Llywodraeth Cymru
Welsh Government

Standard Form Project Agreement (Accommodation Version)

Mutual Investment Model (MIM)

March 2017 (Version 1)

THIS STANDARD FORM PROJECT AGREEMENT MUST BE USED IN CONJUNCTION WITH THE STANDARD FORM PROJECT AGREEMENTS USER GUIDE PUBLISHED BY THE WELSH GOVERNMENT

AGREEMENT

between

[AUTHORITY]

and

[PROJECT CO]

[Project]

[Date]

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THIS AGREEMENT is made the day of

BETWEEN:

(1) [♦] (the "**Authority**"); and

(2) [♦] (registered under number [♦]) whose registered office is [♦] ("**Project Co**").

RECITALS:

(A) The Authority wishes to procure the design, build, finance and maintenance of [♦][1] (the "**Project**");

(B) The Authority conducted a competitive dialogue procurement competition to identify the most economically advantageous tender from persons interested in being appointed the Authority's private sector partner to procure the Project;

(C) The tender submitted by Project Co has been selected as the most economically advantageous tender;

(D) This Agreement is entered into pursuant to a project applying principles similar to the principles of the private finance initiative and is excluded from the Housing Grants, Construction and Regeneration Act 1996 by virtue of the Construction Contracts (England and Wales) Exclusion Order 1998 (SI 1998/646); and

(E) The Project has been approved by the Cabinet Secretary for Finance and Local Government and the Cabinet Secretary for [♦][2], on behalf of the Welsh Ministers.

NOW IT IS HEREBY AGREED as follows:

PART 1: GENERAL

1 **DEFINITIONS AND INTERPRETATION**

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

2 **EXECUTION AND DELIVERY OF DOCUMENTS**

On or prior to execution of this Agreement:

2.1 Project Co shall deliver to the Authority the documents referred to in Section 1 (*Documents to be delivered by Project Co*) of Schedule 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by the Authority by written notice to Project Co); and

[1] Insert description of project.

[2] Insert the title of the relevant portfolio minister as well as the minister with overall responsibility for financial matters. The title may be subject to change from time to time. Note this approval will be needed even if the party entering into the Project Agreement is external to the Welsh Ministers.

2.2 the Authority shall deliver to Project Co the documents referred to in Section 2 (*Documents to be delivered by the Authority*) of Schedule 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by Project Co by written notice to the Authority).

3 COMMENCEMENT AND DURATION

This Agreement, and the rights and obligations of the parties, shall commence on the date of execution of this Agreement and, without prejudice to Clause 47.6 (*Continuing Obligations*), shall terminate automatically on the expiry of the Project Term.

4 PROJECT DOCUMENTS

Ancillary Documents

4.1 Project Co shall perform its obligations under, and observe all of the provisions of, the Project Documents to which it is a party and shall not:

4.1.1 terminate or agree to the termination of all or part of any Ancillary Document;

4.1.2 make or agree to any material variation to, or extension or renewal of any Ancillary Document;

4.1.3 in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights they may have in a material respect), under any Ancillary Document; or

4.1.4 enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Ancillary Document,

unless the proposed course of action (and any relevant documentation) has been submitted to the Authority's Representative for review under Schedule 8 (*Review Procedure*) and either:

(a) there has been no objection in accordance with paragraph 3 of Schedule 8 (*Review Procedure*) within twenty (20) Business Days of receipt by the Authority's Representative of the submission of the proposed course of action (and any relevant documentation), or such shorter period as may be agreed by the parties; or

(b) Project Co is acting in accordance with the comments of the Authority as provided in paragraph 4.2 of Schedule 8 (*Review Procedure*);

and, in the circumstances specified in Clause 4.1.1, Project Co has complied with Clause 58 (*Sub-contracting and Assignment*).

Changes to Funding Agreements and Refinancing

4.2 Subject to Clauses 4.3 and 4.4 (*Changes to Funding Agreements and Refinancing*), Project Co shall be free, at any time, to enter into, terminate, amend, waive its rights and generally deal with its Funding Agreements on such terms and conditions as it sees fit without the prior written consent of the Authority provided that (at the time such action is contemplated and effected) the same will not materially and adversely affect the ability of Project Co to perform its obligations under the Project Documents or this Agreement.

4.3 No amendment, waiver or exercise of a right under any Funding Agreement or Ancillary Document shall have the effect of increasing the Authority's liabilities on early termination of this Agreement unless:

4.3.1 Project Co has obtained the prior written consent of the Authority to such increased liability for the purposes of this Clause 4.3 (*Changes to Funding Agreements and Refinancing*); or

4.3.2 it is a Permitted Borrowing.

4.4 Any amendment or variation of any Funding Agreements which constitutes a Refinancing shall be carried out in accordance with the provisions of Schedule 23 (*Refinancing*).

4.5 Without prejudice to Clause 4.2 (*Changes to Funding Agreements and Refinancing*), Project Co shall liaise with the Authority, and shall use all reasonable endeavours to provide the Authority with a copy of the relevant agreement in settled draft form, not less than ten (10) Business Days before it enters into any Funding Agreement (other than the Initial Funding Agreements).

Delivery

4.6 Without prejudice to the provisions of this Clause 4 (*Project Documents*), if at any time an amendment is made to any Project Document, or Project Co enters into a new Project Document (or any agreement which affects the interpretation or application of any Project Document), Project Co shall deliver to the Authority a conformed copy of each such amendment or agreement within ten (10) Business Days of the date of its execution or creation, certified as a true copy by an officer of Project Co.

Funding Default

4.7 Project Co shall promptly upon the occurrence of a Funding Default notify the Authority of such Funding Default.

4.8 The Authority may, in circumstances referred to in Clause 4.7 (*Funding Default*) above (regardless of whether the Senior Funders have exercised any enforcement or similar rights under the Senior Funding Agreements), require Project Co to provide an Interim Project Report and to attend, and use all reasonable endeavours to ensure that the Senior Funders attend, such meetings as the Authority may convene to discuss such Interim Project Report and the circumstances giving rise to it.

4.9 Project Co shall promptly upon a failure by the Senior Funders to advance amounts due under the Senior Funding Agreements (or in circumstances that might reasonably be expected to lead to such a failure) notify the Authority of such failure (or expected failure).

4.10 The Authority may, in the circumstances referred to in Clause 4.9 (*Funding Default*) above, require Project Co to attend, and use all reasonable endeavours to ensure that the Senior Funders attend, such meetings as the Authority may convene to discuss the circumstances.

5 THE PROJECT OPERATIONS

Scope

5.1 Subject to and in accordance with the provisions of this Agreement, Project Co shall perform its duties under this Agreement at its own cost and risk without recourse to the Authority except as otherwise expressly provided in this Agreement.

General standards[3]

5.2 Project Co shall at its own cost be solely responsible for procuring that the Project Operations are at all times performed:

5.2.1 in compliance with all Law and Consents (including without limitation the giving of notices and the obtaining of any such Consents) and so as not to prejudice the renewal of any such Consents;

5.2.2 in a manner that is not likely to be injurious to health or to cause damage to property;

5.2.3 in a manner consistent with the Authority discharging its statutory duties and other functions undertaken by it as the same may be notified to Project Co from time to time; and

5.2.4 insofar as not in conflict with an express obligation of Project Co under this Agreement, or where in relation to a matter there is no express

[3] Refer to Health Sector Specific Guidance in the User Guide, if applicable.

obligation or standard imposed on Project Co under this Agreement, in accordance with Good Industry Practice.

In the event that any ambiguity, uncertainty, dispute or discrepancy arises in the nature and scope of Project Co's obligations under this Clause 5.2 (*General Standards*), the provisions of this Clause 5.2 (*General Standards*) will be given meaning and have effect in descending order of precedence set out in this Clause 5.2 (*General Standards*).

Authority's Undertaking[4]

5.3 The Authority undertakes to Project Co that it shall:

5.3.1 subject to the provisions of this Agreement, comply with all Laws and Consents applicable to it which relate to the Project Operations;

5.3.2 not wilfully impede Project Co in the performance of its obligations under this Agreement (having regard always to the interactive nature of the activities of the Authority and of Project Co and to the Authority's use of the Facilities to provide the relevant Authority Services and any other operations or activities carried out by the Authority on or at the Site for the purposes contemplated by this Agreement and any other of the Authority's statutory functions);

5.3.3 inform Project Co 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 Project Co informed, of any course of action to remedy the situation recommended or required by the Welsh Government, the Authority or other competent authority; and

5.3.4 to the extent permitted by Law, supply to Project Co within sixty (60) Business Days of their publication, a copy of the Authority's Annual Report and Accounts,

provided that, to avoid doubt, nothing in this Clause 5.3 (*Authority's Undertaking*) shall in any way fetter the discretion of the Authority in fulfilling its statutory functions.

Co-operation[5]

5.4 Each party agrees to cooperate, at its own expense, with the other party in the fulfilment of the purposes and intent of this Agreement. To avoid doubt, neither party shall be under any obligation to perform any of the other's obligations under this Agreement.

[4] Refer to Health Sector Specific Guidance in the User Guide, if applicable.
[5] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

6 GENERAL OBLIGATIONS AND RESPONSIBILITIES OF PROJECT CO

Other business

6.1 Project Co shall not engage in any business or activity other than the business or activities related to, and conducted for, the purpose of the Project Operations.[6]

Project Co Parties

6.2 Subject to the provision of Clause 31.1.7, Project Co shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any Project Co Party. Project Co shall, as between itself and the Authority, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches and negligence of all Project Co Parties. All references in this Agreement to any act, default, omission, breach or negligence of Project Co shall be construed accordingly to include any such act, default, omission, breach or negligence of a Project Co Party.

Safety

6.3 Project Co shall, in carrying out the Project Operations, have full regard for the safety of all persons on the Site (whether lawfully or not) and keep the Site, the Works and the Facilities in an orderly state, appropriate in accordance with Good Industry Practice, to avoid danger to such persons.

7 AUTHORITY'S DATA

No liability

7.1 [Subject to Clause 53 *(Warranties)*,] the Authority shall not be liable to Project Co for and Project Co shall not seek to recover from the Authority (or from any Authority Party) any damages, losses, costs, liabilities or expenses which may arise (whether in contract, tort or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, Project Co, the Independent Tester or any Project Co Party.

No warranty

7.2 [Subject to Clause 53 *(Warranties)*,] the Authority gives no warranty or undertaking of whatever nature in respect of the Disclosed Data and, specifically (but without limitation), the Authority does not warrant that the Disclosed Data represents all of the information in its possession or power (either during the conduct of the tender process for the Project or at the time of execution of this Agreement) relevant or material to or in connection with the Project or the obligations of Project Co under this Agreement or under any of the Project Documents. In addition, without prejudice to the application of [Clause 53 *(Warranties)*,] Clause 30.10.1

[6] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

(*Compensation*), Clause 30.3.2 (*Delay Events*) and/or Clause 52.2.1 (*Excusing Causes*) to the extent that such provisions may apply in respect of any breach on the part of the Authority of Clauses 9.1 (*Access During Construction*) or 9.2 (*Access Following Construction*), the Authority shall not be liable to Project Co in respect of any failure to disclose or make available to Project Co (whether before, on or after the execution of this Agreement) any information, documents or data, nor any failure to review or to update the Disclosed Data, nor any failure to inform Project Co (whether before, on or after execution of this Agreement) of any inaccuracy, error, omission, defects or inadequacy in the Disclosed Data.

Project Co investigation

7.3 [Without prejudice to its rights and remedies under Clause 53 *(Warranties)*,] Project Co acknowledges and confirms that:

7.3.1 it has conducted its own analysis and review of the Disclosed Data and has, before the execution of this Agreement, satisfied itself as to the accuracy, completeness and fitness for purpose of any such Disclosed Data upon which it places reliance; and

7.3.2 it shall not be entitled to and shall not (and shall procure that no Project Co Party shall) make any claim against the Authority or any Authority Party whether in contract, tort or otherwise including, without limitation, any claim in damages, for extensions of time or for additional payments under this Agreement on the grounds:

(a) of any misunderstanding or misapprehension in respect of the Disclosed Data; or

(b) that incorrect or insufficient information relating to the Disclosed Data was given to it by any person, whether or not an Authority Party,

nor shall Project Co be relieved from any obligation imposed on, or undertaken by it, under this Agreement on any such ground.

8 REPRESENTATIVES

Representatives of the Authority[7]

8.1 The Authority's Representative shall be [♦] or such other person appointed pursuant to this Clause. The Authority's Representative shall exercise the functions and powers of the Authority in relation to the Project Operations which are identified in this Agreement as functions or powers to be carried out by the Authority's Representative. The Authority's Representative shall also exercise such other functions and powers of the Authority under this Agreement as may be notified to Project Co from time to time.

[7] Refer to Education Sector Specific Guidance in the User Guide, if applicable.

8.2 The Authority's Representative shall be entitled at any time, by notice to Project Co, to authorise any other person to exercise the functions and powers of the Authority delegated to him pursuant to this Clause, either generally or specifically. Any act of any such person shall, for the purposes of this Agreement, constitute an act of the Authority's Representative and all references to the "**Authority's Representative**" in this Agreement (apart from this Clause) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.

8.3 The Authority may by notice to Project Co change the Authority's Representative. The Authority shall (as far as practicable) consult with Project Co prior to the appointment of any replacement for the Authority's Representative, taking account of the need for liaison and continuity in respect of the Project. 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 Project Co in the execution of its obligations under this Agreement).

8.4 During any period when no Authority's Representative has been appointed (or when the Authority's Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement) the Authority shall carry out the functions which would otherwise be performed by the Authority's Representative.

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

8.5.1 in any way relieve or absolve Project Co from, modify, or act as a waiver or personal bar of, any liability, responsibility, obligation or duty under this Agreement; or

8.5.2 in the absence of an express order or authorisation under Schedule 16 (*Change Protocol*), constitute or authorise a Change.

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

Representative of Project Co

8.7 Project Co's Representative shall be [♦] or such other person appointed pursuant to Clause 8.8 (*Representative of Project Co*). Project Co's Representative shall have full authority to act on behalf of Project Co for all purposes of this Agreement. Except as previously notified in writing before such act by Project Co to the Authority, the Authority and the Authority's Representative shall be entitled to treat any act of Project Co's Representative in connection with this Agreement as being expressly authorised by Project Co and the Authority and the Authority's

Representative shall not be required to determine whether any express authority has in fact been given.

8.8 Project Co may by reasonable notice to the Authority change Project Co's Representative. Where Project Co wishes to do so it shall by written notice to the Authority propose a substitute for approval, taking account of the need for liaison and continuity in respect of the Project. Such appointment shall be subject to the approval of the Authority (not to be unreasonably withheld or delayed).

8.9 Project Co's Key Personnel are identified in Schedule 3 (*Key Personnel*). Project Co shall, as far as it is within Project Co's control, ensure that such persons retain their involvement in the Works and, in particular, will not, for the duration of the Works, require or request any of them to be involved in any other project on behalf of Project Co or any of the Shareholders or its or their Associated Companies if, in the reasonable opinion of the Authority, this would adversely affect the Project. In the event that due to matters outwith Project Co's control it is necessary for there to be a change in any Key Personnel, Project Co shall by written notice to the Authority propose a substitute for approval, taking account of the need for liaison and continuity in respect of the Project. Such appointment shall be subject to the approval of the Authority (not to be unreasonably withheld or delayed).

Authority Observer

8.10 The parties acknowledge that the Authority shall be entitled to nominate (and remove) by notice in writing to [♦][8] (and that [♦][9] shall be entitled to appoint (and remove) by notice in writing to Hold Co), an Authority Observer to the board meetings of Project Co and Hold Co and Project Co shall procure that appropriate provision is maintained within the Project Co and Hold Co Articles of Association to ensure that this entitlement shall survive termination of the Shareholders' Agreement and/or [♦][10] ceasing to be a Shareholder, on the terms set out at Clauses 8.11 to 8.14 (*Authority Observer*) (which for the avoidance of doubt, Project Co shall procure apply to Hold Co with all necessary changes as if references to Project Co were references to Hold Co).

8.11 Project Co shall, subject to Clauses 8.12 to 8.14.3 (*Authority Observer*), ensure that any Authority Observer appointed pursuant to this Clause 8 (*Representatives*) and the Articles of Association:

8.11.1 is invited to attend all Project Co board meetings;

8.11.2 receives at the time that they are received by Project Co's board members) the agendas and supporting papers that are circulated to the board members in advance of the board meetings or tabled at the board meetings including, without prejudice to the foregoing generality, six-monthly and monthly management accounts, budgets and management reports (including explanations of material variances against budget) and the statutory accounts in respect of each financial year;

[8] Insert reference to WG Co Shareholder pursuant to the Shareholders' Agreement.
[9] Insert reference to WG Co Shareholder pursuant to the Shareholders' Agreement.
[10] Insert reference to WG Co Shareholder pursuant to the Shareholders' Agreement.

8.11.3 is permitted by Project Co to attend, participate, speak and contribute (but not vote at) all Project Co board meetings; and

8.11.4 receives (at or around the same time as they are received by the board members) copies of the minutes of Project Co's board meetings and all other financial information relating to Project Co as any director might reasonably require to keep himself properly informed about the activities of Project Co.

8.12 The Authority Observer shall, unless otherwise determined by a majority vote board resolution of Project Co in respect of any particular matter, be entitled to disclose any information received pursuant to Clause 8.11 (*Authority Observer*) subject to and in accordance with the provisions of Clause 62 (*Confidentiality*) and the Authority shall procure that the individual appointed to fulfil such role executes suitable undertakings of confidentiality to comply with the terms of Clause 62 (*Confidentiality*).

8.13 Project Co may, if its board considers it reasonable to do so in all the circumstances (and in the event of disagreement at board level over exclusion, by majority vote only) exclude the Authority Observer from attending Project Co's board meetings and withhold the agendas and supporting papers referred to in Clause 8.11 (*Authority Observer*).

8.14 Notwithstanding the foregoing, the Authority Observer shall not be entitled to attend all or any part of a Project Co board meeting or to receive associated board papers:

8.14.1 in the event that the Authority Observer discloses information received pursuant to Clause 8.11 (*Authority Observer*) other than in accordance with Clause 8.12 (*Authority Observer*); or

8.14.2 where and for so long as the conduct of the Authority Observer is inappropriate; or

8.14.3 at which:

(a) the exercise or purported exercise of contractual rights by Project Co against the Authority or by the Authority against Project Co is to be discussed; or

(b) any matter of interpretation of this Agreement is to be discussed; or

8.14.4 in relation to which any matter where proceedings have been issued by or against the Authority, such that the step-aside provisions in clause 6.5(d) of the Shareholders' Agreement apply,

and Project Co shall be entitled to withhold from the Authority any supporting papers and information to the extent that they relate to the matters listed in Clause 8.14 (*Authority Observer*).

[**Liaison Procedures**

8.15 The Authority and Project Co shall establish and maintain throughout the Project Term a joint Liaison Committee and shall initiate, develop, agree, distribute, implement, control and maintain liaison procedures, all in accordance with the provisions of Schedule 24 (*Liaison Procedure*)].[11]

[11] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

PART 2: LAND ISSUES

9 NATURE OF LAND INTERESTS

Access During Construction

9.1 From the Commencement Date until the Actual Completion Date [relevant Phase Actual Completion Date] or (if earlier) the Termination Date, the Authority shall grant to Project Co and Project Co Parties, or procure that Project Co and the Project Co Parties are granted:

9.1.1 access to the Site; and

9.1.2 the Ancillary Rights;

in each case subject only to the Reserved Rights, the Title Conditions and the Authority's rights under this Agreement and solely for the purposes of implementing the Works and carrying out Project Co's Pre-Completion Commissioning.

Access Following Construction

9.2 After the occurrence of the Actual Completion Date [a Phase Actual Completion Date] the Authority shall grant to Project Co and Project Co Parties, or procure that Project Co and Project Co Parties are granted, access to the Facilities subject only to the Reserved Rights, the Title Conditions and the provisions of this Agreement and solely for the purposes of:

9.2.1 carrying out the Project Operations (other than those Project Operations for which Project Co is granted rights pursuant to Clause 9.1 (*Access During Construction*));

9.2.2 remedying Defects and Snagging Items [relating to that Phase] and exercising its rights under Clause 23.15 (*Authority's Maintenance Obligations*); and

9.2.3 exercising the Ancillary Rights.

Such rights shall terminate on the Expiry Date or (if earlier) the Termination Date.

Extent of Rights

9.3 The rights referred to at Clauses 9.1 (*Access During Construction*) and 9.2 (*Access Following Construction*) shall not operate or be deemed to operate as a lease of the Facilities or the Site or any part of the Facilities or the Site and Project

Co shall not have or be entitled to exclusive possession (save to the extent expressly included within the Ancillary Rights) or any estate, right, title or interest in and to the Site or the Facilities except as provided herein and shall occupy the Site as a licensee only.

9.4 The rights referred to at Clause 9.1 (*Access During Construction*) and 9.2 (*Access Following Construction*) are personal to Project Co and the Project Co Parties.

9.5 Project Co shall procure that:

9.5.1 all Project Operations carried out at the Site by or on behalf of Project Co (whether before, during or after the completion of the Works) shall be carried out in a manner which does not breach any of the Title Conditions and/or the Reserved Rights; and

9.5.2 there shall be no action, or omission to act by Project Co or a Project Co Party, which shall give rise to a right for any person to obtain title to the Site or any part of it.

9.6 Notwithstanding the terms of Clauses 9.1 (*Access During Construction*) and 9.2 (*Access Following Construction*) or any other rights granted under this Agreement, the Authority shall (if it is the legal owner of the Site), or (if it is not the legal owner of the Site) shall procure that the legal owner of the Site shall, enter into such wayleaves, deeds of easement and grant or other similar agreements with any third party that Project Co or any Project Co Party may require to be granted in favour of or by any third party, in order to exercise its rights or perform its obligations under this Agreement. The Authority shall enter into (or, where appropriate, shall procure that the legal owner of the Site shall enter into) any such wayleave, deed of easement and grant or other similar agreement, as soon as reasonably practicable after Project Co has provided to the Authority all relevant information in connection therewith provided always that Project Co has obtained at its own cost the prior agreement of the third party in terms acceptable to the Authority (acting reasonably). Project Co shall reimburse the Authority for all costs and expenses reasonably and properly incurred by the Authority (and/or the legal owner of the Site) in connection with entering into such wayleaves, deeds of easement and grant or other similar agreements at the request of Project Co.

10 THE SITE[12]

10.1 The condition of the Site shall[, subject to Clauses 10.3 and 10.4 (*Responsibility for Ground Conditions and Contamination*),] be the sole responsibility of Project Co. Accordingly (without prejudice to any other obligation of Project Co under this Agreement), Project Co shall be deemed to have:

10.1.1 carried out a Ground Physical and Geophysical Investigation and to have inspected and examined the Site and its surroundings and (where applicable) any existing structures or works on, over or under the Site;

[12] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

10.1.2 satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the form and nature of the Site, the load bearing and other relevant properties of the Site, the risk of injury or damage to property affecting the Site, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials necessary for the execution of the Works;

10.1.3 satisfied itself as to the extent and adequacy of the Site and of the rights of access to and through the Site granted hereunder and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the Site) without prejudice to Project Co's rights under this Agreement in respect of a breach by the Authority of its obligations under Clause 9.1 (*Access During Construction*) and/or Clause 9.2 (*Access Following Construction*);

10.1.4 satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties; and

10.1.5 satisfied itself as to the conditions, burdens, restrictions and reservations set out in the Title Conditions and the Reserved Rights.

10.2 To avoid doubt, Project Co accepts full responsibility for all matters referred to in Clause 10.1 and [subject to Clause 10.3 and Clause 10.4 (*Responsibility for Ground Conditions and Contamination*) [and Clause 53 *(Warranties)*],] Project Co shall:

10.2.1 not be entitled to make any claim against the Authority of any nature whatsoever save, if applicable, as expressly provided in Clause 30 (*Delay Events*), on any grounds including (without limitation) the fact that incorrect or insufficient information on any matter relating to the Site was given to it by any person, whether or not the Authority or an Authority Party; and

10.2.2 be responsible for, and hold the Authority harmless from, cleaning up and/or otherwise dealing with any Contamination at the Site so that it shall at all times comply with its obligations under this Agreement including (without limitation) complying with, at its own cost, any applicable Laws and any Consents, orders, notices or directions of any regulatory body (whether made against the Authority or Project Co).

[Responsibility for Ground Conditions and Contamination

10.3 To the extent that unforeseen ground conditions and/or Contamination exist in any parts of the Site which are under existing buildings as at the Commencement Date and which it is not practical for Project Co to investigate or survey, Project Co shall not be responsible for them unless they were discovered by the Ground Physical and Geophysical Investigation and accordingly identified in Section 3 *(Authority's Construction Requirements)* of Schedule 6 *(Construction Matters)* or unless they should reasonably have been discoverable if the Ground Physical and

Geophysical Investigation had been properly carried out or unless they would have been identified had Project Co carried out such additional surveys as it would have been reasonable to expect an experienced contractor to have carried out in the circumstances. The Authority shall be responsible for any ground conditions and/or Contamination for which Project Co is not responsible by virtue of this Clause 10.3 (*Responsibility for Ground Conditions and Contamination*). This Clause 10.3 (*Responsibility for Ground Conditions and Contamination*) applies to the following areas: [♦].

10.4 Where pursuant to Clause 10.3 (*Responsibility for Ground Conditions and Contamination*) the Authority is responsible for any of the matters referred to then the following provisions shall apply:

10.4.1 during the Construction Phase any such matter shall be deemed to be a Compensation Event for the purposes of this Agreement;

10.4.2 where any such matter arises during the Operational Term it shall, for the avoidance of doubt, be deemed to be an Excusing Cause for the purposes of Clause 52 *(Excusing Causes)*;

10.4.3 further where any such matter arises during the Operational Term and any work or change to the Services is required or instructed to be done in consequence of it, it shall be deemed to be a Qualifying Change; and

10.4.4 where any such matter is Contamination (whether during the Construction Phase or the Operational Term) the Authority shall further hold Project Co harmless from cleaning up and otherwise dealing with the Contamination and shall indemnify Project Co in respect of all Direct Losses incurred by Project Co resulting from such Contamination.]

10.5 Project Co shall, in relation to the Utilities required or affected as a result of carrying out the Works:

10.5.1 be responsible for determining the location of such Utilities as may be at the Site and for the maintenance of access to such Utilities at the Site;

10.5.2 make and rely upon all necessary investigations and surveys as to such Utilities at the Site;

10.5.3 be responsible and make provision for lawfully diverting, disconnecting or otherwise dealing as may be necessary with any Utilities not within the Site;

10.5.4 pay to all Relevant Authorities or undertakings all costs and expenses incurred in diverting, disconnecting or otherwise carrying out works in respect of such Utilities within the Site; and

10.5.5 otherwise do all that is required in relation to the Utilities required for the purpose of the carrying out of the Works [including but not limited to using all reasonable endeavours to conclude with each Utilities Third Party the terms of the relevant Utilities Agreement, subject to Clause 9.6 (*Extent of Rights*)).]

11 CONSENTS & PLANNING APPROVAL

11.1 Project Co shall be responsible for:

11.1.1 obtaining all Consents which may be required for the performance of the Project Operations; and

11.1.2 implementing each Consent within the period of its validity in accordance with its terms.[13]

11.2 In the event that:

11.2.1 a Consent that has been granted is subsequently amended, repealed, revoked or otherwise ceases to be in full force and effect in accordance with its terms as a consequence of any action by a Relevant Authority;

11.2.2 affected persons are entitled to claim compensation for the adverse effects of such action under a statutory scheme of compensation; and

11.2.3 Project Co is not entitled in its own name to claim under that scheme but the Authority is so entitled,

the Authority must use all reasonable endeavours, at the request and at the cost of Project Co, to claim or to include within its claim such sums as Project Co acting reasonably requests and shall pay to Project Co the part of any compensation that it receives under that scheme that relates to the sums claimed at the request of Project Co.

11.3 Each party shall, at its own cost, comply with its responsibilities for complying with or discharging the conditions attached to the Planning Approval, as determined by reference to the table set out at Schedule 27 (*Planning Responsibilities Matrix*).[14]

[13] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

[14] Planning Responsibilities Matrix will be agreed by the parties prior to financial close.

PART 3: DESIGN AND CONSTRUCTION

12 THE DESIGN CONSTRUCTION AND COMMISSIONING PROCESS[15]

Overall Responsibility

12.1 Project Co shall carry out the Works:

12.1.1 so as to procure satisfaction of the Authority's Construction Requirements;

12.1.2 in accordance with Project Co's Proposals;

12.1.3 in accordance with the Quality Plans; and

12.1.4 in accordance with the terms of this Agreement.

12.2 To avoid doubt, the obligations in Clauses 12.1.1, 12.1.2, 12.1.3 and 12.1.4 are independent obligations. In particular:

12.2.1 the fact that Project Co has complied with Project Co's Proposals and/or the Quality Plans shall not be a defence to an allegation that Project Co has not satisfied the Authority's Construction Requirements; and

12.2.2 the fact that Project Co has satisfied the Authority's Construction Requirements shall not be a defence to an allegation that Project Co has failed to comply with Project Co's Proposals and/or the Quality Plans.

Design responsibility

12.3 Project Co warrants that it has used, and will continue to use, the degree of skill and care in the design of the Facilities that would reasonably be expected of a competent professional designer experienced in carrying out design activities of a similar nature, scope and complexity to those comprised in the Works.

Corporate Identity and Signage

12.4 The parties acknowledge that the Authority may, from time to time during the Construction Phase, be required to procure the erection of hoarding, site boards, plaques and/or other signage in connection with the Project. Accordingly:

12.4.1 where requested by the Authority (acting reasonably), Project Co shall procure the erection and maintenance of such hoarding, site boards, plaques and/or other signage as the Authority may require; and

[15] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

12.4.2 the size, design, information disclosed, position and materials used in connection with such hoarding, site boards, plaques or other signage shall be approved by the Authority, such approval not to be unreasonably withheld; and

12.4.3 for the purposes of this Clause 12.4 *(Corporate Identity and Signage)*, the Authority shall be deemed to be acting reasonably where any proposals made by it and/or any approvals exercised by it conform with the Welsh Language Standards and any further relevant guidance, amendments or supplements issued by the Welsh Government from time to time in connection with bilingual use of the Welsh and English language.

Authority design approval

12.5 The Authority confirms that, as at the date of this Agreement, it has reviewed such of Project Co's Proposals as have been initialled by the Authority and that, subject to any qualifications and/or comments notified by the Authority to Project Co in writing and set out in [♦] such proposals satisfy the Authority's requirements in respect of Operational Functionality, so far as can reasonably be determined given the level of detail of Design Data which has been disclosed to the Authority.

12.6 Project Co shall develop and finalise the design and specification of the Works and the Authority shall review the Reviewable Design Data in accordance with Schedule 8 (*Review Procedure*) and the provisions of this Clause 12.6 (*Authority design approval*):

12.6.1 Project Co shall submit the Reviewable Design Data and the design of any Changes developed in accordance with the [Reviewable Design Data Programme and the] procedure set out in Schedule 16 (*Change Protocol*) to the Authority's Representative for review under Schedule 8 (*Review Procedure*). Project Co shall not commence or permit the commencement of construction of the part or parts of the Facilities to which such Reviewable Design Data relates until it has submitted the appropriate Reviewable Design Data and either it is confirmed by the Authority's Representative that Project Co is entitled to proceed with construction in accordance with paragraph 3.3 of Schedule 8 (*Review Procedure*) or Project Co is:

(a) disputing the status of such Reviewable Design Data pursuant to paragraph 1.3.1 or paragraph 4.3 of Schedule 8 (*Review Procedure*); and

(b) proceeding at risk pursuant to paragraph 1.3.2 of Schedule 8 (*Review Procedure*).

12.6.2 with effect from the date at which any item of Reviewable Design Data is or becomes an Approved RDD Item in accordance with Schedule 8 (*Review Procedure*), such Approved RDD Item shall for the purposes of this Agreement be deemed to have satisfied the requirements of the

Authority in the manner and to the extent set out in, Table A in Appendix 1 of Schedule 8 (*Review Procedure*);

12.6.3 Project Co shall allow the Authority's Representative, at any time, a reasonable opportunity to view any items of Design Data, which shall be made available to the Authority's Representative as soon as practicable following receipt of any written request from the Authority's Representative; and

12.6.4 Project Co shall procure that the Contractor establishes and maintains a computerised design database which Project Co and the Authority's Representative may access remotely by computer to view drawings comprised within the Design Data (including Reviewable Design Data) and electronically store and/or print copies of such Design Data. In the event of the Authority's Representative being unable to access such design database, Project Co shall procure that it is made available for inspection by the Authority's Representative, or any other person authorised by the Authority's Representative.

Rectification of Project Co's Proposals

12.7 Without prejudice to Clause 12.1 (*Overall Responsibility*), if it should be found that Project Co's Proposals do not meet the requirements of the Authority's Construction Requirements, Project Co shall at its own expense, and in accordance with Clause 12.8 (*Rectification of Project Co's Proposals*) below, amend Project Co's Proposals and rectify the Works or any part affected. Such amendment and rectification shall have the effect that:

12.7.1 Project Co's Proposals shall satisfy the Authority's Construction Requirements; and

12.7.2 following the amendment or rectification, the structural, mechanical and electrical performance of the Facilities will be of an equivalent standard of performance to that set out in Project Co's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made).

12.8 Where Clause 12.7 (*Rectification of Project Co's Proposals*) applies, Project Co shall submit its proposal for amending Project Co's Proposals and rectifying the Works (or any part affected) to the Authority's Representative for review under Schedule 8 (*Review Procedure*) and shall not amend Project Co's Proposals or commence or allow the commencement of the rectification of the Works (or any part affected) until it is permitted to proceed in accordance with Schedule 8 (*Review Procedure*).

Construction Skills Certification Scheme

12.9 Project Co shall ensure that all persons engaged in carrying out the Works (or part thereof) on the Site are accredited under the Construction Skills Certification Scheme or an equivalent scheme and where Project Co enters into a sub-contract

for the purposes of carrying out the Works, Project Co shall cause a term to be included in such sub-contract:

12.9.1 which requires the sub-contractor to ensure that such persons are accredited under the Construction Skills Certification Scheme or an equivalent scheme; and

12.9.2 in the same terms as that set out in this Clause 12.9 (*Construction Skills Certification Scheme*) (including for the avoidance of doubt this Clause 12.9.2) subject only to modification to refer to the correct designation of the equivalent party as Project Co and sub-contractor as the case may be.

Building Information Model

12.10 The Authority and Project Co shall:

12.10.1 comply with their respective obligations set out in the BIM Protocol;

12.10.2 have the benefit of any rights granted to them in the BIM Protocol; and

12.10.3 have the benefit of any limitations or exclusions of their liability contained in the BIM Protocol.

13 RIGHT OF ACCESS OF AUTHORITY'S REPRESENTATIVE

Access to the Site

13.1 Project Co shall procure that:

13.1.1 subject to complying with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time, the Authority's Representative (together with any specialist advisers) shall have unrestricted access at all reasonable times during normal working hours to:

(a) monitor and view the Works at the Site on reasonable prior notice appropriate to the circumstances, provided that the notice procedures in this Clause 13.1.1(a) shall not apply to the right of access for the Authority's Representative and his staff and visitors to the office and other facilities provided at the Site for his use; and

(b) subject to obtaining the consent of the relevant manufacturer or supplier (which Project Co agrees to use all reasonable endeavours to obtain), visit any site or workshop where materials, plant or equipment are being manufactured, prepared or stored for use in the Works for the purposes of general inspection and of attending any test or investigation being carried out in respect of the Works;

13.1.2 the Authority's Representative shall have such rights of access to the Site in an emergency as he (acting reasonably) considers suitable in the circumstances;

13.1.3 monthly progress meetings and site meetings are held and that the Authority's Representative shall have the right to attend such monthly progress meetings and site meetings and to attend such other meetings as the Authority's Representative may reasonably request; and

13.1.4 satisfactory facilities are made available to accommodate the Authority's Representative and his staff or visitors (when accompanied by a representative of the Authority) for the purposes of Clause 13.1.1(a) and (b) (*Access to Site*), subject to Project Co and the Contractor's construction obligations not being adversely affected and the Authority reimbursing Project Co for any reasonable costs or expenses incurred in connection with the accommodation of the Authority under this Clause 13.1 (*Access to the Site*).

Increased monitoring

13.2 If, following any viewing, visit or inspection made pursuant to Clause 13.1.1, it is discovered that there are defects in the Works or that Project Co has failed to comply with the Authority's Construction Requirements or Project Co's Proposals, the Authority's Representative may (without prejudice to any other right or remedy available to the Authority) by notice to Project Co increase the level of monitoring of Project Co until such time as Project Co shall have demonstrated to the satisfaction of the Authority that it is capable of performing and will perform all its obligations to the Authority under this Agreement. Project Co shall compensate the Authority for any reasonable additional costs incurred as a result of such increased monitoring.

Right to Open Up

13.3 Subject to Clause 13.4 (*Right to Open Up*), the Authority's Representative shall have the right at any time prior to the Actual Completion Date [a Phase Actual Completion Date] to request Project Co to open up and inspect any part or parts of the Works [relating to the relevant Phase] where the Authority's Representative reasonably believes that such part or parts of the Works [relating to the relevant Phase] is or are defective and Project Co shall comply with such request.

13.4 Prior to exercising his right pursuant to Clause 13.3 (*Right to Open Up*) above, the Authority's Representative shall notify Project Co of his intention to exercise such right, setting out detailed reasons.

13.5 If, following the exercise by the Authority's Representative of his right pursuant to Clause 13.3 (*Right to Open Up*), the inspection shows that the relevant part or parts of the Works are not defective then Clause 30.3.4 shall apply.

13.6 If, following the exercise by the Authority's Representative of his right pursuant to Clause 13.3 (*Right to Open Up*), the inspection shows that the relevant part or parts of the Works is or are defective, Project Co shall rectify and make good such Defect(s) and any consequence of such rectification and/or making good Defect(s) shall be carried out by Project Co at no cost to the Authority and Project Co shall not be entitled to any extension of time in relation to such rectification and making good of the Works.

13.7 If, following the exercise by the Authority's Representative of his right pursuant to Clause 13.3 (*Right to Open Up*), the Authority's Representative is of the opinion that the inspection shows that the relevant part or parts of the Works is or are defective and Project Co does not agree with such opinion, the matter shall be determined in accordance with Schedule 20 (*Dispute Resolution Procedure*).

13.8 Without prejudice to the rights of the Authority's Representative pursuant to this Clause 13 (*Right of Access of Authority's Representative*) the parties acknowledge that the exercise of such rights shall not in any way affect the obligations of Project Co under this Agreement save as expressly set out in this Clause 13 (*Right of Access of Authority's Representative*).

Safety during Construction

13.9 The provisions of Section 2 (*Safety During Construction*) of Schedule 6 (*Construction Matters*) shall apply to matters of safety.

14 PROGRAMME AND DATES FOR COMPLETION

Dates for Completion

14.1 Project Co shall complete the Works [relating to a Phase] by the Completion Date [relevant Phase Completion Date]. Without prejudice to Clause 40 (*Project Co Event of Default*), 42 (*Authority Voluntary Termination*), 46 (*Compensation on Termination*) and 47 (*Consequences of Termination*) the Authority shall not be entitled to claim liquidated or general damages in respect of any delay which elapses between the Completion Date [Phase Completion Date] and the Actual Completion Date [relevant Phase Actual Completion Date].

The Programme[16]

14.2 Any Programme submitted in accordance with the provisions set out below shall be prepared in accordance with Good Industry Practice and shall be in sufficient detail so as to enable the Authority's Representative to monitor the progress including all commissioning activities and likely future progress of the Works.

[16] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

14.3 The initial Programme is set out at Schedule 7 (*The Programme*). Any change to the Programme shall only be made in accordance with this Clause 14 (*Programme and Dates for Completion*) and Schedule 8 (*Review Procedure*). Project Co shall promptly submit to the Authority's Representative a copy of any version of the Programme varied in accordance with this Clause 14 (*Programme and dates for Completion*) and Schedule 8 (*Review Procedure*).

14.4 If it appears to the Authority's Representative at any time that the actual progress of the Works has significantly fallen behind the Programme, then the Authority's Representative shall be entitled to require Project Co to submit to the Authority's Representative a report identifying the reasons for the delay and, unless the event causing the delay is still subsisting and it is not possible to predict with any certainty when the delay might come to an end, require Project Co (at the Authority's option):

14.4.1 to produce and submit to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*) a revised Programme showing the manner and the periods in which the Works will be carried out to ensure completion; and/or

14.4.2 to produce and submit to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*) a revised Programme showing the steps which are to be taken to eliminate or reduce the delay.

[Early completion

14.5 Notwithstanding that the Works [relating to a Phase] may have been completed in accordance with this Agreement, the Actual Completion Date [Phase Actual Completion Date] may only occur on a date on or after the Completion Date [Phase Completion Date] unless the Authority, in its absolute discretion, agrees otherwise in writing.

14.6 Project Co shall notify the Authority's Representative if at any time the actual progress of the Works [relating to a Phase] is significantly ahead of the Programme such that Project Co anticipates that the Actual Completion Date [Phase Actual Completion Date] could occur earlier than the Completion Date [relevant Phase Completion Date] in which case the Authority's Representative shall be entitled to require Project Co to produce and submit to the Authority's Representative a revised Programme showing the manner and the periods in which the Works [relating to the relevant Phase] will be carried out and what the revised date for completion would be to enable:

14.6.1 the Authority to consider (at its absolute discretion) whether to agree an earlier date for completion if requested by Project Co to do so; and

14.6.2 the parties to consider what modifications (if any) will be required to the Agreement in order to accommodate such earlier date for completion if agreed to by the Authority pursuant to Clause 14.5 (*Early completion*).]

15 INDEPENDENT TESTER

Appointment

15.1 The parties have on or prior to the date of this Agreement, in compliance with all Law relating to procurement which is applicable to either party, appointed a suitably qualified and experienced consultant to act as the Independent Tester for the purposes of this Agreement upon the terms of the Independent Tester Contract.

Changes to terms of appointment

15.2 Neither the Authority nor Project Co shall without the other's prior written approval (not to be unreasonably withheld or delayed):

15.2.1 terminate, repudiate or discharge the Independent Tester Contract or treat the same as having been terminated, repudiated or otherwise discharged;

15.2.2 waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Independent Tester; or

15.2.3 vary the terms of the Independent Tester Contract or the service performed or to be performed by the Independent Tester.

15.3 The parties shall comply with and fulfil their respective duties and obligations arising under or in connection with the Independent Tester Contract.

Co-operation

15.4 The parties agree to co-operate with each other generally in relation to all matters within the scope of or in connection with the Independent Tester Contract. All instructions and representations issued or made by either of the parties to the Independent Tester shall be simultaneously copied to the other and both parties shall be entitled to attend all inspections undertaken by or meetings involving the Independent Tester.

Replacement

15.5 If the Independent Tester's appointment is terminated otherwise than for full performance, the parties shall liaise and co-operate with each other in order to appoint, in accordance with this Clause 15.5 *(Replacement)*, a replacement consultant to act as the Independent Tester as soon as reasonably practicable. The identity of any such replacement shall be as agreed by the parties and the terms of his appointment shall, unless otherwise agreed, be as set out in the Independent Tester Contract.

15.6 If the parties fail to agree the identity and/or terms of a replacement Independent Tester in accordance with Clause 15.5 *(Replacement)* within ten (10) Business Days of the original Independent Tester's appointment being terminated then such disagreement shall be referred for resolution in accordance with Schedule 20 (*Dispute Resolution Procedure*).

16 EQUIPMENT

The provisions of Schedule 11 (*Equipment*) shall apply in respect of the procurement, installation, commissioning and maintenance of Equipment.

17 PRE-COMPLETION COMMISSIONING AND COMPLETION

17.1 Not less than [six (6)] months before the Completion Date [a Phase Completion Date], Project Co shall provide the Authority with a draft of the Final Commissioning Programme [for the relevant Phase] as jointly developed by the Authority and Project Co in accordance with the provisions of Clause 17.2 and 17.3 *(Pre-Completion Commissioning and Completion)* and Schedule 10 (*Outline Commissioning Programme*). The Authority shall provide Project Co with comments on the draft Final Commissioning Programme [for the relevant Phase] submitted to it within [fifteen (15)] Business Days. The parties shall, within [fifteen (15)] Business Days of receipt by Project Co of the Authority's comments agree the terms of the Final Commissioning Programme [for the relevant Phase] provided that the Authority may by prior notice to Project Co change the scope and time of the Authority's Commissioning or the Authority's Post Completion Commissioning and reimburse Project Co its reasonable costs incurred as a result of such change in scope or time of the Authority's Commissioning. If the parties are unable to agree the Final Commissioning Programme [for the relevant Phase] or the change in scope or time of the Authority's Commissioning by [♦], the matter shall be referred for determination in accordance with Schedule 20 (*Dispute Resolution Procedure*).

17.2 The Final Commissioning Programme [for each Phase] shall be in accordance with the Outline Commissioning Programme and shall impose no greater or more onerous obligations on the Authority than those set out in the Outline Commissioning Programme (unless otherwise agreed by the Authority in its absolute discretion). The Final Commissioning Programme shall then replace the Outline Commissioning Programme [as it relates to that Phase].

17.3 The Final Commissioning Programme shall describe the steps necessary, the party responsible for taking each of such steps and the timing and sequence of each of such steps to ensure [insofar as relevant for the Phase]:

17.3.1 that Project Co's Pre-Completion Commissioning and the Authority's Commissioning will not delay the Actual Completion Date [Phase Actual Completion Date] from occurring by the Completion Date [Phase Completion Date]; and

17.3.2 that Project Co's Post Completion Commissioning and the Authority's Post Completion Commissioning are completed by the Commissioning End Date.

17.4 The parties shall procure that the steps that they are responsible for carrying out and completing pursuant to the Final Commissioning Programme [for the relevant Phase] include, [in the case of Project Co's activities, the activities described at paragraph [♦] of the Authority's Construction Requirements].

17.5 Project Co shall notify the Independent Tester and the Authority's Representative of the date when Project Co (acting reasonably) considers that [a Phase of] the Works will be complete in accordance with the Completion Criteria not less than [♦] months prior to such anticipated completion. Such notification shall trigger the completion activities of the Independent Tester under this Clause.

17.6 The parties each undertake to co-operate with the Independent Tester to ensure that the Independent Tester is familiar with all necessary aspects of the Project for the purposes of its role as described in this Clause.

Commissioning prior to Completion Date

17.7 Project Co shall [insofar as relevant for each Phase]:

17.7.1 undertake Project Co's Pre-Completion Commissioning in accordance with the [relevant] Final Commissioning Programme; and

17.7.2 permit the Authority to undertake the Authority's Commissioning [including permitting specialist contractors engaged by the Authority to deliver and install equipment] on such dates as agreed between the Authority and Project Co, in accordance with the Final Commissioning Programme,

and the Authority shall undertake the Authority's Commissioning in accordance with the [relevant] Final Commissioning Programme and so as not to cause material damage to the Works.

17.8 Project Co shall give written notice to the Independent Tester and the Authority of the commencement of Project Co's Pre-Completion Commissioning [in relation to a Phase] and shall ensure that the Independent Tester and the Authority's Representative are invited to witness all of, and are provided with all information they may reasonably require in relation to, Project Co's Pre-Completion Commissioning [of the relevant Phase] and that the Independent Tester is invited to comment on Project Co's Pre-Completion Commissioning [of the relevant Phase].

17.9 Project Co shall (or shall procure that the Contractor shall), give the Authority access to the Facilities at such times as may be set out in the [relevant] Final Commissioning Programme to enable the Authority to undertake the Authority's Commissioning in accordance with the Final Commissioning Programme [for the relevant Phase] for the period prior to completion [of the relevant Phase]. When exercising such rights the Authority shall comply with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities, the Contractor's Site Rules

from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.

Pre-Completion inspection

17.10 Project Co shall give the Independent Tester and the Authority's Representative not less than [twenty (20)] Business Days' notice and not more than [thirty (30)] Business Days' notice of the date upon which Project Co considers that the Works [relating to a Phase] will be complete and the tests on completion required [for the relevant Phase] to be performed in accordance with the Final Commissioning Programme [for the relevant Phase] will be carried out. Following receipt of the notice specified in this Clause 17.10 (*Pre-Completion Inspection*) the Authority's Representative and the Independent Tester shall be entitled to inspect the Works [relating to the relevant Phase] on the date or dates reasonably specified by Project Co in accordance with this Clause 17.10 (*Pre-Completion Inspection*), and to attend any of the tests on completion. Project Co shall, if so requested, accompany the Authority's Representative and the Independent Tester on any such inspection.

Pre-Completion matters

17.11 The parties shall procure that the Independent Tester, within [five (5)] Business Days of any inspection made pursuant to Clause 17.10 (*Pre-Completion Inspection*), notifies Project Co and the Authority of any outstanding matters (including, without limitation, the repetition of any of the tests on completion which are required to be carried out and passed in accordance with the Final Commissioning Programme [for the relevant Phase]) which are required to be attended to before the Works [relating to the relevant Phase] can be considered to be complete in accordance with the Completion Criteria. Project Co shall attend to such matters and shall, if necessary, give the Independent Tester further notices in accordance with Clause 17.10 (*Pre-Completion Inspection*) (but dealing only with matters raised in the notification under this Clause 17.11 (*Pre-Completion Matters*)) so that the procedures in Clause 17.10 (*Pre-Completion Inspection*) and this Clause 17.11 (*Pre-Completion Matters*) are repeated as often as may be necessary to ensure that all outstanding matters in relation to the Works [relating to the relevant Phase] are attended to.

[Phase] Completion Certificate

17.12 Pursuant to the terms of the Independent Tester Contract and subject to Clauses 17.14 to 17.16 (*Snagging Items*), the parties shall procure that the Independent Tester, when he is satisfied that (i) the Facilities are [a Phase of the Facilities is] complete in accordance with the Completion Criteria, issues a Certificate of Practical Completion [in respect of that Phase] to that effect to the Authority and to Project Co; and (ii) the Snagging Items have been completed to his satisfaction in accordance with Clauses 17.14 to 17.16 (*Snagging Items*), issues a Snagging Items Completion Certificate to that effect to the Authority and Project Co.

17.13 Without prejudice to Clauses 17.14 and 17.17 (*Snagging Items*), the issue of the Certificate of Practical Completion [in respect of a Phase] shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence (but only for the purpose of ascertaining the [relevant] Payment Commencement Date), that the Facilities

were [the Phase was] complete in accordance with the Completion Criteria on the date stated in the [relevant] Certificate of Practical Completion.

Snagging Items

17.14 The Independent Tester shall on the same day as the date of issue of the Certificate of Practical Completion [in relation to a Phase] issue to Project Co and the Authority a list of the relevant Snagging Items (the "**Snagging List**"). Within [five (5)] Business Days after the date of receipt from the Independent Tester of the Snagging List, Project Co will provide to the Authority and the Independent Tester a reasonable programme (the **"Snagging Programme"**) for making good each Snagging Item set out in the Snagging List provided that the Snagging Programme will require that each Snagging Item will be made good within twenty (20) Business Days after the date of provision of the Snagging Programme or, where it is not reasonably practicable to make good within twenty (20) Business Days due to the lead times for supplies or materials, within such time as is reasonably practicable. The parties will seek to agree the Snagging Programme or in default of agreement will refer the matter for determination under Clause 57 (*Dispute Resolution Procedure*).

17.15 Project Co shall, in consultation with the Authority's Representative and in such a manner as to cause as little disruption as reasonably practicable to the Authority's Post Completion Commissioning and the Authority's use of the Facilities, make good each Snagging Item in accordance with the Snagging Programme to the satisfaction of the Independent Tester. Upon satisfactory completion of the Snagging List, the Independent Tester will issue the Snagging Items Completion Certificate in accordance with the Independent Tester Contract and Schedule 22 (*Certificates*).

17.16 If any Snagging Item has not been rectified within twenty (20) Business Days after issue of the Snagging Programme (or such longer period as is agreed in the Snagging Programme pursuant to Clause 17.14 (*Snagging Items*)) then the Authority will be entitled to effect such repairs as may be necessary to rectify the Snagging Item(s) and recover the costs of effecting such repairs from Project Co as a debt.

17.17 The issue of the Certificate of Practical Completion [in respect of a Phase] shall in no way affect or diminish the obligations of Project Co under this Agreement including in respect of any Defects, or any liability for Deductions in accordance with Schedule 14 (*Payment Mechanism)*.

As-built specification

17.18 [[Within [♦] days] after the issue of the Certificate of Practical Completion [in relation to a Phase] [(being [♦] days following the associated 'data drop' pursuant to the BIM Protocol)], Project Co shall provide to the Authority a hard copy of the "as-built" drawings, "as-built" building specification and all ["final issue" construction drawings] relating to [that Phase of] the Works, together with a written statement from Project Co's Representative to the Authority's Representative certifying that all such items are true and accurate.]

[WiFi Completion

17.19 Project Co and the Authority shall procure that the Independent Tester shall, in accordance with the Independent Tester Contract and no earlier than the date that falls [♦] weeks following the [relevant Phase] Actual Completion Date carry out the WiFi Post-Completion Tests so that they have been completed by no later than the WiFi Tests Completion Date. The Authority and Project Co shall be entitled to attend such WiFi Post-Completion Tests. Project Co shall, if so requested, accompany the Authority's Representative and the Independent Tester in relation to the carrying out of the WiFi Post Completion Tests.

17.20 The parties shall procure that the Independent Tester, within [five (5)] Business Days of any inspection made pursuant to Clause 17.19 (*WiFi Completion*), notifies Project Co and the Authority of any outstanding matters (including, without limitation, the repetition of any of the WiFi Post-Completion Tests which are required to be carried out and passed in accordance with the Final Commissioning Programme) which are required to be attended to before the WiFi Post-Completion Tests can be considered to be complete in accordance with the WiFi Post-Completion Completion Criteria. Project Co shall attend to such matters at its own cost and shall give the Independent Tester further notice of the date on which Project Co considers that such matters have been attended to so that the procedures in Clause 17.19 (*WiFi Completion*) and this Clause 17.20 (*WiFi Completion*) are repeated as often as may be necessary to ensure that all such outstanding matters are attended to and that the WiFi Post-Completion Completion Criteria are satisfied.

17.21 Pursuant to the terms of the Independent Tester Contract, the parties shall procure that the Independent Tester shall, when he is satisfied that the WiFi Post-Completion Tests have been passed, issue a Certificate of WiFi Completion to that effect and the issue of the Certificate of WiFi Completion shall in the absence of manifest error, bad faith or fraud, be conclusive evidence that the WiFi Post-Completion Tests have been satisfied on the date stated in such certificate and that the Retained WiFi Amount shall be paid to Project Co on the WiFi Actual Completion Date [for the relevant Phase] in accordance with paragraph 1.1 of Section 2 (*Calculation of Service Payments*) of Schedule 14 (*Payment Mechanism*).

17.22 If the WiFi Actual Completion Date shall not have occurred on the date that falls [♦] weeks after the [relevant Phase] Actual Completion Date the Authority, acting reasonably, may itself take or engage others to remedy any of the outstanding matters that remain to be carried out in accordance with Good Industry Practice provided that if the Authority either takes steps itself or engages with others to remedy any of the outstanding matters that remain to be carried out it will be entitled to recover the costs of effecting such works from Project Co as a debt.

17.23 The issue of the Certificate of WiFi Completion [in respect of a Phase] shall in no way affect or diminish the obligations of Project Co under this Agreement including in respect of any Defects, or any liability for Deductions in accordance with Schedule 14 (*Payment Mechanism)*.[17]

[17] Requirement for post completion Wi-fi testing to be reviewed on a project specific basis, in consultation with technical advisers and to reflect the approach to commissioning and testing. Authority to consider whether requirement to be achieved on completion of specific Phases, where applicable.

18 POST COMPLETION COMMISSIONING[18]

Commissioning

18.1 Project Co and the Authority shall, within [♦] Business Days following the Actual Completion Date [Phase Actual Completion Date], respectively undertake and complete Project Co's Post-Completion Commissioning and the Authority's Post Completion Commissioning, in accordance with the Final Commissioning Programme [for the relevant Phase]. Both parties shall, at all times, and in particular in the period between the Actual Completion Date [Phase Actual Completion Date] and the Actual Commissioning End Date [for the relevant Phase], use reasonable endeavours to assist the other party to ensure compliance with the Final Commissioning Programme [for the relevant Phase].

Information

18.2 Project Co shall ensure that the Authority's Representative is provided with all the information he may reasonably require in relation to Project Co's Post-Completion Commissioning and the Authority shall ensure that Project Co is provided with all information Project Co may reasonably require in relation to the Authority's Post Completion Commissioning.

18.3 If the Authority's Representative, acting reasonably, makes any comment in relation to the carrying out of Project Co's Post-Completion Commissioning, such comments shall be taken into account by Project Co and if Project Co, acting reasonably, makes any comment in relation to the carrying out of the Authority's Post Completion Commissioning, such comment shall be taken into account by the Authority.

18.4 On the completion of Project Co's Post-Completion Commissioning and the Authority's Post Completion Commissioning [for a Phase] the Independent Tester shall issue the Commissioning Completion Certificate [for that Phase].

Operational Manuals

18.5 Project Co shall make available on the Site to the Authority's Representative:

18.5.1 at least [♦] weeks prior to the anticipated Actual Completion Date [Phase Actual Completion Date], [♦] [paper] copies of a draft operation and maintenance manual [in connection with the relevant Phase] in sufficient detail to allow the Authority to plan for the safe and efficient operation of the Facilities;

18.5.2 on or before the Actual Completion Date [Phase Actual Completion Date] [♦] [paper] copies of a final draft operation and maintenance manual [in connection with the relevant Phase] in sufficient detail to allow the Authority to operate and use the Facilities safely and efficiently;

[18] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

18.5.3 within [♦] weeks following the Actual Completion Date [Phase Actual Completion Date], the principal operation and maintenance manual [in connection with the relevant Phase];

in each case in addition to the 'data drops' required pursuant to the BIM Protocol and including all manufacturers' instructions relating to Equipment installed by Project Co and [♦].

18.6 Project Co shall provide to the Authority such information after the Actual Completion Date [Phase Actual Completion Date] as relates to any Snagging Items or rectification of Defect [in relation to the relevant Phase] as is reasonably necessary to allow for the updating of any of the items listed in Clause 18.5 (*Operation Manuals*).

18.7 On termination of this Agreement (howsoever arising) prior to the provision by Project Co in accordance with Clause 18.5 (*Operation Manuals*) of the items listed therein, Project Co shall within ten (10) Business Days of such termination provide a copy of any operating and maintenance manual not yet provided (completed as appropriate to the date of termination) to the Authority.

[Decanting, Decommissioning and Equipment Transfer

18.8 The Authority and Project Co shall, as appropriate, undertake any necessary decanting and decommissioning activities in accordance with the requirements of the Final Commissioning Programme [for the relevant Phase] and Appendix [♦] of Schedule 10 (*Outline Commissioning Programme*), and any Equipment transfer in accordance with Schedule 11 (*Equipment*), such that Project Co is able to perform its obligations in subsequent Phases.]

19 FOSSILS AND ANTIQUITIES

Property

19.1 As between the parties, all fossils, antiquities, and other objects having artistic, historic or monetary value and human remains which may be found on or at the Site are or shall become, upon discovery, the absolute property of the Authority.

Discovery

19.2 Upon the discovery of any such item during the course of the Works, Project Co shall:

19.2.1 immediately notify the Authority's Representative of such discovery;

19.2.2 take all steps not to disturb the object and, if necessary, cease any Works in so far as the carrying out of such Works would endanger the object or prevent or impede its excavation; and

19.2.3 take all necessary steps to preserve the object in the same position and condition in which it was found.

Action

19.3 The Authority shall procure that the Authority's Representative promptly, and in any event within ten (10) Business Days of receipt of notice pursuant to Clause 19.2.1, issues an instruction to Project Co specifying what action the Authority's Representative requires Project Co to take in relation to such discovery.

19.4 Project Co shall promptly and diligently comply with any instruction issued by the Authority's Representative referred to in Clause 19.3 (*Action*) above (except and to the extent that such instruction constitutes an Authority Change pursuant to Clause 19.6 (*Action*) below in which case the provisions of Schedule 16 (*Change Protocol*) shall apply), at its own cost.

19.5 If directed by the Authority's Representative, Project Co shall allow representatives of the Authority to enter the Site for the purposes of removal or disposal of such discovery provided that such entry shall be subject to the Authority complying with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.

19.6 If, in relation to such discovery, the Authority requires Project Co to carry out works (being any work of alteration, addition, demolition or extension or variation in the Works) which are not works which would be necessary for the purpose of compliance with Law or any Consents, it must issue an Authority Change Notice in accordance with the provisions of Schedule 16 (*Change Protocol*).

PART 4: QUALITY ASSURANCE

20 QUALITY ASSURANCE

Quality Plans and Systems

20.1 Project Co shall procure that all aspects of the Project Operations are the subject of quality management systems in accordance with the provisions of this Clause 20 (*Quality Assurance*).

20.2 The quality management systems referred to in Clause 20.1 (*Quality Plans and Systems*) above shall be reflected in appropriate quality plans, the standard of which shall be consistent with BS EN ISO 9001 or 9002 (as the case may be) or any equivalent standard which is generally recognised as having replaced them (or either of them).

20.3 Without limitation to the generality of Clause 20.2 (*Quality Plans and Systems*), there shall be:

20.3.1 a Design Quality Plan;

20.3.2 a Construction Quality Plan; and

20.3.3 a Services Quality Plan for each Service,

provided that the Design Quality Plan and the Construction Quality Plan may be incorporated into one document.

20.4 Project Co shall procure that the Project Operations are carried out in compliance with the Quality Plans. All Quality Plans shall be submitted to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*) and Project Co shall not be entitled to implement or procure the implementation of any Quality Plan unless Project Co is entitled to proceed with such implementation pursuant to Schedule 8 (*Review Procedure*).

20.5 Project Co shall implement the quality management systems referred to in Clause 20.1 (*Quality Plans and Systems*) and shall procure that:

20.5.1 the Contractor implements the Design Quality Plan;

20.5.2 the Contractor implements the Construction Quality Plan; and

20.5.3 each Service Provider implements the relevant Services Quality Plan for each Service being provided by that Service Provider.

20.6 Where any aspect of the Project Operations is performed by more than one contractor or subcontractor, then the provisions of this Clause 20 (*Quality Assurance*) (in so far as relevant or appropriate to the activities to be performed by such contractor or subcontractor) shall apply in respect of each of such contractors or subcontractors, and references in this Clause 20 (*Quality Assurance*) to the "**Contractor**" or the "**Service Provider**" shall be construed accordingly. To avoid doubt, this Clause shall not be construed as requiring subcontractors of the Contractor or the Service Provider to have their own quality plans but only to comply with the Design Quality Plan and the Construction Quality Plan or the relevant aspects of the Services Quality Plan (as the case may be).

20.7 Project Co shall from time to time submit to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*) any changes to any of the Quality Plans required for such Quality Plan to continue to comply with the requirements set out in Clause 20.2 (*Quality Plans and Systems*). The Authority's Representative may raise comments on any such proposed change only on the grounds set out in paragraph 3 of Schedule 8 (*Review Procedure*).

20.8 If there is no objection under Schedule 8 (*Review Procedure*) to a change to any Quality Plan proposed pursuant to Clause 20.7 (*Quality Plans and Systems*), the Quality Plan shall be amended to incorporate such change.

Quality Manuals and Procedures

20.9 If any Quality Plan refers to, relies on or incorporates any quality manual or procedure, then such quality manual or procedure or the relevant parts of it shall be submitted to the Authority's Representative at the time that the relevant Quality Plan or part of (or change to) a Quality Plan is submitted in accordance with Schedule 8 (*Review Procedure*), and the contents of such quality manual or procedure shall be taken into account in the consideration of the relevant Quality Plan or part of (or change to) a Quality Plan in accordance with Schedule 8 (*Review Procedure*).

Quality Management

20.10 Project Co shall maintain a quality management system which shall:

20.10.1 ensure the effective operation of the quality systems described in this Clause 20 (*Quality Assurance*);

20.10.2 cause an audit of the quality systems at regular intervals and the findings of such audit will be reported to the Authority's Representative;

20.10.3 require review of all quality systems at intervals agreed with the Authority's Representative to ensure their continued suitability and effectiveness;

20.10.4 require liaison with the Authority's Representative on all matters relating to quality management; and

20.10.5 require production of reports and their delivery to the Authority's Representative.

Quality Monitoring

20.11 The Authority's Representative may carry out audits of Project Co's quality management system (including all relevant Quality Plans and any quality manuals and procedures) to establish that Project Co is complying with Clauses 20.1 and 20.3 (*Quality Plans and Systems*). The Authority's Representative may carry out such audits at approximate intervals of three (3) months and may carry out other periodic monitoring, spot checks and auditing of Project Co's quality management systems. Project Co shall procure that the Authority's Representative shall have an equivalent right in respect of the Contractor's and the Service Providers' quality management systems. Project Co shall cooperate, and shall procure that any Sub-Contractor co-operates, with the Authority's Representative including providing him with all information and documentation which he reasonably requires in connection with his rights under this Clause.

PART 5: INFORMATION TECHNOLOGY

21 INFORMATION TECHNOLOGY[19]

[19] To be completed on a project specific basis (or marked 'not used', where not required).

PART 6: SERVICES

22 THE SERVICES[20]

General obligations

22.1 Throughout the Operational Term Project Co shall provide (or procure that the Service Provider provides) the Services in accordance with:

22.1.1 the Service Level Specification;

22.1.2 the Method Statements;

22.1.3 the Quality Plans; and

22.1.4 the terms of this Agreement.

22.2 To avoid doubt the obligations in Clauses 22.1.1, 22.1.2, 22.1.3 and 22.1.4 are independent obligations and:

22.2.1 the fact that Project Co has complied with the Method Statements and/or Quality Plans shall not be a defence to an allegation that Project Co has not satisfied the Service Level Specification; and

22.2.2 the fact that Project Co has complied with the Service Level Specification shall not be a defence to an allegation that Project Co has not satisfied the Method Statements and/or Quality Plans;

provided that where there is any conflict between the Service Level Specification, the Method Statements and/or Quality Plans the Authority shall be entitled (in its sole discretion) to decide which shall take precedence and inform Project Co of its decision and Project Co shall, at its own cost, be obliged to implement the Authority's decision.

Commencement and phase in of Services

22.3 Project Co shall procure that the provision of the Services [in respect of a Phase] commences on the Actual Completion Date [relevant Phase Actual Completion Date].

Project Co Services Changes

[20] Refer to Education Sector Specific Guidance in the User Guide, if applicable.

22.4 Project Co may at any time submit to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*) proposals for amendments to or substitution for the Method Statements or any part of them. If there is no comment on such proposed amendment or substitution (on the grounds set out in paragraph 3 of Schedule 8 (*Review Procedure*)), then the Method Statements as so amended or substituted shall be the Method Statements for the purposes of this Agreement, subject to any further amendment or substitution to which there has been no comment in accordance with Schedule 8 (*Review Procedure*).

22.5 To avoid doubt, an amendment to or substitution for the Method Statements proposed pursuant to Clause 22.4 (*Project Co Services Changes*) shall not be a Qualifying Change entitling Project Co to any payment (or other compensation) or to any relief from the performance of its obligations under this Agreement.

No disruption

22.6 Project Co shall perform the Services so as to co-ordinate with the Authority's operations on the Site and/or in the Facilities and shall take all reasonable care to ensure that it does not interfere with the operations of the Authority or any Authority Party.

23 MAINTENANCE[21]

Programmed Maintenance Works

23.1 No later than [three (3)] months prior to the [first Phase] Completion Date Project Co shall submit to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*) a Schedule of Programmed Maintenance for the period from the [first Phase] Completion Date to the expiry of that Contract Year.

23.2 Not later than [three (3)] months prior to the commencement of each subsequent Contract Year Project Co shall submit to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*) a Schedule of Programmed Maintenance for the next succeeding Contract Year [in respect of all Phases completed prior to, and all Phases scheduled to be completed in, that Contract Year].

23.3 Each Schedule of Programmed Maintenance shall contain the following information (the "**Programmed Maintenance Information**"):

23.3.1 details of the proposed start and end dates for each period of Programmed Maintenance, the works to be carried out and the proposed hours of work;

23.3.2 details of any effect of the Programmed Maintenance on the delivery of any of the Services and/or the activities of the Authority; and

[21] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

23.3.3 a proposed Lifecycle Schedule, together with a report on any differences between the Lifecycle Profile and Lifecycle Spend for the previous Contract Year and a prediction of any differences between the Lifecycle Profile and Lifecycle Spend for that Contract Year.

23.4 Not later than twenty (20) Business Days prior to the commencement of any quarter (being a three (3) month period commencing on 1 April, 1 July, 1 October or 1 January), Project Co may submit to the Authority's Representative for approval in accordance with Schedule 8 (*Review Procedure*) a revision to the Schedule of Programmed Maintenance for the Contract Year in which the relevant quarter falls showing the effect of the proposed changes to the Programmed Maintenance Information. If the Authority's Representative does not raise comments on such proposed revision in accordance with Schedule 8 (*Review Procedure*), the Schedule of Programmed Maintenance as revised shall become the Schedule of Programmed Maintenance in respect of that quarter.

23.5 Where the Authority's Representative raises comments in respect of any Programmed Maintenance periods and/or hours of work shown in a Schedule of Programmed Maintenance in accordance with paragraph 3 of Schedule 8 (*Review Procedure*), he shall indicate whether, and if so when, the Programmed Maintenance can be re-scheduled and Project Co shall amend the relevant Schedule of Programmed Maintenance accordingly.

Programmed and Unprogrammed Maintenance

23.6 Project Co shall not carry out any Programmed Maintenance or Unprogrammed Maintenance Work or Lifecycle Replacement save:

23.6.1 in accordance with a Schedule of Programmed Maintenance to which no objection has been made under Schedule 8 (*Review Procedure*) or, where comment has been raised in respect of the Programmed Maintenance or Lifecycle Replacement periods and/or time, the Schedule of Programmed Maintenance has been amended pursuant to the Service Level Specification;

23.6.2 in accordance with the procedures set out in Clause 23.8 (*Programmed and Unprogrammed Maintenance)*; or

23.6.3 in an emergency, in accordance with Clause 23.9 (*Programmed and Unprogrammed Maintenance)*.

23.7 Notwithstanding that there has been no objection to a Schedule of Programmed Maintenance, the Authority's Representative may, at any time, require Project Co to accelerate or defer any Programmed Maintenance or Lifecycle Replacement by giving written notice to Project Co, (unless otherwise agreed) not less than [twenty (20)] Business Days prior to the scheduled date for carrying out such Programmed Maintenance or Lifecycle Replacement, which notice shall set out the time and/or periods at or during which the Authority requires the Programmed Maintenance or Lifecycle Replacement to be performed. Project Co shall notify the Authority of the amount of any additional reasonable costs which it will incur as a direct consequence of such acceleration or deferment (the "**Estimated Increased**

Maintenance Costs") within [five (5)] Business Days of the receipt of the written notice advising of the requirement for an acceleration or deferment of the Programmed Maintenance. The Authority shall, within a further period of [five (5)] Business Days following receipt by the Authority of notification of the amount of the Estimated Increased Maintenance Costs, at the Authority's option, either confirm or withdraw its request to accelerate or defer the Schedule of Programmed Maintenance. If the Authority does not respond within this [five (5)] Business Day period, the request shall be deemed to have been confirmed. The Authority shall reimburse Project Co the direct and reasonable costs actually incurred by Project Co as a consequence of such acceleration or deferment up to, but not exceeding, the amount of the Estimated Increased Maintenance Costs.

23.8 If, in circumstances other than an emergency, the need arises for Maintenance Works or Lifecycle Replacement (excluding any works of a *de minimis* nature in respect of which the parties have agreed this Clause 23.8 (*Programmed and Unprogrammed Maintenance*) shall not apply [and excluding works carried out for the purpose of Rectification, which shall take place in accordance with the provisions of Schedule 14 (*Payment Mechanism*)]), which are not scheduled to be carried out as part of the Programmed Maintenance or Lifecycle Replacement ("**Unprogrammed Maintenance Work**"), Project Co shall not carry out any Unprogrammed Maintenance Work unless and until the Authority's Representative has approved the proposed commencement date, the proposed hours of work and estimated duration of the requisite Unprogrammed Maintenance Work in accordance with the provisions of paragraph 3.9 of Schedule 8 (*Review Procedure*). Nothing in this Clause 23.8 (*Programmed and Unprogrammed Maintenance*) (including any approval of the Authority pursuant to Schedule 8 (*Review Procedure*)) shall prevent the Authority from making any deductions in calculating the Monthly Service Payments pursuant to the Payment Mechanism.

23.9 If, as a result of an emergency, the need arises for Unprogrammed Maintenance Work, Project Co may carry out such Unprogrammed Maintenance Work provided that Project Co shall notify the Authority's Representative as soon as possible (and in any event within two (2) Business Days of the occurrence of the emergency) of the extent of the necessary Unprogrammed Maintenance Work and the reasons for them. Project Co shall take all reasonable steps to minimise the duration of such Unprogrammed Maintenance Work. Nothing in this Clause 23.9 (*Programmed and Unprogrammed Maintenance*) shall prevent the Authority from making any deductions in calculating the Monthly Service Payments pursuant to the Payment Mechanism.

23.10 Where Programmed Maintenance or Lifecycle Replacement scheduled to be carried out in accordance with the Schedule of Programmed Maintenance has been deferred by the Authority's Representative under Clause 23.7 (*Programmed and Unprogrammed Maintenance*), Project Co shall not be treated as having failed to perform the relevant Service on account of the condition of the Facilities or any part of them from the time the Programmed Maintenance or Lifecycle Replacement was scheduled to have been completed until the time the deferred Programmed Maintenance or Lifecycle Replacement was scheduled to have been completed, but not afterwards, provided always, to avoid doubt, that Project Co shall not be relieved from the consequences of any failure to maintain the Facilities in respect of any period prior to the period for performing the particular work according to the Schedule of Programmed Maintenance.

5 Year Maintenance Plan

23.11 Project Co shall deliver to the Authority's Representative not less than [♦] Business Days prior to the [first Phase] Completion Date, and thereafter not less than [♦] Business Days prior to the commencement of each Contract Year the latest version of the 5 Year Maintenance Plan.

23.12 The Authority shall have a right to inspect the Facilities, the Maintenance Works and the Lifecycle Replacement to ensure that the Facilities are being maintained in accordance with the Service Level Specification and that the Facilities comply with the Authority's Construction Requirements and Project Co's Proposals throughout the Project Term. The Authority may appoint an independent third party for the purposes of carrying out any such inspection and shall make known the findings to Project Co and the Funders. The parties shall then meet to discuss any implications of such findings and any steps that are necessary to remedy any failure to comply with such obligations. Project Co shall (subject to Clause 34 (*Change Protocol*)) take into account such discussions in the next Schedule of Programmed Maintenance so that any failure to comply with such obligations shall be remedied.

Authority's Maintenance Obligations

23.13 The Authority's Maintenance Obligations are as follows:

23.13.1 not less frequently than once in every five (5) years from the [first Phase] Actual Completion Date, in a good and workmanlike manner to make good plaster and other interior wall and ceiling finishes and decoration in all such parts of the interior of the Functional Areas as were plastered, finished and/or decorated by Project Co as part of the Works or in implementing an Authority Change;

23.13.2 [not less frequently than once in every [♦] years from the [first Phase] Actual Completion Date, to renew and replace all [*carpets and other non-permanent floor coverings*] in the Functional Areas provided by Project Co as part of the Works or in implementing an Authority Change];

23.13.3 [not less frequently than once in every [♦] years from the [first Phase] Actual Completion Date, to resurface/restore the finish of all [*semi-permanent floor finishes that are subject to wear such as wood floors*] in the Functional Areas provided by Project Co as part of the Works or in implementing an Authority Change];

23.13.4 [as often as is necessary to maintain anything provided by the Authority under a Derogated Low Value Change]; and

23.13.5 to ensure that all portable electrical appliances that are connected to the electricity supply in the Facilities by the Authority and Authority Parties have been tested in accordance with Law and the "**Code of Practice for In-service Inspection and Testing of Electrical Equipment**" published from time to time by the Institution of Electrical Engineers.

