by them shall be binding upon the parties.
 - 4.2 Mediation shall not be a precondition to the commencement of Arbitration.
 - 4.3 Mediation may be conducted using a sole mediator or (where the Parties agree acting reasonably that more than one mediator is required) co-mediators (the "**Mediator(s)**") (such expression not to exclude the presence of a pupils or assistant mediators).
 - 4.4 The Parties shall agree to conduct the mediation in or substantially in accordance with the Centre for Effective Dispute Resolution ("**CEDR**") Model Mediation Procedure 2018 Edition ("**MMP**") for the time being used and the terms of the Model Mediation Agreement attached as Appendix 1 (*CEDR Mediation Agreement*) to this Schedule 22.
 - 4.5 The Mediator(s) shall be accredited mediator(s) agreed between the parties to the Dispute, or in the absence of agreement within fourteen (14) days of notice to mediate served pursuant to paragraph 4.7, appointed by CEDR.
 - 4.6 During the course of the mediation the relevant Parties shall co-operate fully, promptly and in good faith with CEDR and the Mediator(s) in the performance of their obligations under this paragraph 4, including the signing of CEDR's standard agreement to mediate subject to any reasonable amendments agreed by the parties to the Dispute. Any breach or default by any relevant Party to the Dispute of this paragraph 4 shall forthwith release:
 - 4.6.1 the other(s) from further compliance with this paragraph 4; and
 - 4.6.2 CEDR and the other relevant Parties from any mediation agreement signed between them (save for any accrued financial obligations to CEDR and/or the Mediator(s)),and the mediation shall be deemed to be abandoned.

⁵¹ Participants to consider and confirm.

4.7 Mediation shall commence by any Party to the dispute serving on the other(s) written notice to mediate pursuant to this paragraph (a "**Notice to Mediate**").

4.8 Unless they agree otherwise, the Parties shall share equally the fees, costs and expenses relating to the mediation and each Party shall pay its own expenses of preparation for, and participant and representation in, the mediation.

5. **ARBITRATION**

5.1 All Disputes, to the extent not finally resolved pursuant to the procedures set out in the foregoing paragraphs of this Schedule 22, shall subject to any agreement of the relevant Parties to the Dispute to resolve the Dispute by the commencement of legal proceedings, be referred to Arbitration pursuant to the provisions of this paragraph 5.

5.1.1 The Arbitration shall be governed by the Arbitration Act 1996 and the CI Arb Arbitration Rules, as amended; varied or replaced from time to time, save that the relevant Parties shall procure that the Arbitrator complies with, where appropriate, paragraph 8 (*Joinder of Disputes*) of this Schedule 22.

5.2 The Party initiating the Arbitration shall give a notice of Arbitration to the other Party to the Dispute (copied to the other Parties) (the "**Notice**") stating:

5.2.1 that the dispute is referred to Arbitration;

5.2.2 details of the issues to be resolved; and

shall invite the other Party to concur in the appointment of a sole arbitrator who shall be a solicitor or barrister or arbitrator recognised by the Chartered Institute of Arbitrators of not less than ten (10) years' standing as an arbitrator. If the relevant Parties are unable within fourteen (14) days to agree the identity of the Arbitrator, the initiating Party shall request that the Chartered Institute of Arbitrators make the appointment in accordance with Article 8 of the CI Arb Arbitration Rules. Arbitration proceedings shall be deemed to have been instituted on the date on which the Notice has been given.

5.3 Any party to the subsisting Arbitration proceedings may apply to the Chartered Institute of Arbitrators to challenge the office of Arbitrator in accordance with the CI Arb Arbitration Rules.

5.4 If it is required that the Arbitrator is replaced in terms of paragraph 5.3 above, the office shall be reconstituted in accordance with Article 14 of the CI Arb Arbitration Rules.

5.5 The Arbitration is to be held in England, in the English language and London shall be the seat of Arbitration.

5.6 Subject to any further agreement, the Parties agree that the following Articles of the CI Arb Arbitration Rules shall not apply to any Arbitration raised in accordance with this paragraph 5:

5.6.1 [List any Articles that parties do not wish to apply]

5.7 The Arbitrator shall have the power to open up, review and revise any opinion, certificate, instructions, determination or decision of whatever nature given or made under this Agreement.

5.8 Unless this Agreement has already been terminated, the Parties shall, (notwithstanding that any dispute is subject to the Dispute Resolution Procedure set out in this Schedule 22), continue to carry out their obligations in accordance with this Agreement.