23.14 Subject to Clause 23.21 (*Authority's Maintenance Obligations*), the Authority must carry out and perform the Authority's Maintenance Obligations or procure that the Authority's Maintenance Obligations are carried out and performed as often as required by Clause 23.13 (*Authority's Maintenance Obligations*) and in accordance with Good Industry Practice. Without prejudice to the Authority's rights under Clause 23.7 (*Programmed and Unprogrammed Maintenance*), the Authority's Maintenance Obligations must be scheduled by the Authority so as not to interfere with Project Co carrying out Programmed Maintenance or Lifecycle Replacement in accordance with the Schedule of Programmed Maintenance and/or interfere with Project Co carrying out Unprogrammed Maintenance Work in accordance with Clause 23.8 (*Programmed and Unprogrammed Maintenance*).

23.15 If the Authority is in breach of Clause 23.14 (*Authority's Maintenance Obligations*), Project Co may, while the breach is continuing, give a notice to the Authority requiring it to carry out the relevant Authority Maintenance Obligations. If the Authority:

23.15.1 does not reply to Project Co in writing within ten (10) Business Days of the date of Project Co's notice with a programme for carrying out the relevant Authority Maintenance Obligations within a period of time that is reasonable having regard to the nature of the breach, the reasonably foreseeable consequences of non-performance of the relevant Authority Maintenance Obligations for the Services and Project Co's obligations under this Agreement; or

23.15.2 having provided such a programme, does not comply with it,

Project Co shall be entitled to perform the Authority's Maintenance Obligations so far as necessary to prevent any reasonably foreseeable adverse effect on the Services and/or Project Co's obligations under this Agreement consequent upon the non-performance of the relevant Authority Maintenance Obligations.

23.16 Project Co shall not carry out any Project Co's Remedial Services unless and until the Authority's Representative, pursuant to this Clause 23.16 (*Authority's Maintenance Obligations*), has approved or is deemed to have approved or has specified the proposed commencement date, the proposed hours of work and the estimated duration of Project Co's Remedial Services (together the "**PRS Timetable**"). Project Co must give the Authority not less than [twenty (20)] Business Days' notice of its proposed PRS Timetable. If the Authority's Representative considers that the proposed PRS Timetable is not consistent with the principles set out in Appendix 2 to Schedule 8 (*Review Procedure*), he may specify an alternative PRS Timetable that is consistent with those principles, which shall be as near to the PRS Timetable proposed by Project Co as reasonably practicable. If the Authority's Representative fails either to approve Project Co's proposed PRS Timetable or to specify an alternative PRS Timetable within ten (10) Business Days of receipt of Project Co's proposed PRS Timetable, he shall be deemed to have approved it.

23.17 The Authority must allow Project Co and relevant Project Co Parties access to the Site and the Facilities:

23.17.1 for the purpose of monitoring the carrying out of Authority's Maintenance Obligations; and

23.17.2 in accordance with the approved PRS Timetable for the purpose of carrying out any of Project Co's Remedial Services.

23.18 If the Authority does not allow access to the Site and/or the Facilities as required pursuant to Clause 23.17.2, or otherwise prevents or interferes with Project Co and any relevant Project Co Party performing the PRS Remedial Works, Project Co may propose a new PRS Timetable in respect of the relevant Project Co's Remedial Services and Clause 23.16 (*Authority's Maintenance Obligations*) shall apply.

23.19 In carrying out and performing Project Co's Remedial Services, Project Co must comply with the standards applicable to the relevant Authority's Maintenance Obligations and Good Industry Practice and must use reasonable endeavours to match colours and other finishes to those that currently exist in the relevant part or parts of the Facilities.

23.20 The Authority must reimburse Project Co all reasonable costs that it incurs in carrying out and performing Project Co's Remedial Services in accordance with this Clause 23 (*Maintenance*).

23.21 Notwithstanding the terms of Clauses 23.14 to 23.19 (*Authority's Maintenance Obligations*) above, Project Co is responsible for:

23.21.1 making good any defects in plaster and other interior wall and ceiling finishes and decoration [and floor coverings referred to in Clauses 23.13.2 and 23.13.3] provided by Project Co as part of the Works or in implementing an Authority Change, caused by defective design or workmanship in the carrying out of the Works or in implementing the Authority Change; and

23.21.2 making good any defects in plaster and other interior wall and ceiling finishes and decoration [and floor coverings referred to in Clauses 23.13.2 and 23.13.3] provided by Project Co as part of the Works or in implementing an Authority Change (whether or not these have subsequently been replaced or renewed by the Authority) [and things referred to in Clause 23.13.4] consequential on any Programmed Maintenance or Unprogrammed Maintenance or any act or omission of Project Co.

23.22 The Authority and Project Co shall co-operate with each other to coordinate any activities that the Authority proposes to undertake to implement any of the Authority's Maintenance Obligations and Project Co's Programmed Maintenance and Project Co must include the Authority's intentions with regard to performing the Authority's Maintenance Obligations in the Schedule of Programmed Maintenance for each Contract Year.

Energy for Repairs

23.23 Subject to Clause 23.24 (*Energy for Repairs*), the Authority is entitled to be reimbursed by Project Co for costs incurred by the Authority for Utilities supplied to

the Facilities during the Operational Term that are consumed in the process of Project Co or any Project Co Party carrying out operations to rectify an Availability Failure.

23.24 For the purpose of applying Clause 23.23 (*Energy for Repairs*) the cost of each Utility shall be considered separately and Clause 23.23 (*Energy for Repairs*) shall not apply if the costs concerned, in respect of the particular Availability Failure, do not exceed [the daily average cost based on bills paid by the Authority to the supplier of the relevant Utility to the Facilities over the most recent twelve (12) month period for which figures are available].

23.25 Where the Authority claims reimbursement of Utilities costs pursuant to Clause 23.23 (*Energy for Repairs*) it must reasonably estimate those costs using all available evidence and send Project Co a statement showing its calculation of the amount claimed along with its supporting evidence. Unless Project Co disputes the statement within ten (10) Business Days of receipt, the Authority will be entitled, pursuant to Clause 35.6 (*Set-Off*), to set-off the amount claimed.

24 LIFECYCLE REPLACEMENT

24.1 Project Co shall undertake Lifecycle Replacement at the Facilities in accordance with a Lifecycle Schedule which has been approved or not commented on by the Authority under the Review Procedure.

24.2 No later than forty (40) Business Days before each occasion on which any part of the Facilities is due for replacement (as identified in the Lifecycle Schedule), where Project Co does not believe it is necessary to undertake such replacement, Project Co shall submit to the Authority (under the Review Procedure) a written statement detailing:

24.2.1 the replacement(s) which the Lifecycle Schedule records as being due; and

24.2.2 why Project Co does not believe it is necessary to undertake such replacement having regard to the condition of the relevant part and Project Co's obligations under this Agreement.

24.3 If the Authority approves in accordance with the Review Procedure (or it is determined in accordance with the Dispute Resolution Procedure) that the replacement should be deferred, Project Co shall amend the Lifecycle Schedule to reflect such deferral.

24.4 Without prejudice to Clause 24.3 (*Lifecycle Replacement*) Project Co shall replace any items listed in the Lifecycle Schedule with parts of at least equivalent standard to those at the [Actual Completion Date] measured by reference to the standards set out in the Service Level Specification and the standards of the Equipment set out in Project Co's Proposals, measured in each case against the current standards for the relevant part so that as a minimum any replacement part should have an equivalent or greater anticipated lifespan at the same quality as the

original part provided that nothing in this Clause 24.4 (*Lifecycle Replacement*) shall require the relevant elements of the Facilities to have a longer working life than required by paragraph [♦] of the Service Level Specification.

24.5 In the event that Project Co fails to either:

24.5.1 replace any part of the Facilities by the date that it is due for replacement (as identified in the Lifecycle Schedule); or

24.5.2 comply with Clause 24.4 (*Lifecycle Replacement*),

and such failure is not remedied within one (1) month of receipt of written notice by Project Co of such failure from the Authority, the Authority may remedy such failure itself and recover the cost from Project Co as a debt.

Lifecycle Profile and Spend

24.6 Project Co shall keep detailed records of the Lifecycle Replacement and Lifecycle Spend.

24.7 Project Co shall upon written request permit the Authority access to all Project Co's records, receipts, invoices, reports, drawings, technical specifications and performance logs relating to any Lifecycle Asset and Lifecycle Spend, so as to enable the Authority to obtain an accurate assessment of the figures quoted. Project Co shall provide all reasonable co-operation and assistance to the Authority to allow it access to such documents and information and shall in a bona fide manner respond promptly to all reasonable requests for further documents and information made by the Authority in respect of any Lifecycle Asset and the condition of the same and Lifecycle Spend.

24.8 At least [sixty (60)] Business Days prior to a Lifecycle Review Date, Project Co shall submit to the Authority a report containing:

24.8.1 a survey of the state and condition of the Facilities and Lifecycle Assets by comparison to Project Co's maintenance and lifecycle obligations under this Agreement;

24.8.2 a revised projection for any alteration to anticipated replacement or renewal of Lifecycle Assets in respect of:

24.8.2.1 the period from the relevant Lifecycle Review Date until the next Lifecycle Review Date; and

24.8.2.2 the period from the relevant Lifecycle Review Date until the Expiry Date;

24.8.3 confirmation of any differences between the Lifecycle Profile and Lifecycle Spend, and transactions that have taken place during the previous Lifecycle Review Period;

24.8.4 confirmation of the Lifecycle Profile for the period up to the next Lifecycle Review Date;

24.8.5 confirmation of the Lifecycle Profile from that Lifecycle Review Date to the Expiry Date;

24.8.6 a summary of how Project Co has achieved the Lifecycle Efficiencies Plan in the period since the previous Lifecycle Review Date;

24.8.7 details of Equipment to be replaced and commentary on how this has been determined with particular reference to any changes to the Authority Services which the Authority has made Project Co aware of, which mean that a like for like replacement of Equipment may not be appropriate or represent best value for money for the Authority,

(to be referred to as the **Lifecycle Report**).

24.9 On the Lifecycle Review Date, the parties shall discuss the contents of the Lifecycle Report, and Project Co shall make such revisions to the Lifecycle Report as the parties agree are necessary and supply the Authority with a copy of the same within twenty (20) Business Days of the Lifecycle Review Date.

25 BIENNIAL REVIEWS AND REPORTING

25.1 Biennial Reviews

25.1.1 Project Co shall work with the Authority to identify opportunities for improving the performance, efficiency and effectiveness of the Facilities and the Services. This shall be termed a "**Biennial Review**".

25.1.2 On the date falling two (2) years after the [Actual Completion Date] and every two (2) years thereafter, during the Operational Term (each a **"Contract Review Date"**), Project Co and the Authority shall conduct a Biennial Review in order to ensure that the Services and the Facilities are providing a suitable and cost effective solution for the Authority.

25.1.3 The Biennial Review shall include a meeting held between the Authority and Project Co, where both parties shall present their overview of the effectiveness of the Agreement. During each Biennial Review a discussion shall take place concerning the improvements to be made, and Project Co shall record the decisions taken.

25.1.4 Project Co shall produce a **"Biennial Review Report"** and submit this for review by the Authority no less than thirty (30) days prior to the relevant Contract Review Date.

25.1.5 The Biennial Review Report shall identify any activities undertaken by Project Co to improve the effectiveness of the Services, and any further opportunities for improvement of the Agreement through prospective changes in the Services, changes in the Authority Services, and/or behaviour or usage changes by either party; and it shall include as a minimum:

25.1.5.1 a trend analysis of performance against performance and availability standards over the years to date to identify areas of performance that can be improved, and steps taken by Project Co to address performance issues. Where the performance trend analysis identifies a deteriorating trend in performance, repeat failures, or significant failures that impact on the Authority, Project Co shall produce an action plan to identify how performance is to be improved;

25.1.5.2 [a summary of energy consumption over the period since the last Biennial Review and identification of measures that may be taken to improve energy performance and efficiency;]

25.1.5.3 a review of Programmed Maintenance and Unprogrammed Maintenance, in the form of a risk based maintenance analysis (in line with ISO55000 requirements or equivalent);

25.1.5.4 [Project Co's review of [Elective Services] provisions, to identify areas where efficiency or effectiveness can be improved by changes to these provisions;]

25.1.5.5 any alterations to the Facility which may lead to improvements in the performance and availability of the Facility and whether or not this may require capital expenditure on the part of the Authority;

25.1.5.6 a financial summary identifying the cost impact of all the efficiency improvement opportunities identified separated into:

(a) improvements that can be achieved without instigating a Change under Schedule 16 (*Change Protocol*) of the Agreement including changes made by changes in user behaviour and/or changes in Authority or Project Co working which would not require an Authority Change Notice; and

(b) other changes to the Services, or the Facilities that can improve efficiency but which would require an Authority Change Notice.

25.1.6 Any proposed Change set out in a Biennial Review Report which is approved by the Authority shall be subject to Schedule 16 (*Change Procedure*).

25.2 **Provision of an Independent Biennial Review and Biennial Review Report**

25.2.1 Where Project Co fails to either provide the Biennial Review Report, or it is not to a standard acceptable to the Authority acting reasonably or the Authority has reasonable ground for questioning the accuracy of the analysis undertaken by Project Co, then the Authority may appoint suitable competent independent advisors to carry out an independent review and produce an independent Biennial Review Report.

25.2.2 Project Co shall cooperate fully with any independent advisors and provide access to systems, copies or reports and any relevant data to enable such independent advisors to complete their report.

25.2.3 The costs of the independent advisor shall be borne by Project Co.

26 MONITORING OF PERFORMANCE

Monitoring

26.1 In carrying out the Services, Project Co shall, and shall procure that all Project Co Parties and any other persons for whom it is responsible shall, comply with the provisions of Schedule 12 (*Service Requirements*).

26.2 Project Co shall be responsible for monitoring its performance of this Agreement during the Operational Term, in the manner and at the frequencies set out in Schedule 12 (*Service Requirements*). Project Co shall provide the Authority's Representative with relevant particulars of any aspects of its performance which fail to meet the requirements of this Agreement (unless otherwise notified in writing by the Authority). The Authority may at all reasonable times observe, inspect and satisfy itself as to the adequacy of the monitoring procedures (including without limitation carrying out sample checks).

Grounds for Warning Notices[22]

26.3 If at any time during the Operational Term (other than by reason of Force Majeure, a Relief Event or an Emergency):

[22] Refer to Education Sector Specific Guidance in the User Guide, if applicable.

26.3.1 the total Deductions for any Contract Month amount to more than [♦] per cent of the Annual Service Payment for the current Contract Year; or

26.3.2 the total Deductions in each of any three (3) Contract Months in any six (6) consecutive Contract Months amount to more than [♦] per cent of the Annual Service Payment for the current Contract Year;

the Authority's Representative may serve a Warning Notice on Project Co, provided always that, to give Project Co time to take appropriate rectification measures, the Authority's Representative shall not be entitled:

(a) to serve more than one (1) Warning Notice in any month;

(b) to serve a Warning Notice in any two (2) consecutive months to the extent that the same event has contributed to the Authority's right to serve the Warning Notice, but provided that Project Co demonstrates to the Authority that it has taken all reasonable steps to remedy the cause of that event.

Warning Notices Disputes

26.4 If Project Co disputes that the Authority was or is entitled to serve a Warning Notice, Project Co may refer that dispute for determination under the Dispute Resolution Procedure. If, after the Authority's Representative issues a Warning Notice, the parties subsequently agree, or it is determined under the Dispute Resolution Procedure that the Warning Notice was served without justification, that Warning Notice shall be recalled or shall be cancelled and deemed not to have been served.

Authority's remedial rights

26.5 The provisions of Clauses 26.6 to 26.9 (*Authority's remedial rights*) (inclusive) shall apply if the Authority, acting reasonably, considers that it needs to take action in connection with the Services:

26.5.1 because of an immediate and serious threat to the health or safety of any user of the Facilities; or

26.5.2 to prevent or address material interruption in the provision of one or more of the Services; or

26.5.3 because of a risk of the ability of the Authority to provide the relevant Authority Services being prejudiced to a material degree;

26.6 If any of the circumstances set out in Clause 26.5 (*Authority's remedial rights*) arise (without prejudice to its rights under Clause 40 (*Project Co Event of Default*) or any other express rights under this Agreement) and the Authority wishes to take

action (either by itself or by engaging others), the Authority shall notify Project Co in writing of the following:

26.6.1 the action it wishes to take;

26.6.2 the reason for such action;

26.6.3 the date it wishes to commence such action;

26.6.4 the time period which it believes will be necessary for such action; and

26.6.5 to the extent practicable, the effect on Project Co and its obligation to provide the Services during the period such action is being taken.

26.7 Following service of such notice, the Authority shall take such action as has been notified under Clause 26.6 (*Authority's remedial rights*) and any consequential additional action as it reasonably believes is necessary (together, the "**Required Action**") and Project Co shall give all reasonable assistance to the Authority while it is taking the Required Action. To the extent that the Authority performs any of the obligations of Project Co hereunder or undertakes tasks that would otherwise be undertaken by Project Co pursuant to this Agreement, the Authority shall perform such obligations or undertake such tasks to the same standard as would be required of Project Co under the terms of this Agreement.

26.8 If the Required Action is taken other than as a result of a breach by Project Co of its obligations under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents Project Co from providing any part of the Services:

26.8.1 Project Co shall be relieved from its obligations to provide such part of the Services; and

26.8.2 in respect of this period in which the Authority is taking the Required Action and provided that Project Co provides the Authority with reasonable assistance (such assistance to be at the expense of the Authority to the extent that additional costs are incurred), the Monthly Service Payments due from the Authority to Project Co shall equal the amounts that Project Co would receive if it were satisfying all of its obligations and providing the Services affected by the Required Action in full over that period and the Authority shall indemnify Project Co against all Direct Losses sustained by Project Co as a result of the Authority taking the Required Action.

26.9 If the Required Action is taken as a result of a breach by Project Co of its obligations under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents Project Co from providing any part of the Services:

26.9.1 Project Co shall be relieved of its obligations to provide such part of the Services; and

26.9.2 in respect of the period in which the Authority is taking the Required Action, the Monthly Service Payments due from the Authority to Project Co shall equal the amounts Project Co would receive if it were satisfying all of its obligations and providing the Services affected by the Required Action in full over that period, less an amount equal to all of the costs incurred by the Authority in taking the Required Action (including, without limitation, an appropriate sum in respect of general staff costs and overheads).

Emergencies

26.10 If an Emergency arises during the Operational Term which cannot be dealt with by performance of the Services, the Authority may instruct Project Co to procure that such additional or alternative services are undertaken by Project Co as and when required by the Authority to ensure that the Emergency is dealt with and normal operation of the Facility resumes as soon as is reasonably practicable.

26.11 The cost of any additional or alternative services provided by Project Co under Clause 26.10 (*Emergencies*) shall be borne by the Authority and paid in accordance with Clause 35 (*Payment*). The Authority will not be entitled to levy Deductions in respect of any failure to provide the Services to the extent that such failure arises by reason of Project Co's compliance with Clause 26.10 (*Emergencies*).

27 EMPLOYMENT MATTERS[23]

Compliance with Legislation and Authority Policies

27.1 Project Co shall comply and shall procure that each Service Provider and all persons employed or engaged by a Service Provider in connection with the provision of any Service shall comply at all times with the Law on health and safety at work and on anti-discrimination and equal opportunities.

27.2 Project Co shall procure that each Service Provider takes all reasonable steps to procure that all persons including any employed or engaged by a Service Provider in connection with the provision of any Service shall, so far as applicable, comply with the Authority Policies as regards health and safety at work (including the Authority Policy regarding smoking) and with those relating to anti-discrimination and equal opportunities (including those relating to harassment). Project Co also shall take and shall procure that every Service Provider shall take all such steps as the Authority may reasonably require, which shall include co-operation with action proposed or taken by the Authority, to ensure that the Authority complies with its duty under Section 3(1) Health and Safety at Work Act 1974 regarding the conduct of the undertaking of the Authority.

[23] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

Project Co Indemnities

27.3 Project Co shall indemnify and keep indemnified in full the Authority and, at the Authority's request, each and every service provider who has or shall provide any service equivalent to any of the Services against:

27.3.1 claims in respect of all emoluments and all other contractual or statutory payments unpaid by Project Co or a Service Provider to any person entitled to such payments from Project Co or a Service Provider who is or has been employed or engaged by Project Co or any Service Provider in connection with the provision of any of the Services which relate to any period of employment or engagement with Project Co or any Service Provider on or after the Relevant Service Transfer Date but on or prior to the date of expiry or termination of this Agreement, and all income tax (or any tax replacing it) and pension and national insurance contributions payable thereon; and

27.3.2 insofar as Clause 27.3.1 does not apply, all Direct Losses incurred by the Authority as a result of any claim against the Authority in respect of any liability to any person who is or has been employed or engaged (whether as a consequence of the Transfer Regulations or of the provisions of this Clause 27 (*Employment Matters*)) by Project Co or any Service Provider in connection with the provision of any of the Services, where such claim arises as a result of any act or omission of Project Co or the Service Provider occurring after the Relevant Service Transfer Date and before the expiry or termination of this Agreement;

provided the indemnities in Clauses 27.3.1 and 27.3.2 shall not apply to the extent that the claim arises from a wrongful act or omission of the Authority or is in respect of sums for which the Authority is liable pursuant to Clause 27.11 (*No Employee Transfer*).

27.4 Clause 49.3 (*Conduct of Claims*) of this Agreement shall apply where any claim is made in respect of the indemnities given by Project Co under Clause 27.3 (*Project Co Indemnities*).

Position on expiry or earlier termination of this Agreement

27.5 On the expiry or earlier termination of this Agreement, the Authority and Project Co agree that it is their intention that the Transfer Regulations shall apply in respect of the provision thereafter of any service equivalent to a Service 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 Clause is without prejudice to such determination.

27.6 Project Co shall not and shall procure that no Service Provider shall make any material change to the terms and conditions of employment of any person employed in the provision of any Service, transfer any person employed in the provision of any Service to another part of its business, or materially increase or decrease the number of such persons:

27.6.1 within the period of twelve (12) months immediately preceding the expiry of this Agreement, or

27.6.2 within the period of twelve (12) months before the termination of this Agreement or, if shorter, during the period of notice of termination

without the Authority's consent (which shall not be unreasonably withheld), except if such change is required by Law.

27.7 If the Transfer Regulations do not apply on the expiry or earlier termination of this Agreement, the Authority shall ensure that each new provider of a service equivalent to a Service on or after the expiry or earlier termination of this Agreement (including the Authority) shall offer employment to the persons employed by Project Co or a Service Provider in the provision of the Service immediately before the expiry or earlier termination of this Agreement and shall indemnify Project Co or a Service Provider for Direct Losses any of them may 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).

27.8 If an offer of employment is made in accordance with Clause 27.7 (*Position on expiry or earlier termination of this Agreement*) the employment shall be on the same terms and conditions as applied immediately before the expiry or earlier termination of this Agreement including full continuity of employment, except that the Authority 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 Clause 27.6 (*Position on expiry or earlier termination of this Agreement*).

27.9 Project Co shall:

27.9.1 comply with the Ethical Employment Code and any similar applicable schemes or codes of practice which apply to Project Co;

27.9.2 encourage all Sub-Contractors to sign up to the Ethical Employment Code and any similar applicable schemes or codes of practice promoted by the Welsh Government; and

27.9.3 ensure that the [Contractor and the Service Provider and] all Sub-Contractors who have signed up to the Ethical Employment Code comply with that code of practice and any similar applicable schemes or codes of practice which apply to that sub-contractor.

No Employee Transfer

27.10 The Authority and Project Co agree that there are no individuals presently employed by the Authority [or any other sub-contractor of the Authority][24] whose contracts of employment will, by virtue of the transfer to Project Co of responsibility for provision of (or procuring the provision by Service Providers of) any of the

[24] Applicable where the Authority is a local authority.

Services in accordance with this Agreement and in accordance with the Transfer Regulations, have effect after the date or dates of such transfer as agreed by the parties (each a "**Relevant Service Transfer Date**") (or at any other time) as if originally made between those persons and the relevant Service Provider.

27.11 If it is subsequently agreed or determined that there are persons presently employed by the Authority [or any other sub-contractor of the Authority][25] whose contracts of employment do have effect after the Relevant Service Transfer Date as if originally made between those persons and the relevant Service Provider ("**Transferring Staff**") then:

27.11.1 the Authority shall within ten (10) Business Days of the date on which it was so agreed or determined have the opportunity to offer or procure the offer of a position as an employee of the Authority to some or all of the Transferring Staff;

27.11.2 Project Co shall procure that no person to whom the Authority has offered a position in accordance with Clause 27.11.1shall be dismissed by reason of redundancy until the period[26] for acceptance of such offer has expired and the person in question has not accepted such offer; and

27.11.3 subject to Clauses 27.11.1and 27.11.2, Project Co or any Service Provider shall be entitled to dismiss any or all of the Transferring Staff by reason of redundancy provided that Project Co shall use and shall procure that any Service Provider shall carry out in the required manner any obligation to consult with the Transferring Staff or any of them, or their respective representatives, and shall use all reasonable endeavours to mitigate the amount of any costs payable in respect of the Transferring Staff or their dismissal.

The Authority shall indemnify Project Co against any costs referred to in Clause 27.11.3 reasonably incurred by Project Co (or by a relevant Service Provider and for which Project Co is responsible) and shall reimburse any costs reasonably and properly incurred by Project Co or the Service Provider in employing any Transferring Staff prior to the expiry of the period referred to in Clause 27.11.2.

28 SITE SECURITY AND PERSONNEL ISSUES

Access

28.1 The Authority shall have the right to refuse admittance to, or order the removal from, the Facilities of any person employed by (or acting on behalf of) Project Co, any Project Co Party or any sub-contractor whose presence, in the reasonable opinion of the Authority, is likely to have a material adverse effect on the provision by the Authority of the relevant Authority Services at the Facilities or who is not a fit and proper person to be in the Facilities.[27]

[25] Applicable where the Authority is a local authority.
[26] Time period to be agreed on a project by project basis.
[27] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

28.2 Action taken under Clause 28.1 (*Access*) shall forthwith be confirmed in writing by the Authority to Project Co and, to avoid doubt, shall not relieve Project Co of any of its obligations under this Agreement.

28.3 If and when so directed in writing by the Authority, Project Co shall within twenty (20) Business Days provide a list of the names and addresses of all persons it expects may require admission in connection with this Agreement, to any premises occupied by the Authority, specifying the capacities in which those persons are concerned with this Agreement and giving such other particulars as the Authority may reasonably require.

28.4 The decision of the Authority as to whether any person is to be refused admission shall be final and conclusive.

Authority Policies

28.5 Project Co shall, and shall procure that all Project Co Parties shall, comply at all times with the Authority Policies.

28.6 The Authority shall notify Project Co of any proposed change to the Authority Policies as soon as practicable (and, in any event, prior to such change taking effect) and consult with Project Co. Subject to Clause 28.7 (*Authority Policies*), such change shall take effect as a Change in accordance with Schedule 16 (*Change Protocol*).

28.7 The Authority may, at its sole option, notify Project Co that Project Co shall not be obliged to comply with any change to any Authority Policy and that Project Co should continue to comply with the relevant Authority Policy prior to any change in which case such change shall not take effect as a Change in accordance with Schedule 16 (*Change Protocol*).

Convictions and disciplinary action

28.8 Project Co (to the extent permitted by Law) shall procure that all potential staff or persons performing any of the [Project Operations] who may reasonably be expected in the course of their employment or engagement to have access to children, the elderly and/or vulnerable adults:

28.8.1 are questioned concerning their Convictions; and

28.8.2 Project Co or the Service Provider obtains a check of the most extensive available kind made with the Disclosure and Barring Service.

28.9 Project Co shall procure that no person who discloses any Convictions, or who appears on a Barred List following the results of a Disclosure and Barring Service check, in either case of which Project Co or a Service Provider is aware or ought to be aware is employed or engaged in the provision of the [Project Operations]

without the Authority's prior written consent (such consent not to be unreasonably withheld or delayed).

28.10 Project Co shall procure that the Authority is kept advised at all times of any person employed or engaged by Project Co or any Service Provider in the provision of any of the [Project Operations] who, subsequent to his/her commencement of such employment or engagement, receives a Conviction of which Project Co or a Service Provider becomes aware or whose previous Convictions become known to Project Co or a Service Provider.

28.11 The Authority's Representative (acting reasonably) may instruct Project Co to procure that appropriate disciplinary action is taken against any employee of Project Co or any Sub-Contractor (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 whose presence or conduct on the Site or at work is otherwise considered by the Authority's Representative (acting reasonably) to be undesirable. The Authority shall co-operate with any such disciplinary proceedings and shall be advised in writing by Project Co of the outcome.

28.12 Project Co shall procure that there are set up and maintained, by it and by all Service Providers, personnel policies and procedures covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). Project Co 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 Authority.

Management

28.13 Project Co shall consult with the Authority in relation to the selection procedure for Project Co's Facility Manager and such person shall not be appointed (or replaced) without the prior written consent of the Authority (such consent not to be unreasonably withheld or delayed).

28.14 Project Co shall provide, and shall procure that all Service Providers provide, to the Authority upon request details of their respective management organisations.

Lists and Records

28.15 Project Co shall procure that the Authority's Representative shall at all reasonable times have access to all material details in respect of all employees of Project Co or any Service Provider engaged in the provision of the Services including numbers and categories of staff employed to perform the Services and including in respect of each such employee:

28.15.1 details of qualifications; and

28.15.2 details of training undertaken by the employee.

Resources and training[28]

28.16 Project Co shall procure that:

28.16.1 there shall at all times be a sufficient number of staff (including all relevant grades of supervisory staff) engaged in the provision of the 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 Services; and

28.16.2 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.

29 STOCKS CONSUMABLES, MATERIALS AND EQUIPMENT

Standards

29.1 All goods, equipment, consumables and materials which are to be used in the provision of the Services shall be of satisfactory quality.

29.2 Project Co shall ensure that the goods, equipment, consumables and materials used by it or any Sub-Contractor in connection with the provision of any of the Services (each as a distinct and separate obligation) are:

29.2.1 maintained in a safe, serviceable and clean condition in accordance with Good Industry Practice;

29.2.2 of the type specified in the Service Level Specification and/or the Method Statements (where appropriate); and

29.2.3 in compliance with any relevant rules, regulations, codes of practice and/or British or European Standards,

and shall, as soon as practicable after receiving a request from the Authority's Representative, supply to the Authority's Representative evidence to demonstrate its compliance with this Clause 29.2 (*Standards*).

29.3 Project Co shall procure that sufficient stocks of goods, consumables, equipment and materials are held in order to comply with its obligations under this Agreement.

Hazardous substances and materials

[28] Refer to Health Sector Specific Guidance in the User Guide, if applicable.

29.4 Project Co shall not install, keep or use in or on the Facilities any materials, equipment or apparatus the installation, keeping or use of which is likely to cause (or in fact causes):

29.4.1 material damage to the Facilities;

29.4.2 dust, noise or vibration constituting a nuisance to the owners and/or occupiers of any property adjoining or near to the Facilities; or

29.4.3 the generation, accumulation or migration of any hazardous substance in an unlawful manner whether within or outside the Facilities,

and shall use all reasonable endeavours to ensure (by directions to staff and otherwise) that all materials, equipment or apparatus in or on the Facilities are operated so as to minimise noise and vibration likely to cause annoyance or disturbance and the unlawful generation or migration of any hazardous substance.

29.5 Project Co shall not bring in or on to (or keep or maintain in or on) the Facilities any hazardous materials or equipment without the prior written consent of the Authority and unless Project Co has complied with all relevant Law.

29.6 Without prejudice to the generality of its obligations, Project Co shall:

29.6.1 procure that all hazardous materials and equipment used, by it or by a Sub-Contractor or used on behalf of any of them, or stored, by it or by a Sub-Contractor or stored on behalf of any of them, on the Site are kept in accordance with all relevant Law and Good Industry Practice, properly and securely labelled and stored, under appropriate supervision and used only by appropriately trained and competent staff; and

29.6.2 use all practicable and reasonable means to:

(a) prevent or counteract, to the satisfaction of the Authority's Representative, the unlawful emission of any such hazardous substance;

(b) avoid the unlawful discharge into any conducting media serving the Facilities of any hazardous substance;

(c) prevent the unlawful generation, accumulation or migration of any hazardous substance at or from the Facilities; and

(d) prevent any environmental claims arising or any circumstances arising likely to result in any environmental claims,

in so far as any such hazardous substance is, or should be, under the control of Project Co pursuant to this Agreement.

29.7 The Authority shall:

29.7.1 procure that all hazardous materials and equipment used, by it or by any Authority Party or used on behalf of any of them, or stored, by it or by any Authority Party or stored on behalf of any of them, on the Site are kept in accordance with all relevant Law and Good Industry Practice, properly and securely labelled and stored, under appropriate supervision and used only by appropriately trained and competent staff; and

29.7.2 use all practicable and reasonable means to:

(a) prevent or counteract the unlawful emission of any such hazardous substance;

(b) avoid the unlawful discharge into any conducting media serving the Facilities of any hazardous substance;

(c) prevent the unlawful generation, accumulation or migration of any hazardous substance at or from the Facilities; and

(d) prevent any environmental claims arising or any circumstances arising likely to result in any environmental claims,

in so far as any such hazardous substance is, or should be, under the control of the Authority.

29.8 [The Authority] [Project Co] shall:

29.8.1 [maintain] [maintain or procure that a Service Provider maintains] a COSHH register for the Facilities, which shall be up-to-date at all times;

29.8.2 ensure that a copy of the COSHH register is kept at the Facilities; and

29.8.3 ensure that a further copy of the COSHH register is given to [Project Co] [the Authority] as often as it is changed.

Community Benefits

29.9 Project Co shall comply with the Authority's Community Benefits Requirements in accordance with Project Co's Community Benefits Method Statements.

29.10 If, in relation to the Works and prior to issue of the [final] Certificate of Practical Completion, Project Co does not:

29.10.1 [*insert target]* then Project Co shall pay to the Authority the sum of [*insert amount*] (indexed);

29.10.2 [*insert target]* then Project Co shall pay to the Authority the sum of [*insert amount*] (indexed);

29.10.3 [*insert target]* then Project Co shall pay to the Authority the sum of [*insert amount*] (indexed);

29.10.4 provide the [*quarterly / annual*] information in accordance with [♦] then on the occurrence of each such failure Project Co shall pay to the Authority the sum of [*insert amount*] (indexed);

provided that in each case the Authority has first served notice on Project Co notifying it of its non-compliance and Project Co has failed to rectify such non-compliance within [twenty(20)] Business Days of such notice.

29.11 The Authority's sole and exclusive remedy in respect of a breach of Clause [29.10.1 to 29.10.3] above shall be the payments provided for in Clause [29.10.1 to 29.10.3], respectively [and Project Co's maximum liability in this respect shall be [*insert amount*] (indexed)].

29.12 If, in relation to the Services and during the Operational Term, Project Co does not:

29.12.1 [*insert target]* then Project Co shall pay to the Authority the sum of [*insert amount*] (indexed);

29.12.2 [*insert target]* then Project Co shall pay to the Authority the sum of [*insert amount*] (indexed);

29.12.3 [*insert target]* then Project Co shall pay to the Authority the sum of [*insert amount*] (indexed);

29.12.4 provide the [quarterly / annual] information in accordance with [♦] then on the occurrence of each such failure Project Co shall pay to the Authority the sum of [*insert amount*] (indexed);

provided that in each case the Authority has first served notice on Project Co notifying it of its non-compliance and Project Co has failed to rectify such non-compliance within [twenty (20)] Business Days of such notice.

29.13 The Authority's sole and exclusive remedy in respect of a breach of Clause [29.12.1 to 29.12.3] shall be the payments provided for in Clause [29.12.1 to 29.12.3], respectively [and Project Co's maximum liability in this respect shall be[*insert amount*] (indexed)].

29.14 All payments due by Project Co to the Authority under this Clause shall be payable within [♦] Business Days of written demand.

Sustainable Development

29.15 Project Co acknowledges that the Authority is subject to the Well-being of Future Generations Act and shall assist and cooperate with the Authority to facilitate the Authority's compliance with its obligation to carry out sustainable development.

29.16 Project Co further acknowledges that the information contained in or supplied in connection with Clauses 29.9 to 29.14 (*Community Benefits*) and Schedule 29 (*Community Benefits*) may be published in whole or in part and/or supplied by the Authority to a Relevant Authority, as the Authority in its sole discretion considers necessary for compliance with its obligations to supply, produce and/or publish information under the Well-being of Future Generations Act.

29.17 Where the Authority requests information from Project Co in connection with Project Co's obligations under this Agreement (including without limitation Clauses 29.9 to 29.14 (*Community Benefits*) and Schedule 29 (*Community Benefits*)) in relation to any duty or obligation on the Authority under the Well-being of Future Generations Act, Project Co shall supply such information as soon as possible and in any event within [♦] Business Days of receiving such request.

PART 7: DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE

30 DELAY EVENTS

30.1 If, at any time, Project Co becomes aware that there will be (or is likely to be) a delay in completion of the Works [relating to one or more Phases], Project Co shall forthwith give notice to the Authority's Representative to that effect specifying the relevant delay or impediment. In relation to any such delay or impediment if the Authority's Representative is satisfied, or it is determined in accordance with Schedule 20 (*Dispute Resolution Procedure*), that such delay or impediment has arisen as a result of the occurrence of a Delay Event, then, subject to Clause 30.2 (*Delay Events*), the Authority's Representative shall allow Project Co an extension of time equal to the delay or impediment caused by such Delay Event (taking into account reasonably foreseeable consequences of the Delay Event) and shall revise the Completion Date [relevant Phase Completion Date(s)] accordingly but to avoid doubt, there shall be no extension to the Project Term as a result of any such delay or impediment.

30.2 If Project Co is (or claims to be) affected by a Delay Event:

30.2.1 it shall (and shall procure that the Project Co Parties shall) take and continue to take all reasonable steps to eliminate or mitigate the consequences of such an event upon the performance of its obligations under this Agreement and, where relevant, resume performance of its obligations affected by the Delay Event as soon as practicable; and

30.2.2 it shall neither be relieved from liability under this Agreement nor entitled to any extension of time for the purpose of Clause 30 (*Delay Events*) to the extent that it is delayed or impeded due to its failure (if any) to comply with its obligations under Clause 30.2.1 above.

30.3 For the purposes of this Agreement, a Delay Event means any of the following to the extent in each case that there will be (or is likely to be) a delay in completion of the Facilities [a Phase or Phases]:

30.3.1 the occurrence of a Qualifying Change in relation to which it has been agreed or determined that the implementation of the Authority Change would delay the completion of the Facilities [the Phase(s)];

30.3.2 any breach by the Authority and/or any Authority Party of any of the Authority's express obligations under this Agreement to the extent in each case that any such breach is not caused, or contributed to, by Project Co or any Project Co Party;

30.3.3 the execution of works on the Site not forming part of this Agreement by the Authority or any contractors employed by the Authority;

30.3.4 opening up of the Works pursuant to Clauses 13.3 to 13.7 (*Right to Open Up*) (inclusive) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with Schedule 20 (*Dispute Resolution Procedure*) that the opening up of the Works was reasonable in the light of other defects previously discovered by the Authority);

30.3.5 Force Majeure;

30.3.6 a Relief Event;

30.3.7 a Relevant Change in Law referred to in Clause 33.3.1 (*Discriminatory Change in Law*) and Clause 33.3.2 (*Specific Change in Law*)[; or

30.3.8 the occurrence of circumstances deemed to be a Compensation Event pursuant to Clause 10.4 (*Responsibility for Ground Conditions and Contamination*)].[29]

[29] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

30.4 Without prejudice to the generality of Clause 30 (*Delay Events*), Project Co shall give notice in writing to the Authority's Representative as soon as it (or the Contractor) can reasonably foresee a Delay Event occurring or, if the same is not reasonably foreseeable, as soon as it (or the Contractor) shall become aware of a Delay Event. Project Co shall within ten (10) Business Days after such notification, give further written details to the Authority's Representative which shall include:

30.4.1 a statement of which Delay Event the claim is based upon;

30.4.2 details of the circumstances from which the Delay Event arises;

30.4.3 details of the contemporary records which Project Co will maintain to substantiate its claim for extra time;

30.4.4 details of the consequences (whether direct or indirect, financial or non-financial) which such Delay Event may have upon completion of the Facilities [relevant Phase(s)]; and

30.4.5 details of any measures which Project Co proposes to adopt to mitigate the consequences of such Delay Event.

30.5 As soon as possible but in any event within five (5) Business Days of Project Co (or the Contractor) receiving, or becoming aware of, any supplemental information which may further substantiate or support Project Co's claim then, provided that the Completion Date [Phase Completion Date] has not otherwise already been revised pursuant to Clause 30.7 (*Delay Events*), Project Co shall submit further particulars based on such information to the Authority's Representative.

30.6 The Authority's Representative shall, after receipt of written details under Clause 30.4, or of further particulars under Clause 30.5 (*Delay Events*), be entitled by notice in writing to require Project Co to provide such further supporting particulars as he may reasonably consider necessary. Project Co shall afford the Authority's Representative reasonable facilities for investigating the validity of Project Co's claim including, without limitation, onsite inspection.

30.7 Subject to the provisions of this Clause, the Authority's Representative shall revise the Completion Date [relevant Phase Completion Date(s)] in accordance with Clause 30.1 (*Delay Events*) as soon as reasonably practicable and in any event within five (5) Business Days of the later of:

30.7.1 the date of receipt by the Authority's Representative of Project Co's notice given in accordance with Clause 30.4 (*Delay Events*) and the date of receipt of any further particulars (if such are required under Clause 30.6 (*Delay Events*)), whichever is the later; and

30.7.2 the date of receipt by the Authority's Representative of any supplemental information supplied by Project Co in accordance with Clause 30.5

(*Delay Events*) and the date of receipt of any further particulars (if such are required under Clause 30.6 (*Delay Events*)), whichever is the later.

If Project Co has failed to comply with the requirements as to the giving of notice under Clause 30.4 (*Delay Events*), or has failed to maintain records or afford facilities for inspection to the Authority's Representative, then Project Co shall not be entitled to any extension of time (and the Completion Date [relevant Phase Completion Date(s)] shall not be revised) in respect of any period of delay by Project Co in giving notice or providing information under Clause 30.4 (*Delay Events*) and/or to the extent that its failure to maintain records or afford facilities for inspection to the Authority's Representative has prevented the Authority's Representative from assessing the consequences of the Delay Event.

30.8 If:

30.8.1 the Authority's Representative declines to fix a revised Completion Date [Phase Completion Date(s)]; or

30.8.2 Project Co considers that a different Completion Date [Phase Completion Date(s)] should be fixed; or

30.8.3 there is a disagreement as to whether a Delay Event has occurred,

then Project Co shall be entitled to refer the matter for determination in accordance with Schedule 20 (*Dispute Resolution Procedure*).

Compensation

30.9 If the Delay Event is a Compensation Event Project Co's sole right to compensation shall be as provided for in Clauses 30.11 to 30.13 (*Compensation*) inclusive. To avoid doubt, no other Delay Event shall entitle Project Co to receive any compensation save as otherwise expressly provided in:

30.9.1 Schedule 16 (*Change Protocol*) in the case of a Delay Event referred to in Clause 30.3.1 (subject always to the provisions of Clause 33 (*Changes in Law*)); or

30.9.2 Clause 33 (*Changes in Law*) in the case of a Delay Event referred to in Clause 30.3.7.

30.10 For the purposes of Clause 30.9 (*Compensation*), a Compensation Event means:

30.10.1 any Delay Event referred to in Clause 30.3.2, Clause 30.3.3 or Clause 30.3.4 for which, in each case, it has been agreed or determined pursuant to this Clause 30 (*Delay Events*) that Project Co is entitled to an extension of time; or

30.10.2 in the period prior to the Actual Completion Date [a Phase Actual Completion Date], in circumstances where there is no delay in completion of the Facilities [relevant Phase] any breach by the Authority and/or any Authority Party of any of the Authority's express obligations under this Agreement to the extent that such breach is not caused, or contributed to, by Project Co or any Project Co Party[; or

30.10.3 the occurrence of circumstances deemed to be a Compensation Event pursuant to Clause 10.4 (*Responsibility for Ground Conditions and Contamination*)].[30]

30.11 Subject to Clause 30.12 (*Compensation*), if it is agreed, or determined, that there has been a Compensation Event, and Project Co has incurred loss (including loss of revenue) and/or expense as a direct result of such Compensation Event, Project Co shall be entitled to such compensation as would place Project Co in no better or worse position than it would have been in had the relevant Compensation Event not occurred. Project Co shall promptly provide the Authority's Representative with any additional information he may require in order to determine the amount of such compensation.

30.12 Project Co shall take all reasonable steps so as to minimise the loss and/or expense referred to in Clause 30.11 (*Compensation*) in relation to any Compensation Event and any compensation payable shall:

30.12.1 exclude any amounts incurred or to be incurred as a result of any failure of Project Co (or any Project Co Party) to comply with this Clause 30.12 (*Compensation*); and

30.12.2 be reduced by any amount which Project Co has recovered or will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance required under this Agreement) which amount, to avoid doubt, shall not include any excess or deductibles or any amount over the maximum amount insured applicable to any such insurance policy.

30.13 The amount of any compensation due to Project Co under Clause 30.11 (*Compensation*) shall be agreed between the parties or, failing agreement, determined pursuant to Schedule 20 (*Dispute Resolution Procedure*) and such compensation shall be payable:

30.13.1 in respect of compensation for a Compensation Event to the extent resulting in Capital Expenditure being incurred the Authority shall compensate Project Co for the actual Capital Expenditure incurred by Project Co within twenty (20) Business Days of its receipt of a written demand accompanied by a valid VAT invoice for the same by Project Co supported by all relevant information; and

[30] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

30.13.2 in all other cases in accordance with Section 6 (*Changing the Financial Model*) of Schedule 16 (*Change Protocol*) as if a Relevant Event had taken place.

31 RELIEF EVENTS

31.1 For the purposes of this Agreement, subject to Clause 31.4 (*Mitigation*), Relief Events mean any of the following events:

31.1.1 fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute Force Majeure), earthquake, riot or civil commotion;

31.1.2 failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services;

31.1.3 accidental loss or damage to the Works and/or Facilities or any roads servicing the same;

31.1.4 without prejudice to any obligation of Project Co to provide stand-by power facilities in accordance with the Authority's Construction Requirements and the Service Level Specification, failure or shortage of power, fuel or transport;

31.1.5 blockade or embargo falling short of Force Majeure;

31.1.6 the discovery of fossils, antiquities and human remains requiring action in accordance with Clause 19 (*Fossils and Antiquities*); or

31.1.7 official or unofficial strike, lockout, go slow or other dispute in each case generally affecting the construction, building maintenance or facilities management industry (or a significant sector of that industry),

provided in each case that such event does not arise (directly or indirectly) as a result of any wilful act or default of the party claiming relief and/or (i) in the case of Project Co claiming relief, any Project Co Party and (ii) in the case of the Authority claiming relief, any Authority Party.

31.2 Subject to Clauses 31.3 (*Relief Events*) and 31.4 (*Mitigation*), no right of termination shall arise under this Agreement by reason of any failure by a party to perform any of its obligations under this Agreement to the extent that such failure to perform occurs because of the occurrence of a Relief Event (and, to avoid doubt, and without prejudice to Clause 31.9 (*Mitigation*), unless expressly stated to the contrary in this Agreement, it is acknowledged that all other rights and obligations of the parties under this Agreement remain unaffected by the occurrence of a Relief Event).

31.3 Without prejudice to Project Co's rights under Clause 30 (*Delay Events*), Project Co shall only be relieved of its obligations under Clauses 12 (*The Design, Construction and Commissioning Process*), 13 (*Right of Access of Authority's Representative*), 14 (*Programme and Dates for Completion*), 17 (*Pre-Completion Commissioning and Completion*) and 30 (*Delay Events*) by Delay Events in accordance with Clause 30 (*Delay Events*).

Mitigation

31.4 Where a party is (or claims to be) affected by a Relief Event:

31.4.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the Relief Event as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and

31.4.2 it shall not be entitled to rely upon the relief afforded to it pursuant to Clause 31.2 (Relief Events) of this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 31.4.1 above.

31.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant Relief Event. Such initial notice shall give sufficient details to identify the particular event claimed to be a Relief Event.

31.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days of the notice referred to in Clause 31.5 (*Mitigation*) which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Relief Event on the ability of the party to perform, the action being taken in accordance with Clause 31.4 (*Mitigation*), the date of the occurrence of the Relief Event and an estimate of the period of time required to overcome it (and/or its effects).

31.7 The party claiming relief shall notify the other as soon as the consequences of the Relief Event have ceased and of when performance of its affected obligations can be resumed.

31.8 If, following the issue of any notice referred to in Clause 31.6 (*Mitigation*), the party claiming relief receives or becomes aware of any further information relating to the Relief Event (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.

31.9 To avoid doubt, and subject to any other express provision of this Agreement, the occurrence of a Relief Event shall not entitle Project Co to any compensation.

32 FORCE MAJEURE

32.1 For the purposes of this Agreement, Force Majeure means any of the following events or circumstances:

32.1.1 war, civil war, armed conflict or terrorism; or

32.1.2 nuclear contamination unless in any case Project Co and/or any Project Co Party is the source or the cause of the contamination; or

32.1.3 chemical or biological contamination of the Works and/or the Facilities and/or the Site from any of the events referred to in Clause 32.1.1 above; or

32.1.4 pressure waves caused by devices travelling at supersonic speeds,

which directly causes either party to be unable to comply with all or a material part of its obligations under this Agreement.

32.2 Subject to Clauses 32.3 and 32.4 (*Force Majeure*) the party claiming relief shall be relieved from liability under this Agreement to the extent that by reason of the Force Majeure it is not able to perform its obligations under this Agreement. For the avoidance of doubt (but without prejudice to Clause 41 (*Termination Resulting from Force Majeure*)) the Authority shall not be entitled to terminate this Agreement for a Project Co Event of Default if such Project Co Event of Default arises from an event of Force Majeure.

32.3 Where a party is (or claims to be) affected by an event of Force Majeure:

32.3.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the event of Force Majeure as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and

32.3.2 it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 32.3.1.

32.4 Without prejudice to Project Co's rights under Clause 30 (*Delay Events*), Project Co shall only be relieved from its obligations under Clauses 12 (*The Design, Construction and Commissioning Process*), 13 (*Right of Access of Authority's Representative*), 14 (*Programme and Dates for Completion*) and 30 (*Delay Events*) by Delay Events in accordance with Clause 30 (*Delay Events*).

32.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.

32.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the party to perform, the action being taken in accordance with Clause 32.3 (*Force Majeure*), the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects).

32.7 The party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.

32.8 If, following the issue of any notice referred to in Clause 32.6 (*Force Majeure*), the party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.

32.9 Nothing in this Clause 32 (*Force Majeure*) shall affect the Authority's entitlement to make Deductions in the period during which any event of Force Majeure is subsisting.

32.10 The parties shall endeavour to agree any modifications to this Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Schedule 20 (*Dispute Resolution Procedure*) shall not apply to a failure of the Authority and Project Co to reach agreement pursuant to this Clause 32.10 (*Force Majeure*).

Disaster Plan

32.11 The parties shall comply with the provisions of the Disaster Plan.

32.12 The parties shall liaise with each other periodically to review and update the Disaster Plan.

PART 8: CHANGES IN LAW & CHANGES

33 CHANGES IN LAW

General

33.1 Project Co shall take all steps necessary to ensure that the Project Operations are performed in accordance with the terms of this Agreement (including, without limitation, Clause 5.2.1) following any Change in Law.

Relevant Changes in Law

33.2 Subject to Clause 33.4.3(e) and Clause 33.4.3(f) and on the occurrence of any Relevant Change in Law, the parties shall be entitled to seek adjustments to the Annual Service Payments to compensate for any increase or decrease (as the case may be) in the net cost to Project Co of performing the Project Operations. Such adjustments (if any) will be calculated in accordance with and subject to Clause 33.4 (*Relevant Changes in Law*).

33.3 Relevant Change in Law means any of the following:

33.3.1 the occurrence of any Discriminatory Change in Law having an impact on the cost of performance of the Project Operations;

33.3.2 the occurrence of any Specific Change in Law having an impact on the cost of performance of the Project Operations; or

33.3.3 the occurrence, after the relevant date, of any Change in Law which requires any work of alteration, addition, demolition or extension or variation in the quality or function of the Facilities which is not Maintenance Work or Lifecycle Replacement or work which Project Co would otherwise be required to undertake to comply with its obligations under this Agreement. For the purposes of this Clause 33.3.3, the relevant date shall [in respect of a Phase] be the later to occur of the Completion Date [Phase Completion Date] and the Actual Completion Date [Phase Actual Completion Date], save where the Actual Completion Date [Phase Actual Completion Date] is delayed by a Compensation Event, a Delay Event referred to in Clause 30.3.1 or by a Delay Event referred to in Clause 30.3.7, in which case the relevant date shall be the later to occur of the Completion Date [Phase Completion Date] and the date on which the Works [relating to the relevant Phase] would have been completed in accordance with this Agreement had the relevant Compensation Event or Delay Event not occurred,

provided that:

(a) such Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor

performing operations similar to the relevant Project Operations, on the basis of draft bills published in Government green or white papers or other Government departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Union, in each case published:

(i) prior to the date of this Agreement; and

(ii) in substantially the same form or having substantially the same effect as the Relevant Change in Law; and

(b) a Change in Law relating to the application for, coming into effect, terms, implementation, repeal, revocation or otherwise of any Planning Permission shall not constitute a Relevant Change in Law.

33.4 On the occurrence of a Relevant Change in Law:

33.4.1 either party may give notice to the other of the occurrence of the Relevant Change in Law;

33.4.2 the parties shall meet within fifteen (15) Business Days of the notice referred to in Clause 33.4.1 to consult and seek to agree the effect of the Relevant Change in Law. If the parties, within ten (10) Business Days of this meeting, have not agreed the occurrence or the effect of the Relevant Change in Law, either party may refer the question of whether a Relevant Change in Law has occurred or the effect of any Relevant Change in Law for resolution in accordance with Schedule 20 *(Dispute Resolution Procedure)*; and

33.4.3 within ten (10) Business Days of the agreement or determination referred to in Clause 33.4.2 above, the Authority's Representative shall issue an Authority Change Notice and the relevant provisions of Schedule 16 (*Change Protocol*) shall apply except that:

(a) Project Co may give notice to the Authority's Representative that it objects to such an Authority Change Notice only on the grounds that the implementation of the Change would not give effect to or comply with the Relevant Change in Law;

(b) the Authority shall (i) agree the implementation of the Low Value Change, or (ii) confirm the estimate for the Medium Value Change, or (iii) approve the High Value Change Stage 2 Submission, (as appropriate) in respect of the Change in accordance with the relevant provisions of Schedule 16 (*Change Protocol*);

(c) the provisions of Clause 11 (*Consents and Planning Approval*) shall apply;

(d) the Authority shall not be entitled to withdraw any Authority Change Notice or its agreement as to the implementation of the Low Value Change, confirmation of an estimate for the Medium Value Change or approval of a High Value Change Stage 2 Submission (as appropriate), issued in accordance with this Clause 33.4 (*Relevant Changes in Law*);

(e) Project Co shall, without prejudice to its general obligation to comply with the terms of this Agreement:

(i) use all reasonable endeavours to mitigate the adverse effects of any Relevant Change in Law and take all reasonable steps to minimise any increase in costs arising from such Relevant Change in Law; and

(ii) use all reasonable endeavours to take advantage of any positive or beneficial effects of any Relevant Change in Law and take all reasonable steps to maximise any reduction in costs arising from such Relevant Change in Law; and

(f) any compensation payable, or reduction to the Annual Service Payments, shall be calculated in accordance with the relevant provisions of Schedule 16 (*Change Protocol*) provided that:

(i) the amount of any compensation payable; or

(ii) the amount by which the Annual Service Payment is to be reduced,

shall not take into account any amounts incurred or to be incurred as a result of Project Co's failure to comply with Clause 33.4.3(e) above.

General Change in Law

33.5 Either party may give notice to the other of the need for a Change which is necessary in order to enable Project Co to comply with any Change in Law which is not a Relevant Change in Law, in which event:

33.5.1 the parties shall meet within fifteen (15) Business Days to consult and seek to agree the effect of the Change in Law and any Change required as a consequence. If the parties, within ten (10) Business Days of this meeting, have not agreed the occurrence or the effect of the relevant Change in Law, either party may refer the question of whether a Change

in Law has occurred or the effect of the Change in Law for resolution in accordance with Schedule 20 (*Dispute Resolution Procedure*); and

33.5.2 within ten (10) Business Days of the agreement or determination referred to in Clause 33.5.1 above the Authority's Representative shall, if it is agreed or determined that a Change is required in order to comply with the Change in Law, issue an Authority Change Notice and the relevant provisions of Schedule 16 (*Change Protocol*) shall apply except that:

(a) Project Co may give notice to the Authority's Representative that it objects to such an Authority Change Notice only on the grounds that the implementation of the Change would not give effect to or comply with the Change in Law;

(b) the Authority shall (i) agree the implementation of the Low Value Change; or (ii) confirm the estimate for the Medium Value Change; or (iii) approve the High Value Change Stage 2 Submission, (as appropriate) in respect of the Change in accordance with the relevant provisions of Schedule 16 (*Change Protocol*);

(c) the provisions of Clause 11 (*Consents and Planning Approval*) shall apply;

(d) the Authority shall not be entitled to withdraw any Authority Change Notice or its (i) agreement as to the implementation of the Low Value Change; or (ii) confirmation of an estimate for the Medium Value Change; or (iii) approval of a High Value Change Stage 2 Submission (as appropriate), issued in accordance with this Clause 33.5 (*General Changes in Law*); and

(e) Project Co shall not be entitled to any payment or other compensation or relief from any performance of its obligations under this Agreement in respect of such Change in Law or associated Change (or the consequences of either).

34 CHANGE PROTOCOL

The provisions of Schedule 16 (*Change Protocol*) shall have effect in respect of Changes except as otherwise expressly provided in this Agreement.

PART 9: FINANCIAL

35 PAYMENT

Service Payments

35.1 Project Co shall not be entitled to receive any Monthly Service Payments until the Payment Commencement Date [Payment Commencement Date 1]. Subject to the provisions of this Agreement, the Authority shall pay Project Co [[♦] per cent ([♦]%) of the Monthly Service Payments in respect of each Contract Month from the period from the Payment Commencement Date to the Snagging Completion Date][31] in accordance with this Clause 35.1 (*Service Payments*) and the provisions of Schedule 14 (*Payment Mechanism*). On and from the [Snagging Completion Date, the Authority shall pay Project Co the Monthly Service Payments][32] in respect of each Contract Month in accordance with this Clause 35.1 (*Service Payments*) and the provisions of Schedule 14 (*Payment Mechanism*).

Invoicing and payment arrangements

35.2 The provisions of this Clause 35.2 (*Invoicing and payment arrangements*) apply to the issue of invoices in respect of the Monthly Service Payment by Project Co under this Agreement:

35.2.1 [On or before the fifth Business Day of each Contract Month Project Co shall submit to the Authority an invoice in the Agreed Form ("**Monthly Invoice**") aggregating the following:

(a) the Monthly Service Payment for that Contract Month, calculated in accordance with Section 2 (*Calculation of Service Payments*) of Schedule 14 (*Payment Mechanism*);

(b) adjustments to reflect previous over-payments and/or under-payments (each adjustment stated separately);

(c) any other amounts due by one party to the other (and where owed by Project Co showing as a negative figure);

(d) any VAT payable in respect of the above amounts;

(e) as a negative figure, in respect of the Monthly Invoice issued during the final Contract Month only, an amount equivalent to twice the monthly average of the Deductions incurred in the previous six (6) Contract Months ("**Estimated Deductions**"),

[31] To be adjusted for Phasing if necessary
[32] To be adjusted for Phasing if necessary

and setting out the date of the invoice, the due date for payment of the invoice and the account to which payment is to be made together with supporting information that clearly sets out the derivation and calculation of amounts referred to in the Monthly Invoice.]

35.2.2 Subject to Clauses 35.2.3 and 35.3 (*Manner of payment*) and the submission of the supporting information referred to in Clause 35.2.1, where a Monthly Invoice shows a net amount owed by the Authority to Project Co, the Authority shall pay the amount of the Monthly Invoice on the later of the final Business Day of the Contract Month or the date falling fifteen (15) Business Days after receipt of the Monthly Invoice, together with delivery of a valid VAT invoice in respect thereof. Where a Monthly Invoice shows a net amount owed by Project Co to the Authority, Project Co shall pay that amount to the Authority on the later of the final Business Day of the Contract Month or the date falling fifteen (15) Business Days after the Monthly Invoice or, at the option of the Authority, carry forward that amount to the next Monthly Invoice to reduce amounts which would otherwise be owed by the Authority to Project Co.

35.2.3 Within ten (10) Business Days of the Expiry Date, Project Co shall provide to the Authority a Monthly Service Report in respect of the final two (2) Contract Months. If the Deductions incurred in the final two (2) Contract Months exceed the Estimated Deductions, Project Co shall pay to the Authority an amount equal to the excess within fifteen (15) Business Days of receipt of an invoice therefor. If the Estimated Deductions exceed the Deductions incurred in the final two (2) Contract Months the Authority shall pay to Project Co an amount equal to the excess within fifteen (15) Business Days of receipt of an invoice therefor.

35.2.4 On or before the fifth Business Day of each Contract Month Project Co shall submit to the Authority a Monthly Service Report in respect of the immediately preceding Contract Month. The Monthly Service Report shall set out, in respect of the immediately preceding Contract Month:

(a) details of each and the aggregate amount of all Deductions incurred in relation to Performance Failures;

(b) details of each and the aggregate amount of all Deductions incurred in relation to Availability Failures;

(c) other information detailed in Schedule 12 (*Service Requirements*).

35.2.5 The parties shall endeavour to agree the contents of a Monthly Service Report within ten (10) Business Days of its submission in accordance with Clause 35.2.4, failing which either party may refer the matter to the Dispute Resolution Procedure.

Manner of payment

35.3 All invoices under this Agreement shall be raised in Pounds Sterling and the money of account and money of payment in respect of all payments, liabilities and claims (including any accrued rights) under this Agreement at any time shall remain denominated in Pounds Sterling. 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.

Disputes

35.4 If the Authority (acting in good faith) disputes all or any part of the Monthly Service Payments or other amounts calculated in accordance with Clause 35.2 (*Invoicing and Payment Arrangements*), the undisputed amount of the Monthly Service Payment shall be paid by the Authority in accordance with Clause 35.2 (*Invoicing and Payment Arrangements*) and the provisions of this Clause 35.4 (*Disputes*) shall apply. The parties shall use all reasonable endeavours to resolve the dispute in question within ten (10) Business Days of the dispute arising. If they fail so to resolve it, either party may refer the matter to the Dispute Resolution Procedure. Following resolution of the dispute, any amount agreed or determined to have been payable shall be paid forthwith by the Authority to Project Co, together with interest on such amount calculated in accordance with Clause 35.5 (*Late Payments*).

Late Payments

35.5 Each party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not duly made pursuant to the terms of this Agreement on the due date calculated from day to day at a rate per annum equal to the Default Interest Rate and including from the day after the date on which payment was due up to and including the date of payment.

Set-Off

35.6 Subject to Clause 46.11 (*Rights of Set-Off*), whenever any sum of money shall be agreed, or determined, as due and payable by Project Co to the Authority, such sum may at the Authority's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, to Project Co from the Authority under this Agreement provided that the Authority has given Project Co not less than five (5) Business Days' notice of its intention to deduct or apply such sum.

35.7 Whenever any sum of money shall be agreed, or determined, as due and payable by the Authority to Project Co, such sum may at Project Co's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, from Project Co to the Authority under this Agreement provided that Project Co has given the Authority not less than five (5) Business Days' notice of its intention to deduct or apply such sum.

36 VAT AND CONSTRUCTION INDUSTRY TAX DEDUCTION SCHEME

VAT

36.1 All amounts stated to be payable by either party under this Agreement shall be exclusive of any VAT properly chargeable on any amount.

36.2 Each party shall pay to the 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.

36.3 If either party (referred to in this Clause as the "**First Party**") shall consider that any VAT which the other party (referred to in this Clause as 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 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 clearance.

36.4 The following further provisions shall apply in respect of the application for clearance in accordance with Clause 36.3 (*VAT*):

36.4.1 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;

36.4.2 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

36.4.3 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.

36.5 If clearance is required by the First Party under Clause 36.3 (*VAT*), 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 any clearance on the matter. In this case, then subject to Clauses 36.6 (*VAT*) and 36.7 (*VAT*) 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.

36.6 If the First Party disagrees with any clearance obtained pursuant to Clause 36.3 (*VAT*) 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.

36.7 The following further provisions shall apply if the First Party shall exercise its rights under Clause 36.6 (*VAT*):

36.7.1 the action which the 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;

36.7.2 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;

36.7.3 save as specifically provided in Clause 36.5 (*VAT*), 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 of 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

36.7.4 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 36.7.2 which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

Changes in recoverability of VAT

36.8 Subject to Clause 36.9 (*Changes in recoverability of VAT*), if, following a Change in Law, Project Co becomes unable to recover VAT attributable to supplies to be made to the Authority by Project Co pursuant to this Agreement, the Authority shall ensure that Project Co is left in no better and no worse position than it would have been had such Change in Law not occurred (including but not limited to making

such amendments to this Agreement as Project Co and the Authority shall agree acting reasonably), provided that Project Co shall use all reasonable endeavours to mitigate the adverse effects of any such Change in Law.

36.9 The provisions of Clause 36.8 (*Changes in recoverability of VAT*) shall apply only if (and to the extent that) the Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Works on the basis of draft bills published in Government green or white papers or other Government departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Union, in each case published:

36.9.1 prior to the date of this Agreement; and

36.9.2 in substantially the same form as the Change in Law.

Construction Industry Tax Deduction Scheme

36.10 This Clause 36.10 (*Construction Industry Tax Deduction Scheme*) relates to the Construction Industry Tax Deduction Scheme:

36.10.1 In this Clause 36.10 (*Construction Industry Tax Deduction Scheme*) (but not otherwise):

(a) "**the Act**" means the Finance Act 2004;

(b) "**the Regulations**" means the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045);

(c) "**the Legislation**" means Chapter 3 Part 3 of the Act and the Regulations, taken together;

(d) "**Contractor**" means a person who is a contractor for the purposes of Chapter 3 Part 3 of the Act; and

(e) "**sub-contractor**" means a person who is a sub-contractor for the purposes of Chapter 3 Part 3 of the Act.

36.10.2 Each of the Authority and Project Co shall comply with the Legislation.

36.10.3 If any payment due from the Authority to Project Co under this Agreement is a contract payment under section 60(1) of the Act, then the Authority, as Contractor, shall (not later than fifteen (15) Business Days before the first such payment is due to be made) verify, in accordance with paragraph 6 of the Regulations, whether the sub-contractor is

registered for gross payment or for payment under deduction or is not registered under Chapter 3 Part 3 of the Act.

36.10.4 If any payment due from the Authority to Project Co under this Agreement is a contract payment under section 60(1) of the Act, then:

(a) if Project Co is registered for gross payment under section 63(2) of the Act, the Authority shall make a payment to Project Co without any deduction;

(b) if Project Co is not registered for gross payments under section 63(2) of the Act, the Authority shall make a payment to Project Co, subject to the deduction of the relevant percentage in accordance with section 61(1) of the Act, and thereupon Clause 36.10.6 below shall apply.

36.10.5 If any dispute arises between the Authority and Project Co as to whether any payment due by the Authority to Project Co under this Agreement is or is not a contract payment by virtue of the exemption in Regulation 23 of the Regulations, the parties will jointly apply to HM Revenue and Customs for a written clearance and until such clearance is received it shall be assumed that such payment is a contract payment and the provisions of Clause 36.10 (*Construction Industry Tax Deduction Scheme*) shall apply accordingly.

36.10.6 The Authority shall be entitled to make a deduction at the rate specified in section 61(1) of the Act or at such other rate as may be in force from time to time from the whole of any payment to Project Co (and not just that part of such payment which does not represent the direct cost to Project Co or any other person of materials used or to be used in carrying out the construction operations to which the relevant payment relates) unless prior to making such payment the Authority shall have received written confirmation from HM Revenue and Customs (obtained by and at the expense of Project Co) in a form which is reasonably satisfactory to the Authority directing the Authority to make the deduction against only a specified amount or proportion of any such payment to Project Co.

36.10.7 Where any error or omission has occurred in calculating or making any payment under this Clause 36.10 (*Construction Industry Tax Deduction Scheme*) then:

(a) in the case of an over deduction, the Authority shall correct that error by repayment of the sum over deducted to Project Co; and

(b) in the case of an under deduction, Project Co shall correct that error or omission by repayment of the sum under deducted to the Authority.

36.10.8 The Authority shall send promptly to H M Revenue & Customs any returns required by the Legislation, and shall provide to Project Co a payment statement (where appropriate) and/or such other information as may be required by the Legislation in relation to any contract payment.

36.10.9 If compliance with this Clause 36.10 (*Construction Industry Tax Deduction Scheme*) involves the Authority or Project Co in not complying with any other of the terms of this Agreement, then the provisions of this Clause shall prevail.

37 FINANCIAL MODEL

37.1 Unless otherwise agreed between the parties, any amendments to the Financial Model shall reflect, be consistent with and be made only in accordance with the provisions of this Agreement, and shall in all cases be subject to the prior written approval of the Authority (such approval not to be unreasonably withheld or delayed). In the event that the parties fail to agree any proposed amendments to the Financial Model, the matter shall be referred for resolution in accordance with Schedule 20 (*Dispute Resolution Procedure*).

37.2 Following any amendment of the Financial Model in accordance with this Agreement, Project Co shall promptly deliver a copy of the revised Financial Model to the Authority in the same form as the original form (or such other form as may be agreed by the parties from time to time).

38 RECORDS AND OPEN BOOK ACCOUNTING

Records and Reports

The provisions of Schedule 19 (*Record Provisions*) shall apply to the keeping of records and the making of reports.

PART 10: TERMINATION

39 AUTHORITY EVENTS OF DEFAULT[33]

39.1 For the purposes of this Agreement, Authority Events of Default means any of the following events or circumstances:

39.1.1 the Authority is in material breach of its obligations under Clause 9 (*Nature of Land Interests*) (other than as a consequence of a breach by Project Co of its obligations under this Agreement) and such breach materially adversely affects the ability of Project Co to perform its material obligations under this Agreement for a continuous period of not less than thirty (30) Business Days; or

39.1.2 the Authority fails to pay any sum or sums due to Project Co under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) the amount of the Monthly Service Payment from time to time and such failure continues for thirty (30) Business Days from receipt by the Authority of a notice of non payment from Project Co; or

39.1.3 the Authority is in breach of its obligations under Clause 58.11 (*Assignment*).

Project Co's options

39.2 On the occurrence of an Authority Event of Default, or within a reasonable time after Project Co becomes aware of the same, and while the same is still subsisting, Project Co may, at its option:

39.2.1 in respect of execution of the Works, suspend performance by it of its obligations under this Agreement until such time as the Authority shall have demonstrated to the reasonable satisfaction of Project Co that it is capable of performing, and will perform, its obligations under this Agreement; or

39.2.2 [34]serve notice on the Authority (or such other party as may be notified in advance in writing by the Authority to Project Co) of the occurrence (and specifying details) of such Authority Event of Default. If the relevant matter or circumstance has not been rectified or remedied by the Authority (or otherwise) in respect of Clause 39.1.1 or Clause 39.1.3 within sixty (60) Business Days of such notice, and in respect of Clause 39.1.2 within thirty (30) Business Days of such notice, Project Co may serve a further notice on the Authority (or its substitute notified in accordance with this Clause 39.2.2) terminating this Agreement with immediate effect.

[33] Refer to Health and Education Sector Specific Guidance in the User Guide.
[34] Refer to Health and Education Sector Specific Guidance in the User Guide.

39.3 Project Co shall not exercise or purport to exercise any right to terminate this Agreement (or accept any repudiation of this Agreement) except as expressly set out in this Agreement.

40 PROJECT CO EVENT OF DEFAULT

Project Co Event of Default

40.1 For the purposes of this Agreement, Project Co Event of Default means any of the following events or circumstances listed in this Clause 40.1 (*Project Co Event of Default*):

Insolvency

40.1.1 the occurrence of any of the following events in respect of Project Co, namely:

(a) any arrangement or composition with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act 1986) being entered into by or in relation to Project Co;

(b) a receiver, administrator, administrative receiver or other encumbrancer taking possession of 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 any material part of the assets of Project Co;

(c) Project Co 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 winding up, bankruptcy or dissolution of Project Co; or

(e) if Project Co shall suffer any event analogous to the events set out in Clauses 40.1.1(a) to (d) in any jurisdiction in which it is incorporated or resident;

Long stop

40.1.2 Project Co failing to achieve the Actual Completion Date [a Phase Actual Completion Date] within a period of [twelve (12)] months after the Completion Date [relevant Phase Completion Date];

Default

40.1.3

(a) Project Co committing a material breach of its obligations under this Agreement which has a material and adverse effect on the delivery of the Authority Services (other than as a consequence of a breach by the Authority of its obligations under this Agreement);

(b) Project Co wilfully breaches Schedule 23 (*Refinancing*);

40.1.4 Project Co abandoning this Agreement;

Health and safety

40.1.5 at any time after the Actual Completion Date [relevant Phase Actual Completion Date] Project Co committing a material breach of its obligations under this Agreement (other than as a consequence of a breach by the Authority of its obligations under this Agreement) which results in the criminal investigation, prosecution and conviction of Project Co or any Project Co Party or the Authority under the Health and Safety Regime (an "**H&S Conviction**") provided that an H&S Conviction of a Project Co Party or the Authority shall not constitute a Project Co Event of Default if, within ninety (90) Business Days from the date of the H&S Conviction (whether or not the H&S Conviction is subject to an appeal or any further judicial process), the involvement in the Project Operations of each relevant Project Co Party (which in the case of an individual director, officer or employee shall be deemed to include the Project Co Party of which that person is a director, officer or employee) is terminated and a replacement is appointed by Project Co in accordance with Clause 58.1 (*Sub-contractors*);

In determining whether to exercise any right of termination or right to require the termination of the engagement of a Project Co Party pursuant to this Clause 40.1.5, the Authority shall:

(a) act in a reasonable and proportionate manner having regard to such matters as the gravity of any offence and the identity of the person committing it; and

(b) give all due consideration, where appropriate, to action other than termination of this Agreement;

Change in Control

40.1.6 the occurrence of any Change in Control which is prohibited by Clause 59 (*Ownership Information and Changes in Control*);

Assignment

40.1.7 Project Co failing to comply with the provisions of Clauses 58.9 (*Assignment*) or 58.1 (*Sub-contractors*);

Deductions

40.1.8 the total Deductions in each of any three (3) Contract Months in any six (6) consecutive Contract Months is equal to or greater than [♦] percent of the Annual Service Payment for the current Contract Year;[35]

Warning Notices

40.1.9 Project Co is awarded a total of [four] (4) or more Warning Notices in any period of [twelve (12) consecutive months];

Payment

40.1.10 Project Co failing to pay any sum or sums due to the Authority under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) £[♦] (index linked) and such failure continues for sixty (60) Business Days from receipt by Project Co of a notice of non payment from the Authority;

Insurance

40.1.11 a breach by Project Co of its obligation to take out and maintain the insurances required by Clauses 54.1 and 54.2 (*Project Co Insurances*);

Procurement Breach

40.1.12 Project Co 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 Contracts Regulations 2015 (S.I.2015/102) and should therefore have been excluded from the procurement proceedings;

Corrupt Gifts

40.1.13

[35] Refer to Education Sector Specific Guidance in User Guide, if applicable.

(a) Project Co has committed a Prohibited Act, in relation to which Clause 45.3.1 applies; or

(b) Project Co has committed a Prohibited Act, in relation to which Clause 45.3.2, 45.3.3, 45.3.4or 45.3.5 applies; or

Tax Compliance

40.1.14 in the circumstances described at Clause 53.1.5(e) and/or Clause 53.1.6 (*Tax Compliance*).

Notification

40.2 Project Co shall notify the Authority of the occurrence, and details, of any Project Co Event of Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to a Project Co Event of Default, in either case promptly on Project Co becoming aware of its occurrence.

Authority's options

40.3 On the occurrence of a Project Co Event of Default, or within a reasonable time after the Authority becomes aware of the same, and while the same is subsisting, the Authority may:

40.3.1 in the case of the Project Co Events of Default referred to in Clauses 40.1.1 (*Insolvency*), 40.1.2 (*Long Stop*), 40.1.3(b) (*Default*), 40.1.5 (*Health and Safety*), 40.1.6 (*Change in Control*), 40.1.7 (*Assignment*), 40.1.8 (*Deductions*) 40.1.9 (*Warning Notices*), 40.1.10 (*Payment*), 40.1.12 (*Procurement Breach*) or 40.1.13(a)(*Corrupt Gifts*), terminate this Agreement in its entirety by notice in writing having immediate effect;

40.3.2 in the case of any Project Co Event of Default referred to in Clause 40.1.3(a) and 40.1.4, serve notice of default on Project Co requiring Project Co at Project Co's option either:

(a) to remedy the Project Co 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

(b) 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 Co Event of Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Project Co Event of Default is proposed to be remedied (Project Co shall only have the option of putting forward a programme in accordance with this Clause 40.3.2(b) if it first notifies the Authority within ten (10)

Business Days of such notice of default that it proposes to do so);

40.3.3 in the case of any Project Co Event of Default referred to in Clause 40.1.11 (*Insurance*) serve notice of default on Project Co requiring Project Co to remedy the Project Co Event of Default (if the same is continuing) within twenty (20) Business Days of such notice of default;

40.3.4 in the case of any Project Co Event of Default referred to in Clause 40.1.14 (*Tax Compliance*), serve notice of default on Project Co requiring Project Co to remedy the Project Co Event of Default (if the same is continuing) within thirty (30) Business Days of such notice of default; and

40.3.5 in the case of any Project Co Event of Default referred to in Clause 40.1.13(b), serve notice of default on Project Co requiring Project Co to remedy the Project Co Event of Default (if the same is continuing) within twenty (20) Business Days of such notice of default, on the terms required pursuant to Clause 45.3.2, 45.3.3, 45.3.4 or 45.3.5, as appropriate.

Remedy provisions

40.4 Where Project Co puts forward a programme in accordance with Clause 40.3.2(b), the Authority shall have twenty (20) Business Days from receipt of the same within which to notify Project Co (acting reasonably) that it does not accept the programme, failing which the Authority shall be deemed to have accepted the programme. Where the Authority notifies Project Co that it does not accept the programme as being reasonable, the parties shall endeavour within the following five (5) Business Days to agree any necessary amendments to the programme put forward. In the absence of agreement within five (5) Business Days, the question of whether the programme (as the same may have been amended by agreement) will remedy the Project Co Event of Default in a reasonable manner and within a reasonable time period (and, if not, what would be a reasonable programme) may be referred by either party for resolution in accordance with Schedule 20 (*Dispute Resolution Procedure*).

40.5 If:

40.5.1 the Project Co Event of Default notified in a notice of default served under Clause 40.3.2, Clause 40.3.3, Clause 40.3.4 or Clause 40.3.5 (as the case may be) is not remedied before the expiry of the period referred to in Clause 40.3.2(a), Clause 40.3.3, Clause 40.3.4 or Clause 40.3.5 (as appropriate); or

40.5.2 where Project Co puts forward a programme pursuant to Clause 40.3.2(b) which has been accepted by the Authority or has been determined to be reasonable and Project Co fails to achieve any element of the programme or the end date for the programme (as the case may be); or

40.5.3 any programme put forward by Project Co pursuant to Clause 40.3.2(b) is rejected by the Authority as not being reasonable, and the Dispute Resolution Procedure does not find against that rejection,

then the Authority may terminate this Agreement in its entirety by written notice to Project Co with immediate effect. Provided that for the purposes of Clause 40.5.2 if Project Co's performance of the programme is adversely affected by the occurrence of Force Majeure, a Relief Event or an Excusing Cause then, subject to Project Co complying with the mitigation and other requirements in this Agreement concerning Force Majeure, a Relief Event or an Excusing Cause (as the case may be), the time for performance of the programme or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by Force Majeure, the Relief Event or the Excusing Cause (as the case may be) which is agreed by the parties or determined in accordance with Schedule 20 (*Dispute Resolution Procedure*).

Authority's costs

40.6 Project Co shall reimburse the Authority for all reasonable costs incurred by the Authority in exercising any of its rights pursuant to this Clause 40 (*Project Co Event* of *Default*) (including, without limitation, any relevant increased administrative expenses). The Authority shall take reasonable steps to mitigate such costs.

40.7 The Authority shall not exercise, or purport to exercise, any right to terminate this Agreement except as expressly set out in this Agreement. The rights of the Authority (to terminate or otherwise) under this Clause are in addition (and without prejudice) to any right which the Authority may have to claim the amount of loss or damage suffered by the Authority on account of the acts or omissions of Project Co (or to take any action other than termination of this Agreement).

41 TERMINATION RESULTING FROM FORCE MAJEURE

If, in the circumstances referred to in Clause 32 (*Force Majeure*), the parties have failed to reach agreement on any modification to this Agreement pursuant to Clause 32 (*Force Majeure*) within six (6) calendar months of the date on which the party affected serves notice on the other party in accordance with Clause 32 (*Force Majeure*) either party may at any time afterwards terminate this Agreement by written notice to the other party having immediate effect provided always that the effects of the relevant event of Force Majeure continues to prevent either party from performing any material obligation under this Agreement.

42 AUTHORITY VOLUNTARY TERMINATION

42.1 The Authority shall be entitled to terminate this Agreement at any time on [six (6)] months' written notice to Project Co, including, for the avoidance of doubt, in circumstances described at regulation 73(1)(c) of The Public Contracts Regulations 2015 (S.I.2015/102). In the event of notice being given by the Authority in accordance with this Clause, the Authority shall, at any time before the expiration of such notice, be entitled to direct Project Co, where the Works (or any part or parts of the Works) or any Service (or any elements of any Service) have

not been commenced, to refrain from commencing any such Works or Services (or to procure the same).

43 TERMINATION FOR PERSISTENT BREACH BY PROJECT CO

43.1 If an Information Breach, or any other breach, other than any breach for which Deductions could have been made has continued for more than fourteen (14) days or occurred more than three (3) times in any six (6) month period then the Authority may serve a notice on Project Co:

43.1.1 specifying that it is a formal warning notice;

43.1.2 giving reasonable details of the breach; and

43.1.3 stating that such breach is a breach which, if it recurs frequently or continues, may result in a termination of this Agreement.

43.2 If, following service of such a warning notice, the breach specified has continued beyond thirty (30) days or recurred in three (3) or more months within the six (6) month period after the date of service, then the Authority may serve another notice on Project Co:

43.2.1 specifying that it is a final warning notice;

43.2.2 stating that the breach specified has been the subject of a warning notice served within the twelve (12) month period prior to the date of service of the final warning notice; and

43.2.3 stating that if such breach continues for more than fourteen (14) days or recurs in three (3) or more months within the six (6) month period after the date of service of the final warning notice, the Agreement may be terminated.

43.3 A warning notice may not be served in respect of any breach which has previously been counted in the making of a separate warning notice.

43.4 Once a termination notice is served for a Persistent Breach, Project Co should not be entitled to any further rectification period, although the provisions of the Funders' Direct Agreement will still apply.

44 EXPIRY

This Agreement shall terminate automatically on the Expiry Date unless it shall have been terminated earlier in accordance with the provisions of this Agreement. To avoid doubt, Project Co shall not be entitled to any compensation for termination of this Agreement on the Expiry Date.

45 CORRUPT GIFTS AND PAYMENTS

Prohibition on corruption

45.1 The term "**Prohibited Act**" means:

45.1.1 offering, giving or agreeing to give to the Authority or any other public body or to any person employed by or on behalf of the Authority or any other public body 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 this Agreement or any other agreement with the Authority or any other public body; or

(b) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with the Authority or any other public body;

45.1.2 entering into this Agreement or any other agreement with the Authority or any other public body in connection with which commission has been paid or has been agreed to be paid by Project Co 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 the Authority;

45.1.3 committing any offence:

(a) under the Bribery Act 2010;

(b) under any Law creating offences in respect of fraudulent acts; or

(c) at common law, in respect of fraudulent acts in relation to this Agreement or any other agreement with the Authority or any other public body;

45.1.4 defrauding or attempting to defraud or conspiring to defraud the Authority or any other public body;

45.1.5 committing any breach of the Employment Relations 1999 Act (Blacklists Regulations) 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992; or

45.1.6 committing any breach of the Data Protection Act 1998 by unlawfully processing personal data in connection with any blacklisting activities.

Warranty

45.2 Project Co warrants that in entering into this Agreement it has not committed any Prohibited Act.

Remedies

45.3 If Project Co or any Project Co Party (or anyone employed by or acting on behalf of them) commits any Prohibited Act, then the Authority shall be entitled to act in accordance with Clauses 45.3.1 to 45.3.6 below:

45.3.1 if a Prohibited Act is committed by Project Co or by an employee not acting independently of Project Co, then the Authority may terminate this Agreement with immediate effect by giving written notice to Project Co;

45.3.2 if the Prohibited Act is committed by an employee of Project Co acting independently of Project Co, then the Authority may give written notice to Project Co of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Works and/or Services by another person;

45.3.3 if the Prohibited Act is committed by a Contracting Associate or by an employee of that Contracting Associate not acting independently of that Contracting Associate then the Authority may give written notice to Project Co of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co terminates the relevant Sub-Contract and procures the performance of the relevant part of the Works and/or Services by another person, where relevant, in accordance with Clause 58 (*Sub-Contracting and Assignment*);

45.3.4 if the Prohibited Act is committed by an employee of a Contracting Associate acting independently of that Contracting Associate, then the Authority may give notice to Project Co of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice Project Co procures the termination of the employee's employment and (if necessary) procures the performance of the relevant part of the Works and/or Services by another person;

45.3.5 if the Prohibited Act is committed by any other person not specified in Clauses 45.3.1 to 45.3.4 above, then the Authority may give notice to Project Co of termination and this Agreement will terminate unless within twenty (20) Business Days Project Co procures the termination of such person's employment and of the appointment of their employer (where the employer is not the Authority and where such person is not employed

by Project Co or the Contracting Associate) and (if necessary) procures the performance of the relevant part of the Works and/or Services by another person; and

45.3.6 any notice of termination under this Clause shall specify:

(a) the nature of the Prohibited Act;

(b) the identity of the party who the Authority believes has committed the Prohibited Act; and

(c) the date on which this Agreement will terminate in accordance with the applicable provisions of this Clause.

45.4 Without prejudice to its other rights or remedies under this Clause, the Authority shall be entitled to recover from Project Co:

45.4.1 the amount or value of any such gift, consideration or commission; and

45.4.2 any other loss sustained in consequence of any breach of this Clause.

Permitted payments

45.5 Nothing contained in this Clause shall prevent Project Co from paying any proper commission or bonus to its employees within the agreed terms of their employment.

Notification

45.6 Project Co shall notify the Authority of the occurrence (and details) of any Prohibited Act promptly on Project Co becoming aware of its occurrence.

Interim Management

45.7 Where Project Co is required to replace any Sub Contractor pursuant to this Clause, the provisions of Clause 58.5 (*Replacement of a non-performing Sub-Contractor*) shall apply and be construed accordingly.

46 COMPENSATION ON TERMINATION

46.1 If this Agreement is terminated pursuant to Clause 41 (*Termination Resulting from Force Majeure*), then the Authority shall pay compensation to Project Co in accordance with Section 3 (*Consequence of Termination for Force Majeure*) of Schedule 17 (*Compensation on Termination*)

46.2 If this Agreement is terminated pursuant to Clause 40 (*Project Co Events of Default*), Clause 43 (*Termination for Persistent Breach by Project* Co) then the Authority shall pay compensation to Project Co in accordance with Section 2 (*Compensation on Project Co Default*) of Schedule 17 (*Compensation on Termination*).

46.3 If this Agreement is terminated pursuant to Clause 39 (*Authority Events of Default*), then the Authority shall pay compensation to Project Co in accordance with Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of Schedule 17 (*Compensation on Termination*).

46.4 If this Agreement is terminated pursuant to Clause 42 (*Voluntary Termination*), then the Authority shall pay compensation to Project Co in accordance with Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of Schedule 17 (*Compensation on Termination*).

Tax equalisation

46.5 Where a payment is to be made to Project Co pursuant to Clause 46.1, Clause 46.3 or Clause 46.4 (*Compensation on Termination*) (a "**Compensation Payment**") and Project Co has a Relevant Tax Liability in respect of such payment, then the amount of the Compensation Payment to be made by the Authority to Project Co shall be increased so as to ensure that Project Co is in the same position (after account is taken of the Relevant Tax Liability) as it would have been in had it not been for such Relevant Tax Liability.

46.6 For the purposes of this Clause 46 (*Compensation on Termination*):

46.6.1 "**Relief**" shall mean any relief, allowance or deduction in computing profits or tax or a credit against, or right to repayment of, tax granted by or pursuant to any legislation for tax purposes;

46.6.2 a "**Relief derived from the Project**" is a Relief which arises in connection with the Project and includes any Relief arising as a consequence of the distribution of any amount obtained in respect of the Project (other than a Compensation Payment) by Project Co (whether by way of interest, dividend or other distribution, repayment, reduction or redemption of capital or indebtedness or return of assets or otherwise); and

46.6.3 Project Co shall be regarded as having a "**Relevant Tax Liability**" in respect of a Compensation Payment to the extent that:

(a) it has a liability for tax in consequence of or in respect of a Compensation Payment ("**Actual Liability**"); or

(b) it would have had a liability for tax within paragraph (a) above but for the utilisation of a Relief other than a Relief derived from the Project ("**Deemed Liability**").

46.7 In determining whether Project Co has a Relevant Tax Liability by reason of a Compensation Payment, it should be assumed that any Reliefs derived from the Project which are available to Project Co (or would have been so available but for a surrender by Project Co of such Reliefs by way of group or consortium relief) for offset against the Compensation Payment, or against tax in relation to the same, have been so offset to the maximum extent possible.

46.8 Project Co shall keep the Authority fully informed of all negotiations with HM Revenue and Customs in relation to any Relevant Tax Liability in respect of a Compensation Payment. Project Co shall not agree, accept or compromise any claim, issue or dispute relating to such Relevant Tax Liability without the prior written consent of the Authority, which shall not be unreasonably withheld or delayed. The Authority may, if it considers in good faith that such action is justified having regard to the likely costs and benefits, direct Project Co to resist, appeal, defend or otherwise dispute the Relevant Tax Liability in respect of the Compensation Payment, provided that the cost of any such dispute (including any interest or penalties incurred) shall be at the Authority's expense. However, if Project Co obtains professional advice from an independent person with relevant expertise that any resistance, appeal, defence or other mode of dispute is not likely to result in any more beneficial position in relation to the Relevant Tax Liability, Project Co shall be entitled not to continue with such resistance, appeal, defence or other mode of dispute. Where any resistance, appeal, defence or other mode of dispute results in a more beneficial position in relation to the Relevant Tax Liability, an adjustment will be made to the amount payable under Clause 46.5 (*Tax equalisation*) to reflect such outcome.

46.9 Any increase in the amount of a Compensation Payment which is payable under Clause 46.5 (*Tax equalisation*) shall be paid on the later of five (5) Business Days after a demand therefore (together with evidence in sufficient detail for the Authority to satisfy itself of the Relevant Tax Liability and its calculation) is made by Project Co and:

46.9.1 in the case of an Actual Liability, five (5) Business Days before the date on which the relevant tax must be paid to the tax authority in order to avoid incurring interest and penalties; and

46.9.2 in the case of a Deemed Liability, five (5) Business Days before the date on which tax which would have been payable but for the utilisation of the relevant Relief must be paid in order to avoid incurring interest or penalties (whether by Project Co or otherwise) and, for the purposes of determining when the Relief would otherwise have been utilised, Reliefs shall be regarded as utilised in the order in which they arise.

46.10 The Authority shall have the right to pay the amount payable under Clause 46.5 (*Tax equalisation*) direct to HM Revenue and Customs in satisfaction of the relevant tax due by Project Co.

Rights of Set-Off

46.11 To avoid doubt, the Authority's obligations to make any payment of compensation to Project Co pursuant to this Clause are subject to the Authority's rights under Clause 35.6 (*Set-Off*), save that the Authority agrees not to set-off any amount agreed or determined as due and payable by Project Co to the Authority against

any payment of termination compensation (whether payable as a lump sum or in instalments) under Clauses 46.1, 46.3 or 46.4 (*Compensation on Termination*), except to the extent that such termination payment exceeds the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as the case may be) at that time.

Full and final settlement

46.12 Subject to the provisions of paragraph 2.1 of Section 4 (*General*) of Schedule 17 (*Compensation on Termination*):

46.12.1 any compensation paid pursuant to this Clause shall be in full and final settlement of any claim, demand and/or proceedings of Project Co in relation to any termination of this Agreement and/or any Project Document (and the circumstances leading to such termination) and Project Co shall be excluded from all other rights and remedies in respect of any such termination; and

46.12.2 the compensation payable (if any) pursuant to this Clause 46 (*Compensation on Termination*) above shall be the sole remedy of Project Co and Project Co shall not have any other right or remedy in respect of such termination.

47 CONSEQUENCES OF TERMINATION

Continued performance

47.1 Subject to any exercise by the Authority of its rights to perform, or to procure a third party to perform, the obligations of Project Co, the parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of default or notice of termination, until the Termination Date.

Transfer to Authority of Assets, Contracts etc.

47.2 On the service of a notice of termination in accordance with this Agreement for any reason:

47.2.1 if prior to the Actual Completion Date [final Phase Actual Completion Date], in so far as any transfer shall be necessary fully and effectively to transfer property to the Authority, Project Co shall transfer to, and there shall vest in, the Authority, such part of the Works and/or the Facilities as shall have been constructed and such items of the Plant [and [♦]] as shall have been procured by Project Co if the Authority so elects:

47.2.2 all goods and all materials on or near to the Site not yet incorporated in the Works shall remain available to the Authority for the purposes of completing the Works and if the cost of such goods and materials has not been reflected in the payment of any compensation pursuant to

Schedule 17 (*Compensation on Termination*), subject to the payment by the Authority to Project Co in respect of such goods and materials (determined as between a willing vendor and willing purchaser with any disputes determined pursuant to Clause 57 (*Dispute Resolution Procedure*));

47.2.3 the construction plant shall remain available to the Authority for the purposes of completing the Works, subject to payment of the Contractor's reasonable charges;

47.2.4 Project Co shall hand over to, and there shall vest in, the Authority, free from any Encumbrances (other than any created on or by or against the Authority), the Facilities;

47.2.5 if the Authority so elects, Project Co shall procure that any of the Construction Contract, the Service Contracts and/or the Independent Tester Contract shall be novated or assigned to the Authority, provided that where termination occurs under Clause 39 (*Authority Events of Default*) the consent of the Contractor, the Service Provider or the Independent Tester (as the case may be) shall be required;

47.2.6 Project Co shall, or shall procure that any Contracting Associate shall (as the case may be), offer to sell to the Authority at a fair value (determined as between a willing vendor and willing purchaser, with any disputes as to such fair value being determined pursuant to Schedule 20 (*Dispute Resolution Procedure*), free from any Encumbrance all or any part of the stocks of material and other assets, road vehicles, spare parts and other moveable property owned by Project Co or any of its Contracting Associates and reasonably required by the Authority in connection with the operation of the Facilities or the provision of the Services;

47.2.7 Project Co shall deliver to the Authority (as far as not already delivered to the Authority) one (1) complete set of:

(a) "as built drawings" showing all alterations made to the Facilities since the commencement of operation of the Facilities; and

(b) maintenance, operation and training manuals for the Facilities;

47.2.8 Project Co shall use all reasonable endeavours to procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical plant and equipment used or made available by Project Co under this Agreement and included in the Facilities are assigned, or otherwise transferred, to the Authority with full title guarantee; and

47.2.9 Project Co shall deliver to the Authority the records referred to in Clause 38 (*Records and Open Book* Accounting) except where such documents are required by Law to be retained by Project Co or its Contracting Associates (in which case complete copies shall be delivered to the Authority).

47.3 Project Co shall ensure that provision is made in all contracts of any description whatsoever to ensure that the Authority will be in a position to exercise its rights, and Project Co will be in a position to comply with its obligations, under Clause 47.2 (*Transfer to Authority of Assets, Contracts etc.*).

Transitional arrangements

47.4 On the termination of this Agreement for any reason, for a reasonable period both before and after any such termination, Project Co shall have the following duties:

47.4.1 Project Co shall co-operate fully with the Authority and any successor providing to the Authority services in the nature of any of the Services or any part of the Services in order to achieve a smooth transfer of the manner in which the Authority obtains services in the nature of the Services and to avoid or mitigate in so far as reasonably practicable any inconvenience or any risk to the health and safety of the employees of the Authority and members of the public;

47.4.2 Project Co shall as soon as practicable remove from the Site all property not acquired by the Authority pursuant to Clause 47.2 (*Transfer to Authority of Assets, Contracts etc.*) (or not belonging to the Authority or any Authority Party) and if it has not done so within forty (40) Business Days after any notice from the Authority requiring it to do so the Authority may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred to the credit of Project Co;

47.4.3 Project Co shall forthwith deliver to the Authority's Representative:

(a) any security passwords, access codes and other keys to the Facilities and the equipment; and

(b) without prejudice to Clause 56 (*Intellectual Property*), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facilities (but excluding computer programmes, which have been developed or acquired by a Service Provider for its own use and not solely for the purposes of provision of any of the Services at the Facilities or the assignment or transfer of which is otherwise restricted); and

47.4.4 Project Co shall as soon as practicable vacate the Site and (without prejudice to Schedule 18 (*Handback Procedure*)) shall leave the Site and the Facilities in a safe, clean and orderly condition.

47.5 If the Authority wishes to conduct a competition prior to the Expiry Date with a view to entering into an agreement for the provision of services (which may or may not be the same as, or similar to, the Services or any of them) following the expiry of this Agreement, Project Co shall co-operate with the Authority fully in such competition process including (without limitation) by:

47.5.1 providing any information which the Authority may reasonably require to conduct such competition but, to avoid doubt, information which is commercially sensitive to Project Co shall not be provided (and, for the purpose of this Clause 47.5.1 commercially sensitive shall mean information which would if disclosed to a competitor of Project Co give that competitor a competitive advantage over Project Co and thereby prejudice the business of Project Co but shall, to avoid doubt, exclude any information to be disclosed in terms of Clause 27 (*Employment matters*)); and

47.5.2 assisting the Authority by providing all (or any) participants in such competition process with access to the Site and the Facilities.

Continuing Obligations

47.6 Save as otherwise expressly provided in this Agreement or as already taken into account in the calculation of any termination sum or other payment of compensation on termination pursuant to this Agreement:

47.6.1 termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination; and

47.6.2 termination of this Agreement shall not affect the continuing rights and obligations of Project Co and the Authority under Clauses 10 (*The Site*), 27 (*Employment Matters*), 32 (*Force Majeure*), 35 (*Payment*), 36 (*VAT and Construction Industry Tax Deduction Scheme*), 37 (*Financial Model*), 38 (*Records and Open Book Accounting*), 41 (*Termination Resulting from Force Majeure*), 42 (*Authority Voluntary Termination*), 45 (*Corrupt Gifts and Payments*), 46 (*Compensation on Termination*), 47.2 (*Transfer to Authority of Assets, Contracts etc.*), 47.4 and 47.5 (*Transitional Arrangements*), 49 (*Indemnities*), 54 (*Insurance*), 55 (*Exclusions and Limitations on Liability*), 56 (*Intellectual Property*), 57 (*Dispute Resolution Procedure*), 60 (*Mitigation*), 62 (*Confidentiality*), 65 (*Notices*) and Clause 76 (*Governing Law and Jurisdiction*) or under any other provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

48 HANDBACK PROCEDURE

The provisions of Schedule 18 (*Handback Procedure*) shall apply to the handback of the Facilities to the Authority on expiry of this Agreement.

PART 11: INDEMNITIES, RELIEF, WARRANTIES & INSURANCE

49 INDEMNITIES[36]

Project Co indemnities to Authority

49.1 Project Co shall indemnify and keep the Authority indemnified at all times from and against all Direct Losses sustained by the Authority in consequence of:

49.1.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, Project Co or any Project Co Party notwithstanding any act or omission of the Authority or any Authority Party;

49.1.2 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 49.2.1) arising out of, or in the course of, the Project Operations, save to the extent caused (or contributed to) by any Unreasonable Act by the Authority or any Authority Party, breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate or negligent act or omission of the Authority or any Authority Party;

49.1.3 any physical loss of or damage to Authority Assets arising by reason of any act or omission of Project Co or any Project Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate or negligent act or omission of the Authority or any Authority Party; and

49.1.4 any loss of or damage to property or assets of any third party arising by reason of any act or omission of Project Co or any Project Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate or negligent act or omission of the Authority or any Authority Party.

Authority indemnities to Project Co

49.2 The Authority shall indemnify and keep Project Co indemnified at all times from and against all Direct Losses sustained by Project Co in consequence of:

49.2.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, the Authority or any Authority Party notwithstanding any act or omission of Project Co or any Project Co Party;

[36] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

49.2.2 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 49.1.1) arising by reason of any act or omission of the Authority or any Authority Party in the course of provision of the Authority Services, any Unreasonable Act by the Authority or any Authority Party, breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate act or omission of the Authority or any Authority Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party;

49.2.3 any physical damage to any part of the Facilities or any assets or other property of Project Co or any Project Co Party arising by reason of any breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate act or omission of the Authority or any Authority Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party; and

49.2.4 any loss of or damage to property or assets of any third party arising by reason of any breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate act or omission of the Authority or any Authority Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party;

provided that in the case of Clauses 49.2.3 and 49.2.4 there shall be excluded from the indemnity given by the Authority any liability:

(a) for the occurrence of risks against which and to the extent to which Project Co is obliged to insure under this Agreement (but for the avoidance of doubt, not such liability to the extent within any applicable excess or deductible or over the maximum amount insured or to be insured under such insurance); or

(b) in respect of a matter which is a Compensation Event; or

(c) in respect of malicious damage.

Conduct of claims

49.3 This Clause 49.3 (*Conduct of Claims*) 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:

49.3.1 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;

49.3.2 subject to Clauses 49.3.3, 49.3.4 and 49.3.5 below, on the giving of a notice by the Beneficiary pursuant to Clause 49.3.1 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 an 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 cooperation, access and assistance for the purposes of considering and resisting such claim;

49.3.3 with respect to any claim conducted by the Indemnifier pursuant to Clause 49.3.2 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;

49.3.4 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 49.3.2 above; or

(b) the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Beneficiary under Clause 49.3.1 above or notifies the Beneficiary 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 49.3.3 above;

49.3.5 the Beneficiary shall be free at any time to give notice 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 49.3.2 above 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 pursuant to this Clause 49.3.5, then the Indemnifier shall be released from any liability under its indemnity under Clause 49.1 (Project Co Indemnities to Authority) or Clause 49.2 (*Authority Indemnities to Project Co*) (as the case may be) and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to Clause 49.3.2 in respect of such claim;

49.3.6 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,

49.3.7 provided that there shall be no obligation on the Beneficiary to pursue such recovery and that the Indemnifier is 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

49.3.8 any person taking any of the steps contemplated by Clauses 49.3.1 to 49.3.5 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

49.4 To avoid doubt the provisions of Clause 60 (*Mitigation*) apply to any indemnity given under this Agreement and any such indemnity shall not apply to the extent that such part or parts of Direct Losses could have been reduced or avoided by the Beneficiary complying with the provisions of such Clause 60 (*Mitigation*).

50 MALICIOUS DAMAGE

50.1 Remit of Clause

This Clause 50 (*Malicious Damage*) specifies the respective obligations of the parties in relation to malicious damage to the Facilities during the Operational Term.

50.2 Notification

50.2.1 As soon as possible after a Service Event has been notified to the Helpdesk or after Project Co has itself or by a Service Provider become aware of a Service Event, if it considers that the Service Event was caused by malicious damage by a person other than a Project Co Party, Project Co must verbally inform the Helpdesk and the [Authority's Representative] (a "**Malicious Damage Report**"). Where it is reasonably practicable for it to do so without prejudicing its ability to achieve Rectification of the Service Event within the Rectification Period and subject to any immediate steps that it requires to take to make the Facilities safe, it must allow the [Authority's Representative] an opportunity to inspect the evidence it relies on to support its claim that malicious damage caused the Service Event concerned before carrying out Rectification and, where this is not reasonably practicable, Project Co must take reasonable steps to preserve or record in a suitable manner any such evidence and forthwith make that record available to the Authority.

50.2.2 Provided Project Co has complied with the requirements of Clause 50.2.1, unless within [[♦] hours] of receipt of a Malicious Damage Report or within [[♦] hours] of the start of the next Core Times where the Malicious Damage Report is made outside Core Times, or, if applicable, within [one (1)] Business Day of receipt of the evidence or record of the alleged malicious damage concerned the [Authority's Representative] notifies Project Co that he agrees that the Service Event referred to in the relevant Malicious Damage Report was caused by malicious damage by a person other than a Project Co Party, the [Authority's Representative] will be deemed to have disagreed that the Service Event concerned was caused by malicious damage by a person other than a Project Co Party.

50.3 Rectification of Malicious Damage

50.3.1 In relation to any Service Event referred to in a Malicious Damage Report, Project Co shall always take such steps as are necessary in accordance with its obligations under this Agreement to make the Facilities safe.

50.3.2 If the [Authority's Representative] agrees in accordance with Clause 50.2 (*Notification*) that a Service Event was caused by malicious damage by a person other than a Project Co Party, except when Clause 50.3 (*Rectification of Malicious Damage*) applies, Project Co shall not Rectify

the Service Event beyond what is required by Clause 50.3.1 unless instructed by the Authority to do so as an Authority Change under Schedule 16 (*Change Protocol*).

50.3.3 If, in the reasonable opinion of Project Co, the Service Event referred to in a Malicious Damage Report, if not Rectified, will or is likely to result in the costs of performing the Services and in particular the costs of Maintenance Works and Lifecycle Replacement being materially increased, it may notify the [Authority's Representative] to that effect and shall be entitled to proceed with Rectification in accordance with its obligations under this Agreement.

50.3.4 If the [Authority's Representative] does not agree accordance with Clause 50.2 (*Notification*) that the Service Event referred to in a Malicious Damage Report was caused by malicious damage by a person other than a Project Co Party, Project Co shall be entitled to proceed with Rectification in accordance with its obligations under this Agreement.

50.4 **Costs of rectifying malicious damage**

Project Co will be entitled to include all reasonable costs incurred with any Service Provider or third party:

50.4.1 to make the Facilities safe pursuant to Clause 50.3.1 if it is agreed by the Authority or subsequently determined under the Dispute Resolution Procedure that the Service Event was caused by malicious damage by a person other than a Project Co Party; or

50.4.2 to carry out Rectification pursuant to Clause 50.3.3; or

50.4.3 to carry out Rectification pursuant to Clause 50.3.4 if it is subsequently determined under the Dispute Resolution Procedure that the Service Event was caused by malicious damage by a person other than a Project Co Party,

in a Monthly Invoice in accordance with Clause 35.2.1(c). In deciding what a reasonable cost is, regard may be had to prices and rates in the Catalogue (as defined in Schedule 16 (*Change Protocol*)).

50.5 **Project Co to Provide Information**

Project Co must provide the Authority with such information as the Authority reasonably requests for the purpose of making claims for losses due to malicious damage, under the Operational Insurances.

50.6 **Disputes**

Any dispute under this Clause 50.6 (*Disputes*) shall be determined under the Dispute Resolution Procedure.

51 TAX ON INDEMNITY PAYMENTS

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 as would ensure that, after taking into account any such tax payable in respect of such 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. In relation to any such additional amount payable to Project Co, Project Co and the Authority shall have the same rights and obligations as would apply to a Relevant Tax Liability under Clause 46.6.3 and Clauses 46.5 to 46.10 (*Tax equalisation*) (inclusive) shall apply mutatis mutandis to the payment of the additional amount. The party making the payment shall pay such additional amount within ten (10) Business Days of receipt of such demand.

52 EXCUSING CAUSES[37]

52.1 If an Excusing Cause interferes adversely with, or causes or contributes to a failure of, the performance of the Project Operations by Project Co and/or causes or contributes to the occurrence of an Availability Failure and/or a Performance Failure and provided that the effect of such Excusing Cause is claimed within ten (10) Business Days of the date on which Project Co became aware (or ought reasonably to have become so aware) of the occurrence of the Excusing Cause, then (subject to Clauses 52.3 (*Insured Exposure*) and 52.4 (*Mitigation of Excusing Causes*)) to the extent such failure or interference or occurrence of an Availability Failure and/or a Performance Failure arises as a result of such Excusing Cause:

52.1.1 such failure by Project Co to perform or interference or occurrence, and any poor performance of, any affected Service shall not constitute a breach of the provisions of this Agreement by Project Co;

52.1.2 such failure by Project Co to perform or interference or occurrence shall not be taken account of in measuring the performance of any affected Service in accordance with the Service Level Specification, which shall be operated as though the relevant Service had been performed free from such adverse interference; and

52.1.3 any such Availability Failure and/or Performance Failure shall be deemed not to have occurred,

so that Project Co shall be entitled to payment under this Agreement as if there had been no such interference with, or failure in the performance of, the Project Operations and no such occurrence of an Availability Failure and/or Performance Failure.

52.2 For the purpose of Clause 52 (*Excusing Causes*), an Excusing Cause means:

[37] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

52.2.1 any breach of any express provision of this Agreement by the Authority or any Authority Party (unless, and to the extent, caused or contributed to by Project Co or any Project Co Party);

52.2.2 any deliberate act or omission of the Authority or of any Authority Party or any failure by the Authority or Authority Party (having regard always to the interactive nature of the activities of the Authority and of Project Co) to take reasonable steps to carry out its activities in a manner which minimises undue interference with Project Co's performance of the Project Operations, save where (and to the extent):

(a) caused or contributed to by Project Co or any Project Co Party;

(b) the Authority or Authority Party is acting in accordance with a recommendation or instruction of Project Co or any Project Co Party;

(c) any such act or omission giving rise to such failure was within the contemplation of the parties or was otherwise provided for in this Agreement;

(d) the consequences of any such deliberate act or omission or other acts or omissions giving rise to such failure would have been prevented by the proper performance of Project Co's obligations under this Agreement; or

(e) [the same arises from an act of the Authority or an Authority Party compliant with the Contractor's Site Rules and other requirements of the Contractor as referred to in Clause 13.1 (*Access to Site*) or 17.9 (*Commissioning prior to Completion Date*);]

52.2.3 the implementation of any action taken by the Authority or any Authority Party, or any suspension of Project Co's obligation to deliver any or any part of the Services or the compliance by Project Co with instructions given by the Authority, in each case in the circumstances referred to in Clauses 26.6 to 26.9 (*Authority's remedial rights*) (inclusive);

52.2.4 the carrying out of any Low Value Change in accordance with the terms of this Agreement during the period of time agreed between the Authority and Project Co;

52.2.5 the carrying out of planned preventative maintenance in accordance with the Schedule of Programmed Maintenance; or

52.2.6 the occurrence of a Service Event that the [Authority's Representative] has agreed pursuant to Clause 50.3.2 or that it has been determined pursuant to the Dispute Resolution Procedure has been caused by malicious damage by a person other than a Project Co Party, but only

until such time as either (i) the Authority has instructed Project Co to Rectify the Service Event as an Authority Change and the time period for implementation of such Authority Change has expired or (ii) Project Co has Rectified the Service Event pursuant to Clause 50.3.3; [or]

52.2.7 [the occurrence of a matter referred to in Clause 10.4 (*Responsibility for Ground Conditions and Contamination*) during the Operational Term][.]

Insured exposure

52.3 Without prejudice to Clause 54 (*Insurance*), Project Co shall not be entitled to any payment which would not have been due under this Agreement but for Clause 52 (*Excusing Causes*) to the extent that Project Co is or should be able to recover under any policy of insurance required to be maintained by Project Co or any Project Co Party in accordance with this Agreement (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 Project Co (or any Project Co Party), including but not limited to non-disclosure or under insurance) or any other policy of insurance which Project Co has taken out and maintained.

Mitigation of Excusing Cause

52.4 Project Co shall take all reasonable steps to mitigate the consequences of an Excusing Cause on Project Co's ability to perform its obligations under this Agreement. To the extent that Project Co does not take such steps, Project Co shall not be entitled to, and shall not receive, the relief specified in Clause 52.1 (*Excusing Causes*).

52.5 To avoid doubt, Clause 52.2.2 shall not impose a general obligation on the Authority to take (or to procure that any Authority Party takes) such steps and shall apply (and be construed) solely for the purpose of establishing whether an Excusing Cause has occurred.

53 WARRANTIES

53.1 Tax Compliance

53.1.1 Project Co represents and warrants to the Authority that at the date of this Agreement, it has notified the Authority 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 [♦][38]) is involved in.

[38] Reference to be made to the Welsh Government shareholder entity, under the Shareholders' Agreement.

53.1.2 If at any time an Occasion of Tax Non-Compliance occurs in relation to it or any Shareholder other than [♦][39] (a **"Non-Compliant Shareholder"**), Project Co shall:

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

(b) provide to the Authority:

(i) 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

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

53.1.3 The Authority will notify Project Co 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 53.1.2.

53.1.4 Where the Authority notified Project Co that the Proposed Mitigating Measures are not acceptable, the Authority may, in that notice, request that Project Co 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 Authority requesting further measures, Project Co 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 Authority that it is not willing to take further measures. The Authority will consider any further measures proposed by Project Co and notify Project Co within fifteen (15) Business Days if those further measures, taken together with the Proposed Mitigating Measures, are acceptable to the Authority acting reasonably.

53.1.5 If:

(a) the warranty by Project Co contained in Clause 53.1.1 is untrue and Proposed Mitigating Measures are not agreed in accordance with Clauses 53.1.2 to 53.1.4 (inclusive); and/or

(b) Project Co commits a material breach of its obligation to notify the Authority of any Occasion of Tax Non-Compliance and / or Project Co fails to provide details of Proposed Mitigating Measures each as required by Clause 53.1.2; and/or

(c) the Authority otherwise becomes aware that an Occasion of Tax Non-Compliance has occurred in relation to Project Co or a Shareholder (other than [♦][40])) and Project Co fails to provide

[39] Reference to be made to the Welsh Government shareholder entity, under the Shareholders' Agreement.
[40] Reference to be made to the Welsh Government shareholder entity, under the Shareholders' Agreement.

details of Proposed Mitigating Measures within twenty (20) Business Days of its being required by the Authority to do so; and/or

(d) the Authority notifies Project Co under Clause 53.1.4 that the Proposed Mitigating Measures are not acceptable and, if Project Co is requested to provide details of further measures pursuant to Clause 53.1.4 the further measures (if any) are not acceptable to the Authority, in its reasonable opinion and the Authority notifies Project Co to that effect; and / or

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

then the Authority shall be entitled to give to Project Co:

(i) where the Occasion of Tax Non-Compliance has occurred in relation to Project Co, a notice under Clause 40.3.4(*Authority's Options*); and

(ii) where the Occasion of Tax Non-Compliance has occurred in relation to a Shareholder, a notice under Clause 53.1.6 (*Shareholder Tax Non-Compliance Notice*).

53.1.6 Where the Occasion of Tax Non-Compliance applies to a Non-Compliant Shareholder, the Authority 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 Project Co or Hold Co to a person who is not a Restricted 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 Project Co or Hold Co to a person who is not a Restricted Person within such one hundred and eighty (180) day period (or such longer period as may be agreed by the Authority in its absolute discretion) then the Authority will be entitled to give a notice to Project Co under Clause 40.3.4 (*Authority's Options*).

If Project Co fails to implement, or procure the implementation by a Non-Compliant Shareholder of, any Proposed Mitigating Measures agreed to by the Authority in any material respect (including as to timetable) following an Occasion of Tax Non-Compliance which applies to a Non-Compliant Shareholder, the Authority 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 Project Co or Hold Co to a person who is not an Restricted 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 Restricted Person within such ninety (90) day period (or such longer period as may be agreed by the Authority in its absolute discretion) then the Authority will be entitled to give a notice to Project Co under Clause 40.3.4 (*Authority's Options*).

54 INSURANCE

Project Co Insurances

54.1 Project Co shall procure that the Insurances, details of which are set out in Section 1 (*Policies to be taken out by Project Co and maintained during the Design and Construction Phase*) of Schedule 15 (*Insurance Requirements*), are taken out prior to the commencement of the Works and are maintained for the periods specified in Section 1 (*Policies to be taken out by Project Co and maintained during the Design and Construction Phase*) of Schedule 15 (*Insurance Requirements*).

54.2 Project Co shall procure that the Insurances, details of which are set out in Section 2 (*Policies to be taken out by Project Co and maintained from the Actual Completion Date*)) of Schedule 15 (*Insurance Requirements*), are taken out from the [relevant Phase Actual Completion Date] and are maintained for the periods specified in Section 2 (*Policies to be taken out by Project Co and maintained from the Actual Completion Date*) of Schedule 15 (*Insurance Requirements*).

54.3 Without prejudice to the other provisions of this Clause 54 (*Insurance*), Project Co 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.

54.4 All Insurances referred to in Clauses 54.1 and 54.2 (*Project Co Insurances*) shall:

54.4.1 be maintained in the names of the parties specified in Schedule 15 (*Insurance Requirements*) and shall be composite policies of insurance (and not joint) unless stated otherwise in Schedule 15 (*Insurance Requirements*));

54.4.2 be placed with insurers who are acceptable to the Authority (such acceptance not to be unreasonably withheld or delayed);

54.4.3 in so far as they relate to damage to assets (including the Facilities), cover the same for the full reinstatement value;

54.4.4 comply with the relevant provisions of Section 1 (*Policies to be taken out by Project Co and maintained during the Design and Construction Phase*) and Section 2 (*Policies to be taken out by Project Co and maintained from the Actual Completion Date*) of Schedule 15 (*Insurance Requirements*);

54.4.5 provide for thirty (30) days prior written notice of their cancellation, non–renewal or amendment to be given to the Authority in accordance with Endorsement 1 in Section 3 (*Endorsements*) of Schedule 15 (*Insurance Requirements*);

54.4.6 in respect of the Physical Damage Policies provide for payment of any proceeds received by Project Co to be applied in accordance with Clause 54.22 (*Reinstatement*);

54.4.7 in the case of the Operational Insurances only, be reviewed and renewed in accordance with Section 4 (*Insurance Arrangements*) of Schedule 15 (*Insurance Requirements*);

54.4.8 the limit of indemnity and maximum deductible for each of the Operational Insurances shall, where such values are specified as being indexed under Section 2 (*Policies to be taken out by Project Co and Maintained from the Actual Completion Date*) of Schedule 15 (*Insurance Requirements*) be indexed provided that the limit of indemnity or maximum deductible (as appropriate) shall only be increased where the indexed sum is equal to or exceeds the next whole insurable amount or deductible (as the case may be) available in the insurance market.

54.5 Project Co shall ensure that its brokers give the Authority a letter of undertaking substantially in the form set out in Section 5 (*Broker's Letter of Undertaking*) of Schedule 15 (*Insurance Requirements*) at Financial Close and subsequently on the renewal of each of the Insurances.

Subrogation and Vitiation

54.6 Project Co shall in respect of the insurances referred to in Clauses 54.1 and 54.2 (*Project Co Insurances*):

54.6.1 [procure that all policies of insurance to be effected by it pursuant to this Clause shall contain a provision to the effect that the insurers have agreed to waive all rights of subrogation against the Authority (and all Authority Parties other than contractors and sub-contractors) in accordance with Endorsement 2 in Section 3 (*Endorsements*) of Schedule 15 (*Insurance Requirements*)]; and

54.6.2 [provide for non-vitiation protection in respect of any claim made by the Authority as co-insured in accordance with Endorsement 2 in Section 3 (*Endorsements*) of Schedule 15 (*Insurance Requirements*)];

provided that, to avoid doubt, this Clause 54.6 (*Subrogation and Vitiation*) shall not by itself prevent Project Co from claiming against the Authority (or any Authority Party) under an express provision of this Agreement for any loss or damage not covered because of the level of deductibles under such insurance permitted by this Agreement or to the extent such loss or damage exceeds the maximum of such insurance required by this Agreement.

54.7 Neither party shall 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 Project Co Insurance

54.8 Not less than twenty (20) Business Days prior to the amendment or expiry of any relevant insurance policy (other than the expiry of any of the Operational Insurances in respect of which Project Co must comply with the provisions of Section 4 (*Insurance Arrangements)* of Schedule 15 (*Insurance Requirements*)), Project Co shall submit to the Authority a request for approval from the Authority of the insurer and the principal terms and conditions of such insurance policy (and any revision to such terms and conditions or change in identity of such insurer), such approval not to be unreasonably withheld or delayed.

54.9 Project Co shall provide to the Authority:

54.9.1 copies on request of all insurance policies referred to in Clauses 54.1 to 54.3 (*Project Co Insurances*) (together with any other information reasonably requested by the Authority relating to such insurance policies) and the Authority shall be entitled to inspect them during ordinary business hours; and

54.9.2 evidence that the premiums payable under all insurance policies have been paid and that the Insurances are in full force and effect in accordance with the requirements of this Clause 54 (*Insurance*) and Schedule 15 (*Insurance Requirements*).

54.10 Renewal certificates or other such evidence of renewal in relation to the Insurances shall be obtained as and when necessary and copies (certified in a manner acceptable to the Authority) shall be forwarded to the Authority as soon as possible but in any event within twenty (20) Business Days of the Renewal Date.

54.11 If Project Co defaults in insuring or continuing to maintain the Insurances, the Authority may insure against any risk in respect of which such default has occurred and recover any premiums from Project Co as a debt provided that if the default occurs during the Operational Term the amount recoverable from Project Co shall be the difference between the premiums had Project Co continued to maintain the Insurances and the premiums paid by the Authority to take out and maintain the Insurances.

Acceptance and compliance

54.12 The supply to the Authority of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause 54 (*Insurance*) shall not imply acceptance by the Authority (or the Authority's Representative) that:

54.12.1 the extent of insurance cover is sufficient and its terms are satisfactory; or

54.12.2 in respect of any risks not insured against, that the same were Uninsurable.

54.13 Neither failure to comply, nor full compliance, with the insurance provisions of this Agreement shall relieve Project Co of its liabilities and obligations under this Agreement.

54.14 **Uninsurable Risks**

54.14.1 If a risk usually covered by [contractors' 'all risks' insurance, property damage insurance, third party liability insurance, delay in start up and business interruption insurance (but not loss of profits) or statutory insurances] in each case required under this Agreement becomes Uninsurable then:

(a) Project Co shall notify the Authority of any risk becoming Uninsurable within five (5) Business Days of becoming aware of the same and in any event at least five (5) Business Days before expiry or cancellation of any existing insurance in respect of that risk; and

(b) if both parties agree, or it is determined in accordance with the Dispute Resolution Procedure that the risk is Uninsurable and that:

(i) the risk being Uninsurable is not caused by the actions of Project Co or any sub-contractor of Project Co (of any tier); and

(ii) Project Co has demonstrated to the Authority that Project Co and a prudent board of directors of a company operating the same or substantially similar businesses in the United Kingdom to that operated by Project Co would in similar circumstances (in the absence of the type of relief envisaged by this Clause) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking into account inter alia (and without limitation) the likelihood of the Uninsurable risk occurring (if it has not already occurred), the financial consequences for such company if such Uninsurable risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company,

the parties shall meet to discuss the means by which the risk should be managed or shared (including considering the issue of self–insurance by either party).

54.14.2 If the requirements of Clause 54.14.1 are satisfied, but the parties cannot agree as to how to manage or share the risk, then:

(a) where such requirements are satisfied in respect of such third party liability insurance the Authority shall (at the Authority's option) either pay to Project Co an amount equal to the amount calculated in accordance with Section 3 (*Compensation on Termination for Force* Majeure) of Schedule 17 (*Compensation on Termination*) and this Agreement will terminate, or elect to allow this Agreement to continue and Clause 54.14.2(b) below shall thereafter apply in respect of such risk; and

(b) where such requirements are satisfied in respect of [contractors' 'all risks' insurance, property damage insurance, third party liability insurance (if the Authority elects to allow this Agreement to continue in accordance with Clause 54.14.2(a)), delay in start up and business interruption insurance (but not loss of profits) or statutory insurances] this Agreement shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Authority shall (at the Authority's option) either pay to Project Co an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and this Agreement will continue, or an amount equal to the amount calculated in accordance with Section 3 (*Compensation on Termination for Force Majeure*) of Schedule 17 (*Compensation on Termination*) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable whereupon this Agreement will terminate; and

(c) where pursuant to Clauses 54.14.2(a) and/or 54.14.2(b) this Agreement continues then the Annual Service Payment shall be reduced in each year for which the relevant insurance is not maintained by an amount equal to the premium paid (or which would have been paid) by Project Co in respect of the relevant risk in the year prior to it becoming Uninsurable (index linked from the date that the risk becomes Uninsurable) save to the extent that such reduction is otherwise reflected in a reduction in the payments claimed by Project Co pursuant to paragraph 3.1 of Section 6 (*Other Costs*) of Schedule 14 (*Payment Mechanism*). Where the risk is Uninsurable for part of a year only the reduction in the Annual Service Payment shall be pro rated to the number of months for which the risk is Uninsurable;

(d) where pursuant to Clauses 54.14.2(a) and/or 54.14.2(b) this Agreement continues Project Co shall approach the insurance market at least every four (4) months to establish whether the risk remains Uninsurable. As soon as Project Co is aware (and, the parties agree or it is determined pursuant to the Dispute Resolution Procedure) that the risk is no longer Uninsurable, Project Co shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) for such risk in accordance with this Agreement;

(e) in respect of any period between the Authority receiving notification in accordance with Clause 54.14.1(a) that a TPL Risk has become Uninsurable and the Authority's notification to the Project Co in accordance with Clause 54.14.2(a) in respect of such risk then, provided it is ultimately agreed or determined that the requirements of Clause 54.14.1(b) are satisfied in respect of the Uninsurable TPL Risk and subject to Clause 54.14.2(f) below, Clause 54.14.2(b) shall apply in respect of occurrences of the Uninsurable TPL Risk during such period unless the parties otherwise agree how to manage the risk during this period; and

(f) Clause 54.14.2(e) shall only apply provided the Project Co does not unreasonably materially delay (a) agreement and/or determination in accordance with the Dispute Resolution Procedure as to whether the requirements of Clause 54.14.1(b) are satisfied in respect of the Uninsurable TPL Risk and/or (b) meeting with the Authority to discuss the means by which the risk should be managed.

Where this Clause 54.14.2 applies and this Agreement continues, Project Co shall, subject to Clause 54.14.2(c), be relieved of its obligations to maintain insurance in respect of the relevant Uninsurable Risk.

54.14.3 If, pursuant to Clause 54.14.1(b), the Authority elects to make payment of compensation to Project Co (such that this Agreement will terminate)(the **"Relevant Payment"**), Project Co shall have the option (exercisable in writing within twenty (20) Business Days of the date of such election by the Authority (the **"Option Period"**)) to pay to the Authority on or before the end of the Option Period, an amount equal to the insurance proceeds that would have been payable had the relevant risk not become Uninsurable, in which case this Agreement will continue (and the Relevant Payment will not be made by the Authority), and Project Co's payment shall be applied for the same purpose and in the same manner as insurance proceeds would have been applied had the relevant risk not become Uninsurable.

54.14.4 During the Operational Term, the Authority shall be entitled to notify Project Co that a risk has become Uninsurable under paragraph (b) of the definition of "Uninsurable". Following such notification Clauses 54.14.1(b) to 54.14.3 (except Clause 54.14.1(b)(ii)) shall apply as if Project Co has issued a notice under Clause 54.14.1(a).

54.15 **Unavailability of terms**

54.15.1 If, upon the renewal of any of the Insurances:

(a) any Insurance Term is not available to Project Co in the worldwide insurance market with reputable insurers of good standing; and/or

(b) the insurance premium payable for Insurance incorporating such Insurance Term is such that the Insurance Term is not generally being incorporated in insurance procured in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom,

other than, in each case by reason of one or more actions of Project Co and/or any sub-contractor of Project Co (of any tier) then Clause 54.15.2, shall apply.

54.15.2 If it is agreed or determined that Clause 54.15.1 applies then the Authority shall waive Project Co's obligations in Clauses 54.1 to 54.3 and/or Schedule 15 (*Insurance Requirements*) in respect of that particular Insurance Term and Project Co shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Agreement as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in Clause 54.15.1 continue to apply to such Insurance Term.

54.15.3 To the extent that the parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedure, that an alternative or replacement term and /or condition of insurance is available to Project Co in the worldwide insurance market with reputable insurers of good standing which if included in the relevant insurance policy would fully or partially address Project Co's inability to maintain or procure the maintenance of insurance with the relevant Insurance Term, at a cost which contractors in the UK are (at such time) generally prepared to pay, Project Co shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition.

54.15.4 Project Co shall notify the Authority as soon as reasonably practicable and in any event within five (5) days of becoming aware that Clause 54.15.1(a) and/or Clause 54.15.1(b) are likely to apply or (on expiry of the relevant insurance then in place) do apply in respect of an Insurance Term (irrespective of the reason for the same). During the Operational Term the Authority shall be entitled to notify Project Co that Clause 54.15.1(b) is likely to apply or (on expiry of the relevant insurance then in place) does apply in respect of an Insurance Term (irrespective of the reason for the same). Project Co shall provide the Authority with such information as the Authority reasonably requests regarding the unavailability of the Insurance Term and the parties shall meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.

54.15.5 In the event that Clause 54.15.1(a) and/or Clause 54.15.1(b) apply in respect of an Insurance Term, (irrespective of the reasons for the same) Project Co shall approach the insurance market at least every four (4) months to establish whether Clause 54.15.1(a) and/or Clause 54.15.1(b) remain applicable to the Insurance Term. As soon as Project Co is aware that Clause 54.15.1(a) and/or Clause 54.15.1(b) has ceased to apply to the Insurance Term and the parties agree or it is determined pursuant to the Dispute Resolution Procedure, Project Co shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted

as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Agreement.

Risk Management

54.16 With effect from the date of this Agreement, the Authority and Project Co shall each designate or appoint an insurance and risk manager and notify details of the same to the other party. Such person shall:

54.16.1 be responsible for dealing with all risk management matters on behalf of its appointing or designating party including (without limitation) ensuring compliance by that party with this Clause 54.16 (*Risk Management*);

54.16.2 advise and report to that party on such matters; and

54.16.3 ensure that any report or survey conducted by any insurer of any relevant procedures in relation to the Project (or where such report or survey cannot be made available, any recommendation or requirement following that survey) is disclosed to the parties.

54.17 Without prejudice to the provisions of Clause 54.16 (*Risk Management*), the parties shall notify one another, and in Project Co's case the relevant insurer, of any circumstances which may give rise to a claim of a value equal to or in excess of [♦] pounds (£[♦]) (index linked) under the Insurances within [♦] Business Days of becoming aware of the same (or earlier, if so requested by the terms of the relevant insurance policy). If any insurer disputes any such claim, Project Co shall provide the Authority with full details of any disputed claim and the parties shall liaise with one another to ensure that the relevant claim is preserved or pursued.

Application of Proceeds

54.18 All insurance proceeds received by Project Co under the Physical Damage Policies shall be paid into the Insurance Proceeds Account and shall be applied in accordance with this Agreement and in accordance with the Insurance Proceeds Account Agreement.

54.19 Subject to the provisions of the Funders' Direct Agreement and Clause 54.22 *(Reinstatement)*, Project Co shall apply any proceeds of any policies of Insurance:

54.19.1 in the case of third party legal liability or employers' liability insurance, in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable; and

54.19.2 in the case of any other insurance other than delay in start up or business interruption insurance, so as to ensure the performance by Project Co of its obligations under this Agreement, including where necessary the reinstatement, restoration or replacement of the Facilities,

assets, materials or goods affected by the event giving rise to the insurance claim and consequent payment of proceeds.

54.20 Where reinstatement monies are required to be released from the Insurance Proceeds Account Project Co shall obtain the Authority's consent in accordance with the Insurance Proceeds Account Agreement. The Authority shall give its consent (or confirm that it is withholding its consent) to the release of monies from the Insurance Proceeds Account within one (1) Business Day of a request from Project Co (provided that such consent must not be unreasonably withheld).

54.21 If the proceeds of any insurance claim are insufficient to cover the settlement of such claims, Project Co will make good any deficiency forthwith.

54.22 **Reinstatement**

54.22.1 All insurance proceeds received under any Physical Damage Policy shall be applied to repair, reinstate and replace each part or parts of the Facilities in respect of which the proceeds were received.

54.22.2 Where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) (the ("**Relevant Incident**") in an amount in excess of [♦] pounds (£[♦]) (index-linked):

(a) Project Co shall deliver as soon as practicable and in any event within twenty-eight (28) days after the making of the claim a plan prepared by Project Co for the carrying out of the works necessary (the "**Reinstatement Works**") to repair, reinstate or replace (the "**Reinstatement Plan**") the assets which are the subject of the relevant claim or claims in accordance with Clause 54.22.2(b)(iv) below. The Reinstatement Plan shall set out:

(i) if not the Contractor, the identity of the person proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the Authority; and

(ii) the proposed terms and timetable or, if not then established, the reasonably anticipated terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Authority, which approval shall not be unreasonably delayed;

(b) provided that the Authority is satisfied that the Reinstatement Plan will enable Project Co to comply with Clause 54.22.2(b)(iv) below within a reasonable timescale:

(i) the Reinstatement Plan will be adopted and carried out by Project Co;

(ii) Project Co shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the Reinstatement Plan approved by the Authority;

(iii) prior to the earlier to occur of the Termination Date or the Expiry Date, any amounts standing to the credit of the Insurance Proceeds Account (the "**Relevant Proceeds**") (together with any interest accrued) may be withdrawn by Project Co from the Insurance Proceeds Account as required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in Clause 54.22.2(b)(ii) above, and to meet any other reasonable costs and expenses of Project Co for the sole purposes of funding the Reinstatement Works and the parties shall operate the signatory requirements of the Insurance Proceeds Account in order to give effect to such payments. Following the earlier to occur of the Termination Date and the Expiry Date, the Authority may withdraw amounts standing to the credit of the Insurance Proceeds Account for the purposes of funding any Reinstatement Works;

(iv) the Authority agrees and undertakes that, subject to compliance by Project Co with its obligations under this Clause, and provided that Project Co procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in Clause 54.22.2(b)(ii), it shall not exercise any right which it might otherwise have to terminate this Agreement by virtue of the event which gave rise to the claim for the Relevant Proceeds;

(v) the Authority undertakes to use reasonable endeavours to assist Project Co in the carrying out of the Reinstatement Plan;

(vi) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Authority and in accordance with Clause 54.22.3 below the Authority shall permit withdrawal by Project Co of any Relevant Proceeds then held in the Insurance Proceeds Account that have not been paid under Clause 54.22.2(b)(iii) above, in respect of the Relevant Incident, together with any interest accrued; and

(vii) subject to the provisions of Clause 49.1 (*Project Co Indemnities to Authority*) Project Co shall be solely responsible for the payment of any deficiency.

54.22.3 Where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate or replace any Facility, Project Co shall carry out the work in accordance with the Authority's Construction Requirements so that on completion of the work, the provisions of this Agreement are complied with.

54.22.4 If and to the extent that a breach by Project Co of its obligations under Clause 54.22.2(b) leads to a delay in the completion of the Reinstatement Works, any entitlement that Project Co has to relief under Clause 31 *(Relief Events)* shall be suspended.

55 EXCLUSIONS AND LIMITATIONS ON LIABILITY

Exclusions

55.1 The indemnities under this Agreement shall not apply and (without prejudice to the Authority's rights under the Payment Mechanism) there shall be no right to claim damages for breach of this Agreement, in tort or on any other basis whatsoever to the extent that any loss claimed by either party is for loss of profits, loss of use, loss of production, loss of business or loss of business opportunity or is a claim for consequential loss or for indirect loss of any nature ("**Indirect Losses**") suffered or allegedly suffered by either party. The Authority agrees that, notwithstanding the foregoing, any losses of Project Co arising under the Construction Contract and the Service Contracts as originally executed (or as amended in accordance with and subject to Clause 4.1 (*Ancillary Documents*)) which are not Indirect Losses shall not be excluded from such a claim solely by reason of this Clause 55.1 (*Exclusions*).

55.2 The Authority shall not be liable in tort to Project Co or any Project Co Party in respect of any negligent act or omission of the Authority or any Authority Party relating to or in connection with this Agreement and Project Co shall procure that no Project Co Party shall bring such a claim against the Authority. Project Co has accepted this on the basis that it and each Project Co Party will cover the risk of negligent acts or omissions by insurance or in such other manner as it (or they) may think fit.

No Double Recovery

55.3 Subject to:

55.3.1 any other express right of the Authority pursuant to this Agreement; and

55.3.2 the Authority's right to claim, on or after termination of this Agreement, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects

of any breach of this Agreement by Project Co save to the extent that the same has already been recovered by the Authority pursuant to this Agreement or has been taken into account to reduce any compensation payable by the Authority pursuant to Clause 46 (*Compensation on Termination*),

the sole remedy of the Authority in respect of a failure to provide the Services in accordance with this Agreement shall be the operation of the Payment Mechanism.

55.4 Subject to Clause 39 (*Authority Events of Default*) and any other express right of Project Co pursuant to this Agreement, Project Co's sole remedy in respect of any breach of this Agreement which is a Compensation Event shall be pursuant to Clause 30 (*Delay Events*).

55.5 Nothing in Clause 55.3 (*No Double Recovery*) shall prevent or restrict the right of the Authority to seek interdict or a decree of specific implement or other discretionary remedies of the court.

55.6 Notwithstanding any other provision of this Agreement, neither party shall be entitled to recover compensation or make a claim under this Agreement or any other agreement in relation to the Project in respect of any loss that it has incurred (or any failure of the other party) to the extent that it has already been compensated in respect of that loss or failure pursuant to this Agreement or otherwise.

55.7 Neither party shall have the right to terminate this Agreement for breach of contract save as expressly set out in this Agreement.

PART 12: MISCELLANEOUS

56 INTELLECTUAL PROPERTY

Project Data

56.1 Project Co shall make available to the Authority free of charge (and hereby irrevocably licences the Authority to use) all Project Data that might reasonably be required by the Authority and Project Co shall ensure that it can make the Project Data available to the Authority on these terms, for the purposes of:

56.1.1 the Authority carrying out the Authority Services (and its operations relating to the performance of the Authority Services), its duties under this Agreement and/or any statutory duties that the Authority may have; and

56.1.2 following termination of this Agreement, the design or construction of the Facilities, the operation, maintenance or improvement of the Facilities and/or the carrying out of operations the same as, or similar to, the Project Operations,

(together 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.

Intellectual Property Rights

56.2 Project Co:

56.2.1 hereby grants to the Authority, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub-licences) to use the Intellectual Property Rights which are or become vested in Project Co; and

56.2.2 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 56.2.1 above to the Authority,

in both cases, solely for the Approved Purposes.

Project Co 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 Project Co and Project Co shall enter into appropriate agreements with any Project

Co Party (or other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

Maintenance of data

56.3 To the extent that any of the data, materials and documents referred to in this Clause are generated by or maintained on a computer or similar system, Project Co shall use all reasonable endeavours to procure for the benefit of the Authority, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable the Authority or its nominee to access and otherwise use (subject to the payment by the Authority of the relevant fee, if any) such data for such purposes as the Authority may at its sole discretion require. As an alternative, Project Co 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.

56.4 Project Co shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Clause 56.3 (*Maintenance of data*) in accordance with Good Industry Practice. Without prejudice to this obligation, Project Co shall submit to the Authority's Representative for approval its proposals for the back-up and storage in safe custody of such data, materials and documents and the Authority shall be entitled to object if the same is not in accordance with Good Industry Practice. Project Co shall comply, and shall cause all Project Co Parties to comply, with all procedures to which the Authority's Representative has given its approval. Project Co may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Authority's Representative, who shall be entitled to object on the basis set out above.

Claims

56.5 Where a claim or proceeding is made or brought against the Authority 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 Project Operations 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 the Authority otherwise than in accordance with the terms of this Agreement, Project Co shall indemnify the Authority at all times from and against all such claims and proceedings and the provisions of Clause 49.3 (*Conduct of Claims*) shall apply.

57 DISPUTE RESOLUTION PROCEDURE

Except where expressly provided otherwise in this Agreement, any dispute arising out of or in connection with this Agreement shall be resolved in accordance with the procedure set out in Schedule 20 (*Dispute Resolution Procedure*).

58 SUB-CONTRACTING AND ASSIGNMENT

Sub-contractors

58.1 Project Co shall, without prejudice to Clause 58.8 (*Assignment*), procure that none of the persons listed below shall sub-contract all (or substantially all) of their obligations under or in the agreement set out next to its name:

Person	**Contract**
Contractor	Construction Contract
Service Provider	Service Contract

without, in each case, the prior written consent of the Authority (such consent not to be unreasonably withheld or delayed). To avoid doubt, (i) any failure to comply with Clause 58.3 (*Sub-contractors*) shall be a reasonable ground for withholding consent and (ii) consent shall, without prejudice to the other provisions of Clause 58.1 (*Sub-contractors*), not be required in respect of the appointment of any party currently approved by the Authority as a suitable replacement.

58.2 If the contract set out next to the name of any person referred to in Clause 58.1 (*Sub-contractors*) shall at any time lapse, terminate or otherwise cease to be in full force and effect (whether by reason of expiry or otherwise), with the effect that such person shall cease to act in relation to the Project, Project Co shall forthwith appoint a replacement (subject to compliance with Clause 58.1 (*Sub-contractors*)).

58.3 Project Co shall procure that any replacement for any person referred to in Clause 58.1 (*Sub-contractors*) [or any Key Sub-Contractor] shall enter into a contract upon the same or substantially similar terms as the person so replaced and shall also enter into a collateral agreement on the same or substantially the same terms as the Collateral Agreement entered into by the person so replaced.

58.4 Where Project Co enters into a contract with a sub-contractor for the purposes of carrying out the Project Operations or any part of the Project Operations under this Agreement, Project Co shall cause a term to be included in such contract:

58.4.1 which requires payment to be made to the sub-contractor within a specified period not exceeding thirty (30) days from receipt of a valid invoice as defined by the contract requirements and in the case of the provision of Services provides that, for the purpose of payment alone, where the Authority has made payment to Project Co and the sub-contractor's invoice includes Project Operations in relation to which payment has been made by the Authority then, to the extent that it relates to such Project Operations, 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 sub-contractor); and

58.4.2 which notifies the sub-contractor that the contract forms part of a larger contract for the benefit of the Authority and that should the sub-contractor have any difficulty in securing the timely payment of an invoice that matter may be referred by the sub-contractor to the Authority's Representative; and

58.4.3 in the same terms as this Clause 58.4 (*Sub-contractors*) (including for the avoidance of doubt this Clause 58.4.3) subject only to modification to refer to the correct designation of the equivalent party as the supplier and recipient of the relevant Project Operations as the case may be.

Replacement of a non-performing Sub-Contractor

58.5 On the substitution or replacement of a Service Provider due to a breach or default under a Service Contract, Project Co may elect, subject to Clause 58.7 (*Replacement of a non-performing Sub-Contractor*) and provided that at the time of making such election no notice of termination has been served under this Agreement, that for the purposes of Clause 40.1.8 (*Deductions*) and Clause 40.1.9 (*Warning Notices*) only, all Deductions incurred and Warning Notices served prior to the date of such substitution or replacement shall be disregarded by virtue of Clause 58.6 (*Replacement of a non-performing Sub-Contractor*) below.

58.6 If Project Co makes an election pursuant to Clause 58.5 (*Replacement of a non-performing Sub-Contractor*) above then, with effect from the date of substitution or replacement of the Service Provider, all Deductions incurred and Warning Notices served prior to that date shall be disregarded for the purposes of Clause 40.1.8 (*Deductions*) and Clause 40.1.9 (*Warning Notices*). For the avoidance of doubt, the Authority shall retain the right to make Deductions in accordance with Schedule 14 (*Payment Mechanism*) in respect of the Availability Failures and/or Performance Failures to which the Deductions and/or Warning Notices are attributable.

58.7 Project Co shall be entitled to make an election pursuant to Clause 58.5 (*Replacement of a non-performing Sub-Contractor*) on a maximum of two (2) occasions during the Project Term.

Assignment[41]

58.8 This Agreement and any other agreement in connection with the Project to which both the Authority and Project Co are a party shall be binding on, and shall enure to the benefit of, Project Co and the Authority and their respective statutory successors and permitted transferees and assignees. [In the case of the Authority, its successors shall include any person to whom the Welsh Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Authority upon the Authority ceasing to exist, transfers the property, rights and obligations of the Authority under this Agreement and such other agreements in connection with the Project to which the Authority and Project Co are both a party.]

58.9 Subject to Clause 58.10 (*Assignment*), Project Co shall not, without the prior written consent of the Authority, assign, novate, transfer, sub-contract or otherwise dispose of any interest in this Agreement, [the Independent Tester Contract,] the Construction Contract, the Service Contract and [any other contract] entered into by Project Co for the purposes of performing its obligations under this Agreement.

[41] Refer to Health and Education Sector Specific Guidance, in the User Guide.

58.10 The provisions of Clause 58.9 (*Assignment*) do not apply to the grant of any security, in a form approved by the Authority prior to its grant (such approval not to be unreasonably withheld or delayed), for any loan made to Project Co under the Initial Funding Agreements provided that any assignee shall enter into the Funders' Direct Agreement in relation to the exercise of its rights, if the Authority so requires.

59 OWNERSHIP INFORMATION AND CHANGES IN CONTROL

59.1 Project Co represents and warrants to the Authority that at the date of this Agreement the legal and beneficial ownership of Project Co and Hold Co is as set out in Schedule 21 (*Project Co Information*) and that, other than any security granted to the Senior Funders under the Senior Funding Agreements [and other than any Shareholder pre-emption rights,] no arrangements are in place that have or may have or result in any sale, transfer or disposal of any legal, beneficial, equitable or other interest in any or all of the shares in Project Co or Hold Co.

59.2 Project Co shall inform the Authority of any proposed Change in Control in Project Co and/or Hold Co prior to its occurrence, or, if it does not have any prior information, as soon as reasonably practicable (and in any event, within thirty (30) days) of any Change in Control occurring in respect of Project Co and/or Hold Co.

59.3 The Authority may, not more than [twice] in any Contract Year, or at any time when a Project Co Event of Default is outstanding, require Project Co to inform it, as soon as reasonably practicable and in any event within thirty (30) days of receipt of the Authority's request for details, of any Change in Control in respect of Project Co and/or Hold Co.

59.4 Project Co's obligations under Clauses 59.1 and 59.2 (*Ownership Information and Changes in Control*) above shall, except where a legal transfer of shares has occurred be limited to the extent of Project Co's awareness having made all reasonable enquiry.

59.5 Subject to Clause 59.6 (*Ownership Information and Changes in Control*), prior to the expiry of a period of twelve (12) months commencing on the [final Phase] Actual Completion Date, no Change in Control in any or all of the shares in Project Co and/or Hold Co shall be permitted without the prior written approval of the Authority. Any Change in Control arising as a consequence of either:

59.5.1 the grant or enforcement of security in favour of the Senior Funders over or in relation to any of the shares of the Project Co, provided that any document conferring security over any shares has been approved by the Authority (such approval not to be unreasonably withheld or delayed);

59.5.2 any transfer by a Shareholder to an [Associate] of such transferor;

59.5.3 any change in beneficial or legal ownership of any shares that are listed on a recognised investment exchange (as defined in section 285 of the Financial Services and Markets Act 2000); or

59.5.4 where the Change of Control arises as a consequence of any change in legal or beneficial ownership of any interest in shares owned at the date of this Agreement by the [♦][42],

shall be disregarded for the purpose of this Clause 59.5 (*Ownership Information and Changes in Control*) above.

Where Clause 59.5.2 applies and subsequent to any such transfer (the **"Original Transfer"**) the transferee ceases to be an [Associate] of the original transferor, it shall be a breach of this Clause 59.5 (*Ownership Information and Changes in Control*) if the shares or interests which were the subject of the Original Transfer are not [within twenty (20) Business Days] of the transferee ceasing to be an Associate of the original transferor, transferred to the original transferor or any Associate of such transferor.

59.6 No Change in Control (at any time) in any or all of the shares in Project Co or Hold Co (or any company (other than a public quoted company whose equity securities are listed on a recognised investment exchange, as defined in section 285 of the Financial Services and Markets Act 2000) holding shares in Hold Co, Project Co or in any company (or its shareholders) holding shares in such a company (or its shareholders)) shall be permitted without the prior written approval of the Authority where the person acquiring control is a Restricted Person.

60 MITIGATION

Each of the Authority and Project Co shall at all times take all reasonable steps to minimise and mitigate any loss for which the relevant party is entitled to bring a claim against the other party pursuant to this Agreement.

61 DATA PROTECTION

Data Protection

61.1 For the purpose of the following Clauses, the term "personal data" shall have the meaning given to it in the Data Protection Act 1998.

61.2 Project Co undertakes to the Authority that it shall comply with the obligations of a "data controller" under the provisions of the Seventh Data Protection Principle as set out in Schedule 1 of the Data Protection Act 1998. In addition, Project Co:

61.2.1 warrants that it has, or will have at all material times, (and it shall use best endeavours to procure that all Sub-Contractors (and their agents and sub contractors of any tier have or will have at all material times) the appropriate technical and organisational measures in place 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

[42] Reference to be made to the Welsh Government shareholder entity, under the Shareholders' Agreement.

reasonable steps to ensure the reliability of any of its staff which will have access to personal data processed as part of the Project Operations;

61.2.2 undertakes that it will act only on the instructions of the Authority in relation to the processing of any personal data made available by or on behalf of the Authority as part of the Project Operations;

61.2.3 undertakes that it will only obtain, hold, process, use, store and disclose personal data as is necessary to perform its obligations under this Agreement and (without prejudice to Clause 5.2 (*General standards*)) that such data will be held, processed, used, stored and disclosed only in accordance with the Data Protection Act 1998 and any other applicable Law; and

61.2.4 undertakes to allow the Authority access to any relevant premises on reasonable notice to inspect its procedures described at Clause 61.2.1 above.