6. **SUBMISSIONS**

6.1 If any Dispute between WEPCo and a Participant raises issues which relate to any dispute between WEPCo and any Partnering Subcontractor arising under a Supply Chain Agreement or otherwise affects the relationship or rights of WEPCo and/or the Partnering Subcontractor under such Supply Chain Agreement (the "**Supply Chain Agreement Dispute**") then WEPCo may

include as part of its submissions made to the Arbitrator, submissions made by the Partnering Subcontractor as appropriate.

- 6.2 The Arbitrator shall not have jurisdiction to determine the Supply Chain Agreement Dispute but the decision of the Arbitrator shall be binding on WEPCo and the Partnering Subcontractor insofar as it determines the issues relating to the Supply Chain Agreement Dispute.
- 6.3 Any submissions made by the Partnering Subcontractor shall:
- 6.3.1 be made within the time limits applicable to the delivery of submissions by WEPCo to the Arbitrator; and
 - 6.3.2 concern only those matters which relate to the Dispute between the relevant Participant and WEPCo.
- 6.4 Where a Partnering Subcontractor makes submissions in any reference before the Arbitrator, the costs of the Arbitration shall be at the discretion of the Arbitrator.
- 6.5 No Participant shall have liability to any Partnering Subcontractor arising out of or in connection with any decision of the Arbitrator or in respect of the costs of the Partnering Subcontractors in participating in the resolution of any Dispute under this Agreement.
- 6.6 WEPCo shall not allow any Partnering Subcontractor access to any document relevant to the issues in dispute between any Participant and WEPCo save where:
- 6.6.1 the document is relevant also to the issues relating to the Supply Chain Agreement Dispute as the case may be; and
 - 6.6.2 WEPCo has first delivered to the relevant Participants a written undertaking from the Partnering Subcontractor addressed to the relevant Participants that they shall not use any such document otherwise than for the purpose of the dispute resolution proceedings under this Agreement and that they shall not disclose such documents or any information contained therein to any third party other than the Arbitrator or any professional adviser engaged by the Partnering Subcontractor (as appropriate) to advise in connection with the Dispute.

7. **NO LOSS**

Where any Participant would otherwise be expressly liable to make a payment by way of compensation to WEPCo including amounts which, in turn, comprise compensation to any Partnering Subcontractor payable by WEPCo and/or which will be payable by way of compensation to any Partnering Subcontractor by WEPCo, the Participant shall not be entitled to withhold, reduce or avoid any such payment to WEPCo in reliance only on the fact that the amount which is due from WEPCo to the Partnering Subcontractor or the entitlement of the Partnering Subcontractor to payment of such amount, as a result of the circumstances giving rise to the Participant's obligation to pay such compensation, is conditional on the entitlement of, or receipt of payment by WEPCo from the Participant.

8. **JOINDER OF DISPUTES**

- 8.1 If a Dispute to which paragraph 5 applies (the "**Original Dispute**") raises issues which are substantially the same as or connected with issues in a Dispute between a party to the Dispute and any other party to this Agreement in connection with or arising out of this Agreement (the "**Related Dispute**"), a party to the Original Dispute may cause the Original Dispute to be joined with the Related Dispute in the manner provided in this paragraph 8.
- 8.2 A party wishing to join the Original Dispute with a Related Dispute shall, within five (5) Business Days of giving or receiving the Notice in respect of the Original Dispute, serve on each other party to the Original Dispute and to the Related Dispute, and the Arbitrator, a notice (a "**Related Dispute Notice**") stating they wish to join the Original Dispute with the Related Dispute. The Related Dispute Notice shall include:

- 8.2.1 a concise summary of the Related Dispute and issues arising therefrom, including a preliminary statement setting out the basis and grounds for joining the Related Dispute with the Original Dispute, together with (where applicable):
- (a) a statement of claim from each party to the Related Dispute;
 - (b) details of each Related Dispute party;
 - (c) a statement of the relief sought by any party to the Related Dispute;
 - (d) reference to any reports relating to the subject matter of the Related Dispute;
 - (e) a statement of any matters which the parties to the Related Dispute have already agreed in relation to the Related Dispute; and
 - (f) copies of all documents not exceeding, where possible, one lever arch file in total which have a direct bearing on the issues in the Related Dispute, and on which the party serving the Related Dispute Notice intends to rely (or a list of such documents if each party to the Related Dispute has already seen them).
- 8.3 The party giving notice under paragraph 8.2 shall give each Related Dispute party a copy of the following documents:
- 8.3.1 the Notice relative to the Original Dispute together with any counterclaims given or received, and any further notices to/from the other party to the Original Dispute; and
- 8.3.2 the Notice relative to the Related Dispute.
- 8.4 Within five (5) Business Days after receiving a Related Dispute Notice, any party to the Original Dispute or Related Dispute may make written representations to the Arbitrator objecting to the joinder of the Related Dispute with the Original Dispute, simultaneously providing copies to all parties to such disputes.
- 8.5 If no representations are made in accordance with paragraph 8.4, the Arbitrator shall immediately order that that the Original Dispute shall be joined with the Related Dispute.
- 8.6 Where the Arbitrator receives objections under paragraph 8.4, the Arbitrator shall consider whether or not in his or her opinion there is any reasonable basis or ground for the objection received and shall render a final and binding written decision within three (3) Business Days of receiving an objection as to whether the Related Dispute shall be joined with the Original Dispute.
- 8.7 Subject to the provisions of this paragraph 8, the provisions of paragraph 5 (*Arbitration*) shall apply to the resolution of a Related Dispute and the Arbitrator shall, insofar as practicable, apply the same reasoning and analysis in reaching a decision on both the Original Dispute and the Related Dispute.
- 8.8 When a Related Dispute is joined to an Original Dispute, the Arbitrator shall consider both Disputes together but shall render separate decisions on the Original Dispute and the Related Dispute.

APPENDIX 1- CEDR MEDIATION AGREEMENT

Model Mediation Agreement



CEDR Model Mediation Agreement

THIS AGREEMENT dated IS MADE BETWEEN

Party A

..... of

Party B

..... of
(together referred to as “the Parties”)

The Mediator

..... of

(a term which includes any agreed Assistant Mediator)

and

CEDR Solve of IDRC, 70 Fleet Street, London EC4Y 1EU

in relation to a mediation to be held

on

at (“the Mediation”)

concerning a dispute between the Parties in relation to

.....
.....
.....

(“the Dispute”)

IT IS AGREED by those signing this Agreement THAT:

The Mediation

1 The Parties agree to attempt in good faith to settle the Dispute at the Mediation. All signing this Agreement agree that the Mediation will be conducted in accordance with its terms and consistent with the CEDR Solve Model Mediation Procedure and the CEDR Code of Conduct for Mediators current at the date of this Agreement.

Authority and status

2 The person signing this Agreement on behalf of each Party warrants having authority to bind that Party and all other persons present on that Party’s behalf at the Mediation to observe the terms of this Agreement, and also having authority to bind that Party to the terms of any settlement.

3 The Mediator is operating as an independent contractor (unless an employee of CEDR Solve), and neither the Mediator nor CEDR Solve is an agent for any of the Parties in relation to the Dispute or this Agreement.

4 Neither the Mediator nor CEDR Solve shall be liable to the Parties for any act or omission in relation to the Mediation unless the act or omission is proved to have been fraudulent or involved wilful misconduct.

Confidentiality and without prejudice status

5 Every person involved in the Mediation:

5.1 will keep confidential all information arising out of or in connection with the Mediation, including the fact and terms of any settlement, but not including the fact that the Mediation is to take place or has taken place or where disclosure is required by law to implement or to enforce terms of settlement; and

5.2 acknowledges that all such information passing between the Parties, the Mediator and/or CEDR Solve, however communicated, is agreed to be without prejudice to any Party's legal position and may not be produced as evidence or disclosed to any judge, arbitrator or other decision-maker in any legal or other formal process, except where otherwise disclosable in law.

6 Where a Party privately discloses to the Mediator any information in confidence before, during or after the Mediation, the Mediator will not disclose that information to any other Party or person without the consent of the Party disclosing it, unless required by law to make disclosure.

7 The Parties will not call the Mediator or any employee or consultant of CEDR Solve as a witness, nor require them to produce in evidence any records or notes relating to the Mediation, in any litigation, arbitration or other formal process arising from or in connection with the Dispute and the Mediation; nor will the Mediator nor any CEDR Solve employee or consultant act or agree to act as a witness, expert, arbitrator or consultant in any such process. If any Party does make such an application, that Party will fully indemnify the Mediator or the employee or consultant of CEDR Solve in respect of any costs any of them incur in resisting and/or responding to such an application, including reimbursement at the Mediator's standard hourly rate for the Mediator's time spent in resisting and/or responding to such application.