62 CONFIDENTIALITY

62.1 The Authority shall, subject to Clause 62.2 (*Confidentiality*) be entitled to make the documents and information listed in this Clause 62.1 (*Confidentiality*) freely available to the public (which may include, without limitation, publication on the Authority's website):

62.1.1 this Agreement;

62.1.2 the Independent Tester Contract;

62.1.3 the Collateral Agreements;

62.1.4 the Monthly Service Report; and

62.1.5 the Financial Model (as updated from time to time in accordance with this Agreement),

and Project Co acknowledges and agrees that, subject to the exclusion of information referred to in Clause 62.2.2, the provision or publication of the documents and information listed in this Clause 62.1 (*Confidentiality*) shall not give rise to any liability under the terms of this Agreement or otherwise. The Authority shall notify Project Co in writing not less than ten (10) Business Days prior to any intended provision or publication of information pursuant to this Clause 62.1 (*Confidentiality*).

62.2

62.2.1 The parties agree that the provisions of this Agreement, the Financial Model and each Ancillary Document shall, subject to Clause 62.2.2 below, not be treated as Confidential Information and may be disclosed without restriction and Project Co acknowledges that the Authority shall, subject to Clause 62.2.2 below, be entitled to make this Agreement and each Ancillary Document available in the public domain.

62.2.2 Clause 62.2.1 above shall not apply to provisions of this Agreement, the Financial Model or an Ancillary Document designated as Commercially Sensitive Information and listed in Schedule 26 (*Commercially Sensitive Information*) to this Agreement which shall, subject to Clause 62.3 (*Permitted Disclosure*) be kept confidential for the periods specified in that Schedule 26 (*Commercially Sensitive Information*).

62.2.3 The parties shall keep confidential all Confidential Information received by one party from the other party relating to this Agreement and Ancillary Documents or the Project 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

62.3 Clauses 62.2.2 and 62.2.3 shall not apply to:

62.3.1 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;

62.3.2 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;

62.3.3 any disclosure to enable a determination to be made under Schedule 20 (*Dispute Resolution Procedure*) or in connection with a dispute between Project Co and any of its subcontractors;

62.3.4 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;

62.3.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;

62.3.6 any provision of information to the parties' own professional advisers or insurance advisers or to the Senior Funders or the Senior Funders' professional advisers or insurance advisers or, where it is proposed that

a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to Project Co to enable it to carry out its obligations under this Agreement, or may wish to acquire shares in Project Co [and/or Hold Co] in accordance with the 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;

62.3.7 any disclosure by the Authority of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed new contractor, its advisers and lenders, should the Authority decide to retender this Agreement;

62.3.8 any registration or recording of the Consents and property registration required;

62.3.9 any disclosure of information by the Authority to any other department, office or agency of the Government or their respective advisers or to any person engaged in providing services to the Authority for any purpose related to or ancillary to this Agreement;

62.3.10 any disclosure for the purpose of:

(a) the examination and certification of the Authority's or Project Co's accounts;

(b) any examination pursuant to [section 6(1) of the National Audit Act 1983] [the Local Government Act 1999] of the economy, efficiency and effectiveness with which the Authority has used its resources;

(c) complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies; or

(d) (without prejudice to the generality of Clause 62.3.4) compliance with the FOIA and/or the Environmental Information Regulations;

62.3.11 [disclosure pursuant to Clause 62.1 (*Confidentiality*); or]

62.3.12 disclosure to the extent required pursuant to Clause 64.2 (*Information and Audit Access*); [or

62.3.13 identify here disclosure requirements to other public bodies where Facilities are joint facilities;]

provided that, to avoid doubt, neither Clause 62.3.10(d) nor Clause 62.3.4 above shall permit disclosure of Confidential Information otherwise prohibited by Clause 62.2.3 where that information is exempt from disclosure under section 41 of the FOIA.

62.4 Where disclosure is permitted under Clause 62.3 (*Permitted Disclosure*), other than under Clauses 62.3.2, 62.3.4, 62.3.5, 62.3.8 and 62.3.10, 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.

62.5 Project Co shall not make use of this Agreement or any information issued or provided by or on behalf of the Authority in connection with this Agreement otherwise than for the purpose of this Agreement, except with the written consent of the Authority.

62.6 Where Project Co, in carrying out its obligations under this Agreement, is provided with information relating to any Authority Party, Project Co shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless Project Co has obtained the prior written consent of that person and has obtained the prior written consent of the Authority.

62.7 On or before the Expiry Date, Project Co shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any Authority Party including any documents in the possession, custody or control of a Sub-Contractor, are delivered up to the Authority.[43]

62.8 The parties acknowledge that [Welsh Audit Commission] has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament and/or National Assembly of Wales.

62.9 The provisions of this Clause 62 (Confidentiality) are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

Announcements

62.10 Unless otherwise required by any Law or any regulatory or governmental authority (but only to that extent), neither 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 Project Co of its (or any Project Co Party's) interest in the Project or, in any such case, any matters relating thereto, without the prior written consent of the other party (which shall not be unreasonably withheld or delayed).

63 FREEDOM OF INFORMATION

63.1 Project Co acknowledges that the Authority is subject to the requirements of the FOIA and the Environmental Information Regulations and shall assist and

[43] Refer to Health Sector Specific Guidance in the User Guide, if applicable.

cooperate with the Authority to facilitate the Authority's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in Clauses 63.2 to 63.8 (*Freedom of Information*).

63.2 Where the Authority receives a Request for Information in relation to Information that Project Co is holding on its behalf and which the Authority does not hold itself the Authority shall refer to Project Co such Request for Information as soon as practicable and in any event within five (5) Business Days of receiving such Request for Information and Project Co shall:

63.2.1 provide the Authority with a copy of all such Information in the form that the Authority requires as soon as practicable and in any event within five (5) Business Days (or such other period as the Authority acting reasonably may specify) of the Authority's request; and

63.2.2 provide all necessary assistance as reasonably requested by the Authority in connection with any such Information, to enable the Authority 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.

63.3 Following notification under Clause 63.2 (*Freedom of Information*), and up until such time as Project Co has provided the Authority with all the Information specified in Clause 63.2.1, Project Co may make representations to the Authority as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Authority shall be responsible for determining at its absolute discretion:

63.3.1 whether Information is exempt from disclosure under the FOIA and the Environmental Information Regulations; and

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

in no event shall Project Co respond directly, or allow its Sub-Contractors to respond directly, to a Request for Information unless expressly authorised to do so by the Authority.

63.4 Project Co shall ensure that all Information held on behalf of the Authority is retained for disclosure for at least the number of years (from the date it is acquired) [specified in the Authority Policy relating to records retention] and shall permit the Authority to inspect such Information as requested from time to time.

63.5 Project Co shall transfer to the Authority any Request for Information received by Project Co as soon as practicable and in any event within two (2) Business Days of receiving it.

63.6 Project Co acknowledges that any lists provided by it listing or outlining Confidential Information are of indicative value only and that the Authority may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of FOIA and the Environmental Information Regulations.

63.7 In the event of a request from the Authority pursuant to Clause 63.2 (*Freedom of Information*) Project Co shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Authority of Project Co's estimated costs of complying with the request to the extent these would be recoverable, if incurred by the Authority, under section 13(1) of the FOIA and the Fees Regulations. Where such costs (either on their own or in conjunction with the Authority's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in section 12(1) of the FOIA and as set out in the Fees Regulations (the **"Appropriate Limit"**) the Authority shall inform Project Co in writing whether or not it still requires Project Co to comply with the request and where it does require Project Co to comply with the request the five (5) Business Days period for compliance shall be extended by such number of additional days for compliance as the Authority is entitled to under section 10 of the FOIA. In such case, the Authority shall notify Project Co of such additional days as soon as practicable after becoming aware of them and shall reimburse Project Co for such costs as Project Co incurs in complying with the request to the extent it is itself entitled to reimbursement of such costs in accordance with its own FOIA policy from time to time.

63.8 Project Co acknowledges that (notwithstanding the provisions of Clause 62 (*Confidentiality*)) the Authority 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 "**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 Project Co or the Project:

63.8.1 in certain circumstances without consulting with Project Co; or

63.8.2 following consultation with Project Co and having taken their views into account,

provided always that where Clause 63.8.1 above applies the Authority shall, in accordance with the recommendations of the Code, draw this to the attention of Project Co prior to any disclosure.

63.9 In the event that the Project Co is or becomes subject to the Environmental Information Regulations or the FOIA it shall comply with its obligations under the Environmental Information Regulations and the FOIA. In doing so, it will use reasonable endeavours to consult the Authority before disclosing Information about them or any agreement entered into between the Authority and Project Co.

64 INFORMATION AND AUDIT ACCESS

64.1 Project Co shall provide to the Authority's Representative all information, documents, records and the like in the possession of, or available to, Project Co

(and to this end Project Co shall use all reasonable endeavours to procure that all such items in the possession of the Contractor or any Service Providers shall be available to it and Project Co has included, or shall include, relevant terms in all contracts with the Contractor or any Service Providers to this effect) as may be reasonably requested by the Authority's Representative for any purpose in connection with this Agreement.

64.2 For the purpose of:

64.2.1 the examination and certification of the Authority's accounts; or

64.2.2 any examination pursuant to [the Local Government Act 1999] [section 6(1) of the National Audit Act 1983] of the economy, efficiency and effectiveness with which the Authority has used its resources,

the Audit Commission may examine such documents as it may reasonably require which are owned, held or otherwise within the control of Project Co (and Project Co shall procure that any person acting on its behalf who has such documents and/or other information shall also provide access) and may require Project Co to produce such oral or written explanations as he considers necessary.

64.3 Project Co shall provide and shall procure that its Sub-Contractors shall provide such information as the Authority may reasonably require from time to time to enable it to meet its obligations to provide reports and returns pursuant to regulations, directions or guidance applicable to the Authority including, without limitation, reports and returns regarding the physical condition of buildings occupied by the Authority, health and safety, under the firecode, relating to environmental health and to comply with [requirements for the provision of information relating to achievement of customer service targets].

65 NOTICES

65.1 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, by hand or by email, leaving the same at:

If to Project Co:-

Address: [♦]

Email: [♦]

If to the Authority:-

Address: [♦]

Email: [♦]

65.2 Where any information or documentation is to be provided or submitted to the Authority's Representative or the Project Co Representative it shall be provided or submitted by sending the same by first class recorded post, by hand or by email leaving the same at:

If to Project Co's Representative:-

Address: [♦]

Email: [♦]

If to the Authority's Representative:-

Address: [♦]

Email: [♦]

(copied in each case to the Authority)

65.3 Either party to this Agreement (and either Representative) may change its nominated address (including email address) by prior notice to the other party.

65.4 Notices given 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.

65.5 Notices delivered 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.

65.6 Notices given by email shall be deemed to have been received:

65.6.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the email address specified in Clause 65.1 or 65.2 (*Notices*), or notified from time to time under Clause 65.3 (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

65.6.2 by 11am on the next following Business Day, if 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 no error message indicating failure has been received by the sender and provided that in the case of notices required by or issued pursuant to [Clause 26.3 (*Grounds for Warning Notices*), Clause 26.4 (*Warning Notices Disputes*), Clauses 39 to 45 (*Termination*), Schedule 16 (*Change Protocol*) and/or, as the case may be Schedule 17 (*Compensation on Termination*)] that within 24 hours of transmission a hard copy of the email (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 Clauses 65.1 and 65.2 (*Notices*) and where such notice is addressed to the Authority, or the Authority's Representative, copied to [♦[44]].

66 NO WAIVER

66.1 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).

Continued effect – no waiver

66.2 Notwithstanding any breach of this Agreement by either party, and without prejudice to any other rights which the other party may have in relation to it, the other party may elect to continue to treat this Agreement as being in full force and effect and to enforce its rights under this Agreement. The failure of either party to exercise any right under this Agreement, including any right to terminate this Agreement and any right to claim damages, shall not be deemed a waiver of such right for any continuing or subsequent breach.

67 NO AGENCY

67.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Authority and Project Co.

67.2 Save as expressly provided otherwise in this Agreement, Project Co shall not be, or be deemed to be, an agent of the Authority and Project Co shall not hold itself out as having authority or power to bind the Authority in any way.

67.3 Without limitation to its actual knowledge, Project Co 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 any Project Co Party.

68 ENTIRE AGREEMENT

[44] Insert Welsh Government details

68.1 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.

68.2 Each of the parties acknowledges that:

68.2.1 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

68.2.2 this Clause 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.

69 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 Project Co or of any permitted assignee.

70 SEVERABILITY

If any provision of this Agreement shall be declared invalid, unenforceable or illegal 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 and legality of the remaining provisions of this Agreement.

71 CONFLICTS OF AGREEMENTS

In the event of any conflict between this Agreement and the Project Documents, the provisions of this Agreement shall prevail.

72 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 and any Project Document.

73 **AMENDMENTS**

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

74 **COUNTERPARTS**[45]

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

75 **FURTHER ASSURANCE**

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

76 **GOVERNING LAW AND JURISDICTION**

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

76.2 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.

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

[45] Insert Education Sector Specific Guidance in the User Guide, if applicable.

SCHEDULES

SCHEDULE 1

DEFINITIONS AND INTERPRETATION[46]

SECTION 1

In this Agreement unless the context otherwise requires:

"5 Year Maintenance Plan" means the plan, to be prepared by or on behalf of Project Co, for any works for the maintenance or repair of the Facilities, including the renewal or replacement of plant or equipment as necessary, during each rolling five (5) year period for the duration of the Project Term;

"Actual Commissioning End Date" means the date specified in the Commissioning Completion Certificate [for the final Phase] issued by the Independent Tester pursuant to Clause 18.4 (*Information*);

"Actual Completion Date" means the later of:

(a) the date stated in the Certificate of Practical Completion [for the final Phase] issued by the Independent Tester pursuant to Clause 17.12 ([Phase] *Completion Certificate*); and

(b) subject to Clause 14.5 (*Early Completion*), the Completion Date [for the final Phase];

"Actual Liability" has the meaning given in Clause 46.6.3;

"Additional Permitted Borrowing" means on any date, the amount equal to any amount of principal outstanding under the Senior Funding Agreements (as the same may from time to time be amended, whether or not with the approval of the Authority) in excess of the amount of principal scheduled under the Senior Funding Agreements at Financial Close to be outstanding at that date,

but only to the extent that:

(a) this amount is less than or equal to the Additional Permitted Borrowings Limit; and

(b) in respect of any Additional Permitted Borrowing the Agent is not in material breach of its obligations under clause

[46] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

9.4.3 of the Funders' Direct Agreement as it applies to such Additional Permitted Borrowing,

and provided further that any such excess amount of principal which is:

(i) invested as part of any Qualifying Change; or

(ii) outstanding from time to time as a result of any drawing under the Senior Funding Agreements as entered into at the date of this Agreement, disregarding any subsequent amendment; or

(iii) outstanding from time to time as a result of any amendment to the Senior Funding Agreements in respect of which the Authority has agreed that its liabilities on a termination may be increased pursuant to Clause 4.3 (*Changes to Funding Agreement and Refinancing*)

shall not be counted as Additional Permitted Borrowing;

"Additional Permitted Borrowings Limit" means an amount equal to:

(a) 10% of the Original Senior Commitment, for any Additional Permitted Borrowing subsisting in the period from the date of Financial Close to the date on which the amount outstanding under the Senior Funding Agreements is reduced to 50% or less of the Original Senior Commitment; and thereafter

(b) the higher of:

(i) 5% of the Original Senior Commitment; and

(ii) the amount of any Additional Permitted Borrowing outstanding on the last day of the period referred to in paragraph (a);

"Affiliate" means, in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company, and "**holding company**" and "**subsidiary**" shall have the meaning given to them in section 1159 of the Companies Act 2006;

"Agent"	has the meaning given in the Funders' Direct Agreement;
"Agreement"	means this project agreement, including the Schedules;
"Ancillary Documents"	means the Construction Contract, the Service Contract, the [Management Services Agreement], the Performance Guarantees [and [to be inserted]], all as the same may be amended or replaced from time to time;
"Ancillary Rights"	means such rights as set out in Section 3 (*Ancillary Rights*) of Schedule 5 (*Land Matters*);
"Annual Service Payment"	has the meaning given in Schedule 14 (*Payment Mechanism*);
"Approved RDD Item"	means an item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed either "Level A – no comment" or "Level B – proceed subject to amendment as noted" by the Authority's Representative pursuant to the provisions of Clause 12 (*Design, Construction and Commissioning Process*) and Schedule 8 (*Review Procedure*) (provided that in the case of any item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed "Level B – proceed subject to amendment as noted" Project Co has taken account of the Authority's Representative's comments), as such item of Reviewable Design Data may be varied or amended from time to time in accordance with Schedule 16 (*Change Protocol*);
"Articles of Association"	means Project Co's articles of association and/or Hold Co's articles of association as the context may require, and the term "**Articles**" shall be construed accordingly;
"Associated Companies"	means [(a)], in respect of a relevant company, a company which is a Subsidiary, a Holding Company or a company that is a Subsidiary of the ultimate Holding Company of that relevant company, and in the case of Project Co shall include [Hold Co] and each of the Shareholders; [or (b) in respect of one of the initial shareholders [♦] Limited or any person which is a member of that [Investment Group], and the term "**Associate**" shall be interpreted accordingly; [47]
"Authority Assets"	means the [insert details of Authority existing premises/sites, equipment etc] and any other assets and equipment or other property used by,

[47] Insert details of investment funds on a project specific basis, if appropriate.

	or on behalf of, the Authority or any Authority Party, other than the Facilities;
"Authority Change"	has the meaning given in Schedule 16 (*Change Protocol*);
"Authority Change Notice"	has the meaning given in Schedule 16 (*Change Protocol*);
"Authority Events of Default"	has the meaning given in Clause 39.1 (*Authority Events of Default*);
"Authority Observer"	means, from time to time, the individual designated as such by the Authority;
"Authority Party"	means any of the Authority's agents, contractors and sub-contractors of any tier and its or their directors, officers and employees at the Facilities with the authority of the Authority but excluding Project Co, any Project Co Party and statutory undertakers and utilities and "**Authority Parties**" shall be construed accordingly;
"Authority Policies"	means, subject to Clause 28.7 (*Authority Policies*), the policies of the Authority set out in the document annexed to this Agreement as Attachment [♦] as amended from time to time in accordance with the provisions of Clause 33 (*Changes in Law)* and Schedule 16 (*Change Protocol*);
Authority's Annual Reports and Accounts"	[♦][48]
"Authority Services"	means [♦] and such other services as may be notified to Project Co by the Authority from time to time;
"Authority's Commissioning"	means the Authority's pre-completion commissioning activities to be carried out by the Authority in accordance with Clause 17 (*Pre-Completion Commissioning and Completion*);
"Authority's Community Benefits Requirements"	means those requirements set out in Section 1 (*Authority's Community Benefits Requirements*) of Schedule 29 (*Community Benefits*);
"Authority's Construction Requirements"	means the requirements of the Authority set out or identified in Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*) as amended from time to time in accordance with the terms of this Agreement;
"Authority's Maintenance Obligations"	has the meaning given in Clause 23.13 (*Authority's Maintenance Obligations*);
"Authority's Post Completion Commissioning"	means the Authority's post-completion commissioning activities to be carried out by the Authority in accordance with Clause 18.1 (*Post*

[48] To be completed on a project specific basis.

	Completion Commissioning);
"Authority's Representative"	means the person so appointed by the Authority pursuant to Clause 8 (*Representatives*);
"Availability Failure"	has the meaning given in Schedule 14 (*Payment Mechanism*);
"Barred List"	the barred lists provided for under the Safeguarding Vulnerable Groups Act 2006 as amended by the Protection of Freedoms Act 2012;
"Base Date"	has the meaning given in paragraph 16 of Section 2 (*Interpretation*) of Schedule 1 (*Definitions and Interpretation*);
"Base Senior Debt Termination Amount"	has the meaning given in Section 5 (*Definitions*) of Schedule 17 (*Compensation on Termination*);
"Beneficiary"	has the meaning given in Clause 49.3 (*Conduct of Claims*);
"Biennial Review"	means the biennial review referred to in Clause 25.1.1;
"Biennial Review Report"	has the meaning given in Clause 25.1.4;
["BIM Protocol"	means the Construction Industry Council Building Information Modelling Protocol, in the form attached at Schedule 30 (*BIM Protocol*);]
"Business Day"	means a day other than a Saturday, Sunday or a bank holiday in England and Wales;
"Capital Expenditure"	means capital expenditure (as such term is interpreted in accordance with generally accepted accounting principles in the United Kingdom from time to time);
"CDM Regulations"	has the meaning given in Section 2 (*Safety During Construction*) of Schedule 6 (*Construction Matters*);
"Certificate of Practical Completion"	means a certificate in the relevant form set out in Schedule 22 (*Certificates*);
["Certificate of WiFi Completion"	means the certificate to be issued by the Independent Tester in accordance with Clause 17.21 (*WiFi Completion*) in the form set out in Schedule 22 (*Certificates)*;]
"Change"	has the meaning given in Schedule 16 (*Change Protocol*);

"Change in Control" means:

(a) any sale or other disposal of any legal, beneficial or equitable interest in any or all of the equity share capital of a corporation (including the control over the exercise of voting rights conferred on that equity share capital, control over the right to appoint or remove directors or the rights to dividends); and/or

(b) any other arrangements that have or may have or which result in the same effect as paragraph (a) above;

"Change in Law" means the coming into effect or repeal (without re-enactment or consolidation) in England and Wales or in Wales alone of any Law, or any amendment or variation to any Law, or any judgement of a relevant court of law which changes binding precedent in England and Wales or in Wales alone in each case after the date of this Agreement;

"Collateral Agreements" means the Contractor's Collateral Agreement, the Service Provider's Collateral Agreement [and the Key Sub-Contractor Collateral Agreement];

"Commencement Date" means [the date of this Agreement];

"Commercially Sensitive Information" means the sub set of Confidential Information listed in [column 1 of Schedule 26 (*Commercially Sensitive Information*) in each case for the period specified in column 2 of Schedule 26 (*Commercially Sensitive Information*)];

"Commissioning Completion Certificate" means a certificate in the relevant form set out in Schedule 22 (*Certificates*);

"Commissioning End Date" means the date by which the parties' commissioning activities are programmed to be completed in accordance with the Final Commissioning Programme [for the relevant Phase];

["Committed Standby Facility" means [♦];]

"Compensation Event" has the meaning given in Clause 30.10 (*Compensation*);

"Compensation Payment" has the meaning given in Clause 46.5 (*Compensation on Termination*);

"Completion Criteria" has the meaning given to it in paragraph 2 of Appendix B of Schedule 10 (*Outline Commissioning Programme*) [and as may be applicable to each Phase];

["Completion Date" means [ ] or such revised date as may be specified by the Authority's Representative

pursuant to Clause 30 *(Delay Events)* or such other date as may be agreed by the parties;]

"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 interests of any person, trade secrets, Intellectual Property Rights and know-how of either party and all personal data and sensitive personal data within the meaning of the Data Protection Act 1998 and

(b) Commercially Sensitive Information,

provided that information to be supplied by Project Co to the Authority pursuant to Clauses 29.15 to 29.17 (*Sustainable Development*) shall not be Confidential 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 (including, without limitation, any Planning Permission), needed to carry out the Project Operations in accordance with this Agreement;

"Construction Contract" means the design and build contract dated on or around the date of this Agreement between Project Co and the Contractor (which, as at the date of this Agreement, is in the Agreed Form) as amended or replaced from time to time in accordance with this Agreement;

"Construction Phase" means [in respect of a Phase] the period from and including the date of execution of this Agreement to and including the Actual Completion Date [relevant Phase Actual Completion Date];

"Construction Quality Plan" means the document at Section 8 (*Quality Plans (Design and Construction*)) of Schedule 6 (*Construction Matters*);

"Construction Skills Certification Scheme" means the scheme operated by Construction Skills Certification Scheme Limited (registered number 03024675) to evidence the skills and competence of persons employed on construction sites;

"Contamination" means all or any pollutants or contaminants, including any chemical or industrial, radioactive, dangerous, toxic or hazardous substance, waste or residue (whether in solid, semi-solid or liquid

form or a gas or vapour) and including without limitation genetically modified organisms;

"Contingent Funding Liabilities" has the meaning given to it in Section 5 (*Definitions)* of Schedule 17 (*Compensation on Termination*);

"Contract Month" means a calendar month provided that:

(a) the first Contract Month shall be the period from and including the Payment Commencement Date to and including the last day of the calendar month in which the Payment Commencement Date falls; and

(b) the last Contract Month shall be the period from and including the first day of the calendar month in which the Expiry Date or Termination Date (as the case may be) falls to and including the Expiry Date or the Termination Date (as the case may be);

"Contract Review Date" means each review date referred to in Clause 25.1.2;

"Contract Year" means each period of twelve (12) calendar months during the Project Term, starting on [1 April], and each subsequent period of twelve (12) calendar months , save for the first Contract Year which shall be the period commencing on the date of this Agreement and ending on the next 31 March and the final Contract Year which shall be the period commencing on the preceding 1 April and ending on the date of expiry or earlier termination of this Agreement (as the case may be);

"Contracting Associate" means the Contractor, any Service Provider and [any other entity which performs on behalf of Project Co any material function in connection with this Agreement or the Project Operations];

"Contractor" means [♦][49] engaged by Project Co to carry out the Works and any substitute design and/or building contractor engaged by Project Co as may be permitted by this Agreement;

"Contractor's Collateral Agreement" means a collateral agreement among the Authority, Project Co and the Contractor in the form set out in Section 1 (*Contractor's Collateral Agreement*) of Schedule 9 (*Collateral Agreements*);

"Contractor's Site Manager" means the manager to be appointed by the Contractor for purposes of supervision of all day-

[49] Insert description of construction contractor

	to-day activities on the Site;
"Contractor's Site Rules"	means the Contractor's rules, applicable on the Site to the Authority, Project Co, the Contractor and their respective sub-contractors and suppliers of every tier during the construction of the Facilities;
"Convictions"	means, other than in relation to any 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 1 of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023) or any replacement or amendment to that Order);
"Core Times"	has the meaning given to it in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*);
"Decanting and Decommissioning"	means [see Clause 18.8] (*Decanting, Decommissioning and Equipment Transfer*);
"Deduction"	means a deduction to be made in calculating a Monthly Service Payment, calculated in accordance with Section 3 (*Deductions from Monthly Service Payments*) of Schedule 14 (*Payment Mechanism*);
"Deemed Liability"	has the meaning given in Clause 46.6.3;
"Default Interest"	means any increased margin that is payable to the Senior Funders or which accrues as a result of any payment due to the Senior Funders not being made on the date on which it is due;
"Default Interest Rate"	means 2% over LIBOR;
"Defects"	means any defect or fault in the Works and/or the Facilities which occurs due to a failure by Project Co to meet the Authority's Construction Requirements and/or Project Co's Proposals or otherwise to comply with its obligations under this Agreement;
"Delay Event"	has the meaning given in Clause 30.3 (*Delay Events*);
["Derogated Low Value Change"	has the meaning given in Schedule 16 (*Change Protocol*);]
"Design Data"	means all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing and/or operation of the Facilities;

"Design Quality Plan" means the document at Section 8 (*Quality Plans (Design and Construction*)) of Schedule 6 (*Construction Matters*);

"Direct Losses" means, subject to the provisions of Clause 55.1 (*Exclusions and Limits on Liability*), 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;

"Disaster Plan" means the plan set out in Schedule 28 (*Disaster Plan*);

"Disclosed Data" means any Design Data and any other written information, survey reports, data and documents made available or issued to Project Co or any Project Co Party in connection with the Project by or on behalf of the Authority (or any Authority Party) whether on, before or after the execution of this Agreement;

"Disclosure and Barring Service" the non-departmental public body established pursuant to the Protection of Freedoms Act 2012;

"Discriminatory Change in Law" means any Change in Law the effect of which is to discriminate directly against:

(a) [facilities] whose design, construction, financing and operation are procured under the private finance initiative (or any successor initiative applying principles similar to those of the private finance initiative) in relation to other similar projects; or

(b) companies undertaking projects procured by contracts under the private finance initiative in relation to other companies undertaking similar projects; or

(c) the [insert name of the Facilities] in relation to other similar facilities; or

(d) Project Co in relation to other companies,

save:

(i) where such Change in Law is in response to any act or omission on the part of Project Co which is illegal (other than an act or omission rendered illegal by virtue of the Change in Law itself);

(ii) that such action shall not be deemed to be discriminatory solely on the basis that its effect on Project Co is greater than its effect on other companies; and

(iii) that a change in taxes or the introduction of a tax affecting companies generally or a change in VAT shall be deemed not to be discriminatory in any circumstances (to avoid doubt, such changes being given effect in accordance with Clause 36 (*VAT and Construction Industry Tax Deduction Scheme*);

"Dispute Resolution Procedure" means the procedure set out in Schedule 20 (*Dispute Resolution Procedure*);

"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;

"Emergency" means an event causing or, in the reasonable opinion of a party, threatening to cause death or injury to any individual, or serious disruption to the lives of a number of people or extensive damage to property, or contamination of the environment, in each case on a scale beyond the capacity of the emergency services or preventing the Services operating under normal circumstances and requiring the mobilisation and organisation of the emergency services;

"Encumbrance" means any option, right of pre-emption, pledge, security, interest, lien, charge, mortgage, lease, licence, claim, condition, retention or other encumbrance or restriction whether imposed by agreement, by law or otherwise;

"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;

"Equipment" means [♦];

"Estimated Deductions" has the meaning given in Clause 35.2.1;

"Estimated Increased Maintenance Costs"	has the meaning given in Clause 23.7 (*Programmed and Unprogrammed Maintenance*);
"**Ethical Employment Code"**	means the Code of Practice - Ethical Employment in Supply Chains issued by the Welsh Government on [♦];
"Excusing Cause"	has the meaning given in Clause 52.2 (*Excusing Causes*);
"Expiry Date"	means [midnight] on [date];
"Facilities"	means [the buildings and other facilities, together with all supporting infrastructure (including the Plant and [the Group 1 Equipment]), external hard-standings, specialist surfaces and other amenities located on the Site (including as a minimum all aspects detailed within [Appendix B] to Section 1 (*Service Level Specification*) of Schedule 12 (*Service Requirements*)), as required to enable Project Co to comply with its obligations under this Agreement, all as the same may be varied, amended or supplemented from time to time in accordance with this Agreement;]
["Facility Manager"	means Project Co's duty manager who shall be present at the Facilities in accordance with the Service Level Specification;]
"Fees Regulations"	means the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004;
"Final Commissioning Programme"	means the programme jointly developed and agreed by the Authority and Project Co in accordance with the provisions of Clause 17.1 (*Pre-Completion Commissioning and Completion*);
"Financial Close"	means the date of this Agreement;
"Financial Model"	means the computer spreadsheet model for the Project incorporating statements of Project Co's cashflows including all expenditure, revenues, financing and taxation of the Project Operations together with the profit and loss accounts and balance sheets for Project Co throughout the Project Term accompanied by details of all assumptions, calculations and methodology used in their compilation and any other documentation necessary or desirable to operate the model, as amended from time to time in accordance with the terms of Clause 37 (*Financial Model*), a copy of which is attached to this Agreement on disk as Attachment [♦];
"Finishes"	means those finishes listed in the table set out in paragraph 1.2.3 of Schedule 8 (*Review*

	Procedure);
"Finishes Proposal Date"	means, in relation to a Finish, the relevant date identified in the table set out in paragraph 1.2.3 of Schedule 8 (*Review Procedure*);
"Finishes Selection Date"	means, in relation to a Finish, the relevant date identified in the table set out in paragraph 1.2.3 of Schedule 8 (*Review Procedure*);
"First Party"	has the meaning given in Clause 36.3 (*VAT*);
"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;
"Force Majeure"	has the meaning given in Clause 32 (*Force Majeure*);
"Functional Area"	means an area of the Facilities identified as such in [Appendix 2 to Schedule 14 (*Payment Mechanism*)];
"Funders"	means all or any of the persons who provide financing or funding in respect of the Project Operations under the Funding Agreements including **[♦]** and, where the context so permits, prospective financiers or funders;
"Funders' Direct Agreement"	means the agreement to be entered into between the Authority, the Senior Funders and Project Co in the form set out in Schedule 4 (*Funders' Direct Agreement*);
"Funding Agreements"	means all or any of the agreements or instruments to be entered into by Project Co or any of its Associates relating to the financing of the Project Operations (including the Initial Funding Agreements and any agreements or instruments to be entered into by Project Co or any of its Associates relating to the rescheduling of their indebtedness or the refinancing of the Project Operations);
"Funding Default"	means **[♦]**;
"**General Anti-Abuse Rule**"	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 or the Welsh Ministers;
"Ground Physical and Geophysical Investigation"	means the investigation of all the conditions of and surrounding the Site and of any extraneous materials in, on or under the Site (including its surface and subsoil) to enable the Facilities to be designed and constructed and the Works to be carried out with due regard for those conditions and the seismic activity (if any) in the region of the Site;
"Group 1 Equipment"	means [♦];
"H&S Conviction"	has the meaning given in Clause 40.1.5;
"**Halifax Abuse Principle**"	means the principle explained in the CJEU Case C-255/02 Halifax and others;
"Handback Amount"	has the meaning given in Schedule 18 (*Handback Procedure*);
"Handback Bond"	has the meaning given in Schedule 18 (*Handback Procedure*);
"Handback Certificate"	means the certificate of confirmation that the Facilities comply with the Handback Requirements in the relevant form set out in Schedule 22 (*Certificates*);
"Handback Programme"	has the meaning given in Schedule 18 (*Handback Procedure*);
"Handback Requirements"	has the meaning given in Schedule 18 (*Handback Procedure*);
"Handback Works"	has the meaning given in Schedule 18 (*Handback Procedure*);
"Health and Safety Regime"	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;

"Helpdesk"	has the meaning given in Schedule 14 (*Payment Mechanism*);
"High Value Change"	has the meaning given in Schedule 16 (*Change Protocol*);
"High Value Change Stage 2 Submission"	has the meaning given in Schedule 16 (*Change Protocol*);
"Hold Co"	means [♦];
"Holding Company"	has the meaning given to it in section 1159 of the Companies Act 2006;
"Hours for Programmed Maintenance"	has the meaning given in Appendix 2 of Schedule 8 (*Review Procedure*);
"Hours of Operation"	has the meaning given in Appendix 2 of Schedule 8 (*Review Procedure*);
"Indemnifier"	has the meaning given in Clause 49.3 (*Conduct of Claims*);
"Independent Tester"	means the [insert name of Independent Tester] or such substitute independent tester as may be permitted pursuant to this Agreement;
"Independent Tester Contract"	means the contract dated on or around the same date as this Agreement in the form set out in Schedule 13 (*Independent Tester Contract*) or any replacement thereof among Project Co, the Authority, the Contractor and the Independent Tester;
"Indirect Losses"	has the meaning given in Clause 55.1 (*Exclusions and Limits on Liability*);
"Information"	has the meaning given under section 84 of the Freedom of Information Act 2000;
"Information Breach"	means a breach of any provisions of Schedule 19 (*Record Provisions*), or Section 4 (*Insurance Arrangements)* of Schedule 15 (*Insurance Requirements)*;
"Information Commissioner"	has the meaning given in the Data Protection Act 1998;
"Information System"	means a system for generating, sending, receiving, storing or otherwise processing electronic communications;
"Initial Funding Agreements"	means [♦] in the Agreed Form;
"Insurance Proceeds Account"	means the account numbered [♦] in the joint names of Project Co and the Authority with the [Account Bank (as defined in the Funding Agreements)];

"Insurance Proceeds Account Agreement"	means the agreement in the form set out in Schedule 25 (*Insurance Proceeds Account Agreement*);
"Insurances"	means, as the context requires, all or any of the insurances required to be maintained by Project Co pursuant to this Agreement;
"Insurance Term"	means any term and/or condition required to be included in a policy of insurance by Clause 54 (*Insurance*) and/or Schedule 15 (*Insurance Requirements*) but excluding any risk;
"Intellectual Property"	means all registered or unregistered trademarks, service marks, patents, registered designs, utility models, applications for any of the foregoing, copyrights, unregistered designs, the sui generis rights of extraction relating to databases, trade secrets and other confidential information or know-how;
"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 Project Co, any Project Co Party or by other third parties (for the use by or on behalf of or for the benefit of Project Co) for the purposes of the design or construction of the Facilities, the operation, maintenance, improvement and/or testing of the Facilities or the conduct of any other Project Operation or otherwise for the purposes of this Agreement;
"Interface Protocol"	means the interface protocol agreed between Project Co and the Authority pursuant to paragraph 1.3 of Section 4 (*Interface Protocol*) of Schedule 12 (*Service Requirements*);
"Interim Project Report"	means a report prepared by Project Co, incorporating (as a minimum) the details set out at [♦];
["Investment Group"]	[♦];
"IT"	means information technology systems, hardware and software;
"Key Sub-Contractor"	means [♦];
"Key Sub-Contractor Collateral Agreements"	means the collateral agreement among the Authority, Project Co [, the Contractor] and the Key Sub-Contractors in the form set out in Section 3 (*Key Sub-Contractor Collateral Agreement*) of Schedule 9 (*Collateral Agreements*);
"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) of the European Communities Act 1972;

(c) any applicable guidance, direction or determination with which the Authority and/or Project Co is bound to comply (including the Welsh Language Standards) to the extent that the same are published and publicly available or the existence or contents of them have been notified to Project Co by the Authority; and

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

in each case in force in England and Wales or Wales alone;

"Liaison Committee" has the meaning given to it in Schedule 24 (*Liaison Procedure*);

"LIBOR" means the rate per annum determined by [♦] Bank plc to be the offered rate for six (6) month sterling deposits in the London interbank market which appears on Telerate Page 3750 (or such other page as may replace that page on the Dow Jones Telerate service);

"Lifecycle Assets" each item of building fabric, Plant, Equipment or any other asset or part of the Facilities to be renewed or replaced during the Project Term as identified in the Lifecycle Schedule or as may be identified by the parties applying Good Industry Practice;

"Lifecycle Efficiencies Plan" the plan for "Lifecycle Efficiencies" set out in Project Co's Proposals[50];

"Lifecycle Profile" the amounts profiled to be spent by Project Co on the replacement or renewal of Lifecycle Assets as shown in the Financial Model [in row [♦]] as at the Commencement Date;

"Lifecycle Replacement" means any works for the renewal of any Lifecycle Assets that are necessary to ensure that the Facilities are maintained in accordance with the Service Level Specification and Method

[50] Plan to be bid. Bidders will be evaluated on the efficiencies they expect to be able to generate as a result of portfolio savings, group purchasing and aggregation.

	Statements and that the Facilities comply with the Authority's Construction Requirements and Project Co's Proposals throughout the Project Term;
"Lifecycle Report"	the report prepared by Project Co pursuant to Clause 24.8(*Lifecycle Replacement*);
"Lifecycle Review Date"	the 5th, 10th, 15th and 20th anniversaries of the Commencement Date and not less than [♦] prior to the Expiry Date;
"Lifecycle Schedule"	the detailed annual Lifecycle Replacement schedule showing when the Lifecycle Assets will be renewed or replaced, and forming part of the Schedule of Programmed Maintenance;
"Lifecycle Spend"	the actual amount spent by Project Co on the replacement or renewal of Lifecycle Assets;
"Low Value Change"	has the meaning given in Schedule 16 (*Change Protocol*);
"Maintenance Works"	means any works for maintenance or repair of the Facilities that are necessary to ensure that the Facilities are maintained in accordance with Service Level Specification and Method Statements and that the Facilities comply with the Authority's Construction Requirements and Project Co's Proposals (including, without limitation, the renewal or replacement of any Plant or Equipment) throughout the Project Term but excluding for the avoidance of doubt Lifecycle Replacement;
"Malicious Damage Report"	has the meaning given in Clause 50.2.1;
"Management Services Agreement"	means the contract dated on or around the date of this Agreement between Project Co and the Management Service Provider (which as at the date of this Agreement is in the Agreed Form), as amended or replaced from time to time in accordance with this Agreement;
"Medium Value Change"	has the meaning given in Schedule 16 (*Change Protocol*);
"Management Service Provider"	means [♦][51] or any other person engaged by Project Co from time to time as may be permitted by this Agreement to procure the provision of the Services (or any part of them);
"Method Statements"	means the method of providing a Service as set out or identified in Section 2 (*Method Statements*) of Schedule 12 (*Service Requirements*) as amended from time to time in accordance with Clause 34 (*Change Protocol*) and Clause 22 (*The*

[51] Insert description of Management Service Provider(s)

Services);

"Monthly Invoice" has the meaning given in Clause 35.2.1

"Monthly Service Payment" has the meaning given in Schedule 14 (*Payment Mechanism*);

"Monthly Service Report" means a monthly report in the Agreed Form, to be prepared by Project Co and provided to the Authority in accordance with the relevant provisions in Section 1 (*Service Level Specification*) of Schedule 12 (*Service Requirements*);

"Net Present Value" has the meaning given in Schedule 23 (*Refinancing*);

"Non-Compliant Shareholder" has the meaning given to it in Clause 53.1.2 (*Tax Compliance*);

"Notice Date" means [♦];

"**Occasion of Tax Non-Compliance**" means:

(a) any tax return of Project Co 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 Project Co 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 Project Co 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) Project Co'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;

"**Operational Functionality**" means [♦];

"Operational Insurances" means the insurances required by Clause 54.2 (*Insurance*) and "**Operational Insurance**" means any one of such insurances;

"Operational Term" means [in respect of a Phase] the period from the Actual Completion Date [Phase Actual

	Completion Date] until the end of the Project Term;
"Option Period"	has the meaning given in Clause 54.14.3 (*Uninsurable Risks*);
"Original Senior Commitment"	means the amount committed under the Senior Funding Agreements as at Financial Close (as adjusted to take into account any Qualifying Change);
"Other Costs"	means costs payable to Project Co pursuant to Section 6 (*Other Costs*) of Schedule 14 (*Payment Mechanism*);
"Outline Commissioning Programme"	means the programme setting out the standards, specifications, procedures and other requirements for the carrying out and completion of the commissioning activities of the parties set out in outline in Schedule 10 (*Outline Commissioning Programme*);
"Payment Commencement Date"	means the Actual Completion Date;
["Payment Commencement Date 1"	means the Phase 1 Actual Completion Date;]
["Payment Commencement Date 2"	means the Phase 2 Actual Completion Date;]
"Payment Mechanism"	means Schedule 14 (*Payment Mechanism*);
"Performance Failure"	has the meaning given in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*);
"Performance Guarantees"	means the guarantees to Project Co in respect of the Construction Contract and the Service Contract which, as at the date of this Agreement are in the Agreed Form[52];
"**Permitted Borrowing**"	means without double-counting, any: (a) advance to Project Co under the Senior Funding Agreements, provided that such advance is not made under any Committed Standby Facility; (b) Additional Permitted Borrowing; (c) advance to Project Co under any Committed Standby Facility which is made solely for the purpose of funding any cost overruns, increased expenses or loss of revenue which Project Co incurs, provided that such funds are not

[52] Insert details of any other guarantees to be given.

used in substitution for other sources of committed funding designated for those purposes; and

(d) interest and, in respect of the original Senior Funding Agreements only (as entered into at the date of this Agreement, prior to any subsequent amendment), other amounts accrued or payable under the terms of such original Senior Funding Agreements,

except where the amount referred to in paragraphs (a) to (d) above is or is being used to fund a payment of Default Interest on any Additional Permitted Borrowing;

"Persistent Breach" means a breach for which a final warning notice (referred to in Clause 43.2 (*Persistent Breach*) has been issued, which has continued for more than fourteen (14) days or recurred in three (3) or more months within the six (6) month period after the date on which such final warning notice is served on Project Co;

["Phase" means, as the context may require, Phase 1 and/or Phase 2 as described in Section 2 (*Phasing*) of Schedule 7 (*Programme*) and "**Phases**" shall be construed accordingly;]

["Phase 1" means Phase 1 as described in Section 2 (*Phasing*) of Schedule 7 (*Programme*);]

[Phase 1 Actual Completion Date" means the later of:

(a) the date of the Certificate of Practical Completion issued by the Independent Tester in respect of Phase 1 pursuant to Clause 17.12 (*[Phase] Completion Certificate*); and

(b) subject to Clause 14.5 (*Early Completion*), the Phase 1 Completion Date;]

["Phase 1 Completion Date" means, subject to Clause 30 *(Delay Events)*, the date described as such in Section 2 (*Phasing*) of Schedule 7 (*Programme*) or such other date as the parties may agree;]

["Phase 2" means Phase 2 as described in Section 2 (*Phasing*) of Schedule 7 (*Programme*);]

[Phase 2 Actual Completion Date" means the later of:

(a) the date of the Certificate of Practical Completion issued by the Independent Tester in respect of Phase 2 pursuant to Clause 17.12 (*[Phase] Completion*

Certificate); and

(b) subject to Clause 14.5 (*Early Completion*), the Phase 2 Completion Date;]

["Phase 2 Completion Date" means, subject to Clause 30 *(Delay Events)*, the date described as such in Section 2 (*Phasing*) of Schedule 7 (*Programme*) or such other date as the parties may agree;]

["Phase Actual Completion Date" means, as the context may require, the Phase 1 Actual Completion Date and/or the Phase 2 Actual Completion Date;]

["Phase Completion Date" means, as the context may require, the Phase 1 Completion Date and/or the Phase 2 Completion Date;]

["Phase Plans" means the plans attached at Appendix 3 of Schedule 5 (*Land Matters*);]

"Physical Damage Policies" means the policies of insurance referred to in paragraph 1 (*Contractors' 'All Risks' Insurance*) of Section 1 (*Policies to be Taken Out by Project Co and Maintained During the Design and Construction Phase*) and paragraph 1 (*Property Damage Insurance*) of Section 2 (*Policies to be Taken Out By Project Co and Maintained from the Actual Completion Date*) of Schedule 15 (*Insurance Requirements*);

"Planning Approval" means detailed planning consent for the Project dated [insert date of Planning Approval] and annexed as Attachment [♦];

"Planning Permission" means any planning permission, approval of reserved matters, listed building consent, conservation areas consent and/or other consent or approval reasonably required from time to time for construction and/or operation of the Facilities (including without limitation for any Authority Change and the Planning Approval);

"Plant" means the infrastructure systems, building systems, fixed, and immovable equipment systems, installed as part of the Works or pursuant to an Authority Change as replaced from time to time;

"Post Completion Commissioning" means, as appropriate, Project Co's Post Completion Commissioning and/or the Authority's Post Completion Commissioning;

"Pounds Sterling" means the currency issued by the Bank of England from time to time;

"**Programme**" means the programme set out in Schedule 7 (*The Programme*) as revised and issued by Project Co (or on its behalf) from time to time pursuant to

	Clause 14 (*Programme and Dates for Completion*);
"**Programmed Maintenance**"	means the Maintenance Work which Project Co is to carry out in accordance with Schedule of Programmed Maintenance;
"**Programmed Maintenance Information**"	has the meaning given in Clause 23.3 (*Programmed Maintenance Works*);
"Prohibited Act"	has the meaning given in Clause 45 (*Corrupt Gifts and Payments*);
"Project"	has the meaning given to it in Recital A;
"Project Co Event of Default"	has the meaning given in Clause 40 (*Project Co Events of Default*);
"Project Co Party"	means Project Co's agents and contractors (including without limitation the Contractor and the Service Provider[s]) and its or their sub-contractors of any tier and its or their directors, officers, employees and workmen in relation to the Project and "**Project Co Parties**" shall be construed accordingly;
"Project Co's Community Benefits Method Statements"	means those method statements set out in Section 2 (*Project Co's Community Benefit Statements*) of Schedule 29 (*Community Benefits*);
"Project Co's Key Personnel"	means the personnel identified in Schedule 3 (*Key Personnel*);
"Project Co's Post-Completion Commissioning"	means Project Co's commissioning activities carried out in accordance with Clause 18.1 (*Post Completion Commissioning*);
"Project Co's Pre-Completion Commissioning"	means Project Co's commissioning activities to be carried out in accordance with Clause 17 (*Pre Completion Commissioning and Completion*);
"Project Co's Proposals"	means the document at Section 4 (*Project Co Proposals*) of Schedule 6 (*Construction Matters*) as amended from time to time in accordance with Clause 34 (*Change Protocol*);
"Project Co's Remedial Services"	means any activities to be performed by or on behalf of Project Co pursuant to its rights under Clause 23.15 (*Authority's Maintenance Obligations*);
"Project Co's Representative"	means the person appointed by Project Co pursuant to Clause 8 (*Representatives*);
"Project Data"	means:

(a) all Design Data;

(b) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the provision of the Services; and

(c) any other materials, documents and or data acquired, brought into existence or used in relation to the Project Operations or this Agreement;

"Project Documents" means the Ancillary Documents and the Funding Agreements;

"Project Operations" means the carrying out of the Works, the carrying out of Project Co's Pre-Completion Commissioning and Project Co's Post-Completion Commissioning, the management and provision of the Services and the performance of all other obligations of Project Co under this Agreement from time to time;

"Project Term" means the period commencing at [midnight] on the date of this Agreement and ending on the earlier of the Expiry Date and the Termination Date;

"Proposed Mitigating Measures" has the meaning given in Clause 53.1.2(b)(i) (*Tax Compliance*);

"PRS Timetable" has the meaning given in Clause 23.16 (*Authority's Maintenance Obligations*);

"Qualifying Change" means (unless expressly stated otherwise):

(a) a Low Value Change in respect of which the parties have agreed the method of implementation; or

(b) a Medium Value Change in respect of which the Authority has issued a confirmation notice pursuant to paragraph 7.1.1 of Section 3 (*Medium Value Changes*) of Schedule 16 (*Change Protocol*); or

(c) a High Value Change which has received Stage 2 Approval pursuant to paragraph 8.2.1 of Section 4 (*High Value Changes*) of Schedule 16 (*Change Protocol*),

	in each case provided that any necessary changes required to be made to any Project Document and/or Ancillary Document pursuant to Schedule 16 (*Change Protocol*) have been given effect to and become unconditional;
"Quality Plans"	means the Design Quality Plan and Construction Quality Plan, prepared in accordance with Section 8 (*Quality Plans (Design and Construction*)) of Schedule 6 (*Construction Matters*), and the Services Quality Plan, prepared in accordance with Section 3 (*Service Quality Plan*) of Schedule 12 (*Service Requirements*), as required to be implemented by Project Co in accordance with Clause 20 (*Quality Assurance*);
"Range of Finishes"	has the meaning given in paragraph 1.2.3(a) of Schedule 8 (*Review Procedure*);
"Rectification"	has the meaning given in Schedule 14 (*Payment Mechanism*);
"Rectification Period"	has the meaning given in Schedule 14 (*Payment Mechanism*);
"Refinancing"	has the meaning given in Schedule 23 (*Refinancing*);
"Reinstatement Plan"	has the meaning given in Clause 54.22 (*Reinstatement*);
"Reinstatement Works"	has the meaning given in Clause 54.22.2 (*Reinstatement*);
"Relevant Authority"	means any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom, or of the European Union, (or of the Welsh Ministers or the National Assembly for Wales);
"Relevant Change in Law"	has the meaning given in Clause 33.3 (*Changes in Law*);
"Relevant Event"	has the meaning given in Schedule 16 (*Change Protocol*);
"Relevant Incident"	has the meaning given in Clause 54.22.2 (*Reinstatement*);
"Relevant Payment"	has the meaning given in Clause 54.14.3;
"Relevant Proceeds"	has the meaning given in Clause 54.22.2 (*Reinstatement*);

"Relevant Service Transfer Date" has the meaning given in Clause 27.10 (*No Employee Transfer*);[53]

"**Relevant Tax Authority**" means HM Revenue & Customs, or, if applicable, a tax authority in the jurisdiction in which Project Co or, as the case may be, the relevant person is established;

"Relevant Tax Liability" has the meaning given in Clause 46.6.3;

"Relief" has the meaning given in Clause 46.6.1;

"Relief Events" has the meaning given in Clause 31 (*Relief Events*);

"Renewal Date" has the meaning given in Schedule 15 (*Insurance Requirements*);

"Request for Information" has the meaning set out in the FOIA or the Environmental Information Regulations as relevant (where the meaning set out for the term "request" shall apply);

"Required Action" has the meaning given in Clause 26.7 (*Authority's remedial rights*);

"Reserved Rights" means the matters referred to in Section 2 (*Reserved Rights*) at Schedule 5 (*Land Matters*);

"Restricted Person" means either:

(a) a person providing or proposing to provide [♦] services of a similar nature to those provided or contemplated by the Authority at the time in question; or

(b) any person who has a material interest in the manufacture, production, sale or distribution of [pornography,] or [arms and weapons] or [the production of tobacco products and/or alcoholic beverages];

(c) a person who poses, or could pose (in the reasonable opinion of the Authority) a threat to national security;

(d) [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

[53] Refer to Clause 27.1 (*Employee Transfer*) where Staff Transfer drafting is adopted.

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;]

"Retail Prices Index" or **"RPI"** means the Retail Prices Index (All Items) as published by the Office for National Statistics from time to time (the "Index"), or, failing such publication or in the event of a fundamental change to the Index, such other index as the parties may agree, or such adjustments to the Index as the parties may agree (in each case with the intention of putting the parties in no better nor worse position than they would have been in had the Index not ceased to be published or the relevant fundamental change not been made) or, in the event that no such agreement is reached, as may be determined in accordance with the Dispute Resolution Procedure;

["Retained WiFi Amount" means [♦] ;]

"Revenue" means the projected Unavoidable Fixed Costs and Senior Debt Service Costs of Project Co;

"Reviewable Design Data" means the Design Data listed at Section 5 (*Reviewable Design Data*) of Schedule 6 (*Construction Matters*);

["Reviewable Design Data Programme" means the programme for submission and review of the Submitted Items as set out in Appendix 3 of Schedule 8 (*Review Procedure*);]

"Revised Senior Debt Termination Amount" has the meaning given in Section 5 (*Definitions*) of Schedule 17 (*Compensation on Termination*);

"Room Data Sheets" has the meaning given in Section 6 (*Room Data Sheets*) of Schedule 6 (*Construction Matters*);

"Schedule of Programmed Maintenance" means the programme referred to in Clause 23.1 (*Programmed Maintenance Works*) to be

	submitted to the Authority's Representative by Project Co in accordance with Schedule 8 (*Review Procedure*);
"Schedules"	means Schedules 1 to [♦] attached to this Agreement;
"Second Party"	has the meaning given in Clause 36.3 (*VAT*);
"Security Trustee"	means [♦];
"Senior Debt"	has the meaning given in Section 5 (*Definitions*) of Schedule 17 (*Compensation on Termination*);
"Senior Debt Service Costs"	means interest and debt service costs incurred in respect of the [Senior Funding Agreements] less: (a) sums which are in arrears; and (b) all sums reserved by Project Co and which Project Co is entitled to use to make such payments, without breaching the [Senior Funding Agreements];
"Senior Funders"	means [specify relevant funders];
"Senior Funding Agreements"	means [♦] as at the date of this Agreement and as amended as permitted under Clause 4 (*Project Documents*);
"Service Contract"	means the contract dated on or around the date of this Agreement between Project Co and the Service Provider (which as at the date of this Agreement is in the Agreed Form), by which Project Co will procure the performance of the Services (as amended or replaced from time to time in accordance with this Agreement);
"Service Event"	has the meaning given in Schedule 14 (*Payment Mechanism*);
"Service Level Specification"	means the requirements of the Authority set out in Section 1 (*Service Level Specification*) of Schedule 12 (*Service Requirements*) as amended from time to time in accordance with Clause 34 (*Change Protocol*);
"Service Provider"	means [♦][54] or any other person engaged by Project Co from time to time as may be permitted by this Agreement to procure the provision of the Services (or any part of them);
"Service Provider's Collateral Agreement"	means the collateral agreement among the Authority, Project Co and the Service Provider in

[54] Insert description of Service Provider(s)

	the form set out in Section 2 (*Service Provider's Collateral Agreement*) of Schedule 9 (*Collateral Agreements*);
"Services"	means the services to be provided, managed and/or procured by Project Co for the Authority in accordance with Schedule 12 (*Service Requirements*) as subsequently amended or adjusted in accordance with this Agreement;
"Services Quality Plan"	means the document set out in Section 3 (*Services Quality Plan*) of Schedule 12 (*Service Requirements*);
"Shareholder(s)"	means any person(s) who from time to time, as permitted by this Agreement, holds share capital in Project Co or Hold Co which persons are, as at the date of this Agreement, listed as such in Schedule 21 (*Project Co Information*);
"Shareholders' Agreement"	means the agreement between the Shareholders relating to Project Co, including any agreement relating to the subscription of equity (or other shareholder funding) by the Shareholders in Project Co or Hold Co;
"Site"	means the land made available to Project Co for the Project outlined in red on [♦][55];
"Site Conditions"	means the condition of the Site including (but not limited to) climatic, hydrological, hydrogeological, ecological, environmental, geotechnical, topographical and archaeological conditions;
"Site Plans"	means the site plan attached at Appendix 2 of Schedule 5 (*Land Matters*)[56];
"Snagging Completion Date"	means the date of the Snagging Items Completion Certificate issued by the Independent Tester in respect of Phase 1 pursuant to Clause 17.15(*Snagging Items*);
"Snagging Items"	means minor defects, deficiencies or omissions of a snagging nature whose remediation cannot reasonably be expected to affect the provision of the Services, disrupt the use of the Facilities, prejudice the safe use of the Facilities or prevent the Independent Tester from issuing a Certificate of Practical Completion [for the relevant Phase] and the remediation of which does not exceed either [♦] man days or £[♦][57] ;
"Snagging Items Completion Certificate"	means the certificate issued by the Independent Tester in accordance with Clause 17.15 (*Snagging Items*) and in accordance with the

[55] Insert details of relevant plan. An indicative red-line plan must be included in the "Site Pack" referred to in Chapter 4 of the User Guide, in relation to Schedule 5.
[56] Plan to be developed on a project specific basis.
[57] To be completed on a project specific basis.

terms of the Independent Tester Contract;

"Snagging List" means the list to be prepared by the Independent Tester in accordance with Clause 17.14 (*Snagging Items*) containing Snagging Items;

Snagging Programme has the meaning given to it in Clause 17.14 (*Snagging Items*);

"Specific Change in Law" means any Change in Law which specifically refers to:

(a) the provision of works or services the same as or similar to the Works or the Services in premises similar to the Facilities; or

(b) the holding of shares in companies whose main business is providing works or services the same as or similar to the Works or the Services in premises similar to the Facilities;

"Sub-Contractor" means any third party (including the Contractor and a Service Provider) who enters into any Sub-Contract;

"Sub-Contracts" means the contracts entered into by or between Project Co, the Contractor and/or a Service Provider and other third parties in relation to any aspect of the Project Operations;

"Submitted Item" has the meaning given to it in Paragraph 1.2 of Schedule 8 (*Review Procedure*);

"Subordinated Debt" has the meaning given in Section 5 (*Definitions*) of Schedule 17 (*Compensation on Termination*);

"Subordinated Funder" means a person providing finance under a Subordinated Funding Agreement;

"Subordinated Funding Agreements" means [♦] as at the date of this Agreement or as amended with the prior written agreement of the Authority;

"Subsidiary" has the meaning given to it in section 1159 of the Companies Act 2006;

"Suitable Substitute Contractor" has the meaning given in Section 5 (*Definitions*) of Schedule 17 (*Compensation on Termination*);

"Termination Date" means the date on which termination of this Agreement takes effect in accordance with its terms;

"Title Conditions" means title conditions set out in Section 1(*Title*

Conditions) of Schedule 5 (*Land Matters*);

"TPL Risk" means a risk which is required to be insured under the third party liability insurance policy;

"Transfer Regulations" means the Transfer of Undertaking (Protection of Employment) Regulations 2006 (SI No. 246);

"Transferring Staff" has the meaning given to it in Clause 27.11 (*No Employee Transfer*);

"Unavoidable Fixed Costs" means the fixed costs incurred by Project Co which first fall due for payment by Project Co during the period of indemnity but excluding:

(a) costs which could have reasonably been mitigated or avoided by Project Co;

(b) payments to Project Co's Associated Companies;

(c) payments which are not entirely at arm's length;

(d) payments to holders of equity in Project Co, providers of Subordinated Debt and any other financing costs other than Senior Debt Service Costs

(e) indirect losses suffered or allegedly suffered by any person;

(f) fines, penalties or damages for unlawful acts, breaches of contract or other legal obligations;

(g) payments Project Co can recover under contract or in respect of which Project Co has a remedy against another person in respect of the same liability;

(h) payments to the extent that Project Co has such funds available to it including:

(i) reserves which Project Co can draw upon without breaching the Senior Funding Agreements;

(ii) standby or contingent facilities or funds of Senior Debt or equity which Project Co is entitled to have available;

(iii) payments representing any profits of the Project (to the extent not already excluded in (d) above);

"Uninsurable" means, in relation to a risk, either that:

(a) insurance is not available to Project Co in respect of the Project in the worldwide insurance market with reputable insurers of good standing in respect of that risk; or

(b) the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom;

"Unprogrammed Maintenance Work" has the meaning given in Clause 23.8 (*Programmed and Unprogrammed Maintenance*);

"Unreasonable Act" means any act or omission which is contrary to any reasonable instruction, guidance or rules for the operation or management of the Facilities;

"Utilities" has the meaning given in the Service Level Specification;

"Utilities Agreement"

(a) those agreements listed in Schedule [♦] (*Utilities Agreements*); and

(b) any other agreements with, or consents, releases, notices or variations properly required for the purposes of carrying out the Works to be obtained from and/or served on, any public or private utility, drainage, sewage, water, electricity, gas or telecommunications undertaker, authority or company or any service provider or company, body or authority for the requisitioning, design, commissioning, installation, laying, relaying, construction, repair, maintenance, use or diversion or disconnection and/or connection to any services and/or services media of any

	kind including without prejudice to the generality thereof gas, water, electricity, signals and pulses, telecommunications, drainage, sewers, wires, cables, conduits and apparatus;
"Utilities Third Party"	a third party on whom a Utilities Agreement is to be served or from whom a Utilities Agreement is required to be given or executed;
"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 in Clause 36 (*VAT and Construction Industry Tax Deduction Scheme*);
"Vitiating Act"	has the meaning given in Endorsement 2, Section 3 (*Endorsements*) of Schedule 15 (*Insurance Requirements*);
"Warning Notice"	means a notice validly served by the Authority's Representative on Project Co under Clause 26.3 (*Grounds for Warning Notices*), specifying that it is a Warning Notice and setting out the circumstances that have given rise to the issue thereof;
"Well-being of Future Generations Act"	means the Well-being of Future Generations (Wales) Act 2015;
"Welsh Language Standards"	means the Welsh Language Standards (No.1) Regulations 2015;
["WiFi"	means [♦];]
["WiFi Actual Completion Date"	means such date stated in the Certificate of Wi-Fi Completion or, in the event of dispute, as such date may be determined in accordance with Schedule 20 (*Dispute Resolution Procedure*);]
["WiFi Post-Completion Tests"	means the tests in relation to the WiFi as defined in Appendix [♦] of Schedule 10 (*Outline Commissioning Programme*);]
["WiFi Tests Completion Date"	means the date that falls [♦]weeks after the [relevant Phase] Actual Completion Date;]
["WiFi Post-Completion Completion Criteria"	means the criteria set out in Appendix [♦] of Schedule 10 (*Outline Commissioning Programme*);]
"Works"	means the design (including the preparation of all Design Data), construction, installation, testing, commissioning and completion of the Facilities (including any temporary works) to be performed by Project Co in accordance with this Agreement (as varied, amended or supplemented from time

to time in accordance with this Agreement).

SECTION 2

INTERPRETATION

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

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 Except where the context expressly requires otherwise, references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedules are references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedules to this Agreement and references to Sections, Appendices and Attachments (if any) are references to Sections, Appendices and Attachments to or contained in this Agreement.

3 The Schedules (including Sections, Parts, Appendices and Attachments thereto, if any) to this Agreement are integral parts of this Agreement and a reference to this Agreement includes a reference to the Schedules (including Sections, Parts Appendices and Attachments thereto, if any).

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.

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.

6 The language of this Agreement is English. All correspondence, notices, drawings, Design Data, test reports, certificates, specifications and information shall be in English.[58] All 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 Authority provided that all operating and maintenance instructions (and any other complex technical documents) are permitted in English only.

7 Save where stated to the contrary, 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.

[58] Refer to Education Sector Specific Guidance in the User Guide, if applicable.

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 provided that the provisions of this paragraph shall be without prejudice to the operation of Clause 33 (*Changes in Law*) and Schedule 16 (*Change Protocol*) which shall operate in relation to a Change in Law on the basis set out in this Agreement.

9 Without prejudice to Clause 58.8 (*Assignment*), references to a public organisation (other than the Authority) 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 relevant functions and relevant responsibilities of such public organisation.

10 Without prejudice to Clause 58.8 (*Assignment*), references to other persons (other than the Authority and Project Co) shall include their successors and assignees.

11 References to a deliberate act or omission of the Authority or any Authority Party shall be construed having regard to the interactive nature of the activities of the Authority and of Project Co 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.

12 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.

13 Reference to "parties" means the parties to this Agreement and references to "a party" mean one of the parties to this Agreement.

14 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.

15 All of Project Co's obligations, duties and responsibilities shall be construed as separate obligations, duties and responsibilities owed to the Authority and to be performed at Project Co's own cost and expense.

16 Unless expressly stated otherwise, references to amounts or sums expressed to be "indexed" or "index linked" are references to amounts or sums in [♦][59] ("**Base Date**") 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:

[59] Insert full base date

$$\text{Amount or sum in } [\blacklozenge]^{60} \text{ prices} \times \frac{RPI_d}{RPI_0}$$

Where RPI_d is the value of the Retail Prices Index published or determined with respect to the month most recently preceding the date when the provision in question is to be given effect and RPI_0 is the value of the Retail Prices Index in respect of the Base Date.

17 Reference to a document being in the Agreed Form is a reference to the form of the relevant document [(or where appropriate, the form of the relevant document on disk)] agreed between the parties and for the purpose of identification either (i) initialled by each of them or on their behalf or (ii) entered into on or around the Commencement Date.

18 The operation of the Housing Grants, Construction and Regeneration Act 1996 upon any Project Document shall not affect the rights or obligations of the parties under this Agreement.

19 Words in parenthesis and italics appearing after a Clause reference or a reference to a Schedule are inserted for ease of reference only. If there is any discrepancy between the Clause reference and the words appearing in parenthesis and italics after the Clause reference, the Clause reference shall prevail.

20 Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a prescribed number of Business Days after a stipulated date or event, or "no later than" 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 [5pm] on the last Business Day for performance of the obligations concerned.

21 Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a prescribed number of Business Days before a stipulated date or event, or "no later than" or "by" a stipulated date or event which is a prescribed number of Business Days before a stipulated date or event, the latest time for performance shall be [5pm] on the last Business Day for performance of the obligations concerned.

[60] Insert base month/year

SCHEDULE 2

COMPLETION DOCUMENTS

SECTION 1

DOCUMENTS TO BE DELIVERED BY PROJECT CO

Unless an original document is specifically requested, a copy (certified by an officer of Project Co as being a true copy) of each of the following documents is to be delivered by Project Co to the Authority in accordance with Clause 2.1 (*Execution and Delivery of Documents*) of this Agreement:

1 The Consents and other authorisations, licences, permits, and approvals listed below:

[♦][61]

2 The Shareholders' Agreement and certification from Project Co that the 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.

3 The Initial Funding Agreements and certification from Project Co that (1) the Initial Funding Agreements have become unconditional (other than any condition relating to the conditionality of this Agreement) and (2) that all conditions to the availability of funds to Project Co under the Initial Funding Agreements have been satisfied or waived, accompanied by evidence of the same.

4 The Construction Contract, the Service Contract and the Performance Guarantees, executed by the parties to such agreements.

5 An original of the Funders' Direct Agreement, the Independent Tester Contract, the Insurance Proceeds Account Agreement, the Collateral Agreements and the brokers letters of undertaking relating to the Insurances referred to in paragraph 11 below in the Agreed Form, executed by the parties to such agreements (other than the Authority).

6 Extracts from the minutes of the meeting of the board of directors (certified as true and accurate by a director of the relevant company) of each of Project Co, each Shareholder[, Hold Co] and each of the other parties to the documents listed in Section 1 (*Documents to be delivered by Project Co*) of Schedule 2 (*Completion Documents*), 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. For the avoidance of doubt, this requirement shall not extend to the Senior Funders.

[61] Project specific items to be listed

7 A certificate of a director of each of the companies referred to in paragraph 6 above setting out the names and specimen signatures of the person or persons named in the relevant certified extract.

8 Evidence of the share subscriptions required under the Shareholders' Agreement and other shareholder funding commitments having been made by the Shareholders in Project Co [and Hold Co].

9 Project Co's [and Hold Co's] Certificate of Incorporation and of any Certificate of Incorporation on Change of Name.

10 The Articles of Association of Project Co [and Hold Co].

11 The insurance broker's letter of undertaking, evidence of the insurances required in accordance with Clause 54 (*Insurances*) having been taken out by Project Co and that the policies comply with the requirements of this Agreement, [and an estimate by the insurance broker of the premiums for the Operational Insurances for the first year of the Operational Term.]

12 Two computer disk copies of the Financial Model audited by [♦][62].

13 Evidence that Project Co has agreed to be treated as the only "client" for the Project for the purposes of the CDM Regulations.

14 Evidence that the Insurance Proceeds Account has been opened.

15 [♦][63]

16 An original duly executed copy of this Agreement.

[62] Insert name of financial adviser

[63] Authority to indicate other project specific documents, including any other project document, planning and property related agreements and any subordinated debt or other financing arrangement, where appropriate.

SECTION 2

DOCUMENTS TO BE DELIVERED BY THE AUTHORITY

The Authority shall deliver to Project Co the following documents:

1 An original copy of the Funders' Direct Agreement, the Collateral Agreements, the Independent Tester Contract, the Insurance Proceeds Account Agreement and this Agreement, duly executed by the Authority.

2 A certified copy of the resolution of the Authority approving the execution, delivery and performance of the documents referred to in paragraph 1 above 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.

3 A certificate of the relevant officer of the Authority setting out the names and specimen signatures of the person or persons named in the resolution of the Authority referred to in paragraph 2 above.

4 [♦][64]

[64] Authority to list other project specific documents to be included.

SCHEDULE 3

KEY PERSONNEL

SCHEDULE 4

FUNDERS' DIRECT AGREEMENT

THIS AGREEMENT IS MADE ON

AMONG:

(1) [♦] (the "**Authority**")

(2) [♦] (the "**Agent**" for the Senior Funders) on behalf of itself and the Senior Funders; and

(3) [♦] company no [♦]) whose registered office is at [♦] ("**Project Co**")

IT IS AGREED AS FOLLOWS:

1 **INTERPRETATIONS**

1.1 **Definitions**[65]

In this Agreement, unless the context otherwise requires:

"Appointed Representative"	means a Representative that has been notified to the Authority pursuant to a Step-In Notice;
"Authority Direct Agreements"	means [♦];
"Authority Project Documents"	means the Design Build Finance and Maintain Agreement and all other documents to which the Authority and Project Co are parties pursuant to the Design Build Finance and Maintain Agreement;
"Collateral Agreements"	means [♦];
"Collateral Agreement Counterparty"	means one of the parties to the Collateral Agreements (other than the Authority or Project Co);
"Design Build Finance and Maintain Agreement"	means an agreement dated [♦] between Project Co and the Authority relating to the [♦];
"Enforcement Event"	means [♦][66];
"Event of Default"	shall have the meaning given to it in the [Credit Agreement];
"Event of Insolvency"	means [incorporate appropriate cross references from Design Build Finance and Maintain Agreement] (inclusive) of a Project

[65] A number of terms are defined by reference to various funding agreements. If this is the case a Master Definition Schedule should be appended to the Direct Agreement setting out all such definitions so that the intended meaning of all such terms is clear to all parties.

[66] Definition to include not only the occurrence of an event of default under the credit agreement but also the taking of action to enforce repayment.

Co Event of Default;

"Final Payment Date" means [♦];

"Project Co Event of Default" shall have the meaning given to it in the Design Build Finance and Maintain Agreement;

"Representative" means:

(a) the Agent, any Senior Funder and/or any of their Affiliates;

(b) an administrator, administrative receiver, receiver or receiver and manager of Project Co appointed under the Security Documents;

(c) a person directly or indirectly owned or controlled by the Agent and/or any Senior Funders; or

(d) any other person approved by the Authority (such approval not to be unreasonably withheld or delayed);

"Required Period" means subject to Clause 4 (*No Liquid Market*) the period starting on the date of a Termination Notice and:

(a) prior to the Payment Commencement Date, ending eighty (80) Business Days later; and

(b) on or following the Payment Commencement Date, ending sixty (60) Business Days later;[67]

"Security Documents" [list the security documents forming part of the Senior Funding Agreements];

"Senior Debt Discharge Date" means the date on which all amounts owing by Project Co to the Senior Funders under the Senior Funding Agreements have been irrevocably paid in full;

"Senior Funders" means [insert details if not included in Design Build Finance and Maintain Agreement];

"Step-In Date" means the date on which the Agent gives the

[67] In schemes where there is phased completion, the move from eighty (80) to sixty (60) Business Days should occur at the payment commencement date for the first phase.

Authority a Step-In Notice;

"Step-In Notice" means the notice given by the Agent to the Authority pursuant to Clause 5 (*Representative*) stating that the Agent is exercising the step-in rights under this Agreement and identifying the Appointed Representative;

"Step-In Period" means the period from the Step-In Date up to and including the earlier of:

(a) the Step-Out Date;

(b) the date of any transfer under Clause 8 (*Novation*);

(c) the date of any termination for breach under Clause 6 (*Step-In Period*); and

(d) the date of expiry of the Design Build Finance and Maintain Agreement;

"Step-Out Date" means the date falling twenty (20) Business Days after the date of a Step-Out Notice;

"Step-Out Notice" means a notice from the Agent or Appointed Representative to the Authority pursuant to Clause 7 (*Step-Out*);

"Suitable Substitute Contractor" means a person approved by the Authority (such approval not to be unreasonably withheld or delayed) as:

(a) having the legal capacity, power and authority to become a party to and perform the obligations of Project Co under the Authority Project Documents; and

(b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) which are sufficient to enable it to perform the obligations of Project Co under the Authority Project Documents;

"Termination Notice" means a notice given by the Authority to the Agent under Clause 3.2 (*No Termination*

without Notice);

"Unrestricted Assets" means those [Assets], excluding any revenues or cash balances or claims outstanding at the date of transfer under any Sub-Contract, which are required by the Authority or its nominee or any replacement of Project Co for the purposes of the construction, operation or maintenance of the Facilities following termination, assuming such construction, operation or maintenance is carried out on terms substantially the same as the terms of the Design Build Finance and Maintain Agreement.

1.2 **Interpretation**

1.2.1 Capitalised terms defined in the Design Build Finance and Maintain Agreement shall have the same meaning in this Agreement.

1.2.2 The clause and paragraph headings in this Agreement are for ease of reference only and are not to be taken into account in the construction or interpretation of any provision to which they refer.

1.2.3 Unless the context otherwise requires:

(a) a reference in this Agreement to any clause, sub-clause, paragraph, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph, schedule or annex of this Agreement;

(b) references to this Agreement or to any other such document shall include any permitted variation, amendment or supplements to such document;

(c) references to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended or re-enacted;

(d) references to a person includes firms and corporations and their successors and permitted assignees or transferees;

(e) words in this Agreement importing any one gender include both other genders and may be used interchangeably; and

(f) words in this Agreement importing the singular meaning, include the plural meaning and vice versa.

2 CONSENT TO SECURITY

2.1 The Authority acknowledges notice of, and consents to, the security interest granted over Project Co's rights under the Authority Project Documents[68] effected by Project Co in favour of the Senior Funders under the Security Documents.

2.2 The Authority confirms that it has not received notice of any other security interest granted over Project Co's rights under the Authority Project Documents.

2.3 Except as specifically provided for in this Agreement the Authority has no obligations (whether express, implied, collateral or otherwise) to the Agent and/or the Senior Funders in connection with this Agreement or the Authority Project Documents or the Project.

2.4 The Authority acknowledges notice of and consents to the security interest granted by Hold Co in favour of the Agent over the entire issued share capital of Project Co.[69]

2.5 [For the purposes of Clause 35.3 (*Manner of payment*) of the Design Build Finance and Maintain Agreement, Project Co and the Agent hereby authorise and instruct the Authority (and the Authority agrees) to pay all sums payable to Project Co under the Authority Project Documents to the [account] and Project Co and the Authority agree that upon the occurrence of an Enforcement Event, if so directed in writing by the Agent upon giving reasonable notice[70], the Authority shall pay any sum which it is obliged to pay to Project Co under the Authority Project Documents to a bank account specified by the Agent.]

2.6 The Authority shall not be obliged to make any enquiry as to the authority of the Agent in doing any act or entering into any document or making any agreement under or in connection with this Agreement and the Authority shall be entitled to assume that the Agent is duly authorised by each of the Senior Funders to assume the obligations expressed to be assumed by it under this Agreement and to undertake on behalf of each Senior Funder in

[68] It may be appropriate to incorporate an acknowledgement of the creation of security over other project documents (eg any leases to Project Co if applicable). It may also be appropriate to include in this clause an acknowledgement (if applicable) that Service Payments due from the Authority are to be made to a designated account of Project Co held by the Agent.

[69] This clause is not mandatory and will only be relevant in cases where a holding company structure is adopted by the sponsors.

[70] The Authority should not be exposed to the possibility that it may be too late to revoke a payment to Project Co which has already been set up, such that the Authority is at risk of having to pay twice.

the terms of this Agreement so as to bind each Senior Funder as if it were a party hereto.

2.7 The rights of the Agent under this Agreement shall be extinguished upon the Final Payment Date.

3 NO TERMINATION WITHOUT NOTICE

3.1 Subject only to Clause 3.2 (*No Termination without notice*), the Authority may serve notice terminating the Design Build Finance and Maintain Agreement at any time if it is entitled to do so under the terms of the Design Build Finance and Maintain Agreement.

3.2 The Authority shall not terminate or serve notice terminating the Design Build Finance and Maintain Agreement in respect of a Project Co Event of Default without giving to the Agent:

3.2.1 at least the Required Period of prior written notice (a "**Termination Notice**") stating:

(a) that a Project Co Event of Default has occurred and the proposed Termination Date; and

(b) the grounds for termination in reasonable detail, and

3.2.2 not later than the date falling twenty (20) Business Days after the date of a Termination Notice a notice containing details of any amount owed by Project Co to the Authority, and any other liabilities or obligations of Project Co of which the Authority is aware (having made proper enquiry) which are:

(a) accrued and outstanding at the time of the Termination Notice; and/or

(b) which will fall due on or prior to the end of the Required Period, under the Design Build Finance and Maintain Agreement.

3.3 On becoming aware of an Enforcement Event the Agent shall give notice thereof to the Authority stating that an Enforcement Event has occurred and giving reasonable details thereof (an "**Enforcement Event Notice**") whereupon, subject to payment by the Agent of the Authority's reasonable costs and expenses in respect thereof (being such costs and expenses as would not have been incurred in respect of the provision of such information had an Enforcement Event Notice not been served) the provisions of Clause 3.2.2 shall apply as if references therein to a Termination Notice were to an Enforcement Event Notice.

4 NO LIQUID MARKET

4.1 At any time during the Required Period the Agent may issue a written notice (the "**No Liquid Market Notice**") to the Authority setting out the reasons why the Agent does not believe that a Liquid Market exists.

4.2 On or before the date falling fourteen (14) Business Days after the date on which a No Liquid Market Notice is received by the Authority, the Authority shall notify the Agent of its opinion as to whether or not a Liquid Market exists. Where the Authority believes that a Liquid Market does exist, such notice shall set out the reasons for the Authority's belief. If the parties do not agree whether or not a Liquid Market exists, then either party may refer the dispute to be determined in accordance with Clause 17 (*Disputes*) below.

4.3 If the parties agree or it is determined in accordance with Clause 57 (*Dispute Resolution Procedure*) of the Design Build Finance and Maintain Agreement that no Liquid Market exists, the Design Build Finance and Maintain Agreement shall automatically terminate and the provisions of Clause 4 (*No Retendering Procedure*) of Section 2 (*Compensation for Project Co Default*) of Schedule 17 (*Compensation on Termination*) to the Design Build Finance and Maintain Agreement shall apply.

4.4 If any dispute relating to this Clause 4 (*No Liquid Market*) is determined pursuant to Clause 17 (*Disputes*), the Required Period shall be extended by the period of time spent determining such dispute pursuant to Clause 17 (*Disputes*).

5 REPRESENTATIVE

5.1 Subject to Clause 5.2 (*Representative*) and without prejudice to the Agent's rights under the Security Documents, the Agent may give the Authority a Step-In Notice at any time:

5.1.1 during which a Project Co Event of Default or an Enforcement Event[71] is subsisting (whether or not a Termination Notice has been served); or

5.1.2 during the Required Period.

5.2 The Agent shall give the Authority not less than five (5) Business Days prior notice of:

5.2.1 its intention to issue a Step-In Notice; and

[71] If Senior Funders are taking enforcement action, then there is no objection to there being a right of step-in, although in practice funders may not wish to step in if there is no Project Co Event of Default (and therefore no threat of termination of the Design Build Finance and Maintain Agreement).

5.2.2 the identity of the proposed Appointed Representative.

5.3 On the issue of the Step-In Notice, the Appointed Representative shall assume jointly with Project Co the rights of Project Co under the Authority Project Documents and thereafter, until the end of the Step-In Period the Authority shall deal with the Appointed Representative and not Project Co.

6 STEP-IN PERIOD

6.1 Notwithstanding Clause 3 (*No Termination Without Notice*) above, the Authority may terminate the Design Build Finance and Maintain Agreement if:

6.1.1 any amount referred to in Clause 3.2.2(a) above has not been paid to the Authority on or before the Step-In Date; or

6.1.2 any amount referred to in Clause 3.2.2(b) above has not been paid on or before the last day of the Required Period;

6.1.3 amounts, of which the Authority was not aware (having made proper enquiry) at the time of the Termination Notice, subsequently become payable and are not discharged on or before the date falling twenty (20) Business Days after the date on which the liability of Project Co for these amounts is notified to the Agent or if later the Step-In Date; or

6.1.4 grounds arise after the Step-In Date in accordance with the terms of the Design Build Finance and Maintain Agreement provided that Deductions and/or Warning Notices that arose pursuant to Schedule 14 (*Payment Mechanism*) to the Design Build Finance and Maintain Agreement prior to the Step-In Date shall not be taken into account during the Step-In Period but such Deductions and/or Warning Notices (to the extent applicable under the terms of the Design Build Finance and Maintain Agreement) shall be taken into account after the Step-Out Date.

6.2 The Authority shall not terminate the Design Build Finance and Maintain Agreement during the Step-In Period on grounds:

6.2.1 that the Agent has served a Step-In Notice or enforced any Security Document; or

6.2.2 arising prior to the Step-In Date of which the Authority was aware (having made proper enquiry) and whether or not continuing at the Step-In Date unless:

(a) the grounds arose prior to the Actual Completion Date, and the Actual Completion Date does not occur on or before the date twelve (12) months after the date on which the Authority would have been entitled to terminate the Design Build Finance and Maintain Agreement for non-completion of the Works under Clause 40.1.2 (*Long stop*) of the Design Build Finance and Maintain Agreement; or

(b) the grounds arose after the Actual Completion Date, and neither the Appointed Representative nor Project Co is using all reasonable endeavours (including implementation of any remedial programme) to remedy any breach of the Design Build Finance and Maintain Agreement which:

(i) arose prior to the Step-In Date; and

(ii) is continuing (and capable of remedy); and

(iii) would have entitled the Authority to terminate the Design Build Finance and Maintain Agreement; or

(c) the grounds (whenever they first arose) did not give rise to any right to terminate until after the Step-In Notice; or

6.2.3 arising solely in relation to Project Co

7 STEP-OUT

7.1 The Appointed Representative may at any time during the Step-In Period deliver to the Authority a Step-Out Notice which shall specify the Step-Out Date.

7.2 On expiry of the Step-In Period:

7.2.1 the Appointed Representative will be released from all of its obligations and liabilities to the Authority under the Authority Project Documents arising prior to the end of the Step-In Period and rights of the Appointed Representative against the Authority will be cancelled;[72] and

[72] The effect of this provision is that rights and obligations which are outstanding from the Step-in Period are preserved and will be reflected in the amount of compensation payable by the Authority on early termination of the Design Build Finance and Maintain Agreement. It is not therefore necessary for the Authority to retain rights of action against the Appointed Representative after the end of the Step-in Period.

7.2.2 the Authority shall no longer deal with the Appointed Representative and shall deal with Project Co in connection with the Authority Project Documents.

7.3 Project Co shall continue to be bound by the terms of the Design Build Finance and Maintain Agreement, notwithstanding the occurrence of a Step-In Notice, a Step-In Period, a Step-Out Notice, Step-Out Date, any action by the Agent or Appointed Representative or the Senior Funders and/or any provision of this Agreement.

8 NOVATION

8.1 Subject to Clause 8.2 (*Novation*), at any time:

8.1.1 after an Enforcement Event has occurred; or

8.1.2 during the Step-In Period,

the Agent may, subject to Clause 8.2 (*Novation*), on not less than twenty (20) Business Days' prior notice to the Authority and any Appointed Representative, procure the transfer of Project Co's rights and liabilities under the Authority Project Documents to a Suitable Substitute Contractor in accordance with the provisions of Clause 8.4 (*Novation*).

8.2 The Authority shall notify the Agent as to whether any person to whom the Agent proposes to transfer Project Co's rights and liabilities under the Authority Project Documents is a Suitable Substitute Contractor, on or before the date falling twenty (20) Business Days after the date of receipt from the Agent of all information reasonably required by the Authority to decide whether the proposed transferee is a Suitable Substitute Contractor.

8.3 The Authority shall not unreasonably withhold or delay its decision on whether the proposed transferee is a Suitable Substitute Contractor and it shall, without limitation, be reasonable for the Authority to withhold its consent if there are unremedied breaches under the Authority Project Documents and there is no rectification plan reasonably acceptable to the Authority in respect of the breaches.

8.4 Upon the transfer referred to in Clause 8.1 (*Novation*) becoming effective:

8.4.1 Project Co, the Appointed Representative and the Authority will be released from their obligations under the Authority Project Documents to each other (the "discharged obligations");

8.4.2 the Suitable Substitute Contractor and the Authority will assume obligations towards each other which differ from the discharged obligations only insofar as they are owed to or assumed by the

Suitable Substitute Contractor instead of Project Co or the Appointed Representative;

8.4.3 the rights of Project Co and the Appointed Representative against the Authority under the Authority Project Documents and vice versa (the "**discharged rights**") will be cancelled;

8.4.4 the Suitable Substitute Contractor and the Authority will acquire rights against each other which differ from the discharged rights only insofar as they are exercisable by or against the Suitable Substitute Contractor instead of Project Co or the Appointed Representative;

8.4.5 any then subsisting ground for termination of the Design Build Finance and Maintain Agreement by the Authority shall be deemed to have no effect and any subsisting Termination Notice shall be automatically revoked;

8.4.6 the Authority shall enter into a direct agreement with the Suitable Substitute Contractor and a representative of Senior Funders lending to the Suitable Substitute Contractor on substantially the same terms as this Agreement; and

8.4.7 any Deductions and/or Warning Notices that arose pursuant to Schedule 14 (*Payment Mechanism*) [or due to [unavailability]] prior to that time shall, without prejudice to the rights of the Authority to make financial deductions, not be taken into account in determining whether a Project Co Event of Default has occurred.

9 MISCELLANEOUS

9.1 The Authority shall at Project Co's expense, take whatever action the Agent, an Appointed Representative or a Suitable Substitute Contractor taking a transfer in accordance with Clause 8.1 (*Novation*) may require for perfecting any transfer or release under Clause 5 (*Representative*) above, Clause 7 (*Step-Out*) above and Clause 8 (*Novation*) above including the execution of any transfer or assignment, and the giving of any notice, order or direction and the making of any registration which, in each case, the Agent or Appointed Representative or Suitable Substitute Contractor reasonably requires.

9.2 The Authority shall not take any action to wind up, appoint an administrator , seek an interim order appointee under paragraph 13(1)(d) of Schedule B1 of the Insolvency Act 1986 (as amended) or sanction a voluntary arrangement (or similar) or take any other similar or analogous step in relation to Project Co.

9.3 Subject to Clause 16 (*Survivorship*), this Agreement shall remain in effect until the earlier of:

9.3.1 the Final Payment Date;

9.3.2 the date of termination of the Design Build Finance and Maintain Agreement; or

9.3.3 the date of transfer of Project Co's rights and liabilities under the Authority Project Documents to a Suitable Substitute Contractor pursuant to Clause 8.1 (*Miscellaneous*) above.

9.4 The Agent, in respect of Clauses 9.4.1, 9.4.2 and 9.4.3, and Project Co, in respect of Clause 9.4.4 shall promptly notify the Authority of:

9.4.1 any Enforcement Event and any action taken in connection with such Enforcement Event, any decisions to accelerate the maturity of any amounts owing by Project Co to the Senior Funders under the Senior Funding Agreements and/or any decisions to demand repayment;

9.4.2 the date referred to in Clause 9.3.1 above on or before the date falling twenty (20) Business Days after its occurrence:

9.4.3 the details and amount of any proposed Additional Permitted Borrowing including:

(a) the circumstances giving rise to it and reasons for it; and

(b) the terms on which it will be borrowed;

9.4.4 on the first Business Day of each calendar month during which any Additional Permitted Borrowing is, or may be, subsisting, the amount outstanding under the Senior Funding Agreements (as the same may be amended (whether or not with the approval of the Authority))and, to the extent it is aware (having made reasonable and proper enquiry):

(a) the amount of any [Distribution] made by Project Co; and

(b) the amount of any credit balance on any account of Project Co.[73]

[73] For a Bond Transaction, 9.4.4 may be replaced by a new clause as follows if the Authority thinks this is appropriate:

(a) on each [Payment Date] during which any Additional Permitted Borrowing is, or may be, subsisting, the amount outstanding under the Senior Funding Agreements and to the extent it is aware (having made reasonable and proper enquiry);

(b) on each [Payment Date] and the first Business Day of each calendar month following a Distribution made by Project Co the amount of any Distribution made; and

9.5 Project Co joins in this Agreement to acknowledge and consent to the arrangements set out and agrees not knowingly to do or omit to do anything that may prevent any party from enforcing its rights under this Agreement.

9.6 For the avoidance of doubt, if there is any conflict or inconsistency between the provisions of this Agreement and the Design Build Finance and Maintain Agreement, the provisions of this Agreement shall prevail.

9.7 Notwithstanding any provision in the Collateral Agreements to the contrary, the Authority agrees that, subject to Clauses 9.8 and 9.9 (*Miscellaneous*), it will not, in respect of any particular Collateral Agreement, exercise or seek to exercise any of its step-in rights or other rights (other than design, Intellectual Property or similar rights) under such Collateral Agreement until the earliest of:

9.7.1 the Senior Debt Discharge Date; or

9.7.2 the date on which the Agent has given its written consent to such exercise; or

9.7.3 the time when in respect of any such Collateral Agreement either:

(a) the Senior Funders have failed to exercise any corresponding right to such Collateral Agreement under their own Security Documents and the time for exercising such right has ended in accordance with the terms thereof; or

(b) the Agent has confirmed in writing to the Authority (following any request from the Authority for such confirmation, to which the Agent shall be obliged to respond promptly) that it does not intend to exercise any of its rights under the relevant Security Document or that it has no further claim thereunder; or

(c) the Senior Funders have stepped in to or otherwise directly or indirectly taken control over the rights of Project Co under the relevant Sub-Contract (in accordance with their rights under their Security Documents) and then stepped out from, or otherwise relinquished control of such rights under or in connection with such Sub-Contract; or

9.7.4 the date falling [♦] months after the date on which the Design Build Finance and Maintain Agreement has been terminated in accordance with its terms and the terms of this Agreement.

(c) on each [Payment Date] and on the first Business Day of each calendar month following five (5) Business Days written notice from the Authority the amount of any credit balance on any account of Project Co.

9.8 In addition to its rights under Clause 9.7 (*Miscellaneous*), where the Design Build Finance and Maintain Agreement has not been terminated but a counterparty has a right to terminate its Sub-Contract for breach by Project Co of the terms of such Sub-Contract the Authority may pay directly, or undertake to make a payment directly to the counterparty concerned, amounts due pursuant to the Sub-Contract and may set off any such sums against any payments payable by the Authority to Project Co under the Design Build Finance and Maintain Agreement so as to satisfy them pro tanto, provided always that the Authority shall not exercise its rights under this Clause 9.8 (*Miscellaneous*) in respect of any particular Sub-Contract in circumstances where the Senior Funders have stepped in to or otherwise directly or indirectly taken control over the relevant Sub-Contract and have not stepped out of it or otherwise relinquished such control unless the Authority reasonably believes that the Senior Funders are not seeking to preserve continuity of service or build obligation (as relevant) under the relevant Sub-Contract with reasonable diligence (or under any equivalent service or build obligation under the Sub-Contract).

9.9 In addition to its rights under Clause 9.7 (*Miscellaneous*), where the Design Build Finance and Maintain Agreement has been terminated, the Authority shall from the Termination Date be able to exercise any of its step-in rights or other rights under or in respect of any of the Collateral Agreements; however notwithstanding the terms of the Collateral Agreements or any other provisions of this Clause 9.9 (*Miscellaneous*), each of the relevant Sub-Contractors (and any guarantors thereof as relevant) shall remain responsible, and be liable, to Project Co in respect of all costs, claims, damages, losses and liabilities which shall have arisen out of or in connection with the relevant Sub-Contracts in respect of the period prior to the Termination Date in relation to which the Agent acting on behalf of Project Co and the Senior Funders shall retain the benefit of all and any rights to all such costs, claims, damages, losses and liabilities.

9.10 Except in accordance with the provisions of Clauses 9.7 to 9.9 (*Miscellaneous*)(inclusive) the Authority shall not, prior to the Senior Debt Discharge Date:

9.10.1 claim, recover, retain or receive (or seek to claim, recover, retain or receive) any amount under the Collateral Agreements;

9.10.2 take any action to wind-up, appoint an administrator, seek an interim order appointee (under paragraph 1.3(1)(d) of Schedule B1 of the Insolvency Act 1986 (as amended)) or sanction a voluntary arrangement (or similar) in relation to any Sub-Contractors; or

9.10.3 save with the prior written consent of the Agent, compete on grounds (whether in whole or in part) relating to the Project (by virtue of a claim under any of the Collateral Agreements, the Design Build Finance and Maintain Agreement or any other Project Document or otherwise) with the rights of the Senior Funders on any formal insolvency of any Sub-Contractor or Project Co, nor claim to be subrogated to the rights of any Senior Funders.

9.11 The Authority agrees and undertakes that if it receives any amount in contravention of the provisions of Clause 9.10 (*Miscellaneous*) above it will promptly turn the same over to the Agent and pending such payment hold the same on trust for the Agent and the Senior Funders.

9.12 Notwithstanding the terms of the Design Build Finance and Maintain Agreement and Security Documents, the Agent agrees that the Authority may exercise its rights to have transferred to it or its nominee any Unrestricted Assets following the Termination Date and the Agent will not exercise or seek to exercise any enforcement rights and shall on or before the date any Unrestricted Assets are transferred to the Authority or its nominee, as the case may be, release its security over them.

9.13 Notwithstanding the terms of any Senior Funding Agreements, the parties agree and shall, to the extent it is within their power, direct that all insurance proceeds receivable or received by Project Co under the insurances referred to in Clause 54 (*Insurance*) of the Design Build Finance and Maintain Agreement shall be paid directly into the Insurance Proceeds Account and applied in accordance with the Design Build Finance and Maintain Agreement.

10 ASSIGNMENT

10.1 No party to this Agreement may assign or transfer any part of its rights or obligations under this Agreement save as provided in this Clause 10.1(*Assignment*).

10.2 The Agent may assign, novate or transfer its rights and obligations under this Agreement and in respect of the Security Documents to a successor Agent in accordance with the Senior Funding Agreements without the consent of the Authority and any such assignment novation or transfer shall not constitute a Change of Control for the purposes of Clause 59.6 of the Design Build Finance and Maintain Agreement. The Authority also agrees that any enforcement by the Agent of the security referred to in Clause 2.4 (*Consent to Security*) above (and any subsequent transfer of share capital in Project Co) following an Enforcement Event shall not constitute a Project Co Event of Default under Clause 40.1.6 (*Change in Control*) of the Design Build Finance and Maintain Agreement.

10.3 Any Senior Funder may assign or transfer its rights under the [Senior Funding Agreements] in accordance with the terms of the [Senior Funding Agreements].

10.4 The Authority may transfer its rights and obligations under this Agreement to any permitted assignee of its interest in the Design Build Finance and Maintain Agreement and the Agent and the Senior Funders shall co-operate with the Authority in completing the formalities of any transfer or assignment including by executing any additional documents as may be required by the Authority.

10.5 If Clause 10.2 (*Assignment*) applies in relation to the Agent, the Authority shall enter into a new direct Agreement with the new Agent on substantially the same terms as this Agreement.

11 ENTIRE AGREEMENT

Unless otherwise stated in this Agreement, this Agreement and the Authority Project Documents 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. No party has relied on any representation except as expressly set out in this Agreement.

12 WAIVER

12.1 The failure of any party to exercise any contractual right or remedy shall not constitute a waiver thereof until communication in writing under Clause 12.2 (*Waiver*).

12.2 No waiver shall be effective unless it is communicated in writing to the other party.

12.3 A waiver of any right or remedy arising from a breach of contract shall not constitute a waiver of any right or remedy arising from any other breach of this Agreement.

13 SEVERABILITY

If any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality or enforceability of the remaining parts of this Agreement.

14 CONFIDENTIALITY

The Agent shall be bound to comply with the obligations on the part of Project Co contained in Clause 62 (*Confidentiality*) of the Design Build Finance and Maintain Agreement in relation to all information and matters obtained from any other party under or in connection with the Project.

15 NOTICES CONSENTS AND APPROVALS

15.1 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 post, by hand or by email.

15.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

15.2.1 if delivered by hand at the time of delivery; or

15.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting

provided that, in either case, a notice or other communication 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; or

15.2.3 notices given by email shall be deemed to have been received:

(a) at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the email address specified in Clauses 15.3 to 15.5(*Notices*, *Consents and Approvals*)), if sent on a Business Day between the hours of 9am and 4pm; or

(b) by 11am on the next following Business Day, if 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 no error message indicating failure has been received by the sender and provided that within twenty-four (24) hours of transmission a hard copy of the email (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 this Clause 15 (*Notices, Consents and Approvals*) and where such notice is addressed to the Authority, copied to [◆[74]].

15.3 Any notice to be given to the Authority should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing by the Authority.

15.4 Any notice to be given to the Agent should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing by the Agent.

15.5 Any notice to be given to Project Co should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing by Project Co.

[74] Insert Welsh Government details.

15.6 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.

16 SURVIVORSHIP

Notwithstanding the provisions of Clause 9.3.2, Clauses 9.7 to 9.13 (inclusive) (*Miscellaneous*) shall survive termination of this Agreement.

17 DISPUTES

17.1 All disputes shall be resolved in accordance with terms equivalent (mutatis mutandis) to the Dispute Resolution Procedure set out in the Design Build Finance and Maintain Agreement.

17.2 Project Co, the Authority and the Agent shall co-operate to facilitate the proper, just, economical and expeditious resolution of any and all such disputes which arise under this Agreement.

18 COUNTERPARTS

18.1 This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

19 GOVERNING LAW

19.1 Subject to Clause 17 (*Disputes*) above, this Agreement is governed by the laws of England and Wales.

19.2 The 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.

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

SCHEDULE 5[75]

LAND MATTERS

SECTION 1 - TITLE CONDITIONS

1. [All title conditions, rights, real burdens, covenants and other rights identified in Appendix 1 of this Schedule 5 (*Land Matters*).

2. All third party rights and rights of way in respect of the Site which were or should have been apparent from a visual inspection of the Site or which were or should have been apparent from the Site investigations pursuant to Clause 7.3 (*Project Co Investigation*) and Clause 10 (*The Site*).

3. All conditions contained in any agreements entered into pursuant to Clause 9.6 (*Extent of Rights*).][76]

[75] Refer to Health Sector Specific Guidance in the User Guide, if applicable.

[76] To be reviewed on a project specific basis.

SECTION 2 – RESERVED RIGHTS

In relation to the Site, there are excepted and reserved the following rights to the Authority[, Authority Parties] and/or the Authority's Representative:

1. [♦][77]

[77] To be completed on a project specific basis.

SECTION 3 – ANCILLARY RIGHTS

Ancillary Rights means:

(a) a non-exclusive licence to enter and remain upon those parts of the Sites that Project Co and/or any Project Co Party requires access to in order to carry out the Works or provide the Services;

(b) such rights of access to and egress from the Sites including those highlighted [♦] on the Site Plans, as are necessary for Project Co and any Project Co Party to perform their obligations and exercise their rights under this Agreement and in particular for the purposes of implementing the Works and providing the Services, provided that such rights may be varied by the Authority and such variation will be deemed to be a Medium Value Change;

(c) rights of free and uninterrupted passage and running of water, soil, gas, electricity, telephone and other services within the Site, including those highlighted [♦] on the Site Plans, provided that such rights of passage may be varied by the Authority to such alternative routes as the Authority may reasonably specify from time to time; and

(d) the right where necessary to inspect, repair, maintain or renew the Utilities within the Site and the right (at the cost of Project Co) to connect into the Utilities within the Site [or the [Utility Work Areas]] and to construct such new Utilities as may from time to time be necessary in connection with the Project Operations, provided that the prior written consent of the Authority is obtained (such consent not to be unreasonably withheld or delayed),

provided that:

(i) such rights are subject to the Title Conditions, Reserved Rights and the Authority's rights under this Agreement; and

(ii) without prejudice to paragraph (i) above, the rights shall not in any circumstances entitle Project Co or any Project Co Party to exclusive occupancy or exclusive possession of any part of the Sites, save as may be required to the areas shaded [♦] on the Site Plans, for the periods shown on such plans (which, for the avoidance of doubt, shall not in any case extend beyond the [Actual Completion Date/relevant Phase Actual Completion Date]).

APPENDIX 1 – TITLE CONDITIONS

[♦][78]

[78] To be completed on a project specific basis.

APPENDIX 2 – SITE PLAN[79]

[79] To be completed on a project specific basis.

[APPENDIX 3 – PHASE PLANS][80]

[80] To be completed on a project specific basis.

SCHEDULE 6[81]

CONSTRUCTION MATTERS

SECTION 1

PLANNING/CONSENTS

[81] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

SECTION 2

SAFETY DURING CONSTRUCTION

1 In this Section 2 (*Safety During Construction*) of Schedule 6 (*Construction Matters*) and wherever used elsewhere in this Agreement:

1.1 "**CDM Regulations**" means the Construction (Design and Management) Regulations 2015 (and "**CDM Regulation**" shall be construed accordingly); and

1.2 "**the client**", "**the Principal Designer**" and **"the Executive"** shall have the same meanings as are ascribed to them in the CDM Regulations.

2 In so far as not already done, within five (5) Business Days of the date of execution of this Agreement, Project Co shall make and serve on the Authority a notice in writing pursuant to and in the form (if any) required by CDM Regulation 4(8) that Project Co agrees to be treated as the only client in relation to the Works for the purposes of the CDM Regulations. Notwithstanding Project Co agreeing in writing to be treated as the only client pursuant to CDM Regulation 4(8), the Authority will comply with its remaining duties as set out in CDM Regulation 4(8). During the Project Term, Project Co shall not, and shall not seek to, withdraw, terminate or in any manner derogate from its declaration that it will act as, and its acceptance of its responsibilities as, the client in relation to the Works for all the purposes of the CDM Regulations. The Authority will endorse its consent, in writing, to such election on the said election and return it to Project Co within five (5) Business Days of receipt.

3 Project Co warrants that it has the skills, knowledge, organisational capability and experience to, and shall, observe, perform and discharge or shall procure the observance, performance and discharge of:

3.1 all the obligations, requirements and duties of the client arising under the CDM Regulations in connection with the Works and, where necessary, the provision of the Services; and

3.2 all obligations incumbent on the client under any code of practice or guidance for the time being approved by the Health and Safety Commission pursuant to the Health and Safety at Work etc Act 1974 issued in connection with the CDM Regulations.

4 Project Co shall provide to the Authority's Representative:

4.1 in a substantially complete form on the Actual Completion Date; and

4.2 in final form within [♦] of the Actual Completion Date,

one electronic copy (on computer disk, tape or other format) of the revised health and safety file and construction phase plan (current at that date) prepared by the

Principal Designer pursuant to the CDM Regulations in relation to the Works and the Services and electronic or paper copies of every amendment or update made to such file during the Project Term.

SECTION 3

AUTHORITY'S CONSTRUCTION REQUIREMENTS

SECTION 4

PROJECT CO'S PROPOSALS

SECTION 5

REVIEWABLE DESIGN DATA

SECTION 6

ROOM DATA SHEETS

SECTION 7

THERMAL AND ENERGY EFFICIENCY TESTING PROCEDURE

SECTION 8

QUALITY PLANS (DESIGN AND CONSTRUCTION)

SCHEDULE 7

THE PROGRAMME

[SECTION 1: PROGRAMME]

[SECTION 2: PHASING]

SCHEDULE 8[82]

REVIEW PROCEDURE

1 **REVIEW**

1.1 The provisions of this Schedule 8 (*Review Procedure*) shall apply whenever any item, document or course of action is required to be reviewed, approved or otherwise processed in accordance with Schedule 8 (*Review Procedure*).

1.2 Subject to [Clause 12.6.1 (*Authority design approval*) and] any express provision of this Agreement, the manner, form and timing of any submission to be made by Project Co to the Authority's Representative for review under this Schedule 8 (*Review Procedure*) shall be a matter for Project Co to determine. Each submission under this Schedule 8 (*Review Procedure*) shall be accompanied by a copy of the proposed document to be reviewed (including, where applicable, any Reviewable Design Data) or a statement of the proposed course of action (the entire contents of a submission being referred to in this Schedule 8 (*Review Procedure*) as a "**Submitted Item**"). In relation to each Submitted Item, the following procedure shall apply:

1.2.1 as soon as possible and, if the Submitted Item comprises:

(a) an item of Reviewable Design Data;

(b) a revised Programme submitted pursuant to Clause 14 (*Programme and Dates for Completion*); or

(c) a document or proposed course of action submitted in the case of (an emergency),

within [♦] Business Days of the date of receipt of a submission (or re-submission, as the case may be) of the Submitted Item to the Authority's Representative (or such other period as the parties may agree), the Authority's Representative shall return one (1) copy of the relevant Submitted Item to Project Co endorsed "no comment" or (subject to and in accordance with paragraph 3 (*Grounds for Objection*)) "comments" as appropriate; and

1.2.2 subject to paragraph 1.4, if the Authority's Representative fails to return a copy of any Submitted Item (including any re-submitted Submitted Item) duly endorsed in accordance with paragraph 1.2.1, within [♦] Business Days (or within such other period as the parties may agree in writing) of the date of its submission to

[82] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

the Authority's Representative, then the Authority's Representative shall be deemed to have returned the Submitted Item to Project Co endorsed "no comment" (and, in the case of Reviewable Design Data, endorsed "Level A - no comment"); and

1.2.3 in relation to the aspects of each Finish identified in the table below:

(a) Project Co shall submit to the Authority a range or selection of finishes ("**Range of Finishes**") no later than the relevant Finishes Proposal Date;

(b) the Authority's Representative shall by the relevant Finishes Selection Date notify Project Co of its selection for the relevant Finish; and

(c) if no selection of a Finish has been made by the Authority's Representative and notified to Project Co in accordance with paragraph 1.2.3(b) by the relevant Finish Selection Date, Project Co shall be entitled to make a selection from the Range of Finishes submitted in accordance with paragraph 1.2.3(a). After the relevant Finish Selection Date, should the Authority wish to vary any selection previously made by Project Co or by the Authority, such variation shall be effected as a Change in accordance with Schedule 16 (*Change Protocol*).

Table of Finishes

Finishes	Aspects	Finishes Proposal Date	Finishes Selection Date
External finishes (roof, windows and external elevations)	colour and material		
wall finishes	colour		
floor finishes	colour and type		
ironmongery	style and colour		
tapware	style and content		
main public light fittings	specification and style		
external signage	size, style, colour and location		
internal signage	size, style, colour and location		
light switches and sockets	style and colour		
light fittings	style and colour		
hard landscaping	colour and material		

[*others to be inserted on a project specific basis by the Authority*]			

1.3 If the Authority's Representative raises comments on any Submitted Item in accordance with paragraph 3 (*Grounds for Objection*) he shall state the ground upon which such comments are based and the evidence or other information necessary to substantiate that ground. To the extent that the Authority's Representative comments on a Submitted Item other than on the basis set out in this Schedule 8 (*Review Procedure*), or fails to comply with the provisions of this paragraph, Project Co may, in its discretion, either:

1.3.1 request written clarification of the basis for such comments and, if clarification is not received within [♦] Business Days of such request by Project Co, refer the matter for determination in accordance with Schedule 20 (*Dispute Resolution Procedure*); or

1.3.2 in the case of a Submitted Item comprising Reviewable Design Data only, at its own risk, and without prejudice to Clause 12 (*The Design, Construction and Commissioning Process*), proceed with further design or construction disregarding such comments pending the outcome of any reference to the Dispute Resolution Procedure that may be made by either party.

1.4 In the case of any Submitted Item of the type referred to in paragraph 3.10, a failure by the Authority's Representative to endorse and return such Submitted Item within the period specified in paragraph 1.2.2 shall be deemed to constitute an objection by the Authority's Representative to such Submitted Item. If the parties fail to agree the form and content of such Submitted Item, within [♦] Business Days following the expiry of the period specified in paragraph 1.2.2, the matter shall be determined in accordance with Schedule 20 (*Dispute Resolution Procedure*).

2 FURTHER INFORMATION

Project Co shall submit any further or other information, data and documents that the Authority's Representative reasonably requires in order to determine whether he has a basis for raising comments or making objections to any Submitted Item in accordance with this Schedule 8 (*Review Procedure*). If Project Co does not submit any such information, data and documents, the Authority's Representative shall be entitled to:

2.1 comment on the Submitted Item on the basis of the information, data and documents which have been provided; or

2.2 object to the Submitted Item on the grounds that insufficient information, data and documents have been provided to enable the Authority's Representative to determine whether he has a legitimate basis for commenting or objecting in accordance with this Schedule 8 (*Review Procedure*).

3 **GROUNDS OF OBJECTION**

The expression "raise comments" in this paragraph shall be construed to mean "raise comments or make objections" unless the contrary appears from the context. The Authority's Representative may raise comments in relation to any Submitted Item on the grounds set out in paragraph 2 (*Further Information*) above or on the ground that the Submitted Item would (on the balance of probabilities) breach any Law but otherwise may raise comments in relation to a Submitted Item only as follows:

3.1 in relation to any Submitted Item if:

3.1.1 Project Co's ability to perform its obligations under this Agreement would (on the balance of probabilities) be adversely affected by the implementation of the Submitted Item; or

3.1.2 the implementation of the Submitted Item would (on the balance of probabilities) adversely affect any right of the Authority under this Agreement or its ability to enforce any such right;

3.2 in relation to any Submitted Item submitted pursuant to Clause 4.1 (*Ancillary Documents*) if:

3.2.1 the Authority's ability to perform its obligations under this Agreement would be adversely affected by the proposed course of action;

3.2.2 the Authority's ability to provide the relevant Authority Services or to carry out any of its statutory functions would (on the balance of probabilities) be adversely affected by the proposed course of action;

3.2.3 the proposed course of action would be likely to result in an increase to the Authority's liabilities or potential or contingent liabilities under this Agreement;

3.2.4 the proposed course of action would adversely affect any right of the Authority under this Agreement or its ability to enforce any such right; or

3.2.5 Project Co's ability to perform its obligations under this Agreement would be materially adversely affected by the proposed course of action;

3.3 in relation to Reviewable Design Data submitted pursuant to Clause 12.6 (*Authority design approval)*:

3.3.1 which does not comprise 1:50 scale Room Layout Drawings the Authority's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*) on the ground that the Submitted Item is not in accordance with:

(a) the Authority's Construction Requirements; and/or

(b) Project Co's Proposals;

3.3.2 which comprises a 1:50 scale Room Layout Drawing in respect of which there is a corresponding generic 1:50 scale Room Layout Drawing for the relevant room type (which has previously been reviewed and commented upon by the Authority's Representative in accordance with this Schedule 8 (*Review Procedure*)), the Authority's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*), on the ground that the Submitted Item does not conform to the generic 1:50 scale Room Layout Drawing; and

3.3.3 which comprises a 1:50 scale Room Layout Drawing in respect of which there is no corresponding generic 1:50 scale Room Layout Drawing for the relevant room type (which has previously been reviewed and commented upon by the Authority's Representative in accordance with this Schedule 8 (*Review Procedure*)), the Authority's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*), on the grounds that the Submitted Item is not in accordance with the Authority's Construction Requirements and/or Project Co's Proposals;

3.4 in relation to a proposal to amend Project Co's Proposals and rectify (part of) the Works submitted pursuant to Clause 12.8 (*Rectification of Project Co's Proposals*), on the grounds that, following the amendment and rectification proposed:

3.4.1 Project Co's Proposals would not satisfy the Authority's Construction Requirements; and/or

3.4.2 the structural, mechanical and/or electrical performance of the Facilities would not be of an equivalent standard of performance to that set out in Project Co's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made);

3.5 in relation to Finishes:

3.5.1 which have the effect of making a selection from the Range of Finishes (or any alternative range or selection of Finishes

submitted by Project Co to the Authority's Representative) pursuant to Clause 12.6.1; or

3.5.2 where the Submitted Item does not comply with the relevant provisions of the Authority's Construction Requirements and/or Project Co's Proposals;

3.6 in relation to the submission of any revised Programme pursuant to Clause 14 (*Programme and Dates for Completion*) on the ground that the revised Programme would not (on the balance of probabilities) enable the Works to be completed by the Completion Date;

3.7 in relation to the submission of any Quality Plan or part of a Quality Plan or any changes to any Quality Plan pursuant to Clause (*Quality Plans and Systems*) 20.4 or Clause 20.7 (*Quality Plans and Systems*) or any quality manual or procedure in accordance with Clause 20.9 (*Quality Manuals and Procedures*), on the grounds that such Quality Plans, or parts of or changes to such Quality Plans, quality manuals or procedures, or the quality management systems which they reflect, would not comply with:

3.7.1 in the case of the Design Quality Plan and the Construction Quality Plan referred to in Clause 20.8 (*Quality Plans and Systems*), the requirements referred to in Section 8 (Quality *Plans (Design and Construction*)) of Schedule 6 (*Construction Matters*); and

3.7.2 in the case of the Services Quality Plan referred to in Clause 20 (*Quality Assurance*), the requirements referred to in Section 3 (*Services Quality Plan*) of Schedule 12 (*Service Requirements*);

3.8 in relation to the submission of any proposed revision or substitution for the Method Statements or any part of any Method Statement (as the case may be) pursuant to Clause 22.4 (*Project Co Services Changes*), on the grounds that:

3.8.1 the proposed revision or substitution is not in accordance with Good Industry Practice;

3.8.2 the performance of the Services in accordance with the proposed revision or substitution would (on the balance of probabilities):

(a) be materially different from the performance of the Services in accordance with the Method Statement prior to such proposed revision or substitution; or

(b) be less likely to achieve compliance with the Service Level Specification; or

(c) have an adverse effect on the provision by the Authority of the relevant Authority Services at, or on the safety or enjoyment of any users of, the Facilities; or

3.8.3 the proposed revision or substitution would (on the balance of probabilities) result in an inferior standard of performance of the Services to the standard of performance in accordance with the Method Statement prior to such proposed revision or substitution and or, as relevant, result in a probable failure of the Handback Requirements; and

3.9 in relation to the submission of any Schedule of Programmed Maintenance pursuant to Clause 23.1 (*Programmed Maintenance Works*), any revision to any Schedule of Programmed Maintenance pursuant to Clause 23.4 (*Programmed Maintenance Works*), any submission of Unprogrammed Maintenance Work pursuant to Clause 23.8 (*Programmed and Unprogrammed Maintenance*), or any written statement regarding deferral of Lifecycle Replacement and revision of the Lifecycle Schedule (forming part of the Schedule of Programmed Maintenance) pursuant to Clause 24.2 (*Lifecycle Replacement*), on the grounds that:

3.9.1 carrying out the Programmed Maintenance, Lifecycle Replacement or the Unprogrammed Maintenance Work in the period or at the times suggested would (on the balance of probabilities) interfere with the operations of the Authority and such interference could be avoided or mitigated by Project Co rescheduling the Programmed Maintenance, Lifecycle Replacement or the Unprogrammed Maintenance Work; or

3.9.2 in relation to the Schedule of Programmed Maintenance, the proposed hours for carrying out the Programmed Maintenance, Lifecycle Replacement are not consistent with the principles set out in Appendix 2, Table B to this Schedule 8 (*Review Procedure*); or

3.9.3 the proposed method of performance of the Programmed Maintenance, Lifecycle Replacement or the Unprogrammed Maintenance Work would not be in accordance with the Service Level Specification; or

3.9.4 the enjoyment and/or safety of users of the Facilities would (on the balance of probabilities) be adversely affected; or

3.9.5 the period for carrying out the Programmed Maintenance, Lifecycle Replacement or the Unprogrammed Maintenance Work would (on the balance of probabilities) exceed the period reasonably required for the relevant works.

3.10 In relation to the submission of Project Co's proposals for the Handback Works, the Handback Programme and the Handback Amount pursuant to Schedule 18 (*Handback Procedure*), on the grounds that:

3.10.1 in the case of the Handback Works, Project Co's proposals will not (on the balance of probabilities) ensure that the Handback Requirements are achieved by the Expiry Date;

3.10.2 in the case of the Handback Programme, performance of the Handback Works in accordance with the programme is not (on the balance of probabilities) capable of achieving satisfaction of the Handback Requirements by the Expiry Date; and/or

3.10.3 in the case of the Handback Amount, it does not represent the cost of carrying out the Handback Works according to the Handback Programme and the provisions of Schedule 18 (*Handback Procedure*).

4 EFFECT OF REVIEW

4.1 Any Submitted Item which is returned or deemed to have been returned by the Authority's Representative endorsed "no comment" (and in the case of Reviewable Design Data, endorsed "Level A - no comment") shall be complied with or implemented (as the case may be) by Project Co.

4.2 In the case of any Submitted Item other than Reviewable Design Data, if the Authority's Representative returns the Submitted Item to Project Co endorsed "comments", Project Co shall comply with such Submitted Item after amendment in accordance with the comments unless Project Co disputes that any such comment is on grounds permitted by this Agreement, in which case Project Co or the Authority's Representative may refer the matter for determination in accordance with Schedule 20 (*Dispute Resolution Procedure*) and Project Co shall not act on the Submitted Item until such matter is so determined or otherwise agreed.

4.3 In the case of a Submitted Item comprising Reviewable Design Data, if the Authority's Representative returns the Submitted Item endorsed other than "Level A - no comment", Project Co shall:

4.3.1 where the Authority's Representative has endorsed the Submitted Item "Level B - proceed subject to amendment as noted", either proceed to construct or proceed to the next level of design of the part of the Works to which the Submitted Item relates but take into account any amendments required by the Authority's Representative in his comments;

4.3.2 where the Authority's Representative has endorsed the Submitted Item "Level C - subject to amendment as noted" not act upon the Submitted Item, amend the Submitted Item in accordance with the Authority's Representative's comments and re-submit the same to the Authority's Representative in accordance with paragraph 4.4; or

4.3.3 where the Authority's Representative has endorsed the Submitted Item "Level D - rejected" not act upon the Submitted Item, amend the Submitted Item and re-submit the Submitted Item to the Authority's Representative in accordance with paragraph 4.4,

unless Project Co disputes that any such comment or proposed amendment is on grounds permitted by this Agreement, in which case Project Co or the Authority's Representative may refer the matter for determination in accordance with Schedule 20 (*Dispute Resolution Procedure*) and Project Co shall not act on the Submitted Item until such matter is so determined or otherwise agreed except at its own risk in accordance with paragraph 1.3.2.

4.4 Within ten (10) Business Days of receiving the comments of the Authority's Representative on any Submitted Item comprising Reviewable Design Data, Project Co shall (except in the case contemplated in paragraph 4.3.1) send a copy of the Submitted Item as amended to the Authority's Representative pursuant to paragraph 4.3 and the provisions of paragraphs 1.2.1, 4.1 and 4.3 shall apply (changed according to context) to such re-submission.

4.5 The return or deemed return of any Submitted Item endorsed "no comment" (or in the case of Reviewable Design Data endorsed "Level A - no comment" or otherwise endorsed in accordance with paragraph 4.3.1 or 4.3.2) shall mean that the relevant Submitted Item may be used or implemented for the purposes for which it is intended but, save to the extent expressly stated in this Agreement including, without limitation, as specified in Appendix 1 Table A to this Schedule 8 (*Review Procedure*), such return or deemed return of any Submitted Item shall not otherwise relieve Project Co of its obligations under this Agreement nor is it an acknowledgement by the Authority that Project Co has complied with such obligations.

5 DOCUMENTATION MANAGEMENT

5.1 Project Co shall issue [one (1)] paper copy and [one (1)] electronic copy of all Submitted Items to the Authority and compile and maintain a register of the date and contents of the submission of all Submitted Items.

5.2 Project Co shall compile and maintain a register of the date of receipt and content of all Submitted Items that are returned or deemed to be returned by the Authority's Representative.

5.3 Save to the extent set out in Appendix 1, Table A to this Schedule 8 (*Review Procedure*) or elsewhere in this Schedule 8 (*Review Procedure*), no review, comment or approval by the Authority shall operate to exclude or limit Project Co's obligations or liabilities under this Agreement (or the Authority's rights under this Agreement).

6 CHANGES

6.1 No approval or comment or any failure to give or make an approval or comment under this Schedule 8 shall constitute a Change save to the extent provided in this Schedule 8 (*Review Procedure*).

6.2 If, having received comments from the Authority's Representative, Project Co considers that compliance with those comments would amount to a Change, Project Co shall, before complying with the comments, notify the Authority of the same and, if it is agreed by the parties or determined pursuant to Schedule 20 (*Dispute Resolution Procedure*) that a Change would arise if the comments were complied with, the Authority may, if it wishes, implement the Change and it shall be dealt with in accordance with Schedule 16 (*Change Protocol*). Any failure by Project Co to notify the Authority that it considers compliance with any comments of the Authority's Representative would amount to a Change shall constitute an irrevocable acceptance by Project Co that any compliance with the Authority's comments shall be without cost to the Authority and without any extension of time.

6.3 No alteration or modification to the design, quality and quantity of the Works arising from the development of detailed design or from the co-ordination of the design shall be construed or regarded as a Change.

APPENDIX 1

TABLE A

Approved RDD Item (by category)	**Scale**	**Meaning of "Level A - no comment" and "Level B – proceed subject to amendment as noted" endorsement of Reviewable Design Data under Schedule 8 (*Review Procedure*) (including both the actual and deemed endorsement).**
Room Data Sheets	n/a	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any room data sheet means that Project Co may proceed to construct in accordance with the Submitted Item and that the Authority is satisfied that the design and other information in the relevant room data sheet satisfies Operational Functionality.
Drawings – Development Control Plan	1:1250	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any 1:1250 scale development control plan means that Project Co may proceed to construct in accordance with the Submitted Item and that the Authority is satisfied that the design and other information contained in the relevant drawing satisfies Operational Functionality.
Drawings – Site Plan	1:500	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any 1:500 scale site plan means that Project Co may proceed to construct in accordance with the Submitted Item and that the Authority is satisfied that the design and other information contained in the relevant drawing satisfies Operational Functionality.
Drawings – Floor Plans	1:200	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any 1:200 scale floor plan means that Project Co may proceed to construct in accordance with the Submitted Item and that the Authority is satisfied that the design and other information contained in the relevant drawing satisfies the Operational Functionality.
Drawings – Room Layouts (including room elevations) &	1:50	A "Level A - no comment" endorsement or a "Level B - proceed subject to amendment as noted" endorsement of any 1:50 scale room layout and/or reflected ceiling drawing means that Project Co may proceed to construct in accordance with the Submitted Item and that the Authority is satisfied (to the extent of the design and other information contained in the

Reflected ceiling plans		relevant drawing) that the design and other information in the relevant drawing satisfies Operational Functionality.
Drawings – Departmental plans	1:50	A "Level A - no comment" endorsement or a "Level B – proceed subject to amendment as noted" endorsement of any 1:50 scale departmental plan means that Project Co may proceed to construct in accordance with the Submitted Item and that the Authority is satisfied (to the extent of the design and other information contained in the relevant drawing) that the design and other information in the relevant drawing satisfies Operational Functionality.

APPENDIX 2

HOURS FOR PROGRAMMED MAINTENANCE

1 Subject to paragraphs 3 to 5 below, Project Co shall carry out Programmed Maintenance and Lifecycle Replacement at the Facilities during the hours of [♦] to [♦] on [days] ("**Hours for Programmed Maintenance**").

2 Project Co may, with the consent of the Authority (which consent shall not be unreasonably withheld) carry out Maintenance Works and Lifecycle Replacement outside the Hours for Programmed Maintenance provided always that it shall take into account:

2.1 the likely disturbance to the Authority and/or its staff and users within the immediate area where the Maintenance Works and Lifecycle Replacement are to be undertaken;

2.2 the likely disturbance to adjacent areas, the Authority and/or its staff and users in those adjacent areas that may be affected by the Maintenance Works to be undertaken in the area(s) identified in (i) above; and

2.3 compliance with the Law.

3 Subject to paragraph 4, Project Co shall have access to the Facilities during the hours of operation to the areas set out in and in accordance with Table B below (**"Hours of Operation"**) to carry out Programmed Maintenance and Lifecycle Replacement.

TABLE B

4 Where Project Co requires access to an area of the Facilities during the Hours of Operation, Project Co will consult with and obtain the consent of [the member of personnel in charge of a department ("**Head of Department"**)] concerning dates, times and periods during which Programmed Maintenance or Lifecycle Replacement is to be undertaken in those [departments] so as to minimise disruption to those [departments].

5 The Authority may request Project Co to carry out Programmed Maintenance or Lifecycle Replacement outside the Hours for Programmed Maintenance in the event that the carrying out of such Programmed

Maintenance during the Hours for Programmed Maintenance or Lifecycle Replacement would adversely affect the use of the department or area.

[**APPENDIX 3**

REVIEWABLE DESIGN DATA PROGRAMME]

SCHEDULE 9

COLLATERAL AGREEMENTS

SECTION 1

CONTRACTOR'S COLLATERAL AGREEMENT

COLLATERAL WARRANTY

AMONG:

(1) [AUTHORITY] (the "**Authority**");

(2) [CONTRACTOR] (the "**Contractor**");

(3) [PROJECT CO] ("**Project Co**"); and

(4) [SECURITY TRUSTEE] ("**Security Trustee**").

WHEREAS:

(A) The Authority and Project Co have agreed the terms on which Project Co will design, develop and construct and provide certain services in connection with [description of facilities] (the "**Development**") at the Site (as that expression is defined in the Design Build Finance and Maintain Agreement) and, accordingly, have entered into the Design Build Finance and Maintain Agreement and the Project Documents.

(B) [Description of financing arrangements].

(C) [Description of documents entered into by Project Co as security for its obligations.]

(D) The Contractor and Project Co have entered into an agreement (the "**Construction Contract**") of even date herewith relating to the provision of the Works (as defined in the Design Build Finance and Maintain Agreement) by the Contractor to enable Project Co to discharge its obligations to the Authority regarding such Works under the Design Build Finance and Maintain Agreement and the Project Documents.

(E) This Contractor's Collateral Agreement (the "**Agreement**") is the Contractor's Collateral Agreement contemplated by the Design Build Finance and Maintain Agreement.

NOW IT IS HEREBY AGREED as follows:

1 **DEFINITIONS AND INTERPRETATION**

1.1 **Definitions**

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

"Ancillary Documents"	has the meaning given in the Design Build Finance and Maintain Agreement;
"Business Day"	means a day other than a Saturday, Sunday or a bank holiday in England and Wales;
"Construction Contract"	has the meaning given in the Design Build Finance and Maintain Agreement;

"Design Build Finance and Maintain Agreement"	means the Design Build Finance and Maintain Agreement of even date herewith between (1) the Authority and (2) Project Co;
"Event of Project Co Default"	has the meaning given in the Construction Contract;
"Funders"	means [♦];
"Funders' Contractor Direct Agreement"	means the agreement of even date herewith between, amongst others, Project Co, the Contractor and the Senior Funder;
"Funders' Direct Agreement"	means [♦];
"Funding Agreements"	means [♦];
"Novation Agreement"	has the meaning given in Clause 4.5.2(a);
"Novation Effective Date"	means the date of performance of the obligations set out in Clause 4 (*Novation*);
"Parent Company Guarantee"	has the meaning given in the Construction Contract;
"Proposed Novation Date"	has the meaning given in Clause 4.1 (*Proposed Substitute*);
"Proposed Novation Notice"	has the meaning given in Clause 4.1 (*Proposed Substitute*);
"Proposed Step-in Date"	has the meaning given in Clause 3.1 (*Step-in Notice*);
"Proposed Substitute"	has the meaning given in Clause 4.1 (*Proposed Substitute*);
"Security Documents"	has the meaning given in the Funders' Direct Agreement;
"Senior Funder"	means [insert details];
"Step-in Date"	means the date of issue of the Step-in Undertaking;
"Step-in Notice"	has the meaning given in Clause 3.1 (*Step-in Notice*);
"Step-in Period"	means the period commencing on the Step-in Date and ending on the earliest of: (a) the date of the first anniversary of the Step-in Date (but subject always to Clause 4.7 (*Extension*

of Step-in Period));

(b) the Step-out Date;

(c) the Novation Effective Date; and

(d) termination of the Construction Contract under Clause 3.3 (*Restriction of Right of Termination*);

"Step-in Undertaking" has the meaning given in Clause 3.2.4;

"Step-out Date" has the meaning given in Clause 3.4.1;

"Termination Notice" has the meaning given in Clause 2.3 (*Termination Notice*).

1.2 **Interpretation**

Save to the extent that the context or the express provisions of this Agreement otherwise require:

1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;

1.2.2 all references to Clauses are references to Clauses of this Agreement;

1.2.3 all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;

1.2.4 all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;

1.2.5 any reference to time of day shall be a reference to Cardiff time;

1.2.6 the words "herein", "hereto" and "hereunder" refer to this Agreement as a whole and not to the particular Clause in which such word may be used;

1.2.7 words importing the singular include the plural and vice versa;

1.2.8 words importing a particular gender include all genders;

1.2.9 "person" includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency, unincorporated body of persons or association;

1.2.10 any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;

1.2.11 references to "Party" means a party to this Agreement and references to "Parties" shall be construed accordingly;

1.2.12 all monetary amounts are expressed in Pounds Sterling;

1.2.13 references to the word "includes" or "including" are to be construed without limitation;

1.2.14 the obligations of any Party under this Agreement are to be performed at that Party's own cost and expense;

1.2.15 terms used in this Agreement that are defined in the Design Build Finance and Maintain Agreement or the Ancillary Documents shall have the meanings given to them in the Design Build Finance and Maintain Agreement or the Ancillary Documents, as appropriate.

2 TERMINATION NOTICE AND AUTHORITY TERMINATION

2.1 Contractor's Warranties and Undertakings

The Contractor warrants and undertakes to the Authority that it has complied with and fulfilled and shall continue to comply with and fulfil its duties and obligations arising under or by virtue of the Construction Contract, provided that the Authority shall only be entitled to make a claim against the Contractor under this Clause 2.1 (*Contractor's Warranties and Undertakings*) if the Design Build Finance and Maintain Agreement has terminated and shall not be entitled to do so during the Step-in Period or after the Construction Contract has been novated under Clause 4 (*Novation*).

2.2 **Liability of Contractor**

Any liability arising from any claim for breach of the warranty under or pursuant to Clause 2.1 (*Contractor's Warranties and Undertakings*) shall be in addition to and without prejudice to any other present or future liability of the Contractor to the Authority (including, without prejudice to the generality of the foregoing, any liability in negligence) and shall not be released, diminished or in any other way be affected by any independent enquiry into any relevant matter which may be made or carried out by or on behalf of the Authority by any person nor by any action or omission of any person whether or not such action or omission might give rise to an independent liability of such person to the Authority provided always that the Contractor shall owe no greater duties or obligations to the Authority under this Agreement than it owes or would have owed to Project Co under the Construction Contract. Without prejudice to Clause 12 (*Aggregate Liability*), the Contractor shall be entitled in any action or proceedings brought by the Authority under this Agreement to rely on any limitation or exclusion of liability in the Construction Contract and to raise equivalent rights in defence of liability (but excluding set-offs and counterclaims) as it would have against Project Co under the Construction Contract.

2.3 **Termination Notice**

2.3.1 The Contractor undertakes not to terminate the Construction Contract on account of an Event of Project Co Default without first giving the Authority not less than [fifteen (15)] Business Days' prior written notice specifying the grounds for that termination. Subject to Clause 2.3.2 below any such notice shall be a "**Termination Notice**".

2.3.2 Where the Contractor's right to terminate is subject to the terms of the Funders' Contractor's Direct Agreement then the Contractor shall notify the Authority of the same as soon as reasonably practicable upon becoming aware of the provisions of the Funders' Contractor's Direct Agreement applying. Thereafter as soon as the Contractor becomes entitled to terminate the Construction Contract free from the constraints contained in the Funders' Contractor's Direct Agreement, whether upon the expiry of the Step-in Period (as such term is defined in the Funders' Contractor's Direct Agreement) or otherwise, then the Contractor undertakes to the Authority not to terminate the Construction Contract on account of an Event of Project Co Default (whether occurring before or after the Contractor's right to terminate the Construction Contract was free from the constraints of the Funders' Contractor's Direct Agreement) without first giving the Authority not less than [fifteen (15)] Business Days' prior notice specifying the grounds for that termination and noting that the Contractor's right of termination is not subject to the Funders' Contractor's Direct Agreement. Any such notice, other than one given in circumstances where there is no default under the Construction Contract by Project Co or the Contractor, shall for the purposes of this Agreement also be a Termination Notice and the provisions of this Agreement shall apply accordingly.

2.3.3 Notwithstanding any provision of the Construction Contract to the contrary, on termination of the Design Build Finance and Maintain Agreement by the Authority, the Parties agree that the Construction Contract shall not come to an end except in accordance with the terms of this Agreement.

2.3.4 The Authority acknowledges that it shall not be entitled to exercise its rights under Clauses 3 (*Step-in and Step-out*) and 4 (*Novation*):

(a) where the event giving rise to termination of the Design Build Finance and Maintain Agreement is a Contractor Event of Default (as that term is defined in the Construction Contract) whether or not at the relevant time there has been notice to terminate the Construction Contract for such Contractor Event of Default;

(b) until the Security Trustee has released its security over the Construction Contract; or

(c) until the Security Trustee has confirmed to the Authority in writing that it has no further claims or interest in the claims of Project Co or any Suitable Substitute Contractor (as such term is defined in the Funders' Contractor Direct Agreement) against the Contractor whether pursuant to the Security Documents, the Construction Contract or the enforcement of any rights under the Security Documents or the Funders' Contractor Direct Agreement.

3 STEP-IN AND STEP-OUT

3.1 Step-in Notice

3.1.1 If the Authority has terminated the Design Build Finance and Maintain Agreement in accordance with the terms of the Design Build Finance and Maintain Agreement or if the Authority has received a Termination Notice, then subject to the provisions of this Agreement, the Authority may give written notice to the Contractor (copied to the Security Trustee) (a "**Step-in Notice**") of the intention of the Authority to issue a Step-in Undertaking on a specified date (the "**Proposed Step-in Date**") provided that such Proposed Step-in Date shall be:

(a) no later than [five (5)] Business Days after termination of the Design Build Finance and Maintain Agreement where this has been terminated by the Authority; and

(b) no earlier than the date falling five (5) Business Days prior to the date of expiry of the Termination Notice and no later than the date of expiry of the Termination Notice where a Termination Notice has been given by the Contractor.

3.1.2 Unless the Contractor otherwise consents, only one (1) Step-in Notice may be given during the period of this Agreement. Subject to Clause 5.1 (*Rights of Termination*) below, the Contractor shall not be entitled to terminate the Construction Contract until after the Proposed Step-in Date.

3.2 **Notice of Obligations and Step-in Undertaking**

3.2.1 Within [three (3)] Business Days of receipt of any Step-in Notice, the Contractor shall give written notice to the Authority of any sums of which the Contractor has actual knowledge which are due and payable but unpaid by Project Co and of any other material obligations or liabilities, of which the Contractor has actual knowledge, which should have been performed or discharged by Project Co under the Construction Contract, in each case, as at the date of the Step-in Notice.

3.2.2 The Contractor shall inform the Authority in writing as soon as reasonably practicable of:

(a) any change in such sums, obligations or liabilities referred to in Clause 3.2.1; and

(b) any further sums, obligations or liabilities thereafter falling due and payable but unpaid or falling due for performance or discharge and unperformed or undischarged (as the case may be);

in each case of which the Contractor has actual knowledge, before the Step-in Date.

3.2.3 The Contractor shall give the Authority the information referred to in Clauses 3.2.1 and 3.2.2 in good faith and may not give any further notifications pursuant to Clause 3.2.2 less than [two (2)] Business Days prior to the Proposed Step-in Date. The Authority shall not be required to assume any liability under a Step-in Undertaking for any outstanding obligations or liabilities of Project Co to the Contractor which are not notified to the Authority pursuant to Clauses 3.2.1 or 3.2.2.

3.2.4 Not later than the Proposed Step-in Date the Authority shall decide if it is prepared to issue a Step-in Undertaking. If it does so decide, the Authority shall promptly give the Contractor written notification of such decision and, at the same time,

provide a copy of such notification to the Senior Funder. The Authority shall deliver to the Contractor on the Proposed Step-in Date, a written undertaking in form and substance agreed with the Contractor (both the Authority and the Contractor acting reasonably) (the "**Step in Undertaking**"), incorporating a clause in terms similar to Clause 11 (*Default Interest*) (but only to the extent that there will not be double counting of default interest accruing under the Construction Contract and this Agreement), and undertaking to the Contractor:

(a) to pay or procure the payment to the Contractor, within [fifteen (15)] Business Days of demand by the Contractor, of any sum due and payable but unpaid by Project Co to the Contractor under the Construction Contract before the Step-in Date and which has been notified by the Contractor to the Authority in accordance with Clause 3.2.1 or 3.2.2;

(b) to perform or discharge or procure the performance or discharge of any unperformed or undischarged obligations of Project Co under the Construction Contract which shall have fallen due for performance or discharge before the Step-in Date and which have been notified by the Contractor to the Authority in accordance with Clause 3.2.1 or 3.2.2 within such period as the Contractor may reasonably require;

(c) to pay or procure the payment of any sum due and payable by Project Co under the Construction Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to Clauses 3.4 (*Step-Out*) and 4.5.3(b)) but not, to avoid doubt, any sum due in respect of any Works carried out before the Step-in Date; and

(d) to perform or discharge or procure the performance or discharge of any obligations of Project Co under the Construction Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to Clauses 3.4 (*Step-Out*) and 4.5.3(b)) but not, to avoid doubt, to perform or discharge or to procure the performance or discharge of any obligations in respect of any Works carried out before the Step-in Date.

3.2.5 Following notification of the Authority's decision pursuant to Clause 3.2.4, the Security Trustee shall, on or before the Proposed Step-in Date, take any action which is necessary unconditionally and irrevocably to release the Construction Contract and the Parent Company Guarantee from the security constituted by the Security Documents.

3.2.6 Upon release by the Security Trustee of its security over the Parent Company Guarantee in accordance with Clause 3.2.5, Project Co shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority in accordance with Clause [insert reference] of the same.

3.2.7 If the Authority shall not have issued the Step-in Undertaking on or before the Proposed Step-in Date the Step-in Notice shall be deemed to have been withdrawn and the rights and obligations of the Parties shall be construed as if the Step-in Notice had not been given.

3.3 **Restriction of Right of Termination**

During or in respect of the Step-in Period, the Contractor confirms to the Authority that it shall continue to observe and perform its duties and obligations under the Construction Contract and shall, without prejudice to Clause 5.1 (*Rights of Termination*), only be entitled to exercise its rights of termination under the Construction Contract:

3.3.1 by reference to an Event of Project Co Default arising during the Step-in Period provided that no event of default by Project Co under the Design Build Finance and Maintain Agreement (whether resulting in termination of the Design Build Finance and Maintain Agreement or otherwise, and notwithstanding that it has occurred during the Step-in Period) shall entitle the Contractor to exercise such rights of termination during the Step-in Period; or

3.3.2 if the Authority, in breach of the terms of the Construction Contract, fails to pay when due any amount owed to the Contractor or fails to perform or discharge when falling due for performance or discharge any obligation under the Step-in Undertaking or fails to procure such payment or performance or discharge; or

3.3.3 if such rights of termination arise in circumstances where there is no default under the Construction Contract by the Authority or the Contractor.

3.4 **Step-Out**

3.4.1 the Authority may, at any time, give the Contractor at least [thirty (30)] days' prior written notice to terminate the Step-in Period on a date specified in the notice (the "**Step-out Date**");

3.4.2 the Authority shall give the Contractor at least [thirty (30)] days' prior written notice that (subject to Clause 4.4.2) the Step-in Period will end due to the occurrence (subject to Clause 4.7 (*Extension of Step-in Period*) of the first anniversary of the Step-in Date;

provided that:

(a) the Authority has performed and discharged in full or procured the performance and discharge in full of any obligations of Project Co under the Construction Contract in relation to the maintenance of records and the provision of reports during the Step-in Period so as to permit the Contractor to monitor the performance of Project Co's other obligations under the Construction Contract; and

(b) all liability under the Step-in Undertaking pursuant to any claims made up to the date specified in either Clause 3.4.1 or Clause 3.4.2 (as the case may be) shall have been fully and unconditionally discharged,

the Authority shall be released from the Step-in Undertaking on the expiry of the Step-in Period in accordance with Clauses 3.4.1 and 3.4.2. Such release shall not affect the continuation of Project Co's obligations towards the Contractor under the Construction Contract.

4 NOVATION

4.1 Proposed Substitute

At any time that the Authority is entitled to give a Step-in Notice pursuant to Clause 3.1 (*Step-in Notice*) or at any time during the Step-in Period the Authority may give notice (copied to the Security Trustee) (a "**Proposed Novation Notice**") to the Contractor that it wishes itself or another person (a "**Proposed Substitute**") to assume, by way of sale, transfer or other disposal, the rights and obligations of Project Co under the Construction Contract and specifying a date (the "**Proposed Novation Date**"):

4.1.1 falling not later than [fifteen (15)] Business Days after termination of the Design Build Finance and Maintain Agreement where this has been terminated by the Authority;

4.1.2 falling not later than the expiry of the Termination Notice where a Proposed Novation Notice is given by the Authority at a time when it is entitled to give a Step-in Notice pursuant to Clause 3.1 (*Step-in Notice*); and

4.1.3 falling not later than [twenty-eight (28)] Business Days after the date of the Proposed Novation Notice, where a Proposed Novation Notice is given during a Step-in Period.

Save as provided in Clause 4.4 (*Consent Withheld*), only one (1) Proposed Novation Notice may be given during the period of this

Agreement. Without prejudice to Clauses 3.3 (*Restriction of Right of Termination*) and 5.1 (*Rights of Termination*), the Contractor shall not be entitled to terminate the Construction Contract during the notice period specified in a Proposed Novation Notice.

4.2 **Information for Consent to Novation**

If the Proposed Novation Notice specifies the Authority as the Proposed Substitute, the Contractor's consent to the novation shall be deemed to have been given automatically. Where the Proposed Substitute is not the Authority, a novation in accordance with a Proposed Novation Notice shall only be effective if the Contractor consents to that novation in writing in accordance with Clause 4.3 *(Grant of Consent*) and the Authority shall (as soon as practicable) supply the Contractor with the following information (copied to the Security Trustee):

4.2.1 the name and registered address of the Proposed Substitute;

4.2.2 the names of the shareholders in the Proposed Substitute and the share capital owned by each of them;

4.2.3 the names of the directors and the secretary of the Proposed Substitute;

4.2.4 details of the means by which it is proposed to finance the Proposed Substitute (including the extent to which such finance is committed and any conditions precedent as to its availability for drawing); and

4.2.5 the resources (including contractual arrangements) which are to be available to the Proposed Substitute to enable it to perform its obligations under the Construction Contract.

4.3 **Grant of Consent**

The Contractor may withhold or delay consent to a novation only where the Proposed Substitute is not the Authority and the Authority has failed to show to the Contractor's satisfaction (acting reasonably) that:

4.3.1 the Proposed Substitute has the legal capacity, power and authorisation to become a party to and perform the obligations of Project Co under the Construction Contract; and

4.3.2 the technical competence and financial standing of and the technical and financial resources available to the Proposed Substitute are sufficient to perform the obligations of Project Co under the Construction Contract.

The Contractor shall notify the Authority in writing, within [five (5)] Business Days of the later of receipt of a Proposed Novation Notice and all information required under Clause 4.2 (*Information for Consent to Novation*), as to whether or not it has decided to grant such consent (together with an explanation of its reasons if it has decided to withhold its consent).

4.4 **Consent withheld**

If, in accordance with Clause 4.3 (*Grant of Consent*), the Contractor withholds its consent to a Proposed Novation Notice, the Authority shall be entitled to give one or more subsequent Proposed Novation Notices, pursuant to the provisions of Clause 4.1 (*Proposed Substitute*), containing changed particulars relating to the same Proposed Substitute or particulars relating to another Proposed Substitute which (where the replacement Proposed Substitute is not the Authority) the Authority has good cause to believe would fulfil the requirements of Clauses 4.3.1 and 4.3.2, provided that only one Proposed Novation Notice may be outstanding at any one time, and provided further that:

4.4.1 where a Step-in-Notice has not been issued, any revised Proposed Novation Date shall be a date falling no later than the date specified in Clause 4.1.1 or 4.1.2 as appropriate; and

4.4.2 if the Proposed Novation Notice was served during the Step-in Period, any revised Proposed Novation Date shall be a date falling not later than [twenty-eight (28)] Business Days after the date of the revised Proposed Novation Notice.

4.5 **Implementation of Novation**

4.5.1 If the Contractor consents to a novation pursuant to a Proposed Novation Notice (whether automatically or otherwise), then on the Proposed Novation Date and without prejudice to Clause 5.1 (*Rights of Termination*),

(a) following notification pursuant to Clause 4.1 (*Proposed Substitute*) and in the absence of any prior release in accordance with Clause 3.2.5, the Security Trustee shall, on or before the Proposed Novation Date, take any action which is necessary unconditionally and irrevocably to release the Construction Contract and the Parent Company Guarantee from the security constituted by the Security Documents; and

(b) Project Co shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority or other Proposed Substitute in accordance with clause [insert reference] of the same and on the Proposed Novation Date and without prejudice to Clause 5.1 (*Rights of Termination*).

4.5.2 Subject to the prior performance by the Security Trustee and Project Co of their respective obligations under Clause 4.5.1(a) and Clause 4.5.1(b) the Proposed Substitute shall become a party to the Construction Contract in place of Project Co and, thereafter, shall be treated as if it was and had always been named as a party to the Construction Contract in place of Project Co; and

(a) the Contractor, Project Co and the Proposed Substitute shall enter into a novation agreement (the "**Novation Agreement**") and any other requisite agreements, in form and substance satisfactory to the Contractor (acting reasonably), pursuant to which:

(i) the Proposed Substitute shall be granted all of the rights of Project Co under the Construction Contract (including those arising prior to the end of the Step-in Period);

(ii) subject to the Contractor giving to the Proposed Substitute within [three (3)] Business Days of receipt of the Proposed Novation Notice such notice as is referred to in Clause 3.2.1 and to the provisions of Clauses 3.2.2 and 3.2.3, mutatis mutandis, the Proposed Substitute shall assume all of the obligations and liabilities of Project Co under the Construction Contract (including those arising prior to the end of any Step-in Period and those arising during the period of the Proposed Novation Notice);

provided that the Contractor will not be in breach of any of its obligations under this Agreement if the Proposed Substitute does not enter into one or other of such agreements.

4.5.3 On and after the Novation Effective Date:

(a) the Contractor shall owe its obligations under the Construction Contract (whether arising before, on or after such date) to the Proposed Substitute and the receipt, acknowledgement or acquiescence of the Proposed Substitute shall be a good discharge; and

(b) if the Authority shall have entered into a Step-in Undertaking, the Authority will be released from the Step-in Undertaking, provided that:

(i) all obligations of the Authority under the Step-in Undertaking which have accrued up to the Novation Effective Date and are identifiable

as at that date shall have been fully and unconditionally discharged; and

(ii) the Authority has performed and discharged in full or procured the performance and discharge in full of the obligations of Project Co under the Construction Contract in relation to the maintenance of records and the provision of reports during the Step-in Period up to the Novation Effective Date so as to permit the Contractor to monitor the performance of Project Co's other obligations under the Construction Contract.

4.5.4 the Authority and the Contractor shall use all reasonable endeavours to agree and the Authority shall use reasonable endeavours to procure that the Proposed Substitute agrees any amendments to the Construction Contract necessary to reflect Clause 3.2.2 and the fact that the Design Build Finance and Maintain Agreement may have terminated at the time of the Novation Effective Date.

4.6 **Termination After Novation**

After the Novation Effective Date the Contractor shall only be entitled to exercise its rights of termination under the Construction Contract:

4.6.1 in respect of any Event of Project Co Default arising after that date in accordance with the Construction Contract; or

4.6.2 if the Proposed Substitute does not discharge the obligations and liabilities assumed by it under Clause 4.5.2(a) which relate to matters arising prior to the end of the Step-in Period within [fifteen (15)] Business Days following the Novation Effective Date.

4.7 **Extension of Step-In Period**

As at the date of the first anniversary of the Step-in Date, if the Step-in Period has not previously ended, and:

4.7.1 the Authority is in the course of conducting discussions in good faith with a Proposed Substitute (the novation to whom has been approved by the Contractor whether automatically or otherwise in accordance with Clause 4.3 (*Grant of Consent*)), the Step-in Period shall be extended and shall continue until such date as is proposed by the Authority and agreed by the Contractor; or

4.7.2 a contract has been entered into between the Authority and a Proposed Substitute (which has been approved by the Contractor in accordance with Clause 4.3 (*Grant of Consent*)) as at such date, the Step-in Period shall be extended and shall continue until the date such contract comes into force, provided that such date shall not be later than [thirty (30)] Business Days after the last date of execution of such contract.