8 No verbatim recording or transcript of the Mediation will be made in any form.

Settlement formalities

9 No terms of settlement reached at the Mediation will be legally binding until set out in writing and signed by or on behalf of each of the Parties.

Fees and costs of the Mediation

10 The Parties will be responsible for the fees and expenses of CEDR Solve and the Mediator (**"the Mediation Fees"**) in accordance with CEDR Solve's Terms and Conditions of Business current at the date of this Agreement.

11 Unless otherwise agreed by the Parties and CEDR Solve in writing, each Party agrees to share the Mediation Fees equally and also to bear its own legal and other costs and expenses of preparing for and attending the Mediation (“each Party’s Legal Costs”) prior to the Mediation. However, each Party further agrees that any court or tribunal may treat both the Mediation Fees and each Party’s Legal Costs as costs in the case in relation to any litigation or arbitration where that court or tribunal has power to assess or make orders as to costs, whether or not the Mediation results in settlement of the Dispute.

Legal status and effect of the Mediation

12 Any contemplated or existing litigation or arbitration in relation to the Dispute may be started or continued despite the Mediation, unless the Parties agree or a Court orders otherwise.

13 This Agreement is governed by the law of [England and Wales] and the courts of [England and Wales] shall have exclusive jurisdiction to decide any matters arising out of or in connection with this Agreement and the Mediation.

14 The referral of the dispute to the Mediation does not affect any rights that exist under Article 6 of the European Convention of Human Rights, and if the Dispute does not settle through the Mediation, the Parties’ right to a fair trial remains unaffected.

Changes to this Agreement

15 All agreed changes to this Agreement and/or the Model Procedure are set out as follows:

Signed

Party A _____

Party B _____

Mediator _____

CEDR Solve _____

APPENDIX 2 - CEDR MODEL MEDIATION PROCEDURE

Model Mediation Procedure



CEDR Solve Mediation Model Procedure

1 What is mediation?

Mediation is a flexible process conducted confidentially in which a neutral person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

The principal features of mediation are that it:

- involves a neutral third party to facilitate negotiations;
- is quick to set up and is inexpensive, without prejudice and confidential;
- involves party representatives with sufficient authority to settle;
- is flexible, with no set procedure, enabling the process to be designed and managed by the Mediator to suit the parties, in consultation with them;
- enables the parties to devise solutions which are not possible in an adjudicative process such as litigation or arbitration, and which may benefit all the parties, particularly if there is the possibility of a continuing relationship between them;
- can be used in both domestic and cross-border disputes, two-party and multi-party disputes, and whether or not litigation or arbitration has been commenced.

Many commercial and government contracts now require parties to use mediation in accordance with CEDR's Model Procedure. While mediation is essentially flexible, the Model Procedure set out in this document, taken with the CEDR Solve Mediation Agreement, will give sufficient certainty to enable the process to be set up and used.

If settlement terms cannot be agreed at a mediation, the parties are free to revert to litigation or arbitration.

2 Referral to mediation

Referral of a dispute to a mediator or to CEDR Solve for mediation may be as a result of:

- voluntary referral by all parties;
- referral by one party who asks CEDR Solve to secure the involvement of other parties into a mediation;
- responding to a Pre-action Protocol, the Civil Procedure Rules 1998, a Court Order or a recommendation by a judge before trial or appeal;
- the provisions of a clause in a commercial or government contract requiring the use of mediation as a step in the parties' agreed dispute resolution process.

3 Choosing the mediator

Parties may choose their own mediator directly, or may ask CEDR Solve to nominate one or more persons to act as mediator for a dispute in accordance with the wishes of the parties or any relevant Court Order (a copy of which must be supplied to CEDR Solve by the parties as soon as possible after CEDR Solve has been instructed). If the parties require it, more than one mediator can be appointed to work as co-mediators, or the parties can agree on an independent neutral expert to advise the mediator on technical matters.

CEDR Solve will only nominate or appoint a mediator who, in their view, possesses the relevant skills and experience to mediate the dispute for the parties effectively, and who will comply with the CEDR Solve Code of Conduct for Third Party Neutrals (“the Code”). Any nominated mediator will be required to confirm immediately to CEDR Solve if there is any matter which might prevent the nominated mediator from complying with the Code in relation to the mediation of the dispute, such as a conflict of interest. CEDR Solve will then notify the parties of any such matter immediately it is disclosed to them.

If required by either the parties or the Court, or under the published terms of any CEDR Solve dispute resolution scheme, CEDR Solve will **appoint** a mediator to be used in relation to a dispute, subject always to that mediator not being prevented from complying with the Code in relation to the mediation of that dispute.

The parties may be asked by CEDR Solve to approve the appointment by them of an assistant mediator (who will be a CEDR Accredited Mediator) or an observer to attend a mediation at no cost to the parties, provided that they too comply with the Code in respect of the mediation of that dispute. The identity of any assistant mediator or observer proposed to attend the mediation will be made known in advance of the mediation to the parties, who are free to object to any such nomination or decline any such appointment. The mediator’s signature of the mediation agreement binds any assistant mediator or observer to its terms.

4 Preparation for the mediation

Depending on the CEDR Solve service selected by the parties, either CEDR Solve or the mediator when agreed or appointed, will make the necessary arrangements for the mediation as required or agreed by the parties or under the terms of any scheme, including:

- drafting the agreement, submitting it for approval by the parties and preparing the final form for signature, incorporating any agreed amendments;
- facilitating agreement as to the date, venue and start time for the mediation;
- organising exchange of case summaries and document bundles between the parties and the mediator;
- setting up any pre-mediation meetings agreed by the parties and the mediator.

The parties will:

- agree the appointment of the mediator or a process to select or appoint the mediator;
- agree with CEDR Solve the date, venue and start time for the mediation;

- pay CEDR Solve's fees and expenses as agreed under CEDR Solve's Terms and Conditions of business;
- each prepare and exchange a case summary in respect of their approach to the dispute at the mediation and endeavour to agree with all other parties what documents are needed for the mediation;
- send to the mediator (direct or through CEDR Solve) a copy of their case summary and two copies of the document bundles no less than two weeks before the date set for the mediation, making clear whether case summaries have or have not yet been exchanged, whether or not and when CEDR Solve is to effect exchange, and whether all or any part of any case summary or documentation is intended to be confidential for the mediator only;
- notify the mediator direct or through CEDR Solve of the names and roles of all those attending the mediation on their behalf, so that CEDR Solve can inform all Parties and the mediator in advance of the mediation;
- ensure that a lead negotiator with full authority to settle the dispute (or not) attends the mediation to sign the mediation agreement;
- alternatively notify the mediator, CEDR Solve and (unless very good reason exists to the contrary) the other parties of any limitation on authority to settle, for instance lack of legal capacity, or the need for ministerial committee or board ratification, in which case the lead negotiator will need to have power to recommend acceptance of any settlement. Late disclosure of limited authority to settle can call into question that party's good faith involvement in the mediation process, and have detrimental effects on the prospects of success of any mediation.

The mediator will:

- ensure at all times that the Code is complied with in respect of the mediation of the dispute, reporting any conflict of interest or other relevant matter, if any, to CEDR Solve and (subject to any question of confidentiality or privilege) the parties immediately it emerges;
- attend any pre-mediation meetings on terms and agenda agreed by the parties;
- read each case summary and document bundle submitted in advance of the mediation by the parties;
- make contact with a representative of each of the parties before the mediation to assist in preparation for the mediation.

5 Documentation

Documentation intended to be treated as confidential by the mediator or CEDR Solve (such as a counsel's opinion, an undisclosed expert report, a draft proof of evidence or a confidential briefing for the mediator) must be clearly marked as such, and will not be circulated further without express authority.

One of the advantages of mediation is that its success is not dependent on exhaustive disclosure of documents. Bundles can usually be relatively limited in size, containing only key documents, and case summaries can be quite brief, and can to advantage be prepared jointly by the parties. The parties can ask CEDR Solve to effect simultaneous exchange of case summaries if required.

While documents brought into existence for the purpose of the mediation, such as case summaries, are clearly privileged from later production in those or other proceedings, the fact that a document which is otherwise disclosable in proceedings is produced for the first time during the mediation does not normally confer privileged status on it. The parties must take legal advice on such matters if they arise.

6 The mediation agreement

The agreement to mediate provides the essential legal basis for the mediation. Its signatories (the parties to the dispute, the mediator and CEDR Solve) all agree by signing it that the mediation is to be conducted consistent with both this CEDR Solve Model Procedure and the Code.