5 RIGHTS AND OBLIGATIONS UNDER THE CONSTRUCTION CONTRACT

5.1 Rights of Termination

If:

5.1.1 no Step-in Notice or Proposed Novation Notice is given before a Termination Notice expires or within [♦] Business Days after termination of the Design Build Finance and Maintain Agreement by the Authority; or

5.1.2 a Step-in Undertaking is not issued on the Proposed Step-in Date; or

5.1.3 the Step-in Notice is withdrawn or, pursuant to Clause 3.2.7, deemed to have been withdrawn; or

5.1.4 the Step-in Period ends before the occurrence of the Novation Effective Date; or

5.1.5 in the absence of a Step-in Undertaking, the Contractor withholds its consent to a novation pursuant to a Proposed Novation Notice, in accordance with Clause 4.3 (*Grant of Consent*), and does not subsequently grant consent to a novation in accordance with Clause 4.4 (*Consent Withheld*) on or before the Proposed Novation Date; or

5.1.6 in the absence of a Step-in Undertaking, the obligations of the Proposed Substitute set out in Clause 4.5 (*Implementation of Novation*) are not performed on the Proposed Novation Date; or

5.1.7 the Contractor is entitled to terminate the Construction Contract under Clause 3.3 (*Restriction of Right of Termination*) or 4.6 (*Termination after Novation*); or

5.1.8 the Authority exercises its right to Step-out under Clause 3.4.1,

the Contractor shall, on and from the Step-out Date, be entitled to:

5.1.9 exercise all of its rights under the Construction Contract and act upon any and all grounds for termination available to it in relation to the Construction Contract whenever occurring; and/or

5.1.10 pursue any and all claims and exercise any and all rights and remedies against Project Co.

5.2 **Project Co's Obligations to Continue**

Until completion of a novation pursuant to Clause 4.5 (*Implementation of Novation*) (unless the terms of such novation expressly preserve an obligation or liability of Project Co), Project Co shall continue to be liable for all its obligations and liabilities, whenever occurring, under or arising from the Construction Contract notwithstanding:

5.2.1 the service of a Step-in Notice or the issue of a Step-in Undertaking or the expiry of the Step-in Period or the release of a Step-in Undertaking; or

5.2.2 the service of a Proposed Novation Notice; or

5.2.3 any other provision of this Agreement.

6 REVOCATION OF NOTICES

A Termination Notice and a Step-in Notice may each be revoked (in writing to the recipient) by the Party giving them before the expiry of their respective notice periods. Upon any such revocation, the rights and obligations of the Parties shall be construed as if the relevant notice had not been given.

7 ASSIGNMENT

7.1 **Binding on Successors and Assignees**

This Agreement shall be binding on and shall enure to the benefit of the Parties and their respective successors and permitted assignees. In the case of the Authority, its successors shall include any person to which the Welsh Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Authority upon the Authority ceasing to exist, transfers the rights and obligations of the Authority under this Agreement.

7.2 **Restriction on Assignment**

No Party shall assign or transfer any part of its respective rights or obligations under this Agreement without the prior consent of the others (such consent not to be unreasonably withheld or delayed), provided that:

7.2.1 Project Co shall not assign this Agreement to any party other than a party to whom Project Co's interests in the Design Build Finance and Maintain Agreement and Construction Contract are assigned in accordance with the terms of the Design Build Finance and Maintain Agreement and Construction Contract respectively;

7.2.2 the Authority shall be entitled, without the consent of any other Party, to transfer all its rights and obligations hereunder, to any person to whom it assigns or otherwise disposes of the benefit of the Design Build Finance and Maintain Agreement in accordance with Clause 58 (*Sub-Contracting and Assignment*) of the Design Build Finance and Maintain Agreement and, otherwise, with Project Co's and the Contractor's consent (not to be unreasonably withheld or delayed);

7.2.3 nothing in this sub-clause shall restrict the rights of the Welsh Ministers to effect a statutory transfer;

7.2.4 the Contractor shall assign this Agreement to any party to whom it assigns the Construction Contract (in accordance with the terms of that agreement); and

7.2.5 the Security Trustee may assign or transfer its rights and obligations to a successor trustee of the Funders under the Funding Agreements without the consent of any other Party and this Clause 7.2 (*Restriction on Assignment*) shall not prevent any Funder assigning or transferring its rights under the Funding Agreements and the Security Documents in accordance with the terms of the Funding Agreements.

7.3 **No Loss**

The Contractor agrees that it shall not at any time assert that any permitted assignee in terms of this Agreement is precluded from recovering any loss resulting from any breach of this Agreement by reason that such assignee is not an original party to this Agreement or that no loss or a different loss has been suffered by such assignee.

8 **CONFIDENTIALITY**

8.1 The parties shall be bound to observe, mutatis mutandis, the terms of Clause [insert reference] of the Construction Contract with respect to any information or document referred to in Clause [insert reference] of the Construction Contract which shall come into its possession pursuant to this Agreement.]

8.2 The Contractor agrees that the Authority shall be entitled to disclose the terms of this Agreement in accordance with Clause 62 (*Confidentiality*) of the Design Build Finance and Maintain Agreement.

9 **NOTICES**

9.1 Any notice or other communication given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by first class recorded post or emailed to the party named therein at the address or email address of such party shown in this Agreement or such other address or email address as such party may by notice or other communication in writing nominate for the purpose of service .

9.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

9.2.1 if delivered by hand at the time of delivery; or

9.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting,

provided that, in either case, a notice or other communication 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; or

9.3 Notices given by email shall be deemed to have been received:

9.3.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the relevant email address specified in Clauses [9.4 to 9.7] (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

9.3.2 by 11am on the next following Business Day, if 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 no error message indicating failure has been received by the sender and provided that within twenty-four (24) hours of transmission a hard copy of the email (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 this Clause 9 (*Notices*) and where such notice is addressed to the Authority, copied to [♦[83]].

9.4 Any notice to be given to the [Authority] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing to the relevant party by the [Authority].

[83] Insert Welsh Government details.

9.5 Any notice to be given to the [Security Trustee] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Security Trustee].

9.6 Any notice to be given to [Project Co] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Project Co].

9.7 Any notice to be given to the [Contractor] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Contractor].

9.8 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.

10 PAYMENTS AND TAXES

10.1 Payments

All payments under this Agreement to any Party 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 to the other Parties from time to time.

10.2 VAT

10.2.1 All amounts stated to be payable by any Party under this Agreement shall be exclusive of any VAT properly payable in respect of the supplies to which they relate.

10.2.2 Each Party shall pay any VAT properly payable hereunder in respect of any supply made to it under this Agreement, provided that it shall first have received a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.

10.3 Deductions from payments

All sums payable by a Party to any other Party under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of taxation, save as may be required by Law.

11 DEFAULT INTEREST

Each Party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not made on the 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.

12 AGGREGATE LIABILITY

Notwithstanding any other provision of this Agreement, the Contractor's aggregate liability from time to time under this Agreement and the Construction Contract shall not at any time exceed its maximum liability as stated in the Construction Contract.

13 PROFESSIONAL INDEMNITY INSURANCE

13.1 The Contractor by this Agreement covenants with the Authority that it has at its own cost taken out, or procured the taking out of, professional indemnity insurance with reputable insurers carrying on business in the European Union with a limit of indemnity of not less than £[♦],000,000 ([♦] million pounds) [on an each and every claim basis][in the annual aggregate] with at least one (1) annual reinstatement, in relation to the Works, provided always that:

13.1.1 such insurance shall be in place from the commencement of the Works until no less than twelve (12) years after the Actual Completion Date or, if earlier, after the date of termination of the Construction Contract;

13.1.2 the insurance premiums in respect of the insurance shall at all times be the responsibility of the Contractor;

13.1.3 if such insurance is not available to the Contractor (and/or design and build contractors engaged in projects of a similar scope, size, nature and complexity as the Contractor) at commercially reasonable rates and terms (excluding any increase in premiums attributable to the actions, omissions, errors or defaults of the Contractor), the Contractor and the Authority will meet and the Contractor will outline the steps it intends to take to manage such risks. If the steps proposed by the Contractor are not acceptable to the Authority (acting reasonably), the Contractor and the Authority shall agree an alternative method of managing such risk.

13.2 The Contractor will, upon request, provide the Authority with reasonable evidence that the policy referred to in this Clause 13 (*Professional Indemnity Insurance*) is in full force and effect in accordance with the requirements of this Clause 13 (*Professional Indemnity Insurance*).

14 THIRD PARTY RIGHTS

For the purposes of the Contracts (Rights of Third Parties) Act 1999, it is agreed 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 provisions contained herein except for any person to whom the benefit of this Agreement is assigned or transferred in accordance with Clause 7 (*Assignment*).

15 AGENCY

15.1 No Delegation

No provision of this Agreement shall be construed as a delegation by the Authority of any of its statutory authority to any other Party.

15.2 No Agency

Save as otherwise provided in this Agreement, no other Party shall be or be deemed to be an agent of the other Parties nor shall any party hold itself out as having authority or power to bind the other parties in any way.

15.3 Independent Contractor

The Parties shall, at all times, be independent contractors and nothing in this Agreement shall be construed as creating any partnership between the Parties or any relationship of employer and employee between the Parties.

16 WHOLE AGREEMENT

16.1 This Agreement (when read together with the Design Build Finance and Maintain Agreement, the Construction Contract and the Parent Company Guarantee) contains or expressly refers to the entire agreement between the Parties with respect to the specific subject matter of this Agreement and expressly excludes any warranty, condition or other undertaking implied at Law or by custom and supersedes all previous agreements and understandings between the Parties with respect thereto and each of the Parties acknowledges and confirms that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement.

16.2 Nothing in this Agreement is intended to or shall operate so as to exclude or limit any liability for fraud or fraudulent misrepresentation.

17 WAIVER

Failure by any Party at any time to enforce any provision of this Agreement or to require performance by the other Parties of any provision of this Agreement shall not be construed as a waiver of such provision and shall not affect the validity of this Agreement or any part of it or the right of the relevant Party to enforce any provision in accordance with its terms.

18 SEVERABILITY

If any condition, Clause or provision of this Agreement not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

19 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.

20 AMENDMENTS

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Parties.

21 COUNTERPARTS

21.1 This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

22 GOVERNING LAW AND JURISDICTION

22.1 Law

This Agreement shall be governed by and construed in all respects in accordance with the laws of England and Wales.

22.2 Jurisdiction

The Parties each submit to the jurisdiction of the Courts of England and Wales as regards any claim or matter arising in relation to this Agreement.

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

SECTION 2

SERVICE PROVIDER'S COLLATERAL AGREEMENT

COLLATERAL WARRANTY

AMONG:

(1) [AUTHORITY] (the "**Authority**");

(2) [SERVICE PROVIDER] (the "**Service Provider**");

(3) [PROJECT CO] ("**Project Co**"); and

(4) [SECURITY TRUSTEE] ("**Security Trustee**").

WHEREAS:

(A) The Authority and Project Co have agreed the terms on which Project Co will design, develop and construct and provide certain services in connection with the redevelopment of [description of facilities] (the "**Development**") at the Site (as that expression is defined in the Design Build Finance and Maintain Agreement) and, accordingly, have entered into the Design Build Finance and Maintain Agreement and the Project Documents.

(B) [Description of financing arrangements].

(C) [Description of documents entered into by Project Co as security for its obligations.]

(D) The Service Provider and Project Co have entered into an agreement of even date herewith relating to the provision of certain of the Services (as defined in the Design Build Finance and Maintain Agreement) by the Service Provider to enable Project Co to discharge its obligations to the Authority regarding such Services under the Design Build Finance and Maintain Agreement and the Project Documents (the "**Service Contract**").

(E) This Service Provider's Collateral Agreement (the "**Agreement**") is one of the Service Providers' Collateral Agreements contemplated by the Design Build Finance and Maintain Agreement.

NOW IT IS HEREBY AGREED as follows:

1 **DEFINITIONS AND INTERPRETATION**

1.1 **Definitions**

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

"Ancillary Documents"	has the meaning given in the Design Build Finance and Maintain Agreement;
"Business Day"	means a day other than a Saturday, Sunday or a bank holiday in England and Wales;
"Design Build Finance and Maintain Agreement"	means the Design Build Finance and Maintain Agreement of even date herewith between (1) the Authority and (2) Project

	Co;
"Event of Project Co Default"	has the meaning given in the Service Contract;
"Funders"	means [♦];
"Funders' Service Provider Direct Agreement"	is the agreement of even date herewith between, amongst others, Project Co, the Service Provider and the Senior Funder;
"Funders' Direct Agreement"	means [♦];
"Funding Agreements"	means [♦];
"Novation Agreement"	has the meaning given in Clause 4.5.2(a);
"Novation Effective Date"	means the date of performance of the obligations set out in Clause 4 (*Novation*);
"Parent Company Guarantee"	has the meaning given in the Service Contract;
"Proposed Novation Date"	has the meaning given in Clause 4.1 (*Proposed Substitute*);
"Proposed Novation Notice"	has the meaning given in Clause 4.1 (*Proposed Substitute*);
"Proposed Step-in Date"	has the meaning given in Clause 3.1 (*Step-in Notice*);
"Proposed Substitute"	has the meaning given in Clause 4.1 (*Proposed Substitute*);
"Security Documents"	has the meaning given in the Funders' Direct Agreement;
"Senior Funder"	means [insert details];
"Service Contract"	has the meaning given in the Design Build Finance and Maintain Agreement;
"Step-in Date"	means the date of issue of the Step-in Undertaking;
"Step-in Notice"	has the meaning given in Clause 3.1 (*Step-in Notice*);
"Step-in Period"	means the period commencing on the Step-in Date and ending on the earliest of: (a) the date of the first anniversary of the Step-in Date (but subject always to Clause 4.7 (*Extension of Step-in Period*)); (b) the Step-out Date;

(c) the Novation Effective Date; and

(d) termination of the Service Contract under Clause 3.3 (*Restriction of Right of Termination*);

"Step-in Undertaking"	has the meaning given in Clause 3.2.4;
"Step-out Date"	has the meaning given in Clause 3.4.1;
"Termination Notice"	has the meaning given in Clause 2.4 (*Termination Notice*).

1.2 **Interpretation**

Save to the extent that the context or the express provisions of this Agreement otherwise require:

1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;

1.2.2 all references to Clauses are references to Clauses of this Agreement;

1.2.3 all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;

1.2.4 all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;

1.2.5 any reference to time of day shall be a reference to Cardiff time;

1.2.6 the words "herein", "hereto" and "hereunder" refer to this Agreement as a whole and not to the particular Clause in which such word may be used;

1.2.7 words importing the singular include the plural and vice versa;

1.2.8 words importing a particular gender include all genders;

1.2.9 "person" includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency, unincorporated body of persons or association;

1.2.10 any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;

1.2.11 references to "Party" means a party to this Agreement and references to "Parties" shall be construed accordingly;

1.2.12 all monetary amounts are expressed in Pounds Sterling;

1.2.13 references to the word "includes" or "including" are to be construed without limitation;

1.2.14 the obligations of any Party under this Agreement are to be performed at that Party's own cost and expense;

1.2.15 terms used in this Agreement that are defined in the Design Build Finance and Maintain Agreement or the Ancillary Documents shall have the meanings given to them in the Design Build Finance and Maintain Agreement or the Ancillary Documents, as appropriate.

2 TERMINATION NOTICE AND AUTHORITY TERMINATION

2.1 Service Provider's Warranties and Undertakings

The Service Provider warrants and undertakes to the Authority that it has complied with and fulfilled and shall continue to comply with and fulfil its duties and obligations arising under or by virtue of the Service Contract, provided that the Authority shall only be entitled to make a claim against the Service Provider under this Clause 2.1 (*Service Provider's Warranties and Undertakings*) if the Design Build Finance and Maintain Agreement has terminated and shall not be entitled to do so during the Step-in Period or after the Service Contract has been novated under Clause 4 (*Novation*).

2.2 Liability of Service Provider

Any liability arising from any claim for breach of the warranty under or pursuant to Clause 2.1 (*Service Provider's warranties and Undertakings*) shall be in addition to and without prejudice to any other present or future liability of the Service Provider to the Authority (including, without prejudice to the generality of the foregoing, any liability in negligence) and shall not be released, diminished or in any other way be affected by any independent enquiry into any relevant matter which may be made or

carried out by or on behalf of the Authority by any person nor by any action or omission of any person whether or not such action or omission might give rise to an independent liability of such person to the Authority provided always that the Service Provider shall owe no greater duties or obligations to the Authority under this Agreement than it owes or would have owed to Project Co under the Service Contract. Without prejudice to Clause 12 (*Aggregate Liability*), the Service Provider shall be entitled in any action or proceedings brought by the Authority under this Agreement to rely on any limitation or exclusion of liability in the Service Contract and to raise equivalent rights in defence of liability (but excluding set-offs and counterclaims) as it would have against Project Co under the Service Contract.

2.3 **[Retained Employee Indemnity**

If the Design Build Finance and Maintain Agreement is terminated because of a Project Co default then the Service Provider shall indemnify and keep indemnified the Authority against all Direct Losses relating to any contractual claims made by Retained Employees as a consequence of their redundancy resulting from the early termination of the Design Build Finance and Maintain Agreement and/or the Service Contract. The Authority will use reasonable endeavours to mitigate such Direct Losses.]

2.4 **Termination Notice**

2.4.1 The Service Provider undertakes not to terminate the Service Contract on account of an Event of Project Co Default without first giving the Authority not less than [fifteen (15)] Business Days' prior written notice specifying the grounds for that termination. Subject to Clause 2.4.2 below any such notice shall be a "**Termination Notice**".

2.4.2 Where the Service Provider's right to terminate is subject to the terms of the Funders' Service Provider Direct Agreement then the Service Provider shall notify the Authority of the same as soon as reasonably practicable upon becoming aware of the provisions of the Funders' Service Provider Direct Agreement applying. Thereafter as soon as the Service Provider becomes entitled to terminate the Service Contract free from the constraints contained in the Funders' Service Provider Direct Agreement, whether upon the expiry of the Step-in Period (as such term is defined in the Funders' Service Provider Direct Agreement) or otherwise, then the Service Provider undertakes to the Authority not to terminate the Service Contract on account of an Event of Project Co Default (whether occurring before or after the Service Provider's right to terminate the Service Contract was free from the constraints of the Funders' Service Provider Direct Agreement) without first giving the Authority not less than [fifteen (15)] Business Days' prior notice specifying the grounds for that termination and noting that the Service Provider's right of termination is not subject to the Funders' Service Provider Direct Agreement. Any such notice, other than one given in circumstances where there is no default under the Service Contract by Project Co or the Service Provider, shall for

the purposes of this Agreement also be a Termination Notice and the provisions of this Agreement shall apply accordingly.

2.4.3 Notwithstanding any provision of the Service Contract to the contrary, on termination of the Design Build Finance and Maintain Agreement by the Authority, the Parties agree that the Service Contract shall not come to an end except in accordance with the terms of this Agreement.

2.4.4 The Authority acknowledges that it shall not be entitled to exercise its rights under Clauses 3 (*Step-in and Step-out*) and 4 (*Novation*):

where the event giving rise to termination of the Design Build Finance and Maintain Agreement is a Service Provider Event of Default (as that term is defined in the Service Contract) whether or not at the relevant time there has been notice to terminate the Service Contract for such Service Provider Event of Default;

(a) until the Security Trustee has released its security over the Service Contract; or

(b) until the Security Trustee has confirmed to the Authority in writing that it has no further claims or interest in the claims of Project Co or any Suitable Substitute Contractor (as such term is defined in the Funders' Service Provider Direct Agreement) against the Service Provider whether pursuant to the Security Documents, the Service Contract or the enforcement of any rights under the Security Documents or the Funders' Service Provider Direct Agreement.

3 STEP-IN AND STEP-OUT

3.1 Step-in Notice

3.1.1 If the Authority has terminated the Design Build Finance and Maintain Agreement in accordance with the terms of the Design Build Finance and Maintain Agreement or if the Authority has received a Termination Notice, then subject to the provisions of this Agreement, the Authority may give written notice to the Service Provider (copied to the Security Trustee) (a "**Step-in** Notice") of the intention of the Authority to issue a Step-in Undertaking on a specified date (the "**Proposed Step-in Date**") provided that such Proposed Step-in Date shall be:

(a) no later than [five (5)] Business Days after termination of the Design Build Finance and Maintain Agreement where this has been terminated by the Authority; and

(b) no earlier than the date falling five (5) Business Days prior to the date of expiry of the Termination Notice and no later than the date of expiry of the Termination Notice where a Termination Notice has been given by the Service Provider.

3.1.2 Unless the Service Provider otherwise consents, only one (1) Step-in Notice may be given during the period of this Agreement. Subject to Clause 5.1 (*Rights of Termination*) below, the Service Provider shall not be entitled to terminate the Service Contract until after the Proposed Step-in Date.

3.2 **Notice of Obligations and Step-in Undertaking**

3.2.1 Within [three (3)] Business Days of receipt of any Step-in Notice, the Service Provider shall give written notice to the Authority of any sums of which the Service Provider has actual knowledge which are due and payable but unpaid by Project Co and of any other material obligations or liabilities, of which the Service Provider has actual knowledge, which should have been performed or discharged by Project Co under the Service Contract, in each case, as at the date of the Step-in Notice.

3.2.2 The Service Provider shall inform the Authority in writing as soon as reasonably practicable of:

(a) any change in such sums, obligations or liabilities referred to in Clause 3.2.1; and

(b) any further sums, obligations or liabilities thereafter falling due and payable but unpaid or falling due for performance or discharge and unperformed or undischarged (as the case may be);

in each case of which the Service Provider has actual knowledge, before the Step-in Date.

3.2.3 The Service Provider shall give the Authority the information referred to in Clauses 3.2.1 and 3.2.2 in good faith and may not give any further notifications pursuant to Clause 3.2.2 less than [two (2)] Business Days prior to the Proposed Step-in Date. The Authority shall not be required to assume any liability under a Step-in Undertaking for any outstanding obligations or liabilities of Project Co to the Service Provider which are not notified to the Authority pursuant to Clauses 3.2.1 or 3.2.2.

3.2.4 Not later than the Proposed Step-in Date the Authority shall decide if it is prepared to issue a Step-in Undertaking. If it does so decide, the Authority shall promptly give the Service Provider written notification of such decision and, at the same time,

provide a copy of such notification to the Senior Funder. The Authority shall deliver to the Service Provider on the Proposed Step-in Date, a written undertaking in form and substance agreed with the Service Provider (both the Authority and the Service Provider acting reasonably) (the "**Step in Undertaking**"), incorporating a clause in terms similar to Clause 11 (*Default Interest*) (but only to the extent that there will not be double counting of default interest accruing under the Service Contract and this Agreement), and undertaking to the Service Provider:

(a) to pay or procure the payment to the Service Provider, within [fifteen (15)] Business Days of demand by the Service Provider, of any sum due and payable but unpaid by Project Co to the Service Provider under the Service Contract before the Step-in Date and which has been notified by the Service Provider to the Authority in accordance with Clause 3.2.1 or 3.2.2;

(b) to perform or discharge or procure the performance or discharge of any unperformed or undischarged obligations of Project Co under the Service Contract which shall have fallen due for performance or discharge before the Step-in Date and which have been notified by the Service Provider to the Authority in accordance with Clause 3.2.1 or 3.2.2 within such period as the Service Provider may reasonably require;

(c) to pay or procure the payment of any sum due and payable by Project Co under the Service Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to Clauses 3.4 (*Step-Out*) and 4.5.3(b)) but not, to avoid doubt, any sum due in respect of any Services provided before the Step-in Date; and

(d) to perform or discharge or procure the performance or discharge of any obligations of Project Co under the Service Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to Clauses 3.4 (*Step-Out*) and 4.5.3(b)) but not, to avoid doubt, to perform or discharge or to procure the performance or discharge of any obligations in respect of any Services provided before the Step-in Date.

3.2.5 Following notification of the Authority's decision pursuant to Clause 3.2.4, the Security Trustee shall, on or before the Proposed Step-in Date, take any action which is necessary unconditionally and irrevocably to release the Service Contract and the Parent Company Guarantee from the security constituted by the Security Documents.

3.2.6 Upon release by the Security Trustee of its security over the Parent Company Guarantee in accordance with Clause 3.2.5 Project Co shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority in accordance with clause [insert reference] of the same.

3.2.7 If the Authority shall not have issued the Step-in Undertaking on or before the Proposed Step-in Date the Step-in Notice shall be deemed to have been withdrawn and the rights and obligations of the Parties shall be construed as if the Step-in Notice had not been given.

3.3 **Restriction of Right of Termination**

During or in respect of the Step-in Period, the Service Provider confirms to the Authority that it shall continue to observe and perform its duties and obligations under the Service Contract and shall, without prejudice to Clause 5.1 (*Rights of Termination*), only be entitled to exercise its rights of termination under the Service Contract:

3.3.1 by reference to an Event of Project Co Default arising during the Step-in Period provided that no event of default by Project Co under the Design Build Finance and Maintain Agreement (whether resulting in termination of the Design Build Finance and Maintain Agreement or otherwise, and notwithstanding that it has occurred during the Step-in Period) shall entitle the Service Provider to exercise such rights of termination during the Step-in Period; or

3.3.2 if the Authority, in breach of the terms of the Service Contract, fails to pay when due any amount owed to the Service Provider or fails to perform or discharge when falling due for performance or discharge any obligation under the Step-in Undertaking or fails to procure such payment or performance or discharge; or

3.3.3 if such rights of termination arise in circumstances where there is no default under the Service Contract by the Authority or the Service Provider.

3.4 **Step-Out**

3.4.1 the Authority may, at any time, give the Service Provider at least [thirty (30)] days' prior written notice to terminate the Step-in Period on a date specified in the notice (the "**Step-out Date**");

3.4.2 the Authority shall give the Service Provider at least [thirty (30)] days' prior written notice that (subject to Clause 4.4.2) the Step-in Period will end due to the occurrence (subject to Clause 4.7 (*Extension of Step-In Period*) of the first anniversary of the Step-in Date;

provided that:

(a) the Authority has performed and discharged in full or procured the performance and discharge in full of any obligations of Project Co under the Service Contract in relation to the maintenance of records and the provision of reports during the Step-in Period so as to permit the Service Provider to monitor the performance of Project Co's other obligations under the Service Contract; and

(b) all liability under the Step-in Undertaking pursuant to any claims made up to the date specified in either Clause 3.4.1 or Clause 3.4.2 (as the case may be) shall have been fully and unconditionally discharged,

the Authority shall be released from the Step-in Undertaking on the expiry of the Step-in Period in accordance with Clauses 3.4.1 and 3.4.2. Such release shall not affect the continuation of Project Co's obligations towards the Service Provider under the Service Contract.

4 NOVATION

4.1 Proposed Substitute

At any time that the Authority is entitled to give a Step-in Notice pursuant to Clause 3.1 (*Step-in Notice*) or at any time during the Step-in Period the Authority may give notice (copied to the Security Trustee) (a "**Proposed Novation Notice**") to the Service Provider that it wishes itself or another person (a "**Proposed Substitute**") to assume, by way of sale, transfer or other disposal, the rights and obligations of Project Co under the Service Contract and specifying a date (the "**Proposed Novation Date**"):

4.1.1 falling not later than [fifteen (15)] Business Days after termination of the Design Build Finance and Maintain Agreement where this has been terminated by the Authority;

4.1.2 falling not later than the expiry of the Termination Notice where a Proposed Novation Notice is given by the Authority at a time when it is entitled to give a Step-in Notice pursuant to Clause 3.1 (*Step-in Notice*); and

4.1.3 falling not later than [twenty-eight (28)] Business Days after the date of the Proposed Novation Notice, where a Proposed Novation Notice is given during a Step-in Period.

Save as provided in Clause 4.4 (*Consent withheld*), only one (1) Proposed Novation Notice may be given during the period of this Agreement.

Without prejudice to Clauses 3.3 (*Restriction of Right of Termination*) and 5.1 (*Rights of Termination*), the Service Provider shall not be entitled to terminate the Service Contract during the notice period specified in a Proposed Novation Notice.

4.2 **Information for Consent to Novation**

If the Proposed Novation Notice specifies the Authority as the Proposed Substitute, the Service Provider's consent to the novation shall be deemed to have been given automatically. Where the Proposed Substitute is not the Authority, a novation in accordance with a Proposed Novation Notice shall only be effective if the Service Provider consents to that novation in writing in accordance with Clause 4.3 (*Grant of Consent*) and the Authority shall (as soon as practicable) supply the Service Provider with the following information (copied to the Security Trustee):

4.2.1 the name and registered address of the Proposed Substitute;

4.2.2 the names of the shareholders in the Proposed Substitute and the share capital owned by each of them;

4.2.3 the names of the directors and the secretary of the Proposed Substitute;

4.2.4 details of the means by which it is proposed to finance the Proposed Substitute (including the extent to which such finance is committed and any conditions precedent as to its availability for drawing); and

4.2.5 the resources (including contractual arrangements) which are to be available to the Proposed Substitute to enable it to perform its obligations under the Service Contract.

4.3 **Grant of Consent**

The Service Provider may withhold or delay consent to a novation only where the Proposed Substitute is not the Authority and the Authority has failed to show to the Service Provider's satisfaction (acting reasonably) that:

4.3.1 the Proposed Substitute has the legal capacity, power and authorisation to become a party to and perform the obligations of Project Co under the Service Contract; and

4.3.2 the technical competence and financial standing of and the technical and financial resources available to the Proposed Substitute are sufficient to perform the obligations of Project Co under the Service Contract.

The Service Provider shall notify the Authority in writing, within [five (5)] Business Days of the later of receipt of a Proposed Novation Notice and all information required under Clause 4.2 (*Information for Consent to Novation*), as to whether or not it has decided to grant such consent (together with an explanation of its reasons if it has decided to withhold its consent).

4.4 **Consent withheld**

If, in accordance with Clause 4.3 (*Grant of Consent*), the Service Provider withholds its consent to a Proposed Novation Notice, the Authority shall be entitled to give one or more subsequent Proposed Novation Notices, pursuant to the provisions of Clause 4.1 (*Proposed Substitute*), containing changed particulars relating to the same Proposed Substitute or particulars relating to another Proposed Substitute which (where the replacement Proposed Substitute is not the Authority) the Authority has good cause to believe would fulfil the requirements of Clauses 4.3.1 and 4.3.2, provided that only one (1) Proposed Novation Notice may be outstanding at any one time, and provided further that:

4.4.1 where a Step-in-Notice has not been issued, any revised Proposed Novation Date shall be a date falling no later than the date specified in Clause 4.1.1 or 4.1.2 as appropriate; and

4.4.2 if the Proposed Novation Notice was served during the Step-in Period, any revised Proposed Novation Date shall be a date falling not later than [twenty-eight (28)] Business Days after the date of the revised Proposed Novation Notice.

4.5 **Implementation of Novation**

4.5.1 If the Service Provider consents to a novation pursuant to a Proposed Novation Notice (whether automatically or otherwise), then on the Proposed Novation Date and without prejudice to Clause 5.1 (*Rights of Termination*):

(a) following notification pursuant to Clause 4.1 (*Proposed Substitute*) and in the absence of any prior release in accordance with Clause 3.2.5, the Security Trustee shall, on or before the Proposed Novation Date, take any action which is necessary unconditionally and irrevocably to release the Service Contract and the Parent Company Guarantee from the security constituted by the Security Documents; and

(b) Project Co shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority or other Proposed Substitute in accordance with Clause [insert reference] of the same, and on the Proposed Novation Date and without prejudice to Clause 5.1 (*Rights of Termination*).

4.5.2 Subject to the prior performance by the Security Trustee and Project Co of their respective obligations under Clause 4.5.1(a) and Clause 4.5.1(b) the Proposed Substitute shall become a party to the Service Contract in place of Project Co and, thereafter, shall be treated as if it was and had always been named as a party to the Service Contract in place of Project Co; and

(a) the Service Provider, Project Co and the Proposed Substitute shall enter into a novation agreement (the "Novation Agreement") and any other requisite agreements, in form and substance satisfactory to the Service Provider (acting reasonably), pursuant to which:

(i) the Proposed Substitute shall be granted all of the rights of Project Co under the Service Contract (including those arising prior to the end of the Step-in Period);

(ii) subject to the Service Provider giving to the Proposed Substitute within [three (3)] Business Days of receipt of the Proposed Novation Notice such notice as is referred to in Clause 3.2.1 and to the provisions of Clauses 3.2.2 and 3.2.3 mutatis mutandis, the Proposed Substitute shall assume all of the obligations and liabilities of Project Co under the Service Contract (including those arising prior to the end of any Step-in Period and those arising during the period of the Proposed Novation Notice);

provided that the Service Provider will not be in breach of any of its obligations under this Agreement if the Proposed Substitute does not enter into one or other of such agreements.

4.5.3 On and after the Novation Effective Date:

(a) the Service Provider shall owe its obligations under the Service Contract (whether arising before, on or after such date) to the Proposed Substitute and the receipt, acknowledgement or acquiescence of the Proposed Substitute shall be a good discharge; and

(b) if the Authority shall have entered into a Step-in Undertaking, the Authority will be released from the Step-in Undertaking, provided that:

(i) all obligations of the Authority under the Step-in Undertaking which have accrued up to the Novation Effective Date and are identifiable as at that date shall have been fully and unconditionally discharged; and

(ii) the Authority has performed and discharged in full or procured the performance and discharge in full of the obligations of Project Co under the Service Contract in relation to the maintenance of records and the provision of reports during the Step-in Period up to the Novation Effective Date so as to permit the Service Provider to monitor the performance of Project Co's other obligations under the Service Contract.

4.5.4 the Authority and the Service Provider shall use all reasonable endeavours to agree and the Authority shall use reasonable endeavours to procure that the Proposed Substitute agrees any amendments to the Service Contract necessary to reflect Clause 3.2.2 and the fact that the Design Build Finance and Maintain Agreement may have terminated at the time of the Novation Effective Date.

4.6 **Termination After Novation**

After the Novation Effective Date the Service Provider shall only be entitled to exercise its rights of termination under the Service Contract:

4.6.1 in respect of any Event of Project Co Default arising after that date in accordance with the Service Contract; or

4.6.2 if the Proposed Substitute does not discharge the obligations and liabilities assumed by it under Clause 4.5.2(a) which relate to matters arising prior to the end of the Step-in Period within [fifteen (15)] Business Days following the Novation Effective Date.

4.7 **Extension of Step-In Period**

As at the date of the first anniversary of the Step-in Date, if the Step-in Period has not previously ended, and:

4.7.1 the Authority is in the course of conducting discussions in good faith with a Proposed Substitute (the novation to whom has been approved by the Service Provider whether automatically or otherwise in accordance with Clause 4.3 (*Grant of Consent*)), the Step-in Period shall be extended and shall continue until such

date as is proposed by the Authority and agreed by the Service Provider; or

4.7.2 a contract has been entered into between the Authority and a Proposed Substitute (which has been approved by the Service Provider in accordance with Clause 4.3 (*Grant of Consent*)) as at such date,

the Step-in Period shall be extended and shall continue until the date such contract comes into force, provided that such date shall not be later than [thirty (30)] Business Days after the last date of execution of such contract.

5 RIGHTS AND OBLIGATIONS UNDER THE SERVICE CONTRACT

5.1 Rights of Termination

If:

5.1.1 no Step-in Notice or Proposed Novation Notice is given before a Termination Notice expires or within [fifteen (15)] Business Days after termination of the Design Build Finance and Maintain Agreement by the Authority; or

5.1.2 a Step-in Undertaking is not issued on the Proposed Step-in Date; or

5.1.3 the Step-in Notice is withdrawn or, pursuant to Clause 3.2.7, deemed to have been withdrawn; or

5.1.4 the Step-in Period ends before the occurrence of the Novation Effective Date; or

5.1.5 in the absence of a Step-in Undertaking, the Service Provider withholds its consent to a novation pursuant to a Proposed Novation Notice, in accordance with Clause 4.3 (*Grant of Consent*), and does not subsequently grant consent to a novation in accordance with Clause 4.4 (*Consent Withheld*) on or before the Proposed Novation Date; or

5.1.6 in the absence of a Step-in Undertaking, the obligations of the Proposed Substitute set out in Clause 4.5 (*Implementation of Novation*) are not performed on the Proposed Novation Date; or

5.1.7 the Service Provider is entitled to terminate the Service Contract under Clause 3.3 (*Restriction of Right of Termination*) or 4.6 (*Termination after Novation*); or

5.1.8 the Authority exercises its right to Step-out under Clause 3.4.1,

the Service Provider shall, on and from the Step-out Date, be entitled to:

5.1.9 exercise all of its rights under the Service Contract and act upon any and all grounds for termination available to it in relation to the Service Contract whenever occurring; and/or

5.1.10 pursue any and all claims and exercise any and all rights and remedies against Project Co.

5.2 Project Co's Obligations to Continue

Until completion of a novation pursuant to Clause 4.5 (*Implementation of Novation*) (unless the terms of such novation expressly preserve an obligation or liability of Project Co), Project Co shall continue to be liable for all its obligations and liabilities, whenever occurring, under or arising from the Service Contract notwithstanding:

5.2.1 the service of a Step-in Notice or the issue of a Step-in Undertaking or the expiry of the Step-in Period or the release of a Step-in Undertaking; or

5.2.2 the service of a Proposed Novation Notice; or

5.2.3 any other provision of this Agreement.

6 REVOCATION OF NOTICES

A Termination Notice and a Step-in Notice may each be revoked (in writing to the recipient) by the Party giving them before the expiry of their respective notice periods. Upon any such revocation, the rights and obligations of the Parties shall be construed as if the relevant notice had not been given.

7 ASSIGNMENT

7.1 Binding on Successors and Assignees

This Agreement shall be binding on and shall enure to the benefit of the Parties and their respective successors and permitted assignees. In the case of the Authority, its successors shall include any person to which the Welsh Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Authority upon the Authority ceasing to exist, transfers the rights and obligations of the Authority under this Agreement.

7.2 **Restriction on Assignment**

No Party shall assign or transfer any part of its respective rights or obligations under this Agreement without the prior consent of the others (such consent not to be unreasonably withheld or delayed), provided that:

7.2.1 Project Co shall not assign this Agreement to any party other than a party to whom Project Co's interests in the Design Build Finance and Maintain Agreement and Service Contract are assigned in accordance with the terms of the Design Build Finance and Maintain Agreement and Service Contract respectively;

7.2.2 the Authority shall be entitled, without the consent of any other Party, to transfer all its rights and obligations hereunder, to any person to whom it assigns or otherwise disposes of the benefit of the Design Build Finance and Maintain Agreement in accordance with Clause 58 (*Sub-Contracting and Assignment*) of the Design Build Finance and Maintain Agreement and, otherwise, with Project Co's and the Service Provider's consent (not to be unreasonably withheld or delayed);

7.2.3 nothing in this sub-clause shall restrict the rights of the Welsh Ministers to effect a statutory transfer;

7.2.4 the Service Provider shall assign this Agreement to any party to whom it assigns the Service Contract (in accordance with the terms of that agreement); and

7.2.5 the Security Trustee may assign or transfer its rights and obligations to a successor trustee of the Funders under the Funding Agreements without the consent of any other Party and this Clause 7.2 (*Restriction on Assignment*) shall not prevent any Funder assigning or transferring its rights under the Funding Agreements and the Security Documents in accordance with the terms of the Funding Agreements.

7.3 **No Loss**

The Service Provider agrees that it shall not at any time assert that any permitted assignee in terms of this Agreement is precluded from recovering any loss resulting from any breach of this Agreement by reason that such assignee is not an original party to this Agreement or that no loss or a different loss has been suffered by such assignee.

8 **CONFIDENTIALITY**

8.1 The parties shall be bound to observe, mutatis mutandis, the terms of Clause [♦] of the Service Contract with respect to any information or

document referred to in Clause [♦] of the Service Contract which shall come into its possession pursuant to this Agreement.]

8.2 The Service Provider agrees that the Authority shall be entitled to disclose the terms of this Agreement in accordance with Clause 62 (*Confidentiality*) of the Design Build, Finance and Maintain Agreement.

9 **NOTICES**

9.1 Any notice or other communication given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by first class recorded post or emailed to the party named therein at the address or email address of such party shown in this Agreement or such other address or email address as such party may by notice or other communication in writing nominate for the purpose of service .

9.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

9.2.1 if delivered by hand at the time of delivery; or

9.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting,

provided that, in either case, a notice or other communication 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; or

9.3 Notices given by email shall be deemed to have been received:

9.3.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the relevant email address specified in Clauses [9.4 to 9.7] (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

9.3.2 by 11am on the next following Business Day, if 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 no error message indicating failure has been received by the sender and provided that within twenty-four (24) hours of transmission a hard copy of the email (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 this Clause 9 (*Notice*s) and where such notice is addressed to the Authority, copied to [♦[84]].

9.4 Any notice to be given to the [Authority] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing to the relevant party by the [Authority].

9.5 Any notice to be given to the [Security Trustee] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Security Trustee].

9.6 Any notice to be given to [Project Co] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Project Co].

9.7 Any notice to be given to the [Service Provider] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Service Provider].

9.8 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.

10 PAYMENTS AND TAXES

10.1 Payments

All payments under this Agreement to any Party 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 to the other Parties from time to time.

10.2 VAT

10.2.1 All amounts stated to be payable by any Party under this Agreement shall be exclusive of any VAT properly payable in respect of the supplies to which they relate.

10.2.2 Each Party shall pay any VAT properly payable hereunder in respect of any supply made to it under this Agreement, provided that it shall first have received a valid tax invoice in respect of

[84] Insert Welsh Government details.

that supply which complies with the requirements of Part III VAT Regulations 1995.

10.3 **Deductions from payments**

All sums payable by a Party to any other Party under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of taxation, save as may be required by Law.

11 DEFAULT INTEREST

Each Party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not made on the 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.

12 AGGREGATE LIABILITY

Notwithstanding any other provision of this Agreement, the Service Provider's aggregate liability from time to time under this Agreement and the Service Contract shall not at any time exceed its maximum liability as stated in the Service Contract.

13 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 provisions contained herein except for any person to whom the benefit of this Agreement is assigned or transferred in accordance with Clause 7(*Assignment*).

14 AGENCY

14.1 **No Delegation**

No provision of this Agreement shall be construed as a delegation by the Authority of any of its statutory authority to any other Party.

14.2 **No Agency**

Save as otherwise provided in this Agreement, no other Party shall be or be deemed to be an agent of the other Parties nor shall any party hold itself out as having authority or power to bind the other parties in any way.

14.3 **Independent Contractor**

The Parties shall, at all times, be independent contractors and nothing in this Agreement shall be construed as creating any partnership between the Parties or any relationship of employer and employee between the Parties.

15 WHOLE AGREEMENT

15.1 This Agreement (when read together with the Design Build Finance and Maintain Agreement, the Service Contract and the Parent Company Guarantee) contains or expressly refers to the entire agreement between the Parties with respect to the specific subject matter of this Agreement and expressly excludes any warranty, condition or other undertaking implied at Law or by custom and supersedes all previous agreements and understandings between the Parties with respect thereto and each of the Parties acknowledges and confirms that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement.

15.2 Nothing in this Agreement is intended to or shall operate so as to exclude or limit any liability for fraud or fraudulent misrepresentation.

16 WAIVER

Failure by any Party at any time to enforce any provision of this Agreement or to require performance by the other Parties of any provision of this Agreement shall not be construed as a waiver of such provision and shall not affect the validity of this Agreement or any part of it or the right of the relevant Party to enforce any provision in accordance with its terms.

17 SEVERABILITY

If any condition, Clause or provision of this Agreement not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

18 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.

19 AMENDMENTS

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Parties.

20 COUNTERPARTS

20.1 This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

21 GOVERNING LAW AND JURISDICTION

21.1 Law

This Agreement shall be governed by and construed in all respects in accordance with the laws of England and Wales.

21.2 Jurisdiction

The Parties each submit to the jurisdiction of the Courts of England and Wales as regards any claim or matter arising in relation to this Agreement.

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

SECTION 3

KEY SUB-CONTRACTOR COLLATERAL AGREEMENT

COLLATERAL WARRANTY

AMONG:

[**THE AUTHORITY**] having its principal offices at [♦] (the "**Beneficiary**" which expression shall include its successors in title or permitted assignees under this Agreement and/or the Beneficiary's appointee);

and

[**Project Co**], a company incorporated in [Scotland/England and Wales/Northern Ireland] under the Companies Acts (Registered Number [♦]) and having its Registered Office at [♦] ("**Project Co**" which expression shall include its successors in title or permitted assignees under this Agreement);

and

[♦] LIMITED, a company incorporated in [Scotland/England and Wales/Northern Ireland] under the Companies Acts (Registered Number [♦]) and having its Registered Office at [♦] (the "**Contractor**" which expression shall include its successors in title or permitted assignees under this Agreement);

and

[♦] LIMITED, a company incorporated in [Scotland/England and Wales/Northern Ireland] under the Companies Acts (Registered Number [♦]) and having its Registered Office at [♦] (the "**Consultant**").

WHEREAS:

(A) The Beneficiary and Project Co have entered into an agreement for the design, build, finance and maintenance of [insert name of Facilities] (the "**Project**") on or about the date hereof (the "**DBFM Agreement**").

(B) Project Co and the Contractor have entered into a contract (the "**Construction Contract**") on or about the date hereof for the design and construction of the Project (the "**Contract Works**").

(C) The Contractor has entered or intends to enter into an agreement with the Consultant whereby the Consultant will provide certain [design] services (the "**Services**") in connection with the Project ("**the Appointment**") as more particularly described in the Appointment.

(D) It is a condition of the Appointment that the Consultant enters this Agreement with the Beneficiary.

(E) The Beneficiary shall be entitled to rely and is deemed to have relied on the Consultant's reasonable skill, care and diligence in respect of all matters covered by this Agreement insofar as they relate to the Services provided by the Consultant under the Appointment.

NOW IT IS AGREED as follows:

1 **WARRANTY AND UNDERTAKING**

1.1 The Consultant warrants and undertakes to the Beneficiary that it has complied and will continue to comply with all the terms and obligations under or arising out of the Appointment on the Consultant's part to be performed and observed and shall complete the Services in accordance with the Appointment.

1.2 Without prejudice to Clause 1.1 (*Warranty and Undertaking*) of this Agreement, the Consultant further warrants and undertakes to the Beneficiary that:

1.2.1 it has exercised and will continue to exercise all the due skill, care and diligence to be expected from a properly qualified and competent consultant experienced in providing design services on projects similar in nature, size and complexity to the Project in:

(a) the [design] of the Contract Works;

(b) the specification of goods and materials for the Contract Works, and in particular in ensuring that it has not and will not specify for use in relation to the Contract Works any products or materials not in conformity with relevant British or European standards or Codes of Practice or which are at the time of specification generally known within the United Kingdom to an experienced designer of such as the Contract Works to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used; and

(c) the performance of the Services to the Contractor under the Appointment;

1.2.2 the final [design] and all materials and goods specified therein will correspond as to description, quality and condition with the requirements of the Construction Contract; and

1.2.3 the final [design] will at practical completion or its equivalent under the Construction Contract, as the case may be, comply with all relevant legislation and Good Industry Practice.

2 **INSURANCE**

2.1 The Consultant shall maintain throughout the duration of provision of the Services and for a period of twelve (12) years after the date of practical completion or its equivalent under the Construction Contract, professional

indemnity insurance in an amount of not less than [♦] million pounds (£[♦],000,000) sterling on an each and every claim basis and for any one (1) occurrence or series of occurrences arising out of any one (1) event with insurer of good repute carrying on business in the European Union provided always that such insurance is available at rates which are commercially reasonable to consultants.

2.2 In determining whether or not insurance is available as aforesaid, the financial characteristics and claims' record of the Consultant shall be ignored.

2.3 The Consultant shall immediately inform the Beneficiary if such insurance ceases to be available at rates which are commercially reasonable in order that the Consultant and the Beneficiary can consider alternative means of best protecting their respective positions in respect of the Project in the absence of such insurance provided that the Beneficiary shall be entitled to require the Consultant to maintain such lesser amount of Professional Indemnity Insurance as is available to the Consultant at rates which are commercially reasonable.

2.4 As and when it is reasonably requested to do so by the Beneficiary the Consultant shall produce for inspection documentary evidence satisfactory to the Beneficiary (acting reasonably) that its Professional Indemnity Insurance is being maintained.

2.5 The Consultant confirms that this Agreement has been disclosed to and has been approved by the Consultant's Professional Indemnity Insurers or Underwriters.

2.6 Should the Consultant be in breach of any of its obligations under this Clause 2 (*Insurance*), the Beneficiary may itself insure against any risk with respect to which the breach shall have occurred and may recover such sum or sums from the Consultant as a debt.

3 COPYRIGHT

3.1 The Consultant hereby grants to the Beneficiary or its appointee and all those authorised by the Beneficiary an irrevocable, transferable, non-exclusive and royalty-free licence (which shall be capable of assignment) to use and reproduce all information (whether or not stored in computer systems), drawings, models, bills of quantities, specifications, schedules, details, plans, programmes, budgets, reports, calculations or other documents, work or things including all applicable passwords or access codes whatsoever provided or to be provided by the Consultant in connection with the Services (the **"Documents"**) for such purposes as the Beneficiary may at its sole discretion require.

3.2 Such licence shall carry the right to grant sub-licences and shall subsist notwithstanding that the Appointment is terminated or the obligations and duties there under have been completed. For the avoidance of doubt, the

grant of such licence or sub-licences shall not impose any additional liability on the Consultant.

3.3 The Consultant shall on reasonable demand provide to the Beneficiary or its appointee and those authorised by the Beneficiary additional copies of any documents on receipt of reasonable copying costs. The Consultant will not be liable for any use by the Beneficiary or any appointee or sub-licensee of any of the Documents for any purpose other than that for which the same were prepared and provided by the Consultant or for any improper or negligent use by the Beneficiary or any appointee or sub-licensee.

3.4 The Consultant agrees to indemnify and keep indemnified the Beneficiary from and against all loss, damage, cost, expense, liability or claim in respect of breach of the copyright or other intellectual property rights of any third party caused by or arising out of the carrying out of the Services or the use of the licence.

4 ASSIGNMENT

4.1 This Agreement may be assigned in whole or in part by the Beneficiary to any successor to the Beneficiary's interest in the Project or any part thereof without the consent of the Consultant being required and such assignment shall be effective upon written notice thereof being given to the Consultant. No assignment of this Agreement by any other party shall be permitted.

4.2 The Consultant agrees that it shall not at any time assert that any permitted assignee in terms of this Agreement is precluded from recovering any loss resulting from any breach of this Agreement by reason that such assignee is not an original party to this Agreement or that no less or a different loss has been suffered by such assignee.

5 NO WAIVER OR VARIATION

5.1 No failure, approval, act or forbearance on the part of the Beneficiary in respect of any right of the Beneficiary pursuant to this Agreement shall constitute any waiver of any right of the Beneficiary under or arising out of this Agreement nor relieve the Consultant of any of its duties or obligations under or arising out of this Agreement.

5.2 The Consultant will not seek to modify or vary any of the obligations for which it is responsible under the Appointment in any respect if that modification or variation will be detrimental to the Beneficiary or affects the Beneficiary's rights or obligations under the DBFM Agreement or affects the Consultant's obligations under this Agreement.

6 EQUIVALENT RIGHTS

The obligations of the Consultant under this Agreement shall be no greater in extent or quantity than if the Beneficiary had been named as joint employer with the Contractor under the Appointment. The Consultant shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation in the Appointment and to raise the equivalent rights in defence of liability as it would have against the Contractor under the Appointment (other than counterclaim, set-off or to state a defence of no loss or a different loss has been suffered by the Contractor).

7 NOTICES

7.1 Any notice or other communication given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by first class recorded post or emailed to the party named therein at the address or email address of such party shown in this Agreement or such other address or email address as such party may by notice or other communication in writing nominate for the purpose of service .

7.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

7.2.1 if delivered by hand at the time of delivery; or

7.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting,

provided that, in either case, a notice or other communication 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.

7.3 Notices given by email shall be deemed to have been received:

7.3.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the relevant email address specified in Clauses [7.4 to 7.7] (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

7.3.2 by 11am on the next following Business Day, if 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 no error message indicating failure has been received by the sender and provided that within twenty-four (24) hours of transmission a hard copy of the email (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 this Clause 7 (*Notices*) and where such notice is addressed to the Authority, copied to [♦[85]].

7.4 Any notice to be given to the [Authority] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing to the relevant party by the [Authority].

7.5 Any notice to be given to [Project Co] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by [Project Co].

7.6 Any notice to be given to the [Contractor] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Contractor].

7.7 Any notice to be given to the [Consultant] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Consultant].

7.8 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.

7.9 The definitions of words and phrases used in this Agreement shall be those set out in the Construction Contract and Appointment except where expressly defined in this Agreement.

7.10 This Agreement shall be governed by and construed in accordance with the Laws of England and Wales and the parties hereto submit to the exclusive jurisdiction of the Courts of England and Wales.

7.11 This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

7.12 It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that save to the extent expressly provided in this Agreement no provision of this Agreement is intended to or does confer upon any third party any benefit or right enforceable at the option of that third party or any liability whatsoever to any third party..

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

[85] Insert Welsh Government details.

SCHEDULE 10[86]
OUTLINE COMMISSIONING PROGRAMME

1 PRE-COMPLETION COMMISSIONING AND POST-COMPLETION COMMISSIONING

1.1 Project Co's Pre-Completion Commissioning and Project Co's Post-Completion Commissioning shall comprise the activities identified as such in Table A of Appendix A of this Schedule 10 (*Outline Commissioning Programme*).

1.2 The Authority's Commissioning and the Authority's Post-Completion Commissioning shall comprise the activities identified as such in Table A of Appendix A of this Schedule 10 (*Outline Commissioning Programme*).

1.3 Project Co shall give written notice to the Independent Tester and the Authority's Representative of the commencement of Project Co's Pre-Completion Commissioning not less than [ten (10)] Business Days prior to the date when Project Co (acting reasonably) considers that it shall commence Project Co's Pre-Completion Commissioning.

1.4 Project Co shall give written notice to the Authority's Representative of the date upon which the Authority shall be entitled to commence the Authority's Commissioning, such notice to be given at least [one (1) month] prior to the date when Project Co (acting reasonably) considers that the Authority should commence the Authority's Commissioning in accordance with the Final Commissioning Programme.

2. EQUIPMENT

2.1 Project Co shall not clean, or move to enable general cleaning any items of [Group 2 Equipment or Group 3] Equipment unless the Authority's Representative has given the prior written consent, such consent not to be unreasonably withheld. This shall include but not be limited to:

2.1.1 *[Project Specific Equipment Examples]*

2.2 The Authority shall ensure that all of the Authority's existing [Equipment] that is to be transferred to the Facilities has been cleaned in accordance with the Authority's protocols and meets the current health and safety and legislative requirements prior to being transferred to the Facilities.

[86] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

SCHEDULE 10: OUTLINE COMMISSIONING PROGRAMME

Appendix A Commissioning Responsibilities

Table A[87][88]:

Item	Pre or Post Completion Activity	Activity	Responsibility	Programme Date

[87] Timing of activities to be reviewed by the Authority specific to the Project, including any adjustment for phasing of the Works

[88] Equipment groupings to align with Schedule Part 11 (*Equipment*) by the Authority.

Appendix B Completion Criteria

1. General Requirements

1.1 Project Co shall provide such labour, materials, stores, test equipment, tools, instruments, apparatus and assistance as are reasonably required for the purpose of any inspection and where appropriate witnessing by the Independent Tester and shall be responsible for the provision of such electricity, fuel, water and other consumables and materials as may be reasonably required for the same. Invitations shall be given to the Authority and its technical advisers to witness such inspections, testing and commissioning activities of the Works as the Authority deems necessary. At least [ten (10)] Business Days' notice of any testing shall be given.

1.2 Project Co shall ensure that major items of Plant are tested during the Works for both performance and safety prior to dispatch and provide documentary evidence that testing has been carried out if requested by the Independent Tester. For the purposes of this paragraph "major items of Plant" shall include, but not be limited to, boilers, air handling units, generators, chillers, HV/MV switchgear and pressure vessels. Project Co shall arrange to witness specific unit factory testing [of major items of Plant] and shall give the Authority and its technical advisers the opportunity to witness all such factory testing. The Authority and its technical advisers shall be given at [least ten (10)] Business Days' notice, or such reasonable notice as may be agreed, of such testing of major items of Plant.

2. Works Inspection, Testing and Acceptance Activities[89]

2.1 Completion Criteria

[Subject to paragraph 3 of this Appendix B,] Project Co shall demonstrate that the [Works (save for any Snagging Items) are]/[relevant Phase of the Works (save for any Snagging Items) is] complete in accordance with:

(a) the Authority's Construction Requirements;

(b) Project Co's Proposals; and

(c) the terms of this Agreement, including the specific criteria set out at paragraphs 2.1.1 to [2.1.30] below (together the "**Completion Criteria**"), prior to handover of the [Works]/[relevant Phase of the Works]:

2.1.1 The building(s) is structurally complete, all external fabric is complete, wind and watertight. Internally all the finishes are complete in accordance with the Room Data Sheets;

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[89] This section shall be reviewed against Site/Project specific issues, including any phasing of the construction of the Works. Where phasing of the construction of the Works is proposed, different sets of Completion Criteria may need to be provided for each phase.

2.1.2 Safe access and egress to and within the [relevant Phase of the] Facilities has been established;

2.1.3 All incoming Utilities including all relevant backup systems are tested, commissioned and operational;

2.1.4 All environmental design parameters have been met and mechanical and electrical Plant and systems operate satisfactorily in accordance with the specified design criteria of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*), any manufacturers' operating requirements and the Room Data Sheets;

2.1.5 Provision of an "As-Built" Area Schedule confirming compliance with tolerances specified within Authority's Construction Requirements Area Schedule and relevant Room Data Sheets;

2.1.6 The building management system is complete, tested, commissioned and operational including the setting up of graphs, logs or equivalent;

2.1.7 All furniture and [Group 1 and 2] Equipment shown on the loaded room layout drawings (as supplemented by Schedule 11 (*Equipment*)) shall have been installed (and commissioned if appropriate);

2.1.8 All keys, access cards, access codes and other access devices, for access to all relevant areas of the Facilities, complete with all relevant schedules, including agreed suiting schedules are ready for handover to the Authority;

2.1.9 The Works shall be free from all surplus materials, plant and equipment and shall comply with the standards and requirements of paragraph [4] (*Handover Clean*);

2.1.10 All internal, external and below ground drainage systems are installed, are operational and have been tested and subjected to a CCTV survey;

2.1.11 All demolition works as appropriate are complete;

2.1.12 All external works as appropriate have been completed and are available for use by the Authority;

2.1.13 [All external soft landscaping/planting is complete (appropriate to the season) and available for use by the Authority;]

2.1.14 All associated hard-landscaped external works, including roads, car parks, pavements, [sports pitches] and boundary walls/fences are complete and available for use by the Authority;

2.1.15 All road construction consent remedial works identified by the relevant Local Authority have been undertaken;

2.1.16 All lift systems are complete, commissioned and operational; including connection and monitoring of lift car emergency call device;

2.1.17 All building, statutory, directional, departmental, general information, room numbering and external signage as indicated within Project Co's Proposals and/or Reviewable Design Data and necessary to allow the operational Services to commence [for the relevant Phase] have been provided and installed. This includes both internal and external signage for the Facilities and areas outwith the Site boundary to include the access routes to the Site;

2.1.18 Those elements of the fire management strategy and fire safety risk assessment in accordance with the Regulatory Reform (Fire Safety) Order 2005, for which Project Co is responsible, have been produced;

2.1.19 All fire stopping, fire proofing and fire detection, alarm and suppression systems are complete, tested and commissioned by suitably qualified persons and are fully operational having demonstrated cause and effect testing is complete;

2.1.20 All external lighting is installed, tested, commissioned and operational;

2.1.21 All IT and communication systems ([excluding] WiFi)[90] to be installed by Project Co across the Site are complete, tested and test results submitted to the Authority (and if appropriate commissioned);

2.1.22 All security and surveillance systems, access controls and call alarms are complete, tested, commissioned, operational and available for use by the Authority;

2.1.23 All acoustic testing has been completed to prove compliance with Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*) and Section 4 (*Project Co's Proposals*) of Schedule 6 (*Construction Matters*);

2.1.24 All builder's work in connection with art installations are complete;

2.1.25 All specialist systems, including but not limited to [♦][91] systems, are complete tested, commissioned, witnessed by relevant Authority personnel, operational and available for use by the Authority;

2.1.26 Project Co has provided all documentation to the Independent Tester showing satisfactory completion of the Completion Criteria in accordance with this Agreement and paragraph [5 (*Testing and Commissioning Documentation*) below;

[90] Consider with paragraph 3.

[91] Refer to Sector Specific Guidance.

2.1.27 [In respect of the final Phase,] a final draft Operational Manual for the Facilities has been made available to the Authority in accordance with Clause 18 of the Project Agreement, [and Project Co and/or the Contractor have complied with the 'data drops' required pursuant to the BIM Protocol], including delivery of "as-built" drawings, "final issue" construction drawings and the "as-built" specification),] to allow the Facilities to be operated safely;

2.1.28 Copies of all available Consents and warranties relevant to the design and construction have been supplied by Project Co to the Authority;

2.1.29 An As Built Energy Model has been provided with supporting evidence, and all associated tests on completion incorporated in accordance with Section **7** (*Thermal & Energy Efficiency Testing Procedures*) of Schedule 6 (*Construction Matters*) that demonstrates compliance with the Energy Performance Criteria;

2.1.30 Project Co shall ensure the following finishing Works are completed as appropriate to the Facilities;

(a) [decanting of Authority Equipment from existing premises];

(b) removal of Site establishment;

(c) cap off and completely remove temporary site services and record position; and(d) removal of temporary materials, including surfacing, complete with full reinstatement.

3. Wi-Fi Post Completion Tests

3.1 [♦].[92]

4. Handover Clean[93]

On completion of [a Phase of] the Works, Project Co shall [offer a cleaned sample area for review by the Authority to establish cleanliness benchmarks prior to conducting the final clean. Project Co shall] remove builders debris, and clean all areas of the Facilities including plant rooms, to the standard defined below:

4.1 Floors

4.1.1 The floor is cleaned to remove paint, plaster, grit and litter, water and other liquids;

4.1.2 The floor is cleaned to remove stains, spots and scuffs;

[92] To be developed on a project specific basis.

[93] Handover Clean requirements to be agreed with appropriate Authority personnel

4.1.3 Inaccessible areas (edges and corners) cleaned to remove grit and lint;

4.1.4 All carpets, vinyl's and the like floor coverings are clean and vacuumed;

4.1.5 Specialist floor finishes are cleaned in accordance with manufacturers guidance; and

4.1.6 Barrier matting zones/entry floor systems are vacuumed and wells free of debris.

4.2 **Toilets, Sinks, Basins, Baths, Taps and Fixtures**

4.2.1 All labels, tape and sticky marks to be removed;

4.2.2 Porcelain, cubicle rails and plastic surfaces are wiped clean;

4.2.3 Metal surfaces, shower screens and mirrors are wiped clean;

4.2.4 Wall tiles and wall fixtures (including dispensers, toilet holders, paper dispensers, grab rails and the like) wiped clean to remove grit; and

4.2.5 Inaccessible areas (edges, corners, folds and crevices) are cleaned to remove grit and lint.

4.3 All pieces of fixed furniture, equipment and appliances:

4.3.1 All high surfaces are wiped clean;

4.3.2 Blinds, curtains, screens including hanging rails, hooks and fixings are wiped clean;

4.3.3 Shelves, bench tops, cupboards and wardrobes are wiped clean inside and out and are free of litter; and

4.3.4 Protective film is removed from all hard surfaces and equipment unless otherwise requested by the Service Provider.

4.4 **Low Level Surfaces**

4.4.1 Internal walls cleaned to remove paint splashes, grit, soil and graffiti;

4.4.2 Skirtings, covings and the like are cleaned to remove paint or plaster splashes;

4.4.3 Light switches and data and electrical sockets are free from paint and plaster splashes and wiped clean; and

4.4.4 All windows (glass internal and external), ironmongery, vents window frames and sills are free from paint and plaster splashes and are wiped cleaned.

4.5 **High Level Surfaces**

4.5.1 Walls and ceilings are cleaned to remove plaster splashes, paint splashes, grit, soil, film and graffiti;

4.5.2 Ceilings and light fittings are cleaned to remove surface markings;

4.5.3 Doors and doorframes are cleaned to remove grit, soil, and film;

4.5.4 Air vents, grilles and other ventilation outlets are unblocked and cleaned to remove grit, soil, scuffs and other marks; and

4.5.5 Door tracks and door jambs are cleaned to remove grit and other debris.

4.5.6 [♦][94]

5. Testing and Commissioning Documentation

5.1 **Documentation**

The following is a non-exhaustive list of the test documentation expected to be provided by Project Co to the [Independent Tester and the Authority's Representative]:

5.1.1 Building warrant completion certificates;

5.1.2 Evidence that all conditions for which Project Co is responsible attached to the detailed Planning Approval which are due to have been discharged to the satisfaction of the relevant local authority, have been so discharged;

5.1.3 Final road construction consent certificate from the relevant Local Authority should be issued within one (1) month of [the Certificate of Practical Completion];

5.1.4 Flushing cleaning and chlorination test certificates;

[94] Refer to Sector Specific Guidance.

5.1.5 Boiler Plant manufacturers factory test and commissioning sheets in accordance with CIBSE Commissioning Code B, including all steam systems;

5.1.6 Ductwork systems pressure test and volume flow rate certificates if appropriate;

5.1.7 Kitchen equipment commissioning certificate if appropriate;

5.1.8 Electrical installation completion and inspection certificates in accordance with (BS 7671 and NICEIC requirements);

5.1.9 Lighting and power test certificates;

5.1.10 Fire and intruder alarms commissioning certificates, including intruder detection and alarm, access control system(s). [Certification of off-site monitoring links are live shall be provided];

5.1.11 General electrical earth loop and insulation resistance test sheets;

5.1.12 Testing of all hot water service thermostatic mixing valves ("TMV's") in accordance with BS6700 and tests to comply with HSE Document L8 and HGN 'Safe Hot Water and Surface Temperatures;

5.1.13 Emergency lighting completion and test certificates;

5.1.14 Security systems commissioning certificates, including but not limited to Access Control, Intruder Detection and Panic Alarm systems;

5.1.15 Certificate of soundness testing of gas installation;

5.1.16 Gas pipework pressure test and purge certificates;

5.1.17 Fire suppression system certificates (in accordance with BS6266 and tests to comply with CIBSE Guidance E);

5.1.18 Fire alarm sound record sheets;

5.1.19 Lighting calculation sheets and lux level test results in accordance with CIBSE Commissioning Code L;

5.1.20 Machine (generator/ups etc) specialist commissioning and factory test sheets;

5.1.21 Acoustic test sheets (in accordance with BS EN ISO 717 – 1: 2013);

5.1.22 Lift Commissioning in accordance with BS EN 81. Lift Log Book to be provided for each lift;

5.1.23 Lightning protection risk analysis and test/commissioning sheets in accordance with BS EN 62305 (2012);

5.1.24 Works pressure test certificates for all pressure vessels;

5.1.25 Mechanical pipework systems pressure tests;

5.1.26 HVAC Equipment performance tests;

5.1.27 Condensate clearance tests for HVAC Equipment;

5.1.28 BMS/EMS tests/commissioning records in accordance with CIBSE Commissioning Code C. Certification reporting function is complete;

5.1.29 Air distribution systems in accordance with CIBSE Commissioning Code A;

5.1.30 Water systems (heating and domestic water) in accordance with CIBSE Commissioning Code W;

5.1.31 Legionella testing (to include an organic check on the incoming mains) within tolerances given in HSE ACOP test sheets;

5.1.32 Domestic water systems bacteriological quality test sheets;

5.1.33 Plant (Calorific, Treatment etc.) specialist commissioning and factory test sheets, if applicable;

5.1.34 Disabled Toilet Alarm test certificate;

5.1.35 Fire Alarm Test Certificate;

5.1.36 CCTV and access control test certificate. [Certification of off-site monitoring links are live shall be provided];

5.1.37 Telephone and data structured cable scheme test certificate, test results and copy of manufacturer's warranty;

5.1.38 Induction loop test certificate;

5.1.39 Pipeline Pressure and flow rate test certificates including drainage and any steam systems;

5.1.40 Steam boiler/generator test factory test and commissioning certificates in accordance with CIBSE Commissioning Code B;

5.1.41 Refrigerant system factory test and commissioning certificates in accordance with CIBSE Commissioning Code R;

5.1.42 Chemical clean and inhibitor dosing certification to heating/chilled water systems including confirmation of compatibility with manufacturers requirements;

5.1.43 Ductwork physical cleaning certification in accordance with the HVCA (2005) 'TR/19 – Guide to good practice;

5.1.44 Building air pressure test record certificates;

5.1.45 Air tests and test records for the Facilities drains and drainage network. CCTV survey and reports to be provided recording pre-handover condition; and

5.1.46 Test certificates and sufficient written evidence covering the design, construction and repair etc for all protective devices such as pressure relief valves and the like. Specific reference is made to compliance with Regulation 5 of The Pressure Systems Safety Regulations 2000.

SCHEDULE 11

EQUIPMENT[95]

[95] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

SCHEDULE 12

SERVICE REQUIREMENTS[96]

SECTION 1

SERVICE LEVEL SPECIFICATION

[96] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

SECTION 2

METHOD STATEMENTS

SECTION 3

SERVICES QUALITY PLAN

SECTION 4

INTERFACE PROTOCOL

1.1 Project Co and the Authority have a duty to cooperate and recognise the interactive nature of the activities of both parties, and the need to avoid interference with each other's activities. The parties recognise that there is a need to clearly identify and document the points of interface and the responsibilities of each party.

1.2 Project Co will provide help and assistance to the Authority to ensure that the Services are fully integrated with the Authority Services. This will include training, attendance at Site meetings, and provision of support to the Authority to manage its operations.

1.3 The Authority and Project Co have agreed an Interface Protocol which sets out the allocation of responsibilities between the Authority and Project Co. The Interface Protocol identifies the Authority Services and the interfaces between Project Co and the Authority in respect of the delivery of the Authority Services and the Services respectively.

1.4 Project Co shall, or shall procure that the Project Co Parties shall carry out the services listed in column [♦] of Table [♦] of Section 4 *(Interface Protocol)* of this Schedule 12 (*Service Requirements*), in accordance with its terms.

1.5 The Authority shall, or shall procure that the Authority Parties shall carry out the services listed in column [♦] of Table [♦] of Section 4 *(Interface Protocol)* of this Schedule 12 (*Service Requirements)*, in accordance with its terms. Subject always to paragraph 1.4 above, it is acknowledged and agreed by the parties that failure on the part of the Authority to satisfy any of the dependencies identified as "[Authority Responsibility] in column [♦] of Table [♦] of Section 4 *(Interface Protocol)* of this Schedule 12 (*Service Requirements)* (save for any minor failures that do not directly cause or contribute to the occurrence of an Availability Failure and/or Performance Failure) shall be treated as a breach of the Agreement by the Authority for the purposes of Clause 52.2.1 only and in no other respect.

SCHEDULE 13

INDEPENDENT TESTER CONTRACT

AGREEMENT

AMONG:

(1) [AUTHORITY] (the "**Authority**");

(2) [PROJECT CO] ("**Project Co**");

(3) [INDEPENDENT TESTER] (the "**Independent Tester**");

(4) [FUNDER] (in its capacity as "**Agent**" on behalf of the Senior Funders);

(5) [CONTRACTOR] (the "**Contractor**"); and

(6) [EQUIPMENT SERVICES PROVIDER] (the "**Equipment Services Provider**");]

WHEREAS:

(A) Project Co and the Authority have entered into an agreement for the financing, design and construction of and the provision of certain services in connection with [details of facilities] at the Site (the "**Project**") (the "**Design Build Finance and Maintain Agreement**") under the terms of which they have jointly agreed to appoint an independent tester.

(B) Project Co has entered into the Construction Contract with the Contractor for the development of [details of facilities] at the Site.

(C) Project Co has entered into the [Senior Funding Agreements] with the Senior Funders.

(D) The Independent Tester is an independent adviser willing to provide services to Project Co and the Authority and for the benefit of the Senior Funders.

(E) Project Co and the Authority have jointly agreed to engage the Independent Tester to carry out the duties and obligations ascribed to the Independent Tester in the Design Build Finance and Maintain Agreement upon the terms of this Agreement.

IT IS AGREED as follows:

1 **INTERPRETATION**

1.1 Unless the context otherwise requires, words and expressions defined in the Design Build Finance and Maintain Agreement have the same meanings in this Agreement as in the Design Build Finance and Maintain Agreement.

1.2 The headings in this Agreement do not affect its interpretation.

1.3 Unless the context otherwise requires, all references to Clauses and Appendices are references to clauses of and appendices to this Agreement.

2 **APPOINTMENT**

2.1 Project Co and the Authority jointly appoint the Independent Tester to perform the obligations and tasks which are ascribed to the Independent Tester under the Design Build Finance and Maintain Agreement and which are set out in Appendix 1 upon the terms and conditions set out below. The Contractor [and the Equipment Services Provider] is a party [are parties] to this Agreement solely to make the commitments on its part [their respective parts] as expressly made in this Agreement and, for the avoidance of doubt, the Independent Tester shall have no liability to the Contractor [and the Equipment Services Provider][97].

2.2 The Independent Tester shall provide the services under Clause 2.1 (*Appointment*) above (the "Services") independently, fairly and impartially to and as between Project Co and the Authority in relation to the Design Build Finance and Maintain Agreement at such times and at such locations as the parties shall agree from time to time. In performing the Services, the Independent Tester shall have regard to the interest of the Senior Funders. Whilst the Independent Tester shall take account of any representations made by Project Co and the Authority and the Contractor (as appropriate) [and the Senior Funders' Technical Adviser] the Independent Tester shall not be bound to comply with any representations made by any of them in connection with any matter on which the Independent Tester is required to exercise his professional judgement.

2.3 The Independent Tester shall, as far as it is in its reasonable control, ensure that the Services and Varied Services are carried out by the Key Personnel listed in Appendix 3 only (the **"Key Personnel"**). In the event that, due to matters outwith the Independent Tester's control, it is necessary for there to be a change in any Key Personnel, the Independent Tester shall by written notice to the Authority and Project Co propose a suitable substitute for approval, taking into account the experience of the Key Personnel. Such appointment shall be subject to the approval of Project Co and the Authority (not to be unreasonably withheld or delayed).

3 SERVICES AND VARIED SERVICES

3.1 Subject to the prior written agreement of the Authority and Project Co to the costs thereof, the Independent Tester shall carry out and perform any additional and/or varied services required for the implementation of the Project reasonably required by the Authority and Project Co which are not included in, or which are omitted from, the Services (the **"Varied Services"**) on the same terms as required for the Services pursuant to Clause 2.2 (*Appointment*). If the Independent Tester shall at any time be required to perform Varied Services, it shall give to the Authority and Project Co a written quote of the cost thereof (taking into account any reduction in work or other expense which might also occur as a result of the circumstances giving rise to the Varied Services) pursuant to Clause 5.7 (*Fee*).

3.2 The written agreement by the Authority and Project Co pursuant to Clause 3.1 (*Services and Varied Services*) shall state whether (and where applicable in what proportions) the Authority and/or Project Co will be responsible for the payment of the fee agreed for the Varied Services. The Independent Tester acknowledges

[97] It has been suggested on some projects that the Contractor should receive the benefit of a duty of care from the Independent Tester (whether under this agreement or through a collateral warranty). Authorities should consider the implications fully and seek advice from their legal advisers on this point. Authorities' interests are likely to be prejudiced as a result. Issues that need to be considered include: whether this would increase the fee; whether the financial liability of the IT would be diluted (e.g. consider any cap on liability); whether the IT's liability to the Authority may be prejudiced as a result of a claim made by the Contractor; whether there could be any adverse impact on the resources of the IT; whether the Contractor's remedy should lie against Project Co in the event of any claim; and other project-specific considerations.

that the liability of Project Co and the Authority to pay the Independent Tester for the Varied Services shall be several and not joint.

3.3 Where a change to the Project occurs pursuant to the terms of the Design Build Finance and Maintain Agreement (whether by virtue of a Delay Event, Change, change to the Programme or otherwise) which may materially impact on the Services or otherwise on the Independent Tester, the Authority and Project Co shall promptly notify the Independent Tester of such change. The Independent Tester shall within [♦] Business Days of receiving such notification, notify the Authority and Project Co of the impact of such change, if any, on the Services or otherwise, including whether such change gives rise to any Varied Services and the provisions of this Clause 3 (*Services and Varied Services*) shall apply accordingly.

3.4 The Independent Tester shall promptly and efficiently provide the Services and the Varied Services:

3.4.1 with the reasonable care, skill and diligence to be expected of a properly qualified and competent professional adviser who has held itself out as competent and experienced in rendering such services for projects of a similar size, nature, scope and complexity to the Project; and

3.4.2 in accordance with all applicable Law .

3.5 All instructions to the Independent Tester must be signed and given jointly by the Authority's Representative and Project Co's Representative or such other person appointed pursuant to Clause 8 (*Representatives*) of the Design Build Finance and Maintain Agreement and, for the avoidance of doubt, the Independent Tester shall not act in accordance with any instructions given to him by either the Authority or Project Co (or any other person) not given in accordance with the provisions of this Clause 3.5 (*Services and Varied Services*).

3.6 The Independent Tester shall comply with all reasonable instructions given to it by Project Co and the Authority pursuant to Clause 3.5 (*Services and Varied Services*) except and to the extent that the Independent Tester reasonably considers that any such instructions vary or might vary the Services or its authority or responsibilities under this Agreement or prejudices or might prejudice the exercise by the Independent Tester of its professional judgement in accordance with Clauses 2.2 (*Appointment*) and 3.4 (*Services and Varied Services*) above. The Independent Tester shall promptly confirm in writing to Project Co and the Authority whether or not it shall comply with any such instruction setting out the grounds upon which the decision is made.

3.7 The Authority, Project Co[, the Equipment Services Provider] and the Contractor agree to co-operate with and provide reasonable assistance to the Independent Tester to familiarise the Independent Tester with all necessary aspects of the Project to enable the Independent Tester to carry out its obligations under this Agreement.

3.8 The Independent Tester shall be deemed to have full knowledge of the provisions of the Design Build Finance and Maintain Agreement, the Construction Contract,

the Service Contract, the Senior Funding Agreements and the [Sub-Contractor Co-operation Agreement (as defined in the Construction Contract)] such as relates to the Services or Varied Services and shall be deemed to be aware of and to have taken full account of all the undertakings and warranties, both expressed and implied, on the part of Project Co and the Authority which are set out in the Design Build Finance and Maintain Agreement provided always that true and accurate copies have been delivered to the Independent Tester.

3.9 Subject to Clause 3.10 (*Services and Varied Services*), the Independent Tester shall use the following partners, directors or employees: [insert names of individuals] in connection with the performance of the Services and any Varied Services and such persons' services shall be available when necessary and for so long as may be necessary to ensure the proper performance by the Independent Tester of the Services and any Varied Services. Such persons shall have full authority to act on behalf of the Independent Tester for all purposes in connection with the Services and any Varied Services.

3.10 The Independent Tester may by written notice to the Authority and Project Co replace the staff identified in Clause 3.9 (*Services and Varied Services*) taking into account the need for liaison, continuity, level of qualification and availability of personnel in respect of the Project. Such replacement shall be subject to approval in writing by Project Co and the Authority (not to be unreasonably withheld or delayed).

4 DURATION

4.1 The Services shall commence on the date of this Agreement[98].

4.2 The parties hereby agree that this Agreement governs all of the Services (including the Varied Services, if any) provided by the Independent Tester in relation to the Project whether before or after the date hereof.

5 FEE[99]

5.1 Project Co shall pay to the Independent Tester a fee of [INSERT FEE] for the Services provided under this Agreement. The fee is exclusive of value added tax and inclusive of disbursements. The Independent Tester shall issue an invoice to Project Co on a monthly basis in accordance with Appendix 2 Section 1 (*Schedule of Drawdown of Fees*) (the **"Application for Payment"**). The date on which the Application for Payment is received by Project Co shall constitute the due date (the **"Due Date"**). The final date for payment by Project Co shall be thirty (30) days after the Due Date (the **"Final Date"**). If Varied Services are provided then they shall be paid for in accordance with the agreement between the Independent Tester and the Authority and Project Co pursuant to Clause 3.1 and 3.2 (*Services and Varied Services*) and paid for in accordance with the provisions of this Clause 5 (*Fee*).

[98] Authorities to amend according to specific requirements.

[99] This drafting assumes that Project Co is responsible for paying the Independent Tester. Authorities should consider whether this will be the case as it may be better value for money for the Authority to pay an element of the fee itself, although the Authority must ensure that it is able to meet such a commitment. Consider fee in the context of the scope of service and how regular inspections are to be carried out.

5.2 Not later than five (5) days after the Due Date is ascertained in accordance with Clause 5.1 (*Fee*), Project Co shall give written notice to the Independent Tester stating the amount which Project Co considers to be or have been due at the Due Date and the basis on which the amount is calculated (the **"Payment Notice"**). It is immaterial that the sum referred to in this notice may be zero. If Project Co fails to give a Payment Notice in accordance with this Clause 5.2 (*Fee*) and the Independent Tester has given an Application for Payment in accordance with Clause 5.1 (*Fee*), subject to any Pay Less Notice given under Clause 5.3 (*Fee*), the sum to be paid to the Independent Tester shall be the sum specified in the Application for Payment.

5.3 Where Project Co intends to pay less than the sum stated as due pursuant to this Agreement, Project Co shall, not later than two (2) days before the relevant Final Date, give a written notice to the Independent Tester (a **"Pay Less Notice"**). Such Pay Less Notice shall specify both the sum that Project Co considers to be due to the Independent Tester at the date the notice is given and the basis on which that sum is calculated. It is immaterial that the sum referred to in this Clause 5.3 (*Fee*) may be zero. Where any Pay Less Notice is given, the payment to be made on or before the relevant Final Date shall be not less than the amount stated as due in such notice.

5.4 If Project Co fails to pay a sum, or any part of it, due to the Independent Tester under this Agreement by the relevant Final Date, Project Co shall, in addition to any unpaid amount that should properly have been paid, pay the Independent Tester simple interest on that amount from the Final Date until the actual date of payment at the Default Interest Rate.

5.5 If Project Co fails to pay any amount properly due pursuant to this Agreement by the relevant Final Date and the failure continues for twenty-one (21) days after the Independent Tester has given notice to Project Co of its intention to suspend performance of all or any of the Services or Varied Services and the ground or grounds on which it is intended to suspend performance, the Independent Tester may suspend performance of any or all of its obligations until payment is made in full. [Any period of suspension of the Services or Varied Services in accordance with this Clause 5.5 (*Fee*) shall be disregarded in computing any contractual time limit to complete work directly or indirectly affected by the exercise of the rights conferred by this Clause 5.5 (*Fee*), or as the case may be and the time for completion of such work shall be extended by a period equal to the period of suspension.][100]

Where the Independent Tester exercises its right of suspension under this Clause 5.5 (*Fee*), it shall be entitled to a reasonable amount in respect of costs and expenses reasonably incurred by it as a result of the exercise of that right. Any such costs and expenses shall be included in the Independent Tester's next Application for Payment and the Independent Tester shall, with its application, submit such details of the costs and expenses as are reasonably necessary to enable the Independent Tester's entitlement to be ascertained.

5.6 Without prejudice to Clause 3.5 (*Services and Varied Services*), neither the Authority nor Project Co shall issue instructions or do anything which does or is reasonably likely materially to increase the fees payable to the Independent Tester

[100] Authorities to consider whether this or similar drafting is necessary for compliance with the Housing Grants and Construction Act 1996, as amended.

without the prior approval of the other (such approval not to be unreasonably withheld or delayed).

5.7 As soon as the Independent Tester becomes aware of the same and before acting on the same the Independent Tester shall inform the Authority and Project Co of any instructions given to him pursuant to Clause 3.5 (*Services and Varied Services*) which will or could reasonably be expected to increase the fees payable to the Independent Tester under the terms of this Agreement. The Independent Tester shall if requested by either Project Co or the Authority provide both the Authority and Project Co with as detailed an estimate as is reasonably practicable of the increase to the fees payable to it if it carries out such instructions. The estimate of increased fees shall be based upon the rates contained in Appendix 2, Section 2 (*Schedule of Daily Rates*).

6 LIMITATIONS ON AUTHORITY

6.1 The Independent Tester shall not:

6.1.1 make or purport to make any alteration or addition to or omission from the design of the Facilities (including, without limitation, the setting of performance standards) or issue any instruction or direction to any contractor or professional consultant employed or engaged in connection with the Project; or

6.1.2 (unless both Project Co and the Authority consent in writing) consent or agree to any waiver or release of any obligation of Project Co or the Authority under the Design Build Finance and Maintain Agreement or of any contractor or professional consultant employed or engaged in connection with the Project.

6.2 For the avoidance of doubt, the Independent Tester shall not express an opinion on and shall not interfere with or give any advice, opinion or make any representation in relation to any matters which are beyond its role and responsibilities under this Agreement.

7 TERMINATION

7.1 Project Co and the Authority may by joint notice in writing (a "**Joint Notice**") immediately terminate this Agreement if the Independent Tester:

7.1.1 is in breach of any of the terms of this Agreement which, in the case of a breach capable of remedy, shall not have been remedied by the Independent Tester within twenty-one (21) days of receipt by the Independent Tester of a Joint Notice specifying the breach and requiring its remedy;

7.1.2 is incompetent, guilty of gross misconduct and/or any material failure, negligence or delay in the provision of the Services and/or its other duties under this Agreement;

7.1.3 fails or refuses after written warning to provide the Services and/or its other duties under this Agreement reasonably and as properly required of him; or

7.1.4 is subject to an event analogous to any of the events set out in Clause 40.1.1 (*Insolvency*) of the Design Build Finance and Maintain Agreement.

7.2 If the Design Build Finance and Maintain Agreement is rescinded, terminated or repudiated for any reason and, notwithstanding that the validity of such rescission, termination or repudiation may be disputed, this Agreement may be terminated by Joint Notice and with immediate effect.

7.3 Following any termination of this Agreement, but subject to any set-off or deductions which Project Co or the Authority may be entitled properly to make as a result of any breach of this Agreement by the Independent Tester, the Independent Tester shall be entitled to be paid in full and final settlement of any valid claim which the Independent Tester may have in consequence thereof for any fees due under Clause 5 (*Fee*) above in respect of the Services or Varied Services carried out in accordance with this Agreement prior to the date of termination.

7.4 Termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination (including the right of Project Co and the Authority to recover damages from the Independent Tester).

7.5 If this Agreement is terminated in accordance with Clause 7.1 (*Termination*), Project Co and the Authority shall use reasonable endeavours to engage an alternative Independent Tester within thirty (30) days, subject to Law and public procurement rules. If within such period Project Co and the Authority are unable to procure the appointment of an alternative Independent Tester on reasonable commercial terms, the Independent Tester shall pay to Project Co and/or the Authority, as the case may be, any reasonable incremental loss, damage or extra costs suffered by each of them.

7.6 If Project Co fails to make a payment of any undisputed sum to the Independent Tester within [♦] Business Days of the expiry of any notice issued pursuant to Clause 5.5 (*Fee*) in respect of such sum, the Independent Tester may issue a further written notice to the Authority and Project Co specifying that the payment remains outstanding (the "Second Notice") and if payment is not made within [♦] Business Days of receipt of the Second Notice the Independent Tester may issue a further written notice terminating this Agreement with immediate effect. Failure by Project Co to pay, following receipt of a Second Notice pursuant to this Clause 7.6 (*Termination*), shall be the Independent Tester's sole ground for terminating this Agreement by reason of breach of this Agreement by the Authority and/or Project Co.

7.7 Termination of this Agreement shall not affect the continuing rights and obligations of Project Co, the Authority and the Independent Tester under Clauses 6 (*Limitations on Authority*), 8 (*Confidential Information and Copyright*), 9 (*Professional Indemnity Insurance*), 18 (*Dispute Resolution Procedure*) and this Clause or under any other Clause which is expressed to survive termination or

which is required to give effect to such termination or the consequences of such termination.

8 CONFIDENTIAL INFORMATION AND COPYRIGHT

8.1 The Independent Tester shall treat as secret and confidential and shall not at any time for any reason disclose or permit to be disclosed to any person or otherwise make use of or permit to be made use of any unpublished information relating to Project Co's or the Authority's or the Contractor's (if appropriate) technology or other know-how business plans or finances or any such information relating to a subsidiary, supplier, customer or client of Project Co or the Authority or the Contractor (if appropriate) where the information was received during the period of this Agreement except as may be reasonably necessary in the performance of the Services or Varied Services. Upon termination of this Agreement for whatever reasons the Independent Tester shall offer to deliver up to Project Co or the Authority (as appropriate) all working papers, computer disks and tapes or other material and copies provided to or prepared by him pursuant either to this Agreement or to any previous obligation owed to Project Co or the Authority provided always that the Independent Tester shall be entitled to retain copies of all such items where such offer is accepted.

8.2 The obligation to maintain confidentiality does not apply to any information or material to the extent that the Independent Tester is compelled to disclose any such information or material by law or any regulatory or Government authority.

8.3 The copyright in all reports, and other documents produced by the Independent Tester in connection with the Project shall remain vested in the Independent Tester but the Independent Tester grants to Project Co and Authority and their nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such reports, and other documents and to reproduce the information contained in them for any purpose related to the Project including (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Project. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties.

8.4 The Independent Tester shall not be liable for use by any person of the documents, (including reports, details, plans, specifications, schedules, computer programs, software, consents and any other papers, works, reports and inventions produced by the Independent Tester) for any purpose other than that for which the same were prepared by or on behalf of the Independent Tester.

9 PROFESSIONAL INDEMNITY INSURANCE

9.1 Without prejudice to its obligations under this Agreement, or otherwise at law, the Independent Tester shall maintain professional indemnity insurance with a limit of indemnity of not less than [[♦] (£[♦])][101] for any one (1) claim in respect of any neglect, error or omission on the Independent Tester's part in the performance of its obligations under this Agreement for the period commencing on the date of this Agreement and expiring twelve (12) years after:

[101] Authorities to take advice from insurance advisers on appropriate level of PII cover for the scheme. The minimum level is £10 million.

9.1.1 the date of final certification of the Works; or

9.1.2 the termination of this Agreement,

whichever is the earlier, provided that such insurance is available in the market place at commercially reasonable rates.

9.2 The Independent Tester shall maintain such insurance with reputable insurers carrying on business in the United Kingdom.

9.3 Any increased or additional premium required by insurers by reason of the Independent Tester's own claims record or other acts, omissions, matters or things particular to the Independent Tester shall be deemed to be within commercially reasonable rates.

9.4 The Independent Tester shall as soon as reasonably practicable inform Project Co and the Authority if such insurance ceases to be available at commercially reasonable rates in order that the Independent Tester and Project Co and the Authority can discuss means of best protecting the respective positions of Project Co and the Authority and the Independent Tester in respect of the Project in the absence of such insurance.

9.5 The Independent Tester shall fully co-operate with any measures reasonably required by Project Co and the Authority including (without limitation) completing any proposals for insurance and associated documents and maintaining such insurance at rates above commercially reasonable rates if Project Co and the Authority undertake in writing to reimburse the Independent Tester in respect of the net cost of such insurance to the Independent Tester above commercially reasonable rates.

9.6 The Independent Tester shall, prior to commencing the provision of the Services and as soon as reasonably practicable following Renewal Dates, produce for inspection by Project Co and the Authority documentary evidence that such insurance is being properly maintained.

9.7 The above obligations in respect of professional indemnity insurance shall continue notwithstanding termination of this Agreement for any reason whatsoever, including (without limitation) breach by Project Co and the Authority.

10 LIMITATION OF LIABILITY

10.1 With the exception of liability for death, personal injury and/or any other liability that cannot lawfully be excluded or limited, the Independent Tester's maximum [aggregate] liability to all parties, under or in connection with this Agreement,

whether in contract or in tort, or for breach of statutory duty is limited to £[♦][102] million.

10.2 [Notwithstanding anything to the contrary stated elsewhere in this Agreement, the parties hereby expressly agree that the Independent Tester shall have no liability to any party under or in connection with this Agreement for any claim or claims related to terrorism, asbestos or toxic mould.][103]

10.3 No action or proceedings under or in connection with this Agreement shall be commenced against the Independent Tester after the expiry of twelve (12) years from the earlier of: (a) the date of final certification of the Works; and (b) the termination of this Agreement.

11 SUB-CONTRACTOR LOSSES AND NO LOSS AVOIDANCE

11.1 Without prejudice to Clause 10 (*Limitation of Liability*) the Independent Tester hereby acknowledges and accepts (a) that a breach or failure on the part of the Independent Tester could have adverse financial consequences for the Sub-Contractors (or any of them) and (b) any losses, damages, costs and/or other liabilities suffered or incurred by the Sub-Contractors (or any of them) (as the case may be) arising from or in connection with any breach or failure on the part of the Independent Tester under this Agreement shall, for the purposes of this Agreement and notwithstanding the provisions of any Sub-Contract, be deemed to be losses, damages, costs and/or liabilities suffered or incurred by Project Co arising from or in connection with such breach or failure.

11.2 Where the Independent Tester would otherwise be liable to make a payment by way of compensation to Project Co including amounts which, in turn, comprise compensation to any Sub-Contractor which is payable by Project Co and/or which would be payable by way of compensation to any Sub-Contractor by Project Co the Independent Tester shall not be entitled to withhold, reduce or avoid any such payment to Project Co in reliance (in whole or in part) on the fact that payment of the amount which is or would be due from Project Co to the Sub-Contractor or the entitlement of the Sub-Contractor to receive payment of such amount (as a result of the circumstances giving rise to the Independent Tester's obligation to pay such compensation) is conditional on receipt by Project Co of such amount from the Independent Tester.

12 NOTICES

12.1 Any notice or other communication given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by first class recorded post or emailed to the party named therein at the address or email address of such party shown in this Agreement or such other address or email address as such party may by notice or other communication in writing nominate for the purpose of service .

[102] Authorities to consider appropriate cap in the context of the specific project and scope of service. The cap should be set out at a minimum level of £10 million.
[103] This may be appropriate where the IT's insurance cover excludes liability for these occurrences. Authorities to check.

12.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

12.2.1 if delivered by hand at the time of delivery; or

12.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting,

provided that, in either case, a notice or other communication 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; or

12.3 Notices given by email shall be deemed to have been received:

12.3.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the relevant email address specified in Clauses [12.4 to 12.9] (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

12.3.2 by 11am on the next following Business Day, if 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 no error message indicating failure has been received by the sender and in the case of a notice issued pursuant to Clause 7(*Termination*) provided that within twenty-four (24) hours of transmission a hard copy of the email (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 this Clause 12 (*Notices*) and where such notice issued pursuant to Clause 7 (*Termination*) is addressed to the Authority, copied to [♦[104]].

12.4 Any notice to be given to the [Authority] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing to the relevant party by the [Authority].

12.5 Any notice to be given to the [Project Co] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Project Co].

12.6 Any notice to be given to the [Independent Tester] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Independent Tester].

[104] Insert Welsh Government details.

12.7 Any notice to be given to the [Senior Funder] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Senior Funder].

12.8 Any notice to be given to the [Contractor] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Contractor].

12.9 Any notice to be given to the [Equipment Service Provider] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Equipment Service Provider].

12.10 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.

13 ASSIGNMENT

13.1 The Independent Tester shall not assign or transfer any of its rights or obligations under this Agreement or sub-contract the whole or any part of the Services or the Varied Services.[105]

13.2 Neither Project Co nor the Authority shall be entitled to assign or transfer any of their respective rights or obligations under this Agreement save that the parties hereby consent to any such assignment or transfer which is contemporaneous to the assignment or transfer of the Design Build Finance and Maintain Agreement and is made to the same assignee or transferee. In the event that the Design Build Finance and Maintain Agreement is novated to a third party, the term "Design Build Finance and Maintain Agreement" shall include any replacement contract arising from such novation.

13.3 The Independent Tester shall not be entitled to contend that any person to whom this Agreement is assigned in accordance with Clause 13.2 (*Assignment*) is precluded from recovering under this Agreement any loss incurred by such assignee resulting from any breach of this Agreement (whenever happening) by reason that such person is an assignee and not a named promisee under this Agreement.

14 CUMULATIVE RIGHTS AND ENFORCEMENT

14.1 Any rights and remedies provided for in this Agreement whether in favour of Project Co or the Authority or the Independent Tester are cumulative and in addition to any further rights or remedies which may otherwise be available to the parties.

[105] Where the Independent Tester intends to sub-contract any part of the Services, additional drafting should be included to identify any such sub-contractors and to ensure that the Independent Tester remains liable for the relevant part of the Services. The Authority should consider whether it is appropriate to obtain a warranty from such sub-contractors.

14.2 The duties and obligations of the Independent Tester arising under or in connection with this Agreement are owed to Project Co and the Authority both jointly and severally and Project Co and the Authority may accordingly enforce the provisions hereof and pursue their respective rights hereunder in their own name, whether separately or with each other.

14.3 Project Co and the Authority covenant with each other that they shall not waive any rights, remedies or entitlements or take any other action under this Agreement which would or might reasonably be expected to adversely affect the rights, remedies or entitlements of the other without the other's prior written consent, such consent not to be unreasonably withheld or delayed.

15 WAIVER

The failure of any party at any one time to enforce any provision of this Agreement shall in no way affect its right thereafter to require complete performance by any other party, nor shall the waiver of any breach or any provision be taken or held to be a waiver of any subsequent breach of any provision or be a waiver of the provision itself.

16 SEVERABILITY

In the event that any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, clause or provision shall, to that extent, be omitted from this Agreement and the rest of this Agreement shall stand, without affecting the remaining clauses.

17 VARIATION

A variation of this Agreement is valid only if it is in writing and signed by or on behalf of each party.

18 DISPUTE RESOLUTION PROCEDURE

18.1 All disputes shall be resolved in accordance with terms equivalent (mutatis mutandis) to the Dispute Resolution Procedure as set out in the Design Build Finance and Maintain Agreement.[106]

18.2 Project Co, the Authority and the Independent Tester shall co-operate to facilitate the proper, just, economical and expeditious resolution of any and all such disputes which arise under this Agreement.

19 GOVERNING LAW AND JURISDICTION

[106] Authorities should consider whether this is appropriate or whether a more specific DRP should be included in this document. This may depend on whether the DRP contained in Schedule 20 *(Dispute Resolution Procedure)* is considered to be Construction Act compliant.

Subject to Clause 18 (*Dispute Resolution Procedure*) above, this Agreement shall be governed by and construed in accordance with the laws of England and Wales, and (subject as aforesaid) the parties hereby submit to the non-exclusive jurisdiction of the courts of England and Wales.

20 COUNTERPARTS

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes

21 DELIVERY

This Agreement is delivered on the date written at the start of this Agreement.

22 THIRD PARTY RIGHTS

It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that save as expressly set out herein, no provision of this Agreement is intended to or does confer upon any third party any benefit or right enforceable at the option of that third party against any party to this Agreement.

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

APPENDIX 1

SCOPE OF SERVICES - INDEPENDENT TESTER CONTRACT[107]

The Independent Tester shall perform the role of Independent Tester as referred to in Clauses 17 (*Pre-Completion Commissioning and Completion*), 18 (*Post Completion Commissioning*) and 19 (*Fossils and Antiquities*) (including complying with any time limits specified in such Clauses) and Schedule 6 (*Construction Matters*), Schedule 7 (*The Programme*), Schedule 8 (*Review Procedure*), Schedule 10 (*Outlining Commissioning Programme*) and Schedule 17 (*Compensation on Termination*) of the Design Build Finance and Maintain Agreement[108], by providing the following scope of Services:

1 MONTHLY REPORT AND COMPLETION CERTIFICATION

The Independent Tester shall:

1.1 During the Works, attend monthly site progress meetings and provide the Authority and Project Co with a monthly report on the activities carried out by the Independent Tester.

1.2 Undertake [regular inspections (with the maximum interval between inspections not exceeding [♦] weeks)][109] during the Works, as necessary, and in the case of completion activities, in accordance with Clauses [17.8 (*Commissioning Price to Completion Date*), 17.10 (*Pre-Completion Inspections*) and 18.4 (*Information*)] of the Design Build Finance and Maintain Agreement[110]. Report on the completion status of the Project, identifying any work that is not compliant with the Authority's Construction Requirements, Project Co's Proposals, the Approved Reviewable Design Data (Approved RDD) and/or the Completion Criteria in accordance with Clause [17.11 (*Pre-Completion Matters*)] of the Design Build Finance and Maintain Agreement.

1.3 Determine whether any relevant Phase is finished or complete in accordance with the Completion Criteria and advise Project Co and the Authority of the need for any re-testing which may be necessary to demonstrate whether a relevant Phase of the Project is finished or complete.

1.4 Certify the [Phase] Actual Completion Date and issue a Certificate of Practical Completion in accordance with the Design Build Finance and Maintain Agreement.[111]

1.5 On the same day as the date of issue of the [relevant] Certificate of Practical Completion, issue a Snagging List specifying any Snagging Items. Monitor and review rectification of such Snagging Items in accordance with Clause 17.14 (*Snagging Items*) of the Design Build Finance and Maintain Agreement.

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[107] Authorities to ensure that the scope of services is appropriate.
[108] Authorities to insert any other relevant references.
[109] Develop specifics on a project by project basis.
[110] Insert periods here if not included in Completion Criteria. Consider stages before works' closed up'
[111] This will include (amongst other things) testing Energy Efficiency against the levels bid (and incorporated within Project Co's Proposals)

1.6 Review the Snagging Programme for the rectification of all Snagging Items to be carried out and advise Project Co and the Authority as appropriate.

1.7 On satisfactory completion of the Snagging List, issue the Snagging Items Completion Certificate in accordance with Clause 17.12 (*[Phase] Completion Certificate*) of the Design Build Finance and Maintain Agreement.

1.8 In order to enable the Independent Tester to discharge these primary functions which are to be performed independently, fairly and impartially to and as between Project Co and the Authority and having regard to the interests of Funders, the Independent Tester shall discharge the further duties described below.

1.9 [The Independent Tester shall:

1.9.1 No earlier than the date that falls on the date that is [♦] weeks following the [relevant Phase] Actual Completion Date carry out the WiFi Post-Completion Tests so they have been completed by no later than the WiFi Tests Completion Date.

1.9.2 Within five (5) Business Days of any inspection made pursuant to paragraph 1.9.1 above notify Project Co and the Authority of any outstanding matters required to be attended to before the WiFi Post-Completion Tests can be considered to be completed.

1.9.3 Determine whether the WiFi is finished or complete in accordance with the WiFi-Post-Completion Completion Criteria and advise Project Co and the Authority of the need for any re-testing which may be necessary to demonstrate whether the WiFi is finished or complete.

1.9.4 Certify the [relevant Phase] WiFi Actual Completion Date and issue a Certificate of WiFi Completion [for the relevant Phase].]

2 GENERAL

The Independent Tester shall:

2.1 Familiarise itself with the Design Build Finance and Maintain Agreement (including the Design Data, the Design Quality Plan, the Construction Quality Plan[112] and any Changes issued from time to time and any other relevant documentation or information referred to in the Design Build Finance and Maintain Agreement, relevant Service Level Specification and Method Statements)[, the Equipment services contract] and the Construction Contract to the extent necessary to enable it to provide a report to the Authority and Project Co on any contradictory requirements contained within the same and to be in a position to carry out the Services in accordance with the terms of the Design Build Finance and Maintain Agreement and this Agreement.

[112] Insert reference to any equipment list or other document as appropriate.

2.2 Following notification by Project Co, pursuant to Clauses 17.8 and 17.10 (*Pre-Completion inspection*) of the Design Build Finance and Maintain Agreement, inspect and comment as required on the Works [each relevant Phase] as required by Clause 17.11 (*Pre-Completion Matters*) of the Design Build Finance and Maintain Agreement.

3 DESIGN REVIEW

The Independent Tester shall:

3.1 Monitor and report upon the implementation of the Design Quality Plan and Construction Quality Plans for the construction, structural and engineering services design for the Project.

3.2 Monitor the detailed working drawings and specifications for a sample number and type of rooms which in his professional judgment is appropriate to be selected by the Independent Tester to verify that they comply with the Approved RDD as described in the Design Build Finance and Maintain Agreement. The Independent Tester has indicated that in normal circumstances [twenty-five percent (25%)] of rooms should be sampled. If in the professional judgment of the Independent Tester, because of the results of its sample or other circumstances a different sampling percentage is appropriate, he shall provide a detailed report in respect of that and, if so agreed (or determined as between Project Co and the Authority by the Dispute Resolution Procedure) any change in the percentage sampling resulting in a change in fees will be borne by Project Co and the Authority as they shall agree or as determined by the Dispute Resolution Procedure.

3.3 [Review the detailed design information for any approved design or specification variations for compliance with the performance and quality standards of the Design Build Finance and Maintain Agreement, [insert reference to Equipment services contract and any Equipment performance measures] and quality standards as set out in the [refer to Equipment Service Level Specification] and the Quality Plans.]

4 PROCEDURE REVIEW

The Independent Tester shall:

4.1 Monitor the operation of the quality assurance procedures of the Contractor at regular intervals (maximum [[♦] weeks) during the execution of the Works.

4.2 The Independent Tester shall familiarise itself with the proposed procedures and programmes for the testing and commissioning of the [Mechanical and Electrical engineering services] prior to the Authority's occupation.

4.3 Monitor the procedures for the identification, approval and recording of agreed Changes to the Works in accordance with the Design Build Finance and Maintain Agreement.

4.4 Review any samples or mock ups as required by Schedule [♦] and check that they have been approved in accordance with the Design Build Finance and Maintain Agreement.

5 CONSTRUCTION REVIEW

The Independent Tester shall:

5.1 Visit the Site and monitor the Works for their compliance with the Authority's Construction Requirements, Project Co's Proposals and the Approved RDD.[113] The frequency and timing of the Independent Tester's visits are dependent on the progress of construction on Site. The Contractor shall agree a programme with the Independent Tester for the inspection of [Key Construction Processes][114] and the completed [Phases of the] Works and shall give the Independent Tester advance notice of these Works being carried out on Site.

5.2 Randomly check that the Works are being undertaken in accordance with the Construction Quality Plan that has been agreed by the Authority and Project Co.

5.3 Review the written mechanical and electrical engineering services testing and commissioning procedure and undertake selective witnessing of the mechanical and electrical services testing and commissioning. The Independent Tester has indicated that these sampling proportions should amount to approximately [fifty] percent [(50%)]. The Independent Tester shall review [one hundred] percent [(100%)] of all test results. If in the professional judgment of the Independent Tester, because of the results of witnessing (or because of other circumstances) a different sampling percentage is appropriate he shall provide a detailed report in respect of that and any change in the percentage sampling resulting in a change of fees will be borne by Project Co, the Authority or the Contractor as they shall agree and failing such agreement, as determined by the Dispute Resolution Procedure.

5.4 Inspect rectification works which have previously prevented the Independent Tester from certifying the Project as complete.

5.5 Check the delivery of hard copies of the relevant operating manuals, relevant approvals, test results, inspection records, "final issue" construction drawings, "as-built" building specification and "as-built" drawings to the Authority [and monitor compliance with required 'data drops' of the same, pursuant to the BIM Protocol].

6 PARTICIPATION IN DISPUTE RESOLUTION

As and when required by the Authority or Project Co, the Independent Tester shall participate in the Dispute Resolution Procedure of the Design Build Finance and Maintain Agreement (as such term is defined in the Design Build Finance and Maintain Agreement) to the extent that issues under the Design Build Finance and Maintain Agreement which have

[113] Authorities to insert any other relevant documents.

[114] To be defined on a project specific basis. This should include stages of the Works that need to be inspected before being covered over by subsequent activity so that the Independent Tester may satisfy himself that these stages have been constructed in accordance with the Quality Plans, without the need for opening up

been referred to the said Dispute Resolution Procedure relate to the Independent Tester's other obligations and tasks as set out in this Appendix 1 and this Agreement.

APPENDIX 2

SECTION 1

SCHEDULE OF DRAWDOWN OF FEES

SECTION 2

SCHEDULE OF DAILY RATES

APPENDIX 3

KEY PERSONNEL

SCHEDULE 14

PAYMENT MECHANISM[115]

SECTION 1

INTERPRETATION

In this Schedule 14 (*Payment Mechanism*) and elsewhere in this Agreement (save where Schedule 1 (*Definitions and Interpretation*) provides to the contrary) the following words shall have the following meanings:

"Annual Service Payment" means the sum in Pounds Sterling calculated in accordance with paragraph 2 (*Annual Service Payment*) of Section 2 (*Calculation of Service Payments*) of this Schedule 14 (*Payment Mechanism*);

"Availability Failure" subject to Section 4 (*Temporary Repairs*) of this Schedule 14 (*Payment Mechanism*), means a Service Event which has not been Rectified within the relevant Rectification Period and which causes a Functional Area to be Unavailable;

"Availability Standards" means the service requirements identified as such, set out in the Service Level Specification;

"Core Times" has the meaning given in the Service Level Specification and "Core Time" means a time within Core Times;

"Daily SUF" means, on a Day, the aggregate GSUs for all of the Functional Areas that have Core Time on that Day;

"Day" means a period of twenty-four (24) hours, beginning at 00:00 hours, during which there are Core Times;

"Deduction Period" or "DP"

(a) where the relevant Performance Failure or Availability Failure arises following a Service Event in respect of which a Rectification Period is specified in the Availability Standards or the Performance Standards, as applicable,

(i) if the Service Failure Time occurs before or during Core Time [for the relevant Functional Area] on a Day, means the number of Days that elapse from and including that Day to, and including, the Day on which the Logged Rectification Time occurs, but excludes the Day on which the Logged Rectification Time occurs if the Logged Rectification Time is before the commencement of Core Time [for the relevant Functional Area on that Day]; and

(ii) if the Service Failure Time occurs after the expiry of Core Times [for the relevant Functional Area] on a Day, means the number of Days that elapse from and including the next Day to, and including, the Day on which the Logged Rectification Time occurs, but excludes the Day on which the Logged Rectification Time occurs if this occurs before

[115] Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable.

commencement of Core Time [for the relevant Functional Area] on that Day; and

(b) where the relevant Performance Failure arises following a Service Event in respect of which no Rectification Period is specified in the Performance Standards, as applicable, means 1;

["External Utility Failure" means a failure in:

(a) the supply of gas, electricity, water, telephone or telecommunications services to the Site; or

(b) the service and facility of discharging water and sewerage from the Site,

where such failure originates on the side of the relevant Utility Point that is owned or controlled by the relevant utility provider and provided that such failure has not arisen as a result of an act or omission of Project Co or a Project Co Party;]

"Gross Monthly Availability Deduction" [means, for Contract Month "n", the amount in Pounds Sterling calculated by the formula:

$SUR \times SUF \times Days_n$

where $Days_n$ is the number of Days in Contract $Month_n$]

OR

[means, for Contract Month "n", the amount in Pounds Sterling calculated by the formula:

SUR x TMGSUF

where:

TMGSUF means, for Contract Month "n", the aggregate of the Daily SUF of all the Days in that Contract Month;]

"Gross Service Units" or "GSUs" means the number of service units attributed to each Functional Area as set out in Appendix 2 to this Schedule 14 (*Payment Mechanism*);

"**Helpdesk**" means the helpdesk facilities established by Project Co Pursuant to the Service Level Specification;

"Logged Rectification Time" means the time which is shown in the Helpdesk records maintained by Project Co in accordance with the Service Level Specification as being the time when a Service Event was Rectified or Remedied, as the case may be[, or, in the event that a failure affecting the Helpdesk occurs, as shown on the manual Helpdesk records maintained by Project Co];

"Logged Report Time" means the date and time which is shown in the Helpdesk records maintained by Project Co in accordance with the Service Level Specification as being the date and time at which a Service Report was received by the Helpdesk [or, if a failure affecting the Helpdesk occurs, as shown on the manual

Helpdesk records maintained by Project Co];

"Major Performance Failure" means a Performance Failure which has been designated as such in the Service Level Specification or in this Schedule 14 (*Payment Mechanism*);

"Medium Performance Failure" means a Performance Failure which has been designated as such in the Service Level Specification or in this Schedule 14 (*Payment Mechanism*);

"Minimum Agreed Availability Standards" means the minimum standards with which a Functional Area must comply, as agreed between the Authority and Project Co, for the period until a Permanent Repair can be undertaken;

"Minimum Availability Deduction" means, in any Contract Year "n", an amount in Pounds Sterling calculated using the following formula:

$$MAD_n = MAD_o \times (1 - IF) + \left((MAD_o \times IF) \times \left(1 + \frac{(RPI_n - RPI_o)}{RPI_o} \right) \right)$$

where

MAD_n is the Minimum Availability Deduction applicable for the relevant Contract Year;

MAD_o is £[♦], or, where the relevant Functional Area is Unavailable but Used, is £[♦];

IF is the indexation factor being [♦]%;

RPI_n is the value of the Retail Price Index published or determined with respect to the month of February which most recently precedes the relevant Contract Year; and

RPI_o is the value of the Retail Price Index published or determined with respect to the Base Date;

"Minor Performance Failure" means a Performance Failure which has been designated as such in the Service Level Specification or in this Schedule 14 (*Payment Mechanism*);

"Monthly Service Payment" means the sum in Pounds Sterling calculated in accordance with paragraph 1 of Section 2 (*Calculation of Service Payments*) of this Schedule 14 (*Payment Mechanism*);

"Performance Failure" subject to Section 4 (*Temporary Repairs*) of this Schedule 14 (*Payment Mechanism*), means a Service Event relating to a Performance Standard which has not been Rectified within the relevant Rectification Period (if any);

"Performance Standards" means the service requirements identified as such, set out in the Service Level Specification;

"Permanent Repair" means Rectification following the agreement of a Temporary Repair;

"Permanent Repair Deadline" has the meaning given in paragraph 1.2 of Section 4 *(Temporary*

Repairs) of this Schedule 14 (*Payment Mechanism*);

"PTC" has the meaning given in paragraph 1.1 of Section 2 (*Calculation of Service Payments*) of this Schedule 14 (*Payment Mechanism*);

"Rectification" means, following the occurrence of a Service Event, making good the Service Event so that the subject matter of the Service Event complies with the levels of Service required pursuant to this Agreement which shall, without prejudice to the generality of the foregoing, include (a) restoring all functional capability and (b) ensuring that any Functional Area which has been affected by the relevant Service Event complies with the Availability Standards and the Performance Standards, as applicable, and "Rectify" and "Rectifying" shall be construed accordingly;

"Rectification Period" means, where applicable, the period of time specified in the Availability Standards or the Performance Standards, as the case may be, allowed for the Rectification of the relevant Service Event, which period:

(a) shall commence at the Logged Report Time (if the Logged Report Time occurs during Core Time [for the relevant Functional Area]); or

(b) if the Logged Report Time occurs outwith Core Time [for the relevant Functional Area], shall commence at the commencement of the immediately following Core Time [for the relevant Functional Area];

provided that:

(i) subject to Project Co having promptly notified the Authority's Representative of the fact and having recorded the same on the Helpdesk system, the Rectification Period shall be extended by any period during which Project Co was prevented or interrupted by the Authority and any Authority Party from Rectifying any failure to meet the Availability Standards or Performance Standards; and

(ii) if the Rectification Period would otherwise expire outside Core Time [for the relevant Functional Area], it shall be extended so as to expire immediately prior to the start of the next Core Time [for the relevant Functional Area];

"Remedial Period" means, where applicable, the period of time specified in the Performance Standards within which Project Co must Remedy a Service Event;

"Remedy" means the actions or tasks, detailed in the column headed [Remedial Period/Remedy] in the Performance Standards, required to remedy a Performance Failure and "**Remedied**" shall be construed accordingly;

"Service Event" means an incident or state of affairs which does not meet or comply with the Performance Standards and/or does not satisfy the Availability Standards;

"Service Failure Time" means the date and time when a Service Event becomes a Performance Failure or an Availability Failure, as the case may be;

"Service Report" has the meaning given in Section 1 (*Service Level Specification*) of Schedule 12 (*Service Requirements*);

"Service Unit Rate" or "SUR" [means, for Contract Year "n", the amount in Pounds Sterling calculated by the formula:

$$SUR = \left(\frac{ASPn}{SUFxTSD} \right)$$

where:

ASP_n is the Annual Service Payment for Contract Year "n" calculated in accordance with paragraph 2 of Section 2 (*Calculation of Service Payments*) of this Schedule 14 (*Payment Mechanism*); and

TSD is the number of Days in Contract Year "n";]

OR

[means, for Contract Year "n", the amount in Pounds Sterling calculated by the formula:

$$SUR = \left(\frac{ASPn}{TAGSUF} \right)$$

where:

ASP_n is the Annual Service Payment for Contract Year "n" calculated in accordance with paragraph 2 of Section 2 (*Calculation of Service Payments*) of this Schedule 14 (*Payment Mechanism*) and

TAGSUF means, for Contract Year "n", the aggregate of the Daily SUF in respect of all of the Days in that Contract Year;]

"Service Units Affected" or "SUA" means the total Gross Service Units of the Functional Areas affected by an Availability Failure;

"Service Units of the Facilities" or "SUF" means the total number of Gross Service Units attributable to the Facilities as set out in Appendix 2 of this Schedule 14 (*Payment Mechanism*);

"Temporary Repair" means, in respect of the occurrence of a Service Event, works of a temporary nature that do not constitute Rectification but satisfy the Minimum Agreed Availability Standards and substantially make good the relevant Service Event for the period until a Permanent Repair can be undertaken;

"Unavailable" means in relation to a Functional Area that such Functional Area is in a state or condition which does not comply with any one or more of the Availability Standards;

"Unavailable but Used"	means in relation to any Functional Area that it is Unavailable but is used by the Authority for its normal purpose at any time (apart from the purposes of evacuating the Functional Areas and the time taken for such evacuation) during the Core Times including for the avoidance of doubt, for the provision of Authority Services during which it would otherwise be Unavailable;
"Utility Point"	means [♦];
["Whole Facilities Unavailability Threshold"	means that Functional Areas having aggregate Gross Service Units equal to or greater than [thirty (30)%] of the Service Units of the Facilities are Unavailable or Unavailable but Used;]
["Whole Facilities Unavailability Conditions"	means any of the following conditions: (a) the Whole Facilities Unavailability Threshold is exceeded; or (b) more than [♦] percent of the total toilet provision for the Facilities, for either sex, is Unavailable; or (c) [other project specific conditions affecting only parts of the Facilities but which will render the whole of the Facilities substantially unusable for Authority Services].]

SECTION 2

CALCULATION OF SERVICE PAYMENTS

1 MONTHLY SERVICE PAYMENT[116]

1.1 Calculate the Monthly Service Payment payable in respect of a Contract Month "n" using the following formula:

$$MSP_n = \left(\frac{ASP_n}{12} \right) - \sum D_{n-2} + PTC$$

where:

MSP_n is the Monthly Service Payment for the Contract Month n;

ASP_n is the Annual Service Payment for the Contract Year in which Contract Month n occurs, calculated in accordance with paragraph 1.2 below;

ΣD is the sum of Deductions in respect of performance of the Services during the Contract Month that was two (2) months prior to Contract Month n as shown in the Monthly Service Report for that Contract Month and calculated in accordance with the provisions set out in Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*); and

PTC means any Other Costs due for which supporting uncontested invoices from Project Co's suppliers are available.

1.2 In the Contract Month in which the Payment Commencement Date falls, unless the Payment Commencement Date is the first day of that Contract Month, and in the last Contract Month of the Project Term, unless the last day of the Project Term is the last day of that Contract Month, adjust ASP_n for the purposes of paragraph 1.1 above pro rata to reflect the actual number of days in the relevant Contract Month from and including the Payment Commencement Date (for the first month) and (for the last month) up to and including the last day of the Project Term (for the last month).

2 ANNUAL SERVICE PAYMENT

Calculate the Annual Service Payment for any Contract Year "n" using the following formula:

$$ASP_n = ASP_0 x(1 - IF) + \left[(ASP_0 xIF) x \left[1 + \frac{(RPI_n - RPI_0)}{RPI_0} \right] \right]$$

[116] Phased step up for snagging retention,Wi-Fi retention and/or any Phasing of the Works to be developed as necessary on a project by project basis and aligned with the approach in Clause 35.1.

where:

ASP_n is the Annual Service Payment for the relevant Contract Year;

ASP_o is the value for ASPo stated in Appendix 1 to this Schedule 14 (*Payment Mechanism*) (being the Annual Service Payment at the Base Date), subject to any adjustments made from time to time in accordance with any express provision of this Agreement;

IF is the indexation factor being [♦]%;

RPI_n is the value of the [Retail Prices Index] published or determined with respect to the month of February which most recently precedes the relevant Contract Year; and

RPI_o is the value of the [Retail Prices Index] published or determined with respect to the Base Date.

SECTION 3

DEDUCTIONS FROM MONTHLY SERVICE PAYMENTS

1 ENTITLEMENT TO MAKE DEDUCTIONS

1.1 If at any time after the Payment Commencement Date an Availability Failure or a Performance Failure occurs the Authority will be entitled, subject to paragraphs 1.2 and 1.4 of this Section 3 (*Deductions from Monthly Service Payments*) and paragraph 1 of Section 4 (*Temporary Repairs*), to make Deductions in calculating the Monthly Service Payment in respect of that Availability Failure or Performance Failure, calculated in accordance with this Section 3 (*Deductions from Monthly Service Payments*) of Schedule 14 (*Payment Mechanism*).

1.2 In calculating the Monthly Service Payment for Contract Month "n", the maximum aggregate of all Deductions that the Authority may make in respect of Contract Month "n-2" is the Gross Monthly Availability Deduction for Contract Month "n-2".

1.3 In any Contract Month where the value of ∑Dn-2 exceeds the value of ASPn/12, the Monthly Service Payment due by the Authority shall be an amount equal to PTC for that Contract Month but the Authority shall, in calculating the Monthly Service Payment in respect of the following and (to the extent necessary) any subsequent Contract Months, be entitled to carry forward and set off the amount of such excess against the amount by which the value of ASPn/12 exceeds the value of ∑Dn-2 (as such values are calculated in the following Contract Month and (to the extent necessary) any subsequent Contract Months) for a period of up to twelve Contract Months, or, if earlier, until the amount of such excess has been set-off in full.

1.4 To the extent that an Availability Failure or a Performance Failure:

1.4.1 is the result of an Excusing Cause; or

1.4.2 [is the result of an External Utility Failure,]

the Authority shall not be entitled to make Deductions.

1.5 To the extent that an Availability Failure or a Performance Failure is the result of:

1.5.1 a Relief Event; or

1.5.2 an event of Force Majeure,

the Authority shall be entitled to make Deductions but any such Deductions shall be disregarded for the purposes of Clause 26.3 (*Grounds for Warning Notices*) and Clause 40.1.8.

2 DEDUCTIONS FOR PERFORMANCE FAILURES

2.1 Subject to paragraphs 1 (*Entitlement to make Deductions*), 2.3 (*Deductions for Performance Failures*), 2.4 (*Deductions for Performance Failures*), 5 (*Repeated Failures*) and 7 (*Effect of Unavailability on Other Deduction*) of this Section 3 (*Deductions from Monthly Service Payments*), the amount of the Deduction in respect of a Performance Failure is calculated using the following formula:

D = PFD x DP

where:

D means the amount (in Pounds Sterling) of the Deduction in respect of the Performance Failure; and

PFD means:

(a) in the case of a Minor Performance Failure, the sum of £[♦], index linked;

(b) in the case of a Medium Performance Failure, the sum of £[♦], index linked; and

(c) in the case of a Major Performance Failure, the sum of £[♦], index linked.

2.2 In the case of a Service Event for which no Rectification Period is specified in the Performance Standard, a Performance Failure occurs immediately upon the occurrence of the Service Event and, if it is not Remedied within the relevant Remedial Period, it will reoccur at the expiry of the Remedial Period and the Remedial Period shall recommence and so on until such time as the Performance Failure has been Remedied.

2.3 No Deduction may be made by the Authority from the Monthly Service Payment for the relevant Contract Month in respect of any Minor Performance Failure if the total number of Minor Performance Failures which have occurred in the relevant Contract Month is not more than [♦].

2.4 Where two (2) or more Performance Failures occur in a Functional Area during a Day, only the Performance Failure that results in the highest Deduction will apply.

3 DEEMED PERFORMANCE FAILURES

If Project Co fails to monitor or accurately report a Service Event, a Performance Failure or an Availability Failure then, without prejudice to the Deduction to be made in respect of the

relevant Performance Failure or Availability Failure (if any), the failure to monitor or report the Service Event, Performance Failure or Availability Failure will be deemed to be a new Medium Performance Failure unless the circumstances set out in paragraph 6 of Section 5 (*Failure by Project Co to Monitor or Report*) apply, in which case there shall be deemed to be a new Major Performance Failure.

4 DEDUCTIONS FOR AVAILABILITY FAILURES

4.1 Subject to paragraphs 1 (*Entitlement to make Deductions*) and 5 (*Repeated Failures*) of this Section 3 (*Deductions from Monthly Service Payments*), and subject also to paragraph 4.2 [and paragraph 4.3] below where applicable, the amount of the Deduction in respect of an Availability Failure is the higher of:

4.1.1 the Minimum Availability Deduction; and

4.1.2 an amount calculated in accordance with the following formula:

D = SUA x SUR x DP

where:

D means the amount (in Pounds Sterling) of the Deduction in respect of the Availability Failure

4.2 Where the relevant Functional Area is Unavailable but Used the Deduction for the Availability Failure shall be reduced by 50%.

4.3 [If on the relevant day any of the Whole Facilities Unavailability Conditions are met then, for the purpose of the formula in paragraph 4.1 above the SUA will be deemed to be equal to SUF.]

5 REPEATED FAILURES

Subject to paragraph 1 (*Entitlement to make Deductions*) of this Section 3 (*Deductions from Monthly Service Payments*) if:

5.1 a Performance Failure in respect of the same Performance Standard; or

5.2 an Availability Failure in respect of the same Availability Standard,

occurs [♦] or more times in a rolling period of [♦] consecutive Contract Months, then the Deduction calculated pursuant to paragraph 2 (*Deductions for Performance Failures*) or paragraph 4 (*Deductions for Availability Failures*) of this Section 3 (*Deductions from Monthly Service Payments*) for the [♦] and each subsequent such Performance Failure and/or the [♦]

and each subsequent such Availability Failure during the relevant period of [♦] consecutive Contract Months shall be multiplied by [1.5].

6 REPEATED RECTIFICATION

If four (4) or more Service Events occur in any rolling seven (7) day period and:

6.1 each such Service Event is in connection with the same Performance Standard or Availability Standard;

6.2 each such Service Event affects the same Functional Area; and

6.3 there is good reason to believe that the root cause of each such Service Event is the same,

then, notwithstanding paragraph 2.3 and notwithstanding that Project Co achieves Rectification of the Service Events within the relevant Rectification Period, there will be deemed to be a Major Performance Failure.

7 EFFECT OF UNAVAILABILITY ON OTHER DEDUCTIONS

7.1 Subject to paragraphs 7.2 and 7.3, if a Performance Failure occurs affecting a Functional Area and the Service Event giving rise to the Performance Failure also gives rise to an Availability Failure affecting that Functional Area, only the deductions for the Availability Failure apply.

7.2 If an Availability Failure affects a Functional Area and the Authority does not continue to use that Functional Area, the Authority shall not, until Rectification of that Availability Failure, be entitled to make further Deductions in respect of that Functional Area other than in respect of the Availability Failure.

7.3 If a Functional Area is Unavailable but Used, the Authority will be entitled to make Deductions in respect of any Performance Failures affecting that Functional Area.

SECTION 4

TEMPORARY REPAIRS

1 If Project Co informs the Authority that it is unable to Rectify a Service Event within the specified Rectification Period due to the need for specialised materials or personnel that are not, and cannot reasonably be expected to be, immediately available at the Facilities but that a Temporary Repair can be effected:

1.1 Project Co may carry out the Temporary Repair proposed by Project Co unless the Authority, acting reasonably, considers that, if the Temporary Repair proposed by Project Co is carried out, the relevant Functional Area will not be fit for use for the Authority Services for which it is normally used; and

1.2 where a Temporary Repair is permitted pursuant to paragraph 1.1, the Authority and Project Co must act reasonably to agree a date and time (the "**Permanent Repair Deadline**") by which a Permanent Repair must be made, giving Project Co a reasonable period within which to carry out the Permanent Repair.

2 During any period beginning at the time when a Temporary Repair has been approved by the Authority and ending at the earlier of:

2.1 the time at which a Permanent Repair is successfully completed; or

2.2 the Permanent Repair Deadline,

the Availability Standards will be replaced by the Minimum Agreed Availability Standards.

3 If an agreed Temporary Repair is completed by Project Co before the Permanent Repair Deadline and results in the Functional Area affected by the relevant Service Event satisfying the Minimum Agreed Availability Standards, the date and time shown in the Helpdesk records maintained by Project Co in accordance with the Service Level Specification as being the date and time when the Temporary Repair was completed (or, in the event that a failure affecting the Helpdesk occurs, as shown on the manual Helpdesk records maintained by Project Co as being the date and time when the Temporary Repair was completed) shall be deemed to be the Logged Rectification Time for that Service Event for the purpose of determining the value of DP in the formula in paragraph 4 (*Deductions for Availability Failures*) in Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*).

4 If the Permanent Repair is not carried out by the Permanent Repair Deadline, a Performance Failure or, as the case may be, an Availability Failure, will occur at that date and time and the provisions of paragraph 2 (*Deductions for Performance Failures*), paragraph 4 (*Deductions for Availability Failures*) and, if applicable, paragraph 5 (*Repeated Failures*) of Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*) shall apply.

SECTION 5

FAILURE BY PROJECT CO TO MONITOR OR REPORT

1 Subject to paragraphs 2 to 4 inclusive of this Section 5 (*Failure by Project Co to Monitor or Report*), the Monthly Service Report produced by Project Co for any Contract Month shall be the source of the factual information regarding the performance of the Services for the relevant Contract Month for the purposes of calculating the Deductions pursuant to Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*).

2 Either party may give written notice to the other if it believes there is an error or omission in a Monthly Service Report provided that, save in the circumstances referred to in paragraph 6 below, such notice must be given before the end of the Contract Month that falls two (2) Contract Months after the Contract Month in which the relevant Monthly Service Report was submitted by Project Co. The parties shall endeavour to agree the amendments required to rectify the error or omission (if any) within ten (10) Business Days of notice being given in accordance with this paragraph 2, failing which either party may, on giving written notice to the other, refer the matter to the Dispute Resolution Procedure.

3 Where Project Co fails to monitor or accurately to report a Performance Failure or an Availability Failure in the circumstances referred to in paragraph 6 of this Section 5 (*Failure by Project Co to Monitor or Report*), for the purposes of paragraph 1 of Section 1 (*General Requirements*) of Schedule 19 (*Record Provisions*) the Authority shall be deemed to have reasonable cause to require that Project Co shall make available to the Authority for inspection such of the records referred to in paragraphs 10 and 11 of Section 2 (*Records to be Kept*) of Schedule 19 (*Record Provisions*) as the Authority may specify.

4 Project Co shall upon submission of a valid invoice pay to the Authority a sum equal to the costs reasonably incurred by the Authority in carrying out any inspection and investigation of records made available pursuant to paragraph 3 above.

5 In the event that the Authority's inspection or investigation of records made available pursuant to paragraph 3 above reveals any further matters of the types referred to in paragraphs 2 and 3 above, those matters shall be dealt with in accordance with paragraph 2 or 3 as appropriate and the Authority shall, in addition, be entitled to make Deductions in respect of any Performance Failures or Availability Failures in the manner prescribed Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*). The Monthly Service Payment for the Contract Month in which any such Deduction would (but for the error or omission in the Monthly Service Report) have been made shall be re-calculated to take account of such Deduction and the amount of such Deduction shall be immediately due and payable by Project Co to the Authority together with interest at the Default Interest Rate from the date on which the Authority paid the Monthly Invoice for the relevant Contract Month until the date on which payment is made by Project Co.

6 For the purposes of paragraphs 2 and 3 of this Section 5 (*Failure by Project Co to Monitor or Report*) the relevant circumstances are:

6.1 fraudulent action or inaction;

6.2 deliberate misrepresentation; or

6.3 gross misconduct or gross incompetence,

in each case on the part of Project Co or a Project Co Party.

The provisions of this Section 5 (*Failure by Project Co to Monitor or Report*) shall be without prejudice to any rights of the Authority in this Agreement pursuant to Clause 26 (*Monitoring of Performance*), Clause 40 (*Project Co Events of Default*) and Clause 45 (*Corrupt Gifts and Payments*).

SECTION 6

OTHER COSTS

1 [UTILITY CHARGES

1.1 Project Co may include charges for Utilities in the Monthly Service Payment in accordance with paragraph 1.1 of Section 2 (*Calculation of Service Payments*) of this Schedule 14 (*Payment Mechanism*) on the basis of costs reasonably incurred by Project Co and supported by an appropriate invoice from Project Co's suppliers.

1.2 The Authority is responsible for all connection, line rental and usage telephone and data charges.]

2 [RATES

Project Co may include local authority rates in the Monthly Service Payment in accordance with paragraph 1.1 of Section 2 (*Calculation of Service Payments*) of this Schedule 14 (*Payment Mechanism*) on the basis of the cost incurred by Project Co and supported by an appropriate invoice from the relevant local authority.]

3 OPERATIONAL INSURANCE PREMIUMS

3.1 Subject to paragraph 3.2, Project Co may include the premiums paid by Project Co to take out and maintain the Operational Insurances in accordance with Clause 54 (*Insurance*) in the Monthly Service Payment in accordance with paragraph 1 (*Monthly Service Payment*) of Section 2 (*Calculation of Service Payments*) of this Schedule 14 (*Payment Mechanism*) on the basis of the cost incurred by Project Co and supported by appropriate premium notices from the relevant insurer.

3.2 There shall be excluded from the premiums treated as an Additional Cost, a sum equal to any portion of the premiums (referred to in paragraph 3.1) reasonably considered by the Authority, having taken into account the information in the Joint Insurance Cost Report, to be Project Co Factors.

3.3 Where the main source of remuneration of Project Co's insurance broker in respect of services provided to Project Co in connection with the placing of Operational Insurances is by way of a fee, instead of commission, and provided that the fee is reasonable and acceptable to the Authority and no commission is being received by the broker in addition to such fee, the amount of any fee charged, to the extent reasonably and properly attributable to the Operational Insurances, shall be treated in the same manner as the relevant premiums pursuant to paragraph 3.1 above.

APPENDIX 1

ANNUAL SERVICE PAYMENTS AT BASE DATE

APPENDIX 2

FUNCTIONAL AREAS AND GSUs

SCHEDULE 15

INSURANCE REQUIREMENTS

SECTION 1

POLICIES TO BE TAKEN OUT BY PROJECT CO AND MAINTAINED DURING THE DESIGN AND CONSTRUCTION PHASE

Common to each policy in Section 1 (*Policies to be taken out by Project Co and maintained during the design and construction phase*) (unless stated otherwise):

Insureds:

1 Authority

2 Project Co

3 Contractor

4 Service Provider

5 Construction sub-contractors of any tier

6 Senior Funders

7 Subordinated Funders

8 Consultants - for their site activities only

each for their respective rights and interests in the Project

1 **CONTRACTORS' 'ALL RISKS' INSURANCE (CAR)**

1.1 **Insured Property**

The permanent and temporary works, materials [(including but not limited to equipment supplied by the Authority], goods, plant and equipment for incorporation in the works (other than constructional plant, tools, accommodation and equipment belonging to or the responsibility of the Contractor or the Construction sub-contractors) and all other property used or for use in connection with works associated with the Project.

1.2 **Coverage**

"All risks" of physical loss or damage to the Insured Property unless otherwise excluded.

1.3 **Sum Insured**

At all times an amount not less than the full reinstatement or replacement value of the Insured Property, but not less than the value specified in the Construction Contract plus provision to include Cover Features & Extensions as appropriate.

1.4 **Maximum Deductible**

£[♦].

1.5 **Territorial Limits**

United Kingdom including offsite storage and during inland transit.

1.6 **Period of Insurance**

From the date of this Agreement until the Actual Completion Date and thereafter in respect of defects liability until expiry of the twelve (12) months defects liability period.

1.7 **Cover Features & Extensions**

1.7.1 Terrorism

1.7.2 Munitions of war clause

1.7.3 Additional costs of completion clause

1.7.4 Professional fees clause

1.7.5 Debris removal clause

1.7.6 Seventy-two (72) hour clause

1.7.7 European Union local authorities clause

1.7.8 Free issue materials clause

1.7.9 Ten per cent (10%) escalation clause

1.7.10 Automatic reinstatement of sum insured clause

1.7.11 Loss minimisation

1.7.12 Subrogation waiver extended to Authority Parties (other than Contractors and Sub-Contractors)

1.8 **Principal Exclusions**

1.8.1 War and related perils (UK market agreed wording)

1.8.2 Nuclear/radioactive risks (UK market agreed wording)

1.8.3 Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds

1.8.4 Wear, tear and gradual deterioration

1.8.5 Consequential financial losses

1.8.6 Cyber risks

1.8.7 Inventory losses

1.8.8 Fraud and employee dishonesty

1.8.9 DE5/DE3 drop down option

2 **DELAY IN START UP INSURANCE (DSU)**

2.1 **Insureds**

2.1.1 Project Co

2.1.2 Senior Funders

2.1.3 Subordinated Funders

2.1.4 [Authority]

each for their respective rights and interests in the Project.

2.2 **Indemnity**

In respect of:

2.2.1 loss of anticipated Revenue during at least the Minimum Indemnity Period arising from a delay in completion of the Project as a result of loss or damage covered under the Contractors' All Risks' Insurance effected in accordance with paragraph 1 of Section 1 (*Policies to be taken out by Project Co and maintained during the design and construction phase*)of Schedule 15 (*Insurance Requirements*), including physical loss or damage which would be indemnifiable but for the application of any deductible;

2.2.2 the economic additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing the loss of Revenue of Project Co which without such expenditure would have taken place, during the Minimum Indemnity Period.

2.3 **Sum Insured**

An amount sufficient to cover the sums the subject of the Indemnity for the Minimum Indemnity Period.

2.4 **Maximum Excess**

[♦] days.

2.5 **Minimum Indemnity Period**

[♦] months.

2.6 **Period of Insurance**

As per the Contractors' "All Risks" Insurance, excluding the defects liability period.

2.7 **Cover Features & Extensions**

2.7.1 Denial of access

2.7.2 Utilities

2.7.3 Terrorism

2.7.4 Automatic Reinstatement of sum insured

2.7.5 Professional Fees

2.7.6 Subrogation waiver extended to Authority Parties (other than Contractors and Sub-Contractors)

2.8 **Principal Exclusions**

2.8.1 The exclusions under the Contractors' 'All Risks' Insurance, other than for consequential financial losses.

2.8.2 Delayed response by a public body or state authority.

3 CONSTRUCTION THIRD PARTY LIABILITY INSURANCE

3.1 **Interest**

To indemnify the Insured in respect of all sums that they may become legally liable to pay (including claimant's costs and expenses) as damages in respect of accidental:

3.1.1 death, or bodily injury, illness, disease contracted by any person;

3.1.2 loss or damage to property;

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, nuisance, loss of amenities, or any like cause.

happening during the Period of Insurance and arising out of or in connection with the Project.

3.2 **Limit of Indemnity**

Not less than £[♦]m in respect of any one (1) occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution liability.

3.3 **Maximum Deductible**

£[♦] for each and every occurrence of property damage. (Personal injury claims will be paid in full).

3.4 **Territorial Limits**

UK [and elsewhere in the world in respect of non manual visits].

3.5 **Jurisdiction**

Worldwide excluding USA and Canada.

3.6 **Period of Insurance**

As per the Contractors' "All Risks" Insurance, including the defects liability period.

3.7 **Cover Features & Extensions**

3.7.1 Munitions of war

3.7.2 Cross liability clause

3.7.3 Contingent motor

3.7.4 Legal defence costs

3.7.5 Subrogation waiver extended to Authority Parties (other than Contractors and Sub-Contractors)

3.8 **Principal Exclusions**

3.8.1 Liability for death, illness, disease or bodily injury sustained by employees of the Insured.

3.8.2 Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by legislation in respect of such vehicles.

3.8.3 Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the Insured.

3.8.4 Liability in respect of loss or damage to property in the care, custody and control of the Insured but this exclusion is not to apply to all property belonging to the Authority which is in the care, custody and control of another Insured.

3.8.5 Events more properly covered under a professional indemnity policy.

3.8.6 Liability arising from the ownership, possession or use of any aircraft or marine vessel.

3.8.7 Liability arising from seepage and pollution unless caused by a sudden, unintended and unexpected occurrence.

3.8.8 Losses indemnified under the CAR policy or DSU policy.

SECTION 2

POLICIES TO BE TAKEN OUT BY PROJECT CO AND MAINTAINED FROM THE ACTUAL COMPLETION DATE

Common to all policies in Section 2 (*Policies to be taken out by Project Co and maintained from the Actual Completion Date*) (unless stated otherwise):

Insureds

1 Authority

2 Project Co

3 Service Provider

4 Service Provider's sub-contractors

5 Senior Funders

6 Subordinated Funders

each for their respective rights and interests in the Project.

1 PROPERTY DAMAGE INSURANCE

1.1 Insured Property

The project assets which are the property of Project Co or for which Project Co may be responsible including but not limited to the Facilities.

1.2 Coverage

"All risks" of physical loss or damage to the Insured Property from any cause not excluded, including machinery breakdown and computer breakdown in respect of appropriate equipment.

1.3 Sum Insured

At all times an amount not less than the total reinstatement or replacement value of the Insured Property plus provision to include other Cover Features and Extensions as appropriate.

1.4 Maximum Deductible

£[♦] each and every claim (indexed as required in accordance with Clause 54.4.8).

1.5 **Territorial Limits**

United Kingdom plus elsewhere whilst in inland transit.

1.6 **Period of Insurance**

From the Actual Completion Date [Phase Actual Completion Date] or as otherwise specified in this Agreement for the duration of this Agreement and renewable on an annual basis unless agreed otherwise by the Parties.

1.7 **Cover Features & Extensions**

1.7.1 Terrorism

1.7.2 Automatic reinstatement of sum insured

1.7.3 Capital additions clause

1.7.4 Seventy-two (72) hour clause

1.7.5 European Union local authorities clause

1.7.6 Professional fees

1.7.7 Debris removal

1.7.8 Pollution and contamination to the Insured Property arising from an event which itself is not otherwise excluded

1.7.9 Repair / reinstatement basis of claims settlement with cash option for non-reinstatement

1.7.10 Subrogation waiver extended to Authority Parties (other than Contractors and Sub-Contractors)

1.8 **Principal Exclusions**

1.8.1 War and related perils (UK market agreed wording)

1.8.2 Nuclear/radioactive risks (UK market agreed wording)

1.8.3 Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds

1.8.4 Wear, tear and gradual deterioration

1.8.5 Consequential financial losses

1.8.6 Cyber risks

1.8.7 Losses recovered under the CAR policy

2 BUSINESS INTERRUPTION INSURANCE

2.1 Insureds

2.1.1 Project Co

2.1.2 Senior Funders

2.1.3 Subordinated Funders

2.1.4 [Authority]

each for their respective rights and interests in the Project.

2.2 Indemnity

In respect of:

2.2.1 loss of Revenue during at least the Minimum Indemnity Period arising from an interruption or interference in the operation of the Project as a result of loss or damage covered under Property Damage Insurance effected in accordance with paragraph 1 of Section 2 (*Policies to be taken out by Project Co and maintained from the Actual Completion Date*) of this Schedule 15 (*Insurance Requirements*) including physical loss or damage which would be indemnifiable but for the application of any deductible;

2.2.2 the economic additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing the loss of Revenue of Project Co

which without such expenditure would have taken place, during the Indemnity Period.

2.3 **Sum Insured**

An amount sufficient to cover the sums the subject of the Indemnity for the Minimum Indemnity Period.

2.4 **Maximum Excess**

[£]/[♦ days].

2.5 **Minimum Indemnity Period**

[♦] months.

2.6 **Period of Insurance**

From the Actual Completion Date [Phase Actual Completion Date] for the duration of this Agreement and renewable on an annual basis unless agreed otherwise.

2.7 **Cover Features & Extensions**

2.7.1 Denial of access

2.7.2 Terrorism

2.7.3 Utilities

2.7.4 Accountants Clause

2.7.5 Automatic reinstatement of sum insured

2.7.6 Subrogation waiver extended to Authority Parties (other than Contractors and Sub-Contractors)

2.8 **Principal Exclusions**

2.8.1 The exclusions under the Property Damage Insurance, other than for consequential financial losses

2.8.2 Delayed response by a public body or state authority

3 THIRD PARTY PUBLIC AND PRODUCTS LIABILITY INSURANCE

3.1 Indemnity

To indemnify the Insured in respect of all sums that they may become legally liable to pay (including claimant's costs and expenses) as damages in respect of accidental:

3.1.1 death, or bodily injury, illness, disease contracted by any person;

3.1.2 loss or damage to property;

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, nuisance, loss of amenities, or any like cause.

happening during the period of insurance and arising out of or in connection with the Project and the provision of the Services.

3.2 Limit of Indemnity

Not less than £[♦] (indexed as required in accordance with Clause 54.4.8) in respect of any one (1) occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution and products liability.

3.3 Maximum Deductible

£[♦] for each and every occurrence of property damage indexed as required in accordance with Clause 54.4.8). (Personal injury claims will be paid in full).

3.4 Territorial Limits

UK [and elsewhere in the world in respect of non manual visits].

3.5 Jurisdiction

Worldwide excluding USA and Canada.

3.6 Period of Insurance

From the Actual Completion Date or as otherwise specified in this Agreement for the duration of this Agreement and renewable on an annual basis unless agreed otherwise.

3.7 **Cover Features & Extensions**

3.7.1 Munitions of war

3.7.2 Cross liability clause

3.7.3 Contingent motor

3.7.4 Legal defence costs in addition to the Limit of Indemnity

3.7.5 Subrogation waiver extended to Authority Parties (other than Contractors and Sub-Contractors)

3.8 **Principal Exclusions**

3.8.1 Liability for death, illness, disease or bodily injury sustained by employees of the Insured.

3.8.2 Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by legislation in respect of such vehicles.

3.8.3 Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the Insured.

3.8.4 Liability in respect of loss or damage to property in the care, custody and control of the Insured but this exclusion is not to apply to all property belonging to the Authority which is in the care, custody and control of another Insured Party.

3.8.5 Liability arising out of technical or professional advice (given for a fee) other than in respect of death or bodily injury to persons or damage to third party property.

3.8.6 Liability arising from the ownership, possession or use of any aircraft or marine vessel.

3.8.7 Liability arising from seepage and pollution unless caused by a sudden, unintended and unexpected occurrence.

3.8.8 Losses under the property damage policy or business interruption policy.

SECTION 3

ENDORSEMENTS

Unless the context otherwise requires defined terms set out in the following endorsements shall have the meaning set out in the Agreement.

Endorsement 1

Cancellation

1 This policy shall not be cancelled or terminated before the original expiry date is to take effect except in respect of non-payment of premium.

2 The insurer shall by written notice advise the Authority:

2.1 at least thirty (30) days before any such cancellation or termination is to take effect;

2.2 at least thirty (30) days before any reduction in limits or coverage or any increase in deductibles is to take effect; and

2.3 of any act or omission or any event of which the insurer has knowledge and which might invalidate or render unenforceable in whole or in part this policy.

Endorsement 2

Multiple Insured/Non-Vitiation Clause

1 Each of the parties comprising the insured shall for the purpose of this policy be considered a separate co-insured entity, insured on a composite basis, with the words "the insured" applying to each as if they were separately and individually insured provided that the total liability of the insurers under each section of this policy to the insured collectively shall not (unless the policy specifically permits otherwise) exceed the limit of indemnity or amount stated to be insured under that section or policy. Accordingly, the liability of the insurers under this policy to any one insured shall not be conditional upon the due observance and fulfilment by any other insured party of the terms and conditions of this policy or of any duties imposed upon that insured party relating thereto, and shall not be affected by any failure in such observance or fulfilment by any such other insured party.

2 It is understood and agreed that any payment or payments by insurers to any one or more of the insureds shall reduce, to the extent of that payment, insurers' liability to all such parties arising from any one (1) event giving rise to a claim under this policy and (if applicable) in the aggregate.

3 Insurers shall be entitled to avoid liability to or (as may be appropriate) claim damages from any insured party in circumstances of fraud misrepresentation non-disclosure or material breach of warranty or condition of this policy (each referred to in this clause as a "**Vitiating Act**") committed by that insured party save where such misrepresentation non-disclosure or breach of warranty or condition was committed innocently and in good faith.

4 For the avoidance of doubt it is however agreed that a Vitiating Act committed by one insured party shall not prejudice the right to indemnity of any other insured who has an insurable interest and who has not committed the Vitiating Act.

5 Insurers hereby agree to waive all rights of subrogation and/or recourse which they may have or acquire against any insured party (together with their employees and agents) except where the rights of subrogation or recourse are acquired in consequence of a Vitiating Act in which circumstances insurers may enforce such rights against the insured responsible for the Vitiating Act notwithstanding the continuing or former status of the vitiating party as an insured.

6 Notwithstanding any other provision of this policy or any other document or any act and/or omission by any insured party insurers agree that:

6.1 no party other than the Authority has any authority to make any warranty, disclosure or representation in connection with this policy on behalf of the Authority;

6.2 where any warranty, disclosure or representation is required from the Authority in connection with this policy insurers will contact the Authority in writing (in accordance with Endorsement 3 to the Contract) and set out expressly the warranty, disclosure and/or representation required within a reasonable period of time from the Authority (regarding itself); and

6.3 save as set out in a request from insurers to the Authority in accordance with (2) above, the Authority shall have no duty to disclose any fact or matter to insurers in connection with this policy save to the extent that for the Authority not to disclose a fact or matter would constitute fraudulent misrepresentation and/or fraudulent non-disclosure.

Endorsement 3

Communications

1 All notices or other communications under or in connection with this policy shall be given to each insured (and the Authority) in writing or by email. Any such notice will be deemed to be given as follows:

1.1 if in writing, when delivered;

1.2 [if by email:-

1.2.1 at the time the email enters the information system of the intended recipient designated by them to receive electronic notices pursuant to paragraph 2 below, if sent on a Business Day between the hours of 9am and 4pm; or

1.2.2 by 11am on the next following Business Day, if 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 no error message indicating failure has been received by the sender and in the case of notices issued pursuant to paragraph 2 of Endorsement 1 of Section 3 (*Endorsements)* of this Schedule 15 (*Insurance Requirements*) provided that within twenty-four (24) hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by hand to the intended recipient [and, where such notice is addressed to the Authority, copied to [♦[117]].]

2 The postal address and email address of the Authority for all notices under or in connection with this policy are those notified from time to time by the Authority for this purpose to Project Co at the relevant time. The initial postal address and email address of the Authority are as follows:

The Authority: [♦]

Address: [♦]

Email: [♦]

Attention: The Chief Executive from time to time of the Authority

3 It is further agreed that a notice of claim given by the Authority or any other insured shall in the absence of any manifest error be accepted by the insurer as a valid notification of a claim on behalf of all insureds.

Endorsement 4

Loss Payee (applicable only to the Physical Damage Policies)

Subject to the provision of Clause 54.18 of the Contract all proceeds of this policy shall be payable without deduction or set-off to the Insurance Proceeds Account.

Endorsement 5

Primary Insurance

It is expressly understood and agreed that this policy provides primary cover for the insured parties and that in the event of loss destruction damage or liability covered by this policy which is covered either in whole or in part under any other policy or policies of insurance effected by or on behalf of any of the insured parties the insurers will indemnify the insured parties as if such other policy or policies of insurance were not in force and the insurers waive their rights of recourse if any against the insurers of such other policy or policies of insurance.

Endorsement 6

Ringfencing

The level of any indemnity available to an insured party under this policy in relation to any claim(s) concerning the Project shall not be affected and/or reduced by any claim(s) unrelated to the Project.

[117] Insert Welsh Government details.

SECTION 4

INSURANCE ARRANGEMENTS

1 For the purpose of this Section 4 (*Insurance Arrangements)* of this Schedule 15 (*Insurance Requirements)* the following words shall have the following meanings:

"Actual Relevant Insurance Cost" means the aggregate of the annual insurance premiums reasonably incurred by Project Co to maintain the Operational Insurance during the relevant Insurance Review Period;

"Insurance Cost Factors" has the meaning given to it in paragraph 7.2 (iii) of this Section 4 (*Insurance Arrangements)* of this Schedule 15 (*Insurance Requirements)*;

"Insurance Renewal Report" shall bear the meaning ascribed to it in paragraph 7.2 (x) of this Section 4 (*Insurance Arrangements)* of this Schedule 15 (*Insurance Requirements)*;

"Insurance Review Period" means a two (2) year period from the Operational Insurance Inception Date and each subsequent two (2) year period commencing on the second anniversary of the Operational Insurance Inception Date except where the end of such period lies beyond the end of the Project Term, in which case the Insurance Review Period shall be the period from the end of the penultimate Insurance Review Period to the last day of the Project Term;

"Insurance Summary Sheet" has the meaning given to it in paragraph 7.2 (ii) of this Section 4 (*Insurance Arrangements)* of this Schedule 15 (*Insurance Requirements)*;

"Joint Insurance Cost Report" shall bear the meaning ascribed to it in paragraph 7.2 of this Section 4 (*Insurance Arrangements)* of this Schedule 15 (*Insurance Requirements);*

"Market Presentations" shall bear the meaning ascribed to it in paragraph 7.2 (ix) of this Section 4 (*Insurance Arrangements)* of this Schedule 15 (*Insurance Requirements)*;

"Operational Insurance Inception Date" means the date on which the Operational Insurance is first providing active insurance cover to the Project Co, being a date no earlier than [first Phase Actual Completion Date];

"Portfolio Cost Saving" means any insurance cost saving which arises from Project Co changing the placement of the Operational Insurances from being on a stand-alone project-specific basis, to being on the basis of a policy (or policies) also covering risks on other projects or other matters which are outside the scope of the Project so as to benefit from portfolio savings. A Portfolio Cost Saving is defined to be a positive sum and cannot be less than zero;

"Project Co Factors" shall bear the meaning ascribed to it in paragraph 7.2 (v).of this Section 4 (*Insurance Arrangements)* of this Schedule 15 (*Insurance Requirements)*;

"Relevant Insurance Market" means the insurance market which insures the majority of all MIM/PFI/PF2/PPP/NPD projects across all of the MIM/PFI/PF2/PPP/NPD sectors (as determined by the number of MIM/PFI/PF2/PPP/NPD projects) and at the date of this Agreement the Relevant Insurance Market is the United Kingdom; and

"Renewal Date" means the Operational Insurance Inception Date, the second anniversary of the Operational Insurance Inception Date and the date falling on each subsequent two year anniversary during the Project Term.

2 Project Co must comply with the provisions of this Section 4 (*Insurance Arrangements*) of Schedule 15 when placing or renewing the Operational Insurances.

3 Not less than [sixty (60)] Business Days prior to the [first Phase] Completion Date and each subsequent Renewal Date in respect of each of the Operational Insurances, Project Co must inform the Authority Representative of the forthcoming requirement to place or renew an Operational Insurance and its proposals for obtaining competitive quotations from at least three (3) suitable insurers (including any portfolio arrangements where such arrangements are available to Project Co). Project Co must take advice from reputable insurance brokers experienced in arranging insurances for similar risks as to which insurers are most likely to provide quotations that will represent best value for money for the Authority as payer of the premiums for such insurance. In considering which insurers to approach, Project Co must consider whether any of the Shareholders enjoys any special relationship with any insurer and/or is otherwise able to procure the placing of the relevant insurance in any particular manner consistent with the requirements of this Agreement that may result in lower premiums and shall include such insurers in its proposal under this paragraph 3.

4 Within [ten (10)] Business Days of receiving a notice from Project Co pursuant to paragraph 3, the Authority may provide Project Co with details of any other insurers that it wishes Project Co to invite to quote for provision of the relevant Operational Insurance.

5 Not less than [thirty (30)] Business Days prior to the [first Phase] Completion Date and each subsequent Renewal Date for any of the Operational Insurances, Project Co must forward to the Authority's Representative quotes from the proposed insurers (together with Insurance Summary Sheets, Market Presentations and Insurance Renewal Reports in respect of each quote), to include any insurer nominated by the Authority pursuant to paragraph 4, including a reasoned recommendation as to which quote Project Co views as offering best value for money for the Authority, taking into account all relevant circumstances.

6 Within [fifteen(15)] Business Days of receiving a recommendation from Project Co pursuant to paragraph 5, the Authority must notify Project Co in writing which insurer it is to place the relevant Operational Insurance with, failing which Project Co shall be entitled to place the relevant Operational Insurance with the insurer recommended by Project Co.

7 **Insurance Review Procedure**

7.1 This procedure shall be used to determine whether any increase or decrease in Operational Insurance costs is to be excluded from the Operational Insurance costs to be charged by Project Co to the Authority as Other Costs pursuant to paragraph 3 (*Operational Insurance Premiums*) of Section 6 (*Other Costs*) of Schedule 14 (*Payment Mechanism*).

7.2 Project Co's insurance broker shall prepare a report on behalf of both Project Co and the Authority (the "**Joint Insurance Cost Report**"). The Joint Insurance Cost Report is to be prepared at Project Co's expense, and should, as a minimum, contain the following information for the relevant Insurance Review Period:

(i) A full breakdown of the Actual Relevant Insurance Cost for the current Insurance Review Period, together with the Actual Relevant Insurance Cost for the previous Insurance Review Period;

(ii) A spreadsheet (the "**Insurance Summary Sheet**") detailing separately:-

(A) the sum(s) insured/limit of indemnity (i.e rateable factor) for each of the Operational Insurances;

(B) the premium rate for each of the Operational Insurances;

(C) the gross premium paid (or to be paid) for each of the Operational Insurances;

(D) the deductible(s) for each Operational Insurance;

(E) details of any claims (paid or reserved) (including incident date, type and quantum) in excess of £[♦]; and

(F) details of any insurance broker remuneration and/or commissions.

(iii) Full details of the amount of the premium reasonably considered by Project Co's insurance broker to be attributable to:

(A) circumstances generally prevailing in the Relevant Insurance Market together with reasoning for such view;

(B) the claims history of the Authority; and

[(C) malicious damage at the Facilities],[118]

(the "**Insurance Cost Factors**") together with the insurance brokers reasons for such view (specifying the impact of each of the factors and quantifying the amount attributable to each factor specified above).

(iv) Full details of any Portfolio Cost Saving;

(v) Full details of any factor which increases the cost of the insurance premium and the associated amount of the premium reasonably considered by Project Co's insurance broker to be attributable to any factor other than the Insurance Cost Factors (the "**Project Co Factors**"), together with reasoning for such view (specifying the impact of each of the factors and quantifying the amount attributable to each factor specified);[119]

(vi) The calculation of the Other Costs in respect of the Operational Insurances, in accordance with paragraph 8 *(Calculation of Insurance Cost Anticipated to*

[118] Malicious damage only to be referred to here where it is an Authority risk.
[119] Malicious damage only to be referred to here where it is an Authority risk.

be Payable by the Authority) below, over the course of the relevant Insurance Review Period (stated on a monthly basis);

(vii) Evidence satisfactory to the Authority (acting reasonably) of any changes to circumstances generally prevailing in the Relevant Insurance Market that are relied on by the Insurance Broker in preparing the Insurance Summary Sheet;

(viii) Details of movements from a recognised insurance index plus, if available from other appropriate sources, details of changes in insurance cost across the Relevant Insurance Market as a whole;

(ix) A copy of the market presentation(s) prepared by Project Co's insurance broker and issued to insurers in respect of the relevant Insurance Review Period (the "**Market Presentations**"); and

(x) A copy of the insurance renewal report prepared by Project Co's insurance broker in respect of the relevant Insurance Review Period (the "**Insurance Renewal Report**").

7.3 Project Co shall procure that the Insurance Broker, no later than the date which is ten (10) Business Days after the Insurance Review Date, delivers to the Authority, at the same time as it delivers to Project Co, at least two (2) copies of the Joint Insurance Cost Report. Following receipt of the Joint Insurance Cost Report, the Authority shall notify Project Co in writing within fifteen (15) Business Days whether or not it accepts the Joint Insurance Cost Report including full details of any disagreement. If the Authority does not provide such notification and/or details of any disagreement to Project Co within fifteen (15) Business Days, the Authority shall be deemed to have accepted the Joint Insurance Cost Report. If the Authority disagrees with any item in the Joint Insurance Cost Report, the parties shall use their respective reasonable endeavours acting in good faith to agree the contents of the Joint Insurance Cost Report. If the parties fail to agree the contents of the Joint Insurance Cost Report within thirty-five (35) Business Days from the date it was delivered to the Authority, the matter shall be resolved pursuant to Clause 57 (*Dispute Resolution*).

7.4 The Authority may make the Joint Insurance Cost Report available to any of its [or the Welsh Government's] agents or advisers or other body or bodies nominated by the Welsh Government for insurance cost verification, benchmarking or similar purpose.

8 Calculation of Insurance Costs Anticipated to be Payable by the Authority

The calculation of the Other Costs to be included in the Insurance Summary Sheet pursuant to paragraph 7.2 (vi) above, shall be a sum equal to:

8.1 the Actual Relevant Insurance Costs;

plus

8.2 any fee which Project Co's insurance broker anticipates will be payable pursuant to paragraph 3.2 of Section 6 (*Other Costs*) of Schedule 14 (*Payment Mechanism*) to this Agreement;

minus

8.3 the Project Co Factors.

SECTION 5

BROKER'S LETTER OF UNDERTAKING

To: The Authority

Dear Sirs

Agreement dated [♦] entered into between [♦] Limited ("Project Co") and [♦] (the "Authority") (the "Agreement")

1 We refer to the Agreement. Unless the context otherwise requires, terms defined in the Agreement shall have the same meaning in this letter.

2 We act as insurance broker to Project Co in respect of the Insurances and in that capacity we confirm that the Insurances which are required to be procured pursuant to Clause 54 *(Insurance)* and Schedule 15 (*Insurance Requirements*) of the Agreement:

2.1 where appropriate name you and such other persons as are required to be named pursuant to the Agreement for their respective interests;

2.2 are, in our reasonable opinion as insurance brokers, as at today's date, in full force and effect in respect of all the matters specified in the Agreement; and

2.3 that all premiums due to date in respect of the Insurances are paid and the Insurances are, to the best of our knowledge and belief, placed with insurers which, as at the time of placement, are reputable and financially sound. We do not, however, make any representations regarding such insurers' current or future solvency or ability to pay claims; and that

2.4 the endorsements set out in Section 3 (*Endorsements*) of Schedule 15 (*Insurance Requirements*) of the Agreement are as at today's date in full force and effect in respect of the Insurances.

3 We further confirm that the attached cover notes confirm this position.

4 Pursuant to instructions received from Project Co and in consideration of your approving our appointment [or continuing appointment] as brokers in connection with the Insurances, we hereby undertake in respect of the interests of the Authority in relation to the Insurances:

4.1 **Notification Obligations**

4.1.1 to notify you at least thirty (30) days prior to the expiry of any of the Insurances if we have not received instructions from Project Co to negotiate renewal and in the event of our receiving instructions to renew, to advise you promptly of the details thereof; and

4.1.2 to notify you at least thirty (30) days prior to ceasing to act as brokers to Project Co unless, due to circumstances beyond our control, we are unable to do so in which case we shall notify you as soon as practicable.

4.2 **Advisory Obligations**

4.2.1 to notify you promptly of any default in the payment of any premium for any of the Insurances;

4.2.2 to notify you if any insurer cancels or gives notification of cancellation of any of the Insurances, at least thirty (30) days before such cancellation is to take effect or as soon as reasonably practicable in the event that notification of cancellation takes place less than thirty (30) days before it is to take effect;

4.2.3 to notify you of any act or omission, breach or default of which we have knowledge which in our reasonable opinion may either invalidate or render unenforceable in whole or in part any of the Insurances or which may otherwise materially impact on the extent of cover provided under the Insurances; and

4.2.4 to advise Project Co of its duties of disclosure to insurers and to specifically advise upon:

(a) the facts, circumstances and beliefs that should generally be disclosed to insurers; and

(b) the obligation not to misrepresent any facts, matters or beliefs to insurers.

4.3 **Disclosure Obligations**

4.3.1 to disclose to insurers all information made available to us from any source and any fact, change of circumstances or occurrence made known to us from any source which in our reasonable opinion is material to the risks insured against under the Insurances and which properly should be disclosed to insurers as soon as practicable after we become aware of such information, fact, change of circumstance or occurrence whether prior to inception or renewal or otherwise; and

4.3.2 to treat as confidential all information so marked or otherwise stated to be confidential and supplied to us by or on behalf of Project Co or the Authority and not to disclose such information, without the prior written consent of the supplier, to any third party other than those persons who, in our reasonable opinion have a need to have access to such information from time to time, and for the purpose of disclosure to the insurers or their agents in respect of the Insurances in discharge of our obligation set out at Clause 4.3.1 of this letter. Our obligations of confidentiality shall not conflict with our duties owed to Project Co and

shall not apply to disclosure required by an order of a court of competent jurisdiction, or pursuant to any applicable law, governmental or regulatory authority having the force of law or to information which is in the public domain.

4.4 **Administrative Obligations**

4.4.1 to hold copies of all documents relating to or evidencing the Insurances, including but without prejudice to the generality of the foregoing, insurance slips, contracts, policies, endorsements and copies of all documents evidencing renewal of the Insurances, payment of premiums and presentation and receipt of claims;

4.4.2 to supply to the Authority and/or its insurance advisers (or the Authority's or its insurance advisers' authorised representatives) promptly on written request copies of the documents set out in Clause 4.4.1 of this letter, and to the extent available, to make available to such persons promptly upon the Authority's request the originals of such documents;

4.4.3 to pay into the Insurance Proceeds Account without set off or deduction of any kind for any reason all payments in respect of claims received by us from insurers in relation to the Insurances specified in Clauses [♦] 54.1 to 54.3 (*Project Co Insurances*) of the Agreement.

4.4.4 to administer the payment of premiums due pursuant to the Insurances such that, in so far as we hold appropriate funds, all such premiums shall be paid to insurers in accordance with the terms of the Insurances;

4.4.5 to administer the payment of claims from insurers in respect of the Insurances (the "Insurance Claims") including:

(a) negotiating settlement of Insurance Claims presented in respect of the Insurances;

(b) collating and presenting all information required by insurers in relation to Insurance Claims presented in respect of the Insurances; and

(c) insofar as it is relevant and practicable, liaising with and reporting to each Authority throughout the settlement, payment and administration of such Insurance Claims.

4.4.6 to advise the Authority promptly upon receipt of notice of any material changes which we are instructed to make in the terms of the Insurances and which, if effected, in our opinion as Insurance Brokers would result in any material reduction in limits or coverage or in any increase in deductibles, exclusions or exceptions;

4.4.7 to advise the Authority in advance of any change to the terms of, or any lapse, non-renewal and/or cancellation of any policy maintained in respect of the Insurances;

4.4.8 to use our reasonable endeavours to have endorsed on each and every policy evidencing the Insurances (when the same is issued) endorsements substantially in the form set out in Section 3 (*Endorsements*) to Schedule 15 (*Insurance Requirements*) of the Agreement; and

4.4.9 to:

(a) prepare prior to the commencement of the Operational Insurances and prior to each Renewal Date, at the expense of the Project Co, a Joint Insurance Cost Report on behalf of both the Project Co and the Authority in accordance with the insurance review procedure as set forth in Section 4 (*Insurance Arrangements*) of Schedule 15 (*Insurance Requirements*) to the Project Agreement. We shall ensure that the information in the Joint Insurance Cost Report is fairly represented, based on the information available to us; and

(b) provide such other information required to satisfy the requirement of Section 4 (*Insurance Arrangements*) of Schedule 15 (*Insurance Requirements*) to the Project Agreement,

in each case, supported by appropriate evidence, of the generally prevailing market for the relevant Operational Insurance and of any other circumstances relevant to the application of paragraph 3 of Section 6 (*Other Costs*) of Schedule 14 (*Payment Mechanism*) to the Project Agreement.

5 We shall supply further letters substantially in this form on renewal of each of the Insurances and shall supply copies of such letters to those parties identified to us by the Authority for such purposes.

Yours faithfully

For and on behalf of [Project Co's broker]

SCHEDULE 16

CHANGE PROTOCOL

SECTION 1

DEFINITIONS

In this Schedule 16 (*Change Protocol*) and elsewhere in this Agreement (save where Schedule 1 (*Definitions and Interpretation*) provides to the contrary) the following words shall have the following meanings:

"Adjustment Date"	means the date on which the adjustment to the Annual Service Payments takes effect in accordance with the provisions of this Agreement, or such other date as is agreed between the parties;
"Affordable"	means within the revenue resource parameters determined by the Authority and notified in writing by it to Project Co as available for a proposed High Value Change;
"Approval Criteria"	has the meaning given in paragraph 7 (*Approval Criteria*) of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*);
"Approved Project"	has the meaning given in paragraph 8.2.1 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*);
"Assumption Adjustment"	means an adjustment to any of the assumptions contained in the Financial Model;
"Authority Change"	means, as the case may be, a Low Value Change, a Medium Value Change or a High Value Change;
"Authority Change Notice"	means a notice issued in accordance with this Schedule 16 (*Change Protocol*) requiring an Authority Change;
"Calculation Date"	means the relevant date for the purposes of calculating the Incurred Change Management Fee in accordance with Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*);
"Capital Cost"	means in relation to any High Value Change the cost of carrying out the design, construction and commissioning of any construction works required to implement that High Value Change;
"Catalogue of Small Works and Services" and "Catalogue"	means the list of prices and time periods for types of Low Value Changes set out in Appendix 1 Part 1 (*Catalogue*) to this Schedule 16 (*Change Protocol*), as amended from time to time in accordance with paragraph 3 (*Project Co Response and Authority Confirmation*) of Section 2 (*Low Value Changes*) of this Schedule 16 (*Change Protocol*);
"Catalogue Price"	means the total cost (excluding VAT) of carrying out a

Low Value Change as set out in the Catalogue;

"Catalogue Review Date" means each third anniversary of the Commencement Date;

"Change" means a change in the Works, the Facilities and/or Services or additional works and/or services or a change in the Authority's Policies that may be made under Clause 34 (*Change Protocol*) or this Schedule 16 (*Change Protocol*);

"Change in Costs" means in respect of any Relevant Event, the effect of that Relevant Event (whether of a one-off or recurring nature, and whether positive or negative) upon the actual or anticipated costs, losses or liabilities of Project Co and/or the Contractor and/or any Service Provider (without double counting), including, as relevant, the following:

(a) the reasonable costs of complying with the requirements of Clauses 26.9 (*Authority's remedial rights*), 30 (*Delay Events*), 33 (*Changes in Law*) and/or Sections 2 (*Low Value Changes*) to 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*), including the reasonable costs of preparation of design and estimates;

(b) the costs of continued employment of, or making redundant, staff who are no longer required;

(c) the costs of employing additional staff;

(d) reasonable professional fees;

(e) the costs to Project Co of financing any Relevant Event (and the consequences thereof) including commitment fees and capital costs interest and hedging costs, lost interest on any of Project Co's own capital employed and any finance required pending receipt of a lump sum payment or adjustments to the Annual Service Payment;

(f) the effects of costs on implementation of any insurance reinstatement in accordance with this Agreement, including any adverse effect on the insurance proceeds payable to Project Co (whether arising from physical damage insurance or business interruption insurance (or their equivalent)) in respect of that insurance reinstatement and any extension of the period of implementation of the insurance reinstatement;

(g) operating costs, or lifecycle maintenance or

replacement costs;

(h) Capital Expenditure (or, in the case of a Relevant Event which is a Relevant Change in Law, Capital Expenditure for which the Authority is responsible);

(i) the costs required to ensure continued compliance with the Funding Agreements;

(j) any deductible or increase in the level of deductible, or any increase in premium under or in respect of any insurance policy; and

(k) Direct Losses or Indirect Losses, including reasonable legal expenses on an indemnity basis;

["Change in Revenue" means, in respect of any Relevant Event, the effect of that Relevant Event (whether of a one-off or recurring nature, and whether positive or negative) upon the actual or anticipated income of Project Co and/or any Service Provider [from Third Party Use] or from other income committed from third parties (without double counting);

"Change Management Fee" means the fee calculated in accordance with paragraph 10 (*Change Management Fee*) of Section 4 (*High Value Changes*);

"Cost" where used in the definitions of High Value Change and Low Value Change means the immediate cost that will be incurred by Project Co to implement the relevant Change, disregarding any Whole Life Costs;

["Derogated Low Value Change" means:

(a) [list specific types of Changes to be allowed] and

(b) any [other] Low Value Change that:

(i) consists of minor works;

(ii) only affects the interior of the Facilities;

(iii) does not affect any of the mechanical and electrical equipment of the Facilities;

(iv) does not involve any interference with the service media in the Facilities;

(v) will not conflict with any Programmed Maintenance or Lifecycle Replacement; and

(vi) will not prejudice any of the Operational Insurances;]

["Derogated Low Value Change Notice" means a notice given by the Authority in accordance with paragraph 1.2 of Section 2 (*Low Value Changes*) of this Schedule 16 (*Change Protocol*);]

"Estimate" has the meaning given in paragraph 3 of Section 3 (*Medium Value Changes*) of this Schedule 16 (*Change Protocol*);

"Estimated Change in Project Costs" means, in respect of any Relevant Event, the aggregate of any Change in Costs [and/or (without double counting) Change in Revenue (as relevant)];

"High Value Change" means:

(a) a Change requested by the Authority that, in the reasonable opinion of the Authority, is likely either to Cost in excess of [one hundred thousand pounds (£100,000)] (index linked) or to require an adjustment to the Annual Service Payment that on a full year basis is 2% or more of the Annual Service Payment in the relevant Contract Year provided that the parties may agree that such a Change should instead be processed as a Medium Value Change; or

(b) any other Change that the parties agree is to be treated as a High Value Change;

"High Value Change Proposal" means a proposal satisfying the requirements of paragraph 3.4 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*);

"High Value Change Requirements" has the meaning given in paragraph 2.1.3 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*);

"High Value Change Stage 2 Submission" has the meaning given in paragraph 4.1.1 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*);

"Incurred Change Management Fee" means the amounts actually incurred or payable by or on behalf of Project Co up to the Calculation Date in respect of matters identified by Project Co pursuant to paragraphs 3.4.3 and/or 4.3.7 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*) as falling within the Change Management Fee (and not already reimbursed by the Authority);

"Input Adjustment" means any adjustment to the Financial Model other than Assumption Adjustment and Logic Adjustments;

"Key Ratios" means the following ratios:

(a) the [Loan Life Cover Ratio] (as defined in the Senior Funding Agreements);

(b) the [Annual Debt Service Cover Ratio] (as defined in the Senior Funding Agreements);

(c) the [Project IRR]; and

(d) the [Subordinated Debt Rate];

"Logic Adjustment" means an adjustment to the logic or formulae contained in the Financial Model;

"Low Value Change" means a Change which is either:

(a) of a type listed in the Catalogue of Small Works and Services; or

(b) is not so listed, but has an individual Cost not exceeding [ten thousand pounds (£10,000)] (index linked), or as otherwise agreed from time to time, except for any request that would (if implemented) increase the likelihood of Project Co failing to meet the Authority's Construction Requirements and/or the Service Level Specification or materially and adversely affect Project Co's ability to perform its obligations under this Agreement;

"Medium Value Change" means a Change requested by the Authority which is not a Low Value Change or a High Value Change;

"Post-Adjustment Financial Model" means the Financial Model in effect immediately following the making of the relevant adjustments;

"Pre-Adjustment Financial Model" means the Financial Model in effect immediately prior to the making of the relevant adjustments;

"Project Co Change" means a Change that is initiated by Project Co by submitting a Project Co Notice of Change to the Authority pursuant to Section 5 (*Project Co Changes*) of this Schedule 16 (*Change Protocol*);

"Project Co Notice of Change" has the meaning given in paragraph 1 of Section 5 (*Project Co Changes*) of this Schedule 16 (*Change Protocol*);

"Relevant Event" means an event or circumstance in which this Agreement expressly provides for an adjustment to the Annual

	Service Payments to be made;
"Review Procedure"	means the procedure set out in Schedule 8 (*Review Procedure*);
"Small Works and Services Rates"	means the rates to be applied in respect of any request from the Authority for a Low Value Change set out in Appendix 1 Part 2 (*Small Works and Services Rates*) to this Schedule 16 (*Change Protocol*), as amended from time to time in accordance with paragraph 8 of Section 2 (*Low Value Changes*) of this Schedule 16 (*Change Protocol*);
"Stage 1 Approval"	has the meaning given in paragraph 3.7 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*);
"Stage 1 Approved Project"	has the meaning given in paragraph 3.7 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*);
"Stage 2 Approval"	has the meaning given in paragraph 8.2.1 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*);
"Stage 2 Approved Project"	has the meaning given in paragraph 8.2.1 of section 4 (*High Value Charges*) of this Schedule 16 (*Change Protocol*);
"Target Cost"	has the meaning given in paragraph 2.1.2 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*);
"Third Party Costs"	means: (a) in relation to a Medium Value Change, the costs incurred by Project Co with third parties in responding to an Authority Change Notice for a Medium Value Change , including, but not limited to, the Sub-Contractors, consultants and advisers; and (b) in relation to a High Value Change, the costs incurred by Project Co with third parties in responding to an Authority Change Notice for a High Value Change, including, but not limited to, the Sub-Contractors, consultants and advisers but under the exclusion of any costs incurred by the Sub-Contractors [and [Management Service Provider]] in relation to project managing the development, procurement and implementation of the High Value Change; and
"Whole Life Cost"	means the estimated and (to the extent that such information is available) the actual cost of operating and maintaining that High Value Change over its intended design life (consistent with Project Co's Proposals).

SECTION 2

LOW VALUE CHANGES

1 Low Value Change Notice

1.1 Subject to paragraph 1.2 of this Section 2 (*Low Value Changes*), where a Low Value Change is required by the Authority, it must submit an Authority Change Notice to Project Co.

1.2 [The Authority may carry out Derogated Low Value Changes during the Operational Term. If the Authority wishes to carry out a Derogated Low Value Change it shall send Project Co a notice at least [five (5)] Business Days prior to the date on which it proposes to start to implement the Change setting out the nature of the proposed Change in sufficient detail to enable Project Co to satisfy itself that the proposed Change constitutes a Derogated Low Value Change. Project Co may notify the Authority within [three (3)] Business Days of receipt of a Derogated Low Value Change Notice that it does not agree that the proposed Change constitutes a Derogated Low Value Change and, unless the parties otherwise agree, the Authority must not take any steps to carry out the proposed Change unless it has referred the dispute to the Dispute Resolution Procedure and it has been determined that the proposed Change is a Derogated Low Value Change.]

1.3 [If it carries out a Derogated Low Value Change, the Authority must use Good Industry Practice to the standards that would have applied to Project Co if it had carried it out as a Low Value Change.]

2 Authority Change Notice

An Authority Change Notice for a Low Value Change must:

2.1 state that it relates to a Low Value Change;

2.2 contain a description of the works and/or the change to the Works and/or the Services that the Authority requires including, if relevant, the applicable type of Low Value Change listed in the Catalogue; and

2.3 if there is no applicable type of change listed in the Catalogue, specify the time period within which the Authority requires the Change to be implemented.

3 Project Co Response and Authority Confirmation

Within five (5) Business Days of receipt of an Authority Change Notice for a Low Value Change, Project Co must notify the Authority of:

3.1 the cost of implementing the required Low Value Change; and

3.2 the time period for implementing the Low Value Change,

in each case in accordance with paragraph 4 of this Section 2 (*Low Value Changes*).

4 Cost and Timing

4.1 If the Low Value Change is of a type listed in the Catalogue, the cost of carrying out that Low Value Change shall not exceed the relevant Catalogue Price and the time period for implementing the Low Value Change shall not exceed the relevant time specified in the Catalogue.

4.2 If the Low Value Change is not of a type that is listed in the Catalogue, the cost of carrying out that Low Value Change shall be calculated on the basis that:

4.2.1 wherever practicable the Low Value Change will be carried out by an [existing on-site and] suitably qualified employee of Project Co or a Project Co Party and in that case Project Co may not charge for labour. Where there is no such suitably qualified on-site employee reasonably available to carry out the Low Value Change, the cost of the labour element will be calculated in accordance with the Small Works and Services Rates or, where such rates are not applicable, in accordance with rates which are fair and reasonable; and

4.2.2 the materials element will be charged at the cost of materials to Project Co or to the Project Co Party carrying out the work (net of all discounts) and there shall be no management fee, margin, overhead, contingency or other cost applied in relation thereto.

4.3 Other than the costs referred to in paragraphs 4.1 and 4.2 of this Section 2 (*Low Value Changes*) Project Co may not charge the Authority for processing, implementing or managing a Low Value Change.

5 Authority objection

The Authority may object in writing within five (5) Business Days of receipt of Project Co's notice pursuant to paragraph 3 of this Section 2 (*Low Value Changes*), to any part of that notice and in that event the parties shall act reasonably to endeavour to agree as soon as practicable how the Low Value Change is to be implemented, which may include the Authority withdrawing the Authority Notice of Change.

6 Implementation

6.1 Project Co must implement a required Low Value Change so as to minimise any inconvenience to the Authority and, subject to paragraph 10.2 of this Section 2 (*Low Value Changes*), within the timescale specified in the notice given by Project Co pursuant to paragraph 3 of this Section 2 (*Low Value Changes*) (or agreed by the parties pursuant to paragraph 5 of this Section 2 (*Low Value Changes*)).

6.2 Project Co shall notify the Authority when it considers that the Low Value Change has been completed.

6.3 If Project Co:

6.3.1 fails to give a notice to the Authority in accordance with paragraph 3 of this Section 2 (*Low Value Changes*) within fifteen (15) Business Days of the date of the Authority Change Notice; or

6.3.2 gives a notice pursuant to paragraph 3 of this Section 2 (*Low Value Changes*) to which the Authority has objected pursuant to paragraph 5 of this Section 2 (*Low Value Changes*) on any ground other than the cost of the Low Value Change, the parties have not reached agreement as to how the Low Value Change is to be implemented and the objection has not been referred to the Dispute Resolution Procedure; or

6.3.3 gives a notice pursuant to paragraph 3 of this Section 2 (Low Value Changes) to which the Authority does not object pursuant to paragraph 5 but then fails to fully implement the Low Value Change within ten (10) Business Days after the timescale specified in that notice or agreed in accordance with paragraph 5 of this Section 2 (*Low Value Changes*),

then, subject to paragraph 10.3 of this Section 2 (*Low Value Changes*), the Authority may notify Project Co that the Low Value Change Notice is withdrawn and, following such notification, may procure the implementation of the Low Value Change without further recourse to Project Co, but the Authority must ensure that the Low Value Change is carried out in accordance with Good Industry Practice and to the standards that would have applied to Project Co if it had implemented the Low Value Change.

7 Payment

Unless the Authority notifies Project Co within five (5) Business Days of receipt of a notice from Project Co pursuant to paragraph 6.2 above that the Low Value Change has not been implemented to its reasonable satisfaction:

7.1 Project Co shall, where the Low Value Change is implemented prior to the Operational Term, issue an invoice in respect of the costs of the Low Value Change, which the Authority must pay within twenty (20) Business Days of receipt; or

7.2 Project Co shall, where the Low Value Change is implemented during the Operational Term, include the costs of the Low Value Change in the next Monthly

Invoice submitted pursuant to Clause 35.2 of this Agreement following completion or implementation of the relevant Low Value Change and the amounts payable for the Low Value Changes shall be invoiced and paid in accordance with the procedure described in Clause 35 of this Agreement.

8 Update of Catalogue and Small Works and Services Rates

8.1 From the Commencement Date the Catalogue shall be that set out in Part 1 (*Catalogue)* of Appendix 1 to this Schedule 16 (*Change Protocol*) and the Small Works and Services Rates shall be those set out in Part 2 of (*Small Works and Services Rates*) Appendix 1 to this Schedule 16 (*Change Protocol*). **1**

8.2 Subject to paragraph 8.3 of this Section 2 (*Low Value Changes*), the unit prices and the Small Works and Services Rates set out in the Catalogue and the Small Works and Services Rates shall be indexed on each anniversary of the Commencement Date for the change in RPI since the Commencement Date or, after the first Catalogue Review Date, since the most recent Catalogue Review Date.

8.3 On the date which is twenty (20) Business Days before each Catalogue Review Date, Project Co must provide the Authority with:

8.3.1 a revised and updated Catalogue which:

(a) includes in the Catalogue unit prices for any types of Low Value Changes which have occurred and which the parties consider are reasonably likely to reoccur during the life of the Project and any other types of Low Value Changes as the parties may agree; and

(b) includes time periods for the carrying out of each listed type of Low Value Change; and

8.3.2 updated Small Works and Services Rates.

The unit prices and Small Works and Services Rates will be for the ensuing three (3) year period following the Catalogue Review Date. The unit prices must represent good value for money having regard to:

(a) prices prevailing for similar items in the market at the time; and

(b) paragraph 4.2 of this Section 2 (*Low Value Changes*).

The Small Works and Services Rates must provide value for money with reference to rates prevailing for similar services in the market at the time.

8.4 Within ten (10) Business Days of the submission by Project Co of the revised and updated Catalogue and Small Works and Services Rates pursuant to paragraph 8.3 of this Section 2 (*Low Value Changes*), the Authority shall confirm in writing whether or not it agrees that the revised and the updated Catalogue shall constitute the Catalogue and the updated Small Works and Services Rates shall constitute the Small Works and Services Rates for the purposes of this Agreement from the relevant Catalogue Review Date;

8.5 If the Authority does not confirm to Project Co that it agrees with the revised and updated Catalogue and/or Small Works and Services Rates provided by Project Co pursuant to paragraph 8.3 of this Section 2 (*Low Value Changes*), the parties shall meet and endeavour, in good faith, to agree any amendments to the Catalogue and/or Small Works and Services Rates. Any dispute in relation to this paragraph 8 may be referred by either party to the Dispute Resolution Procedure. The revised and updated Catalogue and revised and updated Small Works and Services Rates with such amendments as are agreed by the parties or determined under the Dispute Resolution Procedure shall constitute the Catalogue and the Small Works and Services Rates for the purposes of this Agreement from the relevant Catalogue Review Date.

9 Documentation and Monitoring

9.1 No due diligence (whether funder, legal, technical, insurance or financial) shall be required in relation to Low Value Changes unless otherwise agreed between the parties.

9.2 The Works, Services, Facilities and/or Authorities Policies (as appropriate) shall be deemed to be amended pursuant to Clause 73 (*Amendments*), to include any required Low Value Change implemented by Project Co pursuant to paragraph 6.1 of this Section 2 (*Low Value Changes*). Subject to paragraph 9.3 of this Section 2 (*Low Value Changes*). no other changes shall be made to this Agreement or any Project Document as a result of a Low Value Change, unless otherwise agreed between the parties.

9.3 Where it is agreed that an adjustment of the Annual Service Payment is required in respect of a Low Value Change, the Financial Model and Annual Service Payment shall be adjusted to give effect to such Low Value Changes once each Contract Year on a date to be agreed between the parties and all relevant Low Value Changes that have occurred since the preceding such adjustment shall be aggregated together into a single cumulative adjustment in accordance with Section 6 (*Changing the Financial Model*) of this Schedule 16 (*Change Protocol*).

9.4 Project Co shall keep a record of all Low Value Changes processed, completed and outstanding and shall provide the Authority with a copy of that record whenever reasonably required by the Authority.

10 Disputes

10.1 Any dispute concerning any matter referred to in this Section 2 (*Low Value Changes*) may be referred by either party to the Dispute Resolution Procedure.

10.2 Project Co shall not be obliged to implement the Low Value Change until any dispute has been determined except that where such dispute concerns only the cost of a Low Value Change, unless the Authority otherwise directs, Project Co must continue to carry out or implement the Low Value Change within the prescribed timescale notwithstanding the dispute.

10.3 The Authority is not entitled to withdraw an Authority Change Notice and procure implementation of a Low Value Change in respect of which there is a dispute that has been referred to the Dispute Resolution Procedure, unless that dispute has been determined in its favour and Project Co has not confirmed to the Authority in writing within five (5) Business Days of the date of the determination that it will implement and carry out the Low Value Change in accordance with the determination.

SECTION 3

MEDIUM VALUE CHANGES

1 Medium Value Changes

1.1 If the Authority requires a Medium Value Change, it must serve an Authority Change Notice on Project Co in accordance with paragraph 2 (*Medium Value Change Notice*) of this Section 3 (*Medium Value Changes*).

1.2 Project Co shall be entitled to refuse a Medium Value Change that:

1.2.1 requires the Works and/or the Services to be performed in a way that infringes any law or is inconsistent with Good Industry Practice;

1.2.2 would cause any Consent to be revoked (or would require a new consent to be obtained or any existing Consent to be amended which, after using reasonable efforts, Project Co has been unable to obtain);

1.2.3 would materially and adversely affect Project Co's ability to deliver the Works and/or the Services (except those Works and/or Services which have been specified as requiring to be amended in the Authority Change Notice) in a manner not compensated for pursuant to this Section 3 (*Medium Value Changes*);

1.2.4 would materially and adversely affect the health and safety of any person;

1.2.5 would, if implemented, materially and adversely change the nature of the Project (including its risk profile); or

1.2.6 the Authority does not have the legal power or capacity to require implementation of.

2 Medium Value Change Notice

2.1 An Authority Change Notice for a Medium Value Change must:

2.1.1 state that it refers to a Medium Value Change;

2.1.2 set out the change in the Works or Services or the additional works or services required in sufficient detail to enable Project Co to calculate and provide the Estimated Change in Project Costs in accordance with paragraph 3 (*Contractor's Estimate*) of this Section 3 (*Medium Value Changes*);

2.1.3 set out whether, in respect of any additional facilities, Project Co is expected to provide facilities management services and lifecycle maintenance services in respect of such additional facilities; and

2.1.4 set out the timing of the additional works or services required by the Authority.

2.2 Within fifteen (15) Business Days of receipt of the Medium Value Change Notice, Project Co must notify the Authority in writing:

2.2.1 whether it considers that it is entitled to refuse the Medium Value Change on any of the grounds set out in paragraphs 1.2.1 to 1.2.6 of this Section 3 (*Medium Value Changes*);

2.2.2 when it will provide the Estimate to the Authority bearing in mind the requirement in paragraph 7.2.2 of this Section 3 (*Medium Value Changes*); and

2.2.3 its estimate of the Third Party Costs that it will incur to prepare the Estimate.

2.3 If Project Co notifies the Authority that it considers that it is entitled to refuse the Medium Value Change on one or more of the grounds set out in paragraphs 1.2.1 to 1.2.6 of this Section 3 (*Medium Value Changes*), then unless the parties otherwise agree, the Authority shall be deemed to have withdrawn the Authority Notice of Change if it has not referred the matter to the Dispute Resolution Procedure within [twenty (20)] Business Days of receipt of Project Co's notice.

2.4 If the Authority considers that Project Co's proposed time for providing the Estimate is not reasonable, the parties shall endeavour to agree the time, failing which the matter may be referred to the Dispute Resolution Procedure.

2.5 If the Authority considers that the Project Co's estimate of Third Party Costs to prepare the Estimate is not reasonable, the parties shall endeavour to agree the same, failing which the matter may be referred to the Dispute Resolution Procedure.

2.6 If any matter is referred to the Dispute Resolution Procedure pursuant to paragraph 2 (*Medium Value Change Notice*) of this Section 3 (*Medium Value Changes*), the time for Project Co to provide the Estimate shall be counted from the date of determination of that dispute if the dispute is determined in Project Co's favour.

3 Contractor's Estimate

As soon as reasonably practicable and in any event within the time period agreed or determined pursuant to paragraph 2.4 of this Section 3 (*Medium Value Changes*), Project Co shall deliver to the Authority the Estimate.

The Estimate must contain:

3.1 a detailed timetable for implementation of the Medium Value Change;

3.2 any requirement for relief from compliance with obligations, including the obligations of Project Co to achieve the Actual Completion Date [an Actual Phase Completion Date] by the Completion Date [relevant Phase Completion Date] and to meet the requirements set out in the Authority's Construction Requirements and/or the Service Level Specification during the implementation of the Medium Value Change;

3.3 an outline of the proposed design solution and design, including an appropriate analysis/risk appraisal and, to the extent relevant, the impact on whole life costings;

3.4 any impact on the provision of the Works and/or the Services;

3.5 a value for money justification for any proposed change to the quality of the works or the services comprised in the Medium Value Change as compared to the Works and the Services;

3.6 any amendment required to this Agreement and/or any Project Document as a result of the Medium Value Change;

3.7 any Estimated Change in Project Costs that results from the Medium Value Change;

3.8 any Capital Expenditure that is required or no longer required as a result of the Medium Value Change;

3.9 amendments to existing Consents that are required;

3.10 a payment schedule for any Capital Expenditure required to implement the Change, based on milestones where relevant;

3.11 costs and details of (i) any other approvals required and/or due diligence permitted pursuant to paragraph 12 of this Section 3 (*Medium Value Changes*); and (ii) any Third Party Costs;

3.12 the method of implementation and the proposed method of certification of any construction aspects of the Medium Value Change, if not covered by the procedures specified in Clause 14 (*Programme and Dates for Completion*); and

3.13 any other information requested by the Authority in the Authority Change Notice.

together the "**Estimate**"

4 **Costing of the Estimate**

In calculating the Estimated Change in Project Costs and/or the Capital Expenditure for the purposes of the Estimate, Project Co shall apply the following principles wherever applicable:

4.1 unless the Authority's requirements for the Medium Value Change specify a different quality as compared to the Works:

4.1.1 the unit cost of any construction or installation works or associated preliminaries (excluding any temporary or demolition works, professional fees, contingencies, overheads and profit margins) required to implement the Medium Value Change is the equivalent unit rate set out in Part 1 (*Unit Cost for Construction or Installation Costs*) of Appendix 2 of this Schedule 16 (*Change Protocol*), uplifted using the Department for Trade and Industry Pubsec index for construction cost inflation in the period between the Commencement Date and the date the Medium Value Change is to be commenced;

4.1.2 any lifecycle replacement and maintenance associated with additional works (or changes to the Works) are consistent with the lifecycle and maintenance profile of the Facilities envisaged in Section 4 (*Project Co's Proposals*) of Schedule 6 (*Construction Matters*) including (without limitation) in terms of the replacement cycles for equipment, provided that Project Co must reflect improvements in technology that can optimise Whole Life Costs for the Authority; and

4.1.3 the unit costs to be applied to the pricing of lifecycle replacement and maintenance is the equivalent unit rate set out in Part 2 (*Unit Costs of Lifecycle Maintenance*) of Appendix 2 of this Schedule 16 (*Change Protocol*) (index linked). If any such additional works are specified to a higher quality as compared to the Works, then the unit Lifecycle Replacement and maintenance cost shall be (in real terms) lower;

4.2 any professional fees, contingencies, overheads and/or profit margins to be charged by any consultant, sub-contractor or supplier in respect of construction and/or installation and/or lifecycle and/or service provision for the Medium Value Change are the equivalent rates set out in Part 3 (*Consultant, Sub-contractor or Supplier Fees*) of Appendix 2 of this Schedule 16 (*Change Protocol*), or if the professional fees, contingencies, overheads and profit margins being charged by consultants, sub-contractors and/or suppliers in current market conditions have changed significantly from those set out in Part 3 (*Consultant, Sub-contractor or Supplier Fees*) of Appendix 2 of this Schedule 16 (*Change Protocol*), such other rates as the parties agree or failing agreement as may be determined under the Dispute Resolution Procedure as being consistent with those charged in current market conditions;

4.3 unless the Authority's requirements for the Medium Value Change specify a different quality than required by the Service Level Specification, the unit cost of

any extension of, or change to, any Service (either in scope or area), taking into account the capacity of existing labour resources, is consistent with the equivalent unit rate set out in Part 4 (*Unit Costs for Labour Rates*) of Appendix 2 to this Schedule 16 (*Change Protocol*);

4.4 other than as referred to in paragraphs 4.1 to 4.3 of this Section 3 (*Medium Value Changes*) no charge shall be made in respect of Project Co's time, or that of any Project Co Party spent processing, managing or monitoring the Medium Value Change (and no additional mark up or management fee shall be applied by Project Co); and

4.5 where aspects of the Medium Value Change are not addressed by paragraphs 4.1 to 4.4 of this Section 3 (*Medium Value Changes*), they shall be costed on a fair and reasonable basis reflecting the then current market rates.

5 **Standards of provision of the Estimate**

In providing the Estimate Project Co must:

5.1 use reasonable endeavours to oblige its Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;

5.2 demonstrate how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred, reasonably foreseeable Changes in Law at that time have been taken into account; and

5.3 demonstrate that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Medium Value Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under paragraphs 3.7 and/or 3.8 of this Section 3 (*Medium Value Changes*); and

5.4 provide written evidence of Project Co's compliance with paragraphs 5.1 to 5.3 of this Section 3 (*Medium Value Changes*).

6 **Determination of the Estimate**

As soon as practicable after the Authority receives the Estimate, the parties shall discuss and endeavour to agree the contents of the Estimate. If the parties cannot agree on the contents of the Estimate, the matter may be referred by either party to the Dispute Resolution Procedure to determine if the Estimate represents a fair and reasonable approach to implementing the Medium Value Change in all respects.

7 **Confirmation or Withdrawal of the Medium Value Change Notice**

7.1 As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to paragraph 6 of this Section 3 (*Medium Value Changes*), the Authority shall:

7.1.1 confirm in writing to Project Co the Estimate (as modified); or

7.1.2 withdraw the Authority Change Notice.

7.2 If, in any Contract Year, the Authority has either not confirmed an Estimate (as modified, if applicable) within twenty (20) Business Days of the contents of the Estimate having been agreed or determined in accordance with the foregoing provisions of this Section 3 (*Medium Value Changes*) or has withdrawn an Authority Change Notice for a Medium Value Change on three or more occasions, then the Authority shall pay to Project Co on the third and each subsequent such occasion in that Contract Year the reasonable additional Third Party Costs incurred by Project Co in preparing the Estimate provided that:

7.2.1 Project Co has used all reasonable endeavours to submit a reasonably priced Estimate; and

7.2.2 Project Co made available to the Authority, with the Estimate, a cost break down of Third Party Costs incurred by Project Co to prepare the Estimate, which shall be consistent with the estimate of such costs approved by the Authority pursuant to paragraph 2.5 of this Section 3 (*Medium Value Changes*).

8 **Implementation of the Medium Value Change**

8.1 When the Authority has confirmed the Estimate in accordance with paragraph 7.1 of this Section 3 (*Medium Value Changes*), Project Co shall, subject to Project Co obtaining all new or amended Consents that are required and have not already been obtained, implement the required Medium Value Change in accordance with the Estimate. Where an extension of time has been agreed as part of the Estimate the Completion Date [relevant Phase Completion Dates] shall be extended as agreed in the Estimate.

8.2 Project Co shall notify the Authority when it considers that the Medium Value Change has been completed.

8.3 If:

8.3.1 Project Co fails to provide a response pursuant to paragraph 2.2 of this Section 3 (*Medium Value Changes*) within fifteen (15) Business Days of the date of the Medium Value Change Notice; or

8.3.2 Project Co fails to provide an Estimate in accordance with paragraph 3 of this Section 3 (*Medium Value Changes*); or

8.3.3 the Authority has confirmed an Estimate but Project Co fails to fully implement the Medium Value Change within [ten (10)] Business Days after the expiry of the time for implementing the Medium Value Change set out in the Estimate Low Value Change (as such time may be extended for any delay that is, or is equivalent to, a Delay Event);

then, subject to paragraph 14.3 of this Section 3 (*Medium Value Changes*), the Authority may notify Project Co that the Medium Value Change Notice is withdrawn and, following such notification, may procure the implementation of the Medium Value Change without further recourse to Project Co, but the Authority must ensure that the Medium Value Change is carried out in accordance with Good Industry Practice and to the standards that would have applied to Project Co if it had implemented the Medium Value Change.

9 Certification of the Medium Value Change

9.1 Where the Medium Value Change is implemented at the Facilities before the Actual Completion Date [relevant Phase Actual Completion Date], the procedure set out at Clause 17 (*Pre-Completion Commissioning and Completion*) shall apply to the Medium Value Change at the same time as it applies to the original Works.

9.2 Where the Medium Value Change is implemented at the Facilities after the Actual Completion Date [Phase Actual Completion Date], and constitutes additional works, the procedure set out and agreed in the Estimate for certifying the completion of the Medium Value Change shall apply to determine whether the Medium Value Change has been completed appropriately.

10 Method of Payment of Authority Contribution

10.1 Project Co shall invoice the Authority for Capital Expenditure incurred by Project Co to implement a Medium Value Change according to the payment schedule set out in the Estimate as referred to in paragraph 3.10.

10.2 The Authority shall make a payment to Project Co within fifteen (15) Business Days of receipt by the Authority of invoices presented to the Authority (complete in all material respects) in accordance with paragraph 10.1 of this Section 3 (*Medium Value Changes*) accompanied by the relevant evidence (where applicable) that the relevant part of the Medium Value Change has been carried out.

11 Adjustment to Annual Service Payment

Any adjustment to the Annual Service Payment that is necessary due to the implementation of a Medium Value Change shall be calculated in accordance with Section 6 (*Changing the Financial Model*) of this Schedule 16 (*Change Protocol*).

12 Due Diligence

12.1 Project Co shall procure that the Senior Funders shall not:

12.1.1 (in any event) withhold or delay any consents that are required pursuant to the Senior Funding Agreements to a Medium Value Change other than on the basis that the Senior Funders, acting pursuant to the terms of the Senior Funding Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.6 of this Section 3 (*Medium Value Changes*) apply; or

12.1.2 carry out any due diligence (whether funder, legal, technical, insurance or financial) in relation to the carrying out of any Medium Value Change unless either (i) the Medium Value Change in question would result in an adjustment to the Annual Service Payment that, on a full year basis, is in excess of one percent (1%) of the Annual Service Payment in the relevant Contract Year or (ii) the Senior Funders, acting pursuant to the terms of the Senior Funding Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.6 of this Section 3 (*Medium Value Changes*) apply.

12.2 Where not prohibited by paragraph 12.1 of this Section 3 (*Medium Value Changes*), the Senior Funders may carry out legal, financial, insurance and/or technical due diligence on any proposal for a Medium Value Change. In the event that such due diligence is permitted and required, the parties shall agree a budget for the due diligence not exceeding 5% of the overall value of the Medium Value Change in question unless the parties (acting reasonably) agree otherwise. Any costs incurred by Project Co as a result of the Senior Funders due diligence shall be reimbursed by the Authority following agreement or determination of the contents of the Estimate within ten (10) Business Days of Project Co submitting an invoice for and evidence of such costs, subject to the invoices being in accordance with the agreed budget.

12.3 It is acknowledged that Changes (particularly where they involve a change to the Works or the Facilities) may require authorisation from the insurers under the Insurances. Project Co shall notify the relevant insurance broker immediately upon any material Medium Value Change being agreed (materiality being judged in relation to the size and nature of the scope of the Medium Value Change).

13 Project Documentation

13.1 The Works, Services, Facilities and/or Authorities Policies (as appropriate) shall be deemed to be amended pursuant to Clause 73 (*Amendments*), to include any required Medium Value Change implemented by Project Co pursuant to paragraph 8 of this Section 3 (*Medium Value Changes*). Subject to paragraph 11 of this Section 3 (*Medium Value Changes*), no other changes to the Project Documents shall be made as a result of a Medium Value Change, unless the parties otherwise agree.

13.2 Project Co shall, no later than one (1) month following completion of a Medium Value Change, provide updated hard copies of the "as-built" drawings, "as-built" specification and the operating and maintenance manuals to the Authority [and procure the necessary 'data drops' required pursuant to the BIM Protocol], as necessary to reflect the Medium Value Change.

14 Disputes

14.1 Any dispute concerning any matter referred to in this Section 3 (*Medium Value Changes*) may be referred by either party to the Dispute Resolution Procedure.

14.2 Project Co shall not be obliged to implement the Medium Value Change until the dispute has been determined.

14.3 The Authority is not entitled to withdraw an Authority Change Notice and procure implementation of a Medium Value Change in respect of which there is a dispute that has been referred to the Dispute Resolution Procedure, unless that dispute has been determined in its favour and Project Co has not confirmed to the Authority in writing within five (5) Business Days of the date of the determination that it will implement and carry out the Medium Value Change in accordance with the determination.

SECTION 4

HIGH VALUE CHANGES

1 High Value Changes

1.1 If the Authority requires a High Value Change it must serve an Authority Change Notice on Project Co in accordance with paragraph 2 of this Section 4 (*High Value Changes*).

1.2 Project Co shall be entitled to refuse a High Value Change that:

1.2.1 requires the Works and/or the Services to be performed in a way that infringes any law or is inconsistent with Good Industry Practice;

1.2.2 would cause any Consent to be revoked (or would require a new consent to be obtained to implement the relevant change in the Works and/or the Services which, after using reasonable efforts, Project Co has been unable to obtain);

1.2.3 would materially and adversely affect Project Co's ability to deliver the Works and/or the Services (except those Works and/or Services which have been specified as requiring to be amended in the High Value Change Notice) in a manner not compensated pursuant to this Section 4 (High Value Changes);

1.2.4 would materially and adversely affect the health and safety of any person;

1.2.5 would, if implemented, materially and adversely change the nature of the Project (including its risk profile);

1.2.6 is the subject of a High Value Change Notice that cannot reasonably be complied with;

1.2.7 the Authority does not have the legal power or capacity to require implementation of; or

1.2.8 would if implemented adversely affect the enforceability or priority of the security held by or on behalf of the existing Senior Funders.

2 High Value Change Notice

2.1 An Authority Change Notice for a High Value Change must:

2.1.1 state that is refers to a High Value Change;

2.1.2 set out the maximum available capital and/or revenue the Authority is able to commit to that High Value Change (the **"Target Cost"**);

2.1.3 identify any requirements of the Authority that must be satisfied as part of the High Value Change Proposal (the **"High Value Change Requirements"**); and

2.1.4 identify how the Authority will assess whether the High Value Change Stage 2 Submission offers it value for money.

2.2 The parties may agree written protocols with express reference to this Section 4 (*High Value Changes*) which explain or clarify any aspects of the High Value Change approval procedure set out in this Section 4 (*High Value Changes*) and such protocols shall be read as if incorporated into this Section 4 (*High Value Changes*) (including accelerated procedures with reduced requirements for High Value Changes of relatively low values).

2.3 The parties must:

2.3.1 within five (5) Business Days of receipt by Project Co of any High Value Change Notice, discuss and review the nature of the High Value Change, including a discussion as to which of the items set out in paragraph 3.4 of this Section 4 (*High Value Changes*) are appropriate to be included within the High Value Change Proposal; and

2.3.2 within five (5) Business Days of a High Value Change Proposal becoming a Stage 1 Approved Project, discuss and review the nature of the Stage 1 Approved Project, including a discussion as to which of the items set out in paragraph 4.3 of this Section 4 (*High Value Changes*) are appropriate to be included within the High Value Change Stage 2 Submission.

3 High Value Change Proposal

3.1 Project Co must notify the Authority in writing as soon as practicable and in any event within fifteen (15) Business Days after having received the Authority Change Notice for a High Value Change if it considers that any of the circumstances set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (High Value Changes) apply. If no such notice is served, Project Co must (within thirty (30) Business Days after having received the Authority Change Notice) either:

3.1.1 submit a High Value Change Proposal to the Authority; or

3.1.2 notify the Authority as to when the High Value Change Proposal will be provided to it (provided that Project Co shall use all reasonable endeavours to obtain all the information that it requires, expeditiously).

3.2 If Project Co notifies the Authority that it considers that one or more of the grounds set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply, then unless the parties otherwise agree, the Authority shall be deemed to have withdrawn the Authority Notice of Change if it has not referred the matter to the Dispute Resolution Procedure within [twenty (20)] Business Days of receipt of Project Co's notice. If the matter is referred to the Dispute Resolution Procedure the time for Project Co to provide the High Value Change Proposal shall be counted from the date of determination of that dispute if the dispute is determined in Project Co's favour.

3.3 If the Authority considers that Project Co's proposed time for providing the High Value Change Proposal is not reasonable, the parties shall endeavour to agree the time, failing which the matter may be referred to the Dispute Resolution Procedure.

3.4 Unless Project Co has submitted a High Value Change Proposal in accordance with paragraph 3.1.1 of this Section 4 (*High Value Changes*), Project Co must deliver to the Authority the High Value Change Proposal as soon as reasonably practicable and in any event within the time period agreed or determined pursuant to paragraph 3.3 of this Section 4 (*High Value Changes*). Unless the parties agree otherwise, a High Value Change Proposal will contain at least the following information in sufficient detail to enable the Authority to make an informed decision under paragraph 3.6 of this Section 4 (*High Value Changes*):

3.4.1 a description of the High Value Change, with evidence of how the High Value Change meets the High Value Change Requirements;

3.4.2 an outline of the proposed building solution and design including an appropriate analysis/risk appraisal of, in each case to the extent relevant (if at all), the preferred investment solution contemplated in terms of new build, refurbishment, whole life costings;

3.4.3 the Change Management Fee for the High Value Change, which shall be a capped fee calculated in accordance with paragraph 10 of this Section 4 (*High Value Changes*);

3.4.4 details of the third party activity likely to be required by Project Co in developing a High Value Change Stage 2 Submission together with a budget (or budgets) for relative Third Party Costs;

3.4.5 an estimated programme for submission of the High Value Change Stage 2 Submission and for the implementation of the High Value Change;

3.4.6 any requirement for relief from compliance with obligations, including the obligations of Project Co to achieve the Actual Completion Date [Phase Actual Completion Date] by the Completion Date [relevant Phase Completion Date] and meet the requirements set out in the Authority's Construction Requirements and/or the Service Level Specification during the implementation of the High Value Change;

3.4.7 any impact on the provision of the Works and/or the Services;

3.4.8 any amendment required to this Agreement and/or any Project Document as a result of the High Value Change;

3.4.9 any Estimated Change in Project Costs that results from the High Value Change;

3.4.10 an outline of how Project Co proposes to finance any Capital Expenditure required for the High Value Change;

3.4.11 Project Co's suggested payment schedule for any Capital Expenditure to be incurred in implementing the Change that is to be borne by the Authority, based on milestones where relevant;

3.4.12 any new Consents and/or any amendments to existing Consents which are required;

3.4.13 costs and details of any other approvals required or due diligence permitted pursuant to paragraph 14 of this Section 4 (*High Value Changes*);

3.4.14 the proposed method of certification of any construction or operational aspects of the Works or the Services required by the proposed High Value Change if not covered by the procedures specified in Clause 17 (*Pre-Completion Commissioning and Completion*); and

3.4.15 a value for money assessment explaining why Project Co's proposals represent value for money taking into account both the proposed Capital Cost and Whole Life Cost.

3.5 Liaison between Project Co, the Authority and relevant end users

In developing a High Value Change Proposal Project Co must liaise with the Authority and relevant end users (being such persons or organisations as Project Co in consultation with the Authority considers appropriate). The Authority must provide Project Co with such information about its requirements as Project Co reasonably requires and must assist Project Co in the review of any draft designs in relation to the High Value Change Proposal. Any and all information and other input or feedback provided by the Authority to Project Co, unless expressly stated otherwise by the Authority, will be without warranty and will be provided without prejudice to the Authority's rights under this Section 4 (*High Value Changes*).

3.6 Consideration of a High Value Change Proposal by the Authority

The Authority will consider in good faith each High Value Change Proposal put forward by Project Co and the Authority will not unreasonably withhold or delay its consent to a

High Value Change Proposal. If, acting reasonably, the Authority finds that any material aspects of the High Value Change Proposal are unsatisfactory to it, it shall notify Project Co of the same and offer reasonable assistance to Project Co to enable it to revise and resubmit the High Value Change Proposal as soon as reasonably practicable.

3.7 Authority response to a High Value Change Proposal

If the Authority approves a High Value Change Proposal (including any revised High Value Change Proposal resubmitted pursuant to paragraph 3.5 of this Section 4 (*High Value Changes*)), then it shall be a **"Stage 1 Approved Project"** or be referred to as having received **"Stage 1 Approval"**, as the context requires.

3.8 Project Co not entitled to dispute non-approval

Project Co shall not be entitled to refer any dispute concerning the Authority's failure to approve a High Value Change Proposal to the Dispute Resolution Procedure.

4 Stage 2 Submission

4.1 Development of a High Value Change Stage 2 Submission

4.1.1 Within ten (10) Business Days of a High Value Change Proposal having become a Stage 1 Approved Project, the parties shall seek to agree the time period within which Project Co must develop the Stage 1 Approved Project into a detailed submission (the **"High Value Change Stage 2 Submission"**). If the parties are unable to agree a reasonable time period for such submission any dispute may be referred to the Dispute Resolution Procedure.

4.1.2 Following agreement or determination of what is an appropriate time period for submission by Project Co of the High Value Change Stage 2 Submission pursuant to paragraph 4.1.1 of this Section 4 (*High Value Changes*), Project Co shall proceed regularly and diligently to produce and submit the same to the Authority within the agreed or determined time period.

4.2 Liaison between Project Co, the Authority and relevant end users

In developing a High Value Change Stage 2 Submission Project Co must continue to liaise with the Authority and relevant end users (being such persons or organisations as the Authority in consultation with Project Co considers appropriate). The Authority must provide Project Co with such information as to its requirements as is reasonably necessary to enable Project Co to submit a full and complete High Value Change Stage 2 Submission and any such other information as Project Co may reasonably require and must assist Project Co in the review of any draft designs in relation to the Stage 1 Approved Project and in the development of other aspects of the High Value Change Stage 2 Submission (but not where this would involve the Authority incurring additional material expense). Any and all information and other input or feedback provided by the

Authority to Project Co will be without warranty and will be provided without prejudice to the Authority's rights under this Section 4 (*High Value Changes*).

4.3 Content requirements in relation to a High Value Change Stage 2 Submission

Save where the parties agree otherwise, in relation to the relevant Stage 1 Approved Project, Project Co shall procure that a High Value Change Stage 2 Submission includes (but not be limited to):

4.3.1 draft(s) of the relevant Project Document(s) identifying (if relevant) any material changes or amendments proposed in respect of the relevant Stage 1 Approved Project, together with the reasons for any such changes or amendments proposed and including full details of which provisions of the relevant Project Documents will apply to the High Value Change so that it is implemented in equivalent manner and to an equivalent standard as required in respect of the Works and/or Services as appropriate;

4.3.2 detailed design solutions (to RIBA Level [3]);

4.3.3 appropriate plans and drawings;

4.3.4 relevant detailed planning permissions and any other relevant planning approvals and Consents (or such lesser confirmation or information in relation to planning as may be agreed with the Authority);

4.3.5 a proposed revised Financial Model including the detailed price estimates for the Stage 1 Approved Project;

4.3.6 an explanation (together with appropriate supporting evidence) as to why the High Value Change Stage 2 Submission meets the Approval Criteria (as defined in paragraph 7 of this Section 4 (*High Value Changes*));

4.3.7 confirmation (or details of any requested variations to (with supporting justification)) of the Change Management Fee referred in paragraph 3.4.3 of this Section 4 (*High Value Changes*);

4.3.8 the proposed method of certification of any construction aspects of the High Value Change, if not covered by the procedures specified in Clause 17 (*Pre-Completion Commissioning and Completion*);

4.3.9 a value for money assessment explaining why Project Co's proposals represent value for money taking into account both the proposed Capital Cost and Whole Life Cost;

4.3.10 a timetable and method statement setting out how the relevant High Value Change will be delivered, which shall include (but not be limited to) in so far as relevant:

(a) proposals for the effective management of the building programme;

(b) [project specific information];

(c) an assessment as to the savings to be generated by the High Value Change, particularly on staff costs and lifecycle replacement and maintenance and operation of Services;

(d) details of the Sub-Contractors together with evidence and explanation of the value testing undertaken by Project Co in relation to the High Value Change;

(e) a completed risk register showing the potential risks identified in relation to the delivery of the High Value Change the occurrence of which are capable of adversely affecting the time for completion, cost and/or quality of the Project, the probability of such risks occurring and a financial estimate of the most likely consequences of each risk occurring together with the prioritisation of all continuing risks and an action plan in respect of, and risk owners for, all risks prioritised as serious risks;

4.3.11 any surveys and investigations and associated reports that are reasonably necessary to ascertain (in relation to Changes involving the construction of additional buildings) information as to the nature, location and condition of the relevant land (including hydrological, geological, geotechnical and sub-surface conditions) together with information relating to archaeological finds, areas of archaeological, scientific or natural interest and (in relation to the refurbishment of any existing buildings) information on the condition and quality of existing structures and, in particular, the presence of any latent defects.

Co-operation of the Authority

4.4 The Authority will co-operate with Project Co in relation to any High Value Change Stage 2 Submission being developed by Project Co, including (without limitation) promptly providing:

4.4.1 written confirmation of the Target Cost and/or High Value Change Requirements and any change to such Target Cost and/or High Value Change Requirements; and

4.4.2 any information reasonably required by Project Co to enable it to satisfy the requirements of paragraph 4.3 of this Section 4 (*High Value Changes*).

5 **Time periods for approval**

5.1 Each High Value Change Proposal and each High Value Change Stage 2 Submission shall be valid for a period of three (3) months from the date of its submission by Project Co.

5.2 If by the end of the three (3) month period referred to in paragraph 5.1 of this Section 4 (*High Value Changes*) the Authority has not:

5.2.1 in relation to a High Value Change Proposal, approved or rejected that High Value Change Proposal in accordance with the procedures set out in this Section 4 (*High Value Changes*):

(a) Project Co shall be entitled to withdraw the High Value Change Proposal; and

(b) Project Co shall not be entitled to any costs relating to the High Value Change Proposal unless the Authority has either not responded to the High Value Change Proposal and/or is in material breach of its obligations in paragraph 3 and/or paragraph 4.4 of this Section 4 (*High Value Changes*) in which case paragraph 8.5 of this Section 4 (*High Value Changes*) shall apply;

5.2.2 in relation to a High Value Change Stage 2 Submission, approved or rejected that High Value Change Stage 2 Submission in accordance with the procedures set out in this Section 4 (*High Value Changes*) (or has not given any notification of the Authority's response to the High Value Change Stage 2 Submission or has given written notice to Project Co withdrawing or cancelling the High Value Change to which the High Value Change Stage 2 Submission relates) then the High Value Change Stage 2 Submission shall be deemed to have been improperly rejected by the Authority and paragraph 8.5 shall apply.

6 **Changes to the High Value Change Requirements or Approval Criteria**

6.1 If the High Value Change Requirements or Approval Criteria are subject to any material variation in relation to a High Value Change by the Authority after the High Value Change Proposal has been submitted then:

6.1.1 Project Co and the Authority shall negotiate in good faith as to the implications on the High Value Change Proposal or High Value Change Stage 2 Submission (as the case may be) and shall seek to agree changes thereto to accommodate the variation (including any change to the Target Cost and/or to the Change Management Fee);

6.1.2 if agreement has not been reached pursuant to paragraph 6.1.1 of this Section 4 (*High Value Changes*) within twenty (20) Business Days (or such longer period as the parties may agree) then:

(a) Project Co shall be entitled by notice in writing to the Authority to withdraw the High Value Change Proposal or the High Value Change Stage 2 Submission (as the case may be) and to be paid the Incurred Change Management Fee with the Calculation Date being the date of the variation notified by the Authority; and

(b) the Authority shall not be entitled to procure the High Value Change without issuing a new Authority Change Notice for the High Value Change and complying with the procedure in this Section 4 (*High Value Changes*) in relation to that High Value Change.

6.1.3 The Authority may, at any time, give notice in writing to Project Co that it proposes to cancel a High Value Change without completing the process set out in this Section 4 (*High Value Changes*) in which case the Authority must pay Project Co the Incurred Change Management Fee in respect of the cancelled High Value Change with the Calculation Date being the date of such notice.

7 Approval Criteria

7.1 For the purposes of this Section 4 (*High Value Changes*), Approval Criteria means the criteria against which any Stage 1 Approved Project is to be judged by the Authority in determining whether it achieves Stage 2 Approval. The criteria are:

7.1.1 whether the costs of the Stage 1 Approved Project are within the Target Cost notified to Project Co by the Authority;

7.1.2 whether it has been demonstrated that the Stage 1 Approved Project provides value for money assessed in accordance with the measures identified by the Authority in accordance with paragraph 2.1.4 of this Section 4 (*High Value Changes*);

7.1.3 whether the Authority, acting reasonably, is satisfied that the High Value Change Stage 2 Submission meets the High Value Change Requirements;

7.1.4 whether any material changes or amendments to the relevant Project Document(s) as detailed pursuant to paragraph 4.3.1 of this Section 4 (*High Value Changes*) are acceptable to the Authority, acting reasonably; and

7.1.5 whether the High Value Change Stage 2 Submission contains all the information required pursuant to paragraph 4.3 of this Section 4 (*High Value Changes*) (or as otherwise agreed by the parties).

8 Submission of the High Value Change Stage 2 Submission to the Authority and consideration of that submission by the Authority

8.1 The Authority will consider in good faith High Value Change Stage 2 Submissions submitted by Project Co and the Authority will not unreasonably withhold or delay its consent to a High Value Change Stage 2 Submission. The Authority is entitled to call for such reasonable information and assistance as it considers appropriate to enable it to decide whether the High Value Change Stage 2 Submission meets the Approval Criteria. Project Co must reply promptly to all such requests for further information and assistance.

8.2 As soon as reasonably practicable after the submission to it of a High Value Change Stage 2 Submission (including any revised High Value Change Stage 2 Submission re-submitted by Project Co) the Authority must give written notice of whether it:

8.2.1 approves the relevant Stage 1 Approved Project (in which case the Stage 1 Approved Project will be referred to as having received **"Stage 2 Approval"** or as being a **"Stage 2 Approved Project"** or an "**Approved Project**" as the context requires); or

8.2.2 rejects the Stage 1 Approved Project:

(a) on the ground that the High Value Change Stage 2 Submission in relation to the relevant Stage 1 Approved Project has failed to meet one or more of the Approval Criteria (except as referred to in paragraph 8.2.2(b)(i) or paragraph 8.2.2(b)(ii)), in which case (subject to resubmission under paragraph 8.2.3) paragraph 8.3 shall apply;

(b)

(i) because, as a result of any change to the Target Cost referred to in paragraph 2.1.2, the Stage 1 Approved Project is not in fact Affordable despite the High Value Change Stage 2 Submission being within the Target Cost notified by the Authority pursuant to paragraph 2.1.2 of this Section 4 (*High Value Changes*); or

(ii) because Project Co has failed to meet one or more of the Approval Criteria and the sole reason for that failure is that any Consent identified by Project Co (in compliance with paragraph 3.4.12 of this Section 4 (*High Value Changes*)) has not been obtained; or

(iii) otherwise on grounds other than those set out in paragraphs 8.2.2(a), 8.2.2(b)(i) and 8.2.2(b)(ii) of this Section 4 (*High Value Changes*),

in which case paragraph 8.5 shall apply.

8.2.3 If the Authority rejects the High Value Change Stage 2 Submission on the grounds set out in paragraph 8.2.2(a) the Authority and Project Co will work together to address the reasons for such failure and attempt in good faith to produce a revised High Value Change Stage 2 Submission for Project Co to re-submit to the Authority.

8.2.4 If:

(a) a resubmitted High Value Change Stage 2 Submission is rejected by the Authority on the ground set out in paragraph 8.2.2(a) (subject to paragraphs 16.3 to 16.4 (if applicable) of this Section 4 (*High Value Changes*)); or

(b) no resubmission of the High Value Change Stage 2 Submission is made within thirty (30) Business Days of the date of the notice of rejection (or such longer period as the parties may agree),

then the relevant Stage 1 Approved Project shall be treated as having been properly rejected, the provisions of paragraph 8.3 of this Section 4 (*High Value Changes*) shall apply and neither the Authority nor Project Co will have any further obligations in relation to the relevant High Value Change referred to in the High Value Change Stage 2 Submission.

If a High Value Change Stage 2 Submission is properly rejected by the Authority

8.3 Where this paragraph 8.3 applies (as set out in paragraph 8.2.2(a), paragraph 8.2.4 and paragraph 16.4.2 of this Section 4 (*High Value Changes*)) the Authority shall not be required to reimburse or compensate Project Co in respect of any costs relating to the High Value Change including the Change Management Fee.

8.4 If:

8.4.1 Project Co fails to provide a response to an Authority Change Notice in accordance with paragraph 3.1 of this Section 4 (*High Value Changes*); or

8.4.2 (where applicable) Project Co fails to provide a High Value Change Proposal in accordance with paragraph 3.4 of this Section 4 (*High Value Changes*); or

8.4.3 Project Co fails to submit a High Value Change Stage 2 Submission in accordance with paragraph 4.1.2 of Section 4 (*High Value Changes*); or

8.4.4 the Authority has validly rejected a High Value Change Stage 2 Submission in accordance with paragraph 8.2 and the matter has not been referred to the Dispute Resolution Procedure or any such dispute has been determined as described in paragraph 16.4.2 of this Section 4 (*High Value Changes*),

then, subject to paragraph 17 of this Section 4 (*High Value Changes*), the Authority may notify Project Co that the High Value Change Notice is withdrawn and, following such notification, may procure the implementation of the High Value Change without further recourse to Project Co, but the Authority must ensure that the High Value Change is carried out in accordance with Good Industry Practice and to the standards that would have applied to Project Co if it had implemented the High Value Change.

If a High Value Change Stage 2 Submission is improperly rejected by the Authority

8.5 Where this paragraph 8.5 applies (as set out in paragraph 5.2.1(b), paragraph 5.2.2 paragraph 8.2.2(b) and paragraph 16.4.1)), the Incurred Change Management Fee and Third Party Costs incurred by Project Co to prepare the High Value Change Proposal and Stage 2 Submission, which shall be in accordance with the activities and budget referred to in paragraph 3.4.4 of this Section 4 (*High Value Changes*), in relation to the relevant High Value Change will be paid by the Authority within ten (10) Business Days of the date on which Project Co receives written notice of the rejection or the date of the deemed rejection (as the case may be) with the date of the rejection or the deemed rejection (as the case may be) being the Calculation Date for the purposes of calculating the amount of the Incurred Change Management Fee (unless a different Calculation Date is expressly stated in this Section