A draft mediation agreement will be sent for approval to the parties as part of the preparation process for the mediation, and any proposed amendments can then be discussed and inserted if agreed. The mediation agreement will normally be signed at the beginning of the mediation day on behalf of each of the parties and the mediator, having been pre-signed on behalf of CEDR Solve. In any pre-mediation contact with the parties, CEDR Solve staff and any CEDR mediator once appointed will observe its terms as to confidentiality, even though the agreement has not yet been signed.

7 The mediation

It is normal for each of the parties to have a private room for confidential consultations on their own and with the mediator during the mediation. There should also be a further room large enough for all parties to meet with the mediator jointly.

The mediator will chair and take responsibility for determining the procedure at the mediation, in consultation with the parties.

The likely procedure will comprise:

- preliminary meetings with each of the parties when they arrive at the venue;
- a joint meeting of all attending the mediation, at which each of the parties will normally be invited to make an oral presentation;

- a mix of further private meetings and joint meetings (which may involve all or some of each party's team), as proposed by the mediator and agreed by the parties.

Professional advisers, particularly lawyers, can and usually do attend the mediation. Such advisers play an important role in the exchange of information and opinion on fact, evidence and law; in supporting their clients (particularly individuals) in the negotiations; in advising clients on the implications of settlement; and in drawing up the settlement agreement and any consent order.

Although the agreement provides that no verbatim recording or transcript will be made of the whole mediation by the parties or the mediator, they can make their own private notes which will be undisclosed to anyone else, including in any subsequent litigation or arbitration.

Mediations can last beyond a normal working day and it is important that the key people present for each of the parties remain present or at worst available by telephone for so long as the mediation continues. Any time constraints should be reported to CEDR Solve or the mediator as soon as known, as any unexpected departure can be detrimental to the progress of the mediation and perceived as disrespectful by other parties.

8 Confidentiality in relation to the mediation

The CEDR Solve standard agreement provides that what happens at the mediation is to be treated as confidential by the parties, the mediator and CEDR Solve, including the fact and terms of settlement. However, the fact that the mediation is to take place or has taken place is not normally made confidential, as either or both of the parties may wish to claim credit for agreeing to engage in the process. If it is desired to make the fact that the mediation is taking place confidential also, the agreement can be amended.

Apart from where the parties agree in writing to consent to disclosure of what would normally be confidential, there may be rare circumstances in which the confidentiality of the mediation process cannot be preserved, such as where:

- the mediator or any party or their representative is required by law to make disclosure;
- the mediator reasonably considers that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed; or
- the mediator reasonably considers that there is a serious risk of being personally subject to criminal proceedings unless the information in question is disclosed.

Such questions might arise in relation to duties under the Proceeds of Crime Act 2002 or related legislation or under any other legislation. Legal representatives (who may themselves be under a comparable duty of disclosure in their own capacity) must take full responsibility for advising their clients of the implications of disclosure in relation to any such matters at a mediation.

9 Conclusion of the Mediation

The mediation may end in a number of ways:

- by settlement of the dispute in whole or part, when all agreed matters must be written down and signed by the parties to be binding;

- by one or more parties leaving the mediation before settlement is achieved;
- by an agreed adjournment for such time and on such terms as the parties and the mediator agree;
- by withdrawal of the mediator in accordance with the mandatory and optional circumstances set out in the Code.

The mediator will facilitate the drawing up of any settlement agreement, though the drafting is normally done by the lawyers representing each of the parties. Where proceedings **have not** been started in respect of the dispute, the settlement agreement will (if so intended and drafted) be a contract enforceable by legal action. Where proceedings **have** been issued in relation to the dispute, it is normal for a Consent Order to be agreed either at or after the mediation and later lodged to end the proceedings on the terms agreed.

Where the mediation does not end in complete settlement, the Mediator may make contact with the parties thereafter to see whether further progress might be possible. Many disputes which do not settle at the mediation settle later, usually as a result of what occurred or was learned at the mediation.

CEDR Solve endeavours to make contact with all the parties after every mediation to obtain their feedback on both the process itself and, in particular, the mediator. Any feedback obtained regarding the mediator will be given in full to the mediator as part of the mediator's continuing learning and development.

10 Complaints

Any formal complaint about CEDR Solve or any mediator nominated by CEDR Solve should follow the procedure set out on the CEDR website at www.cedr.com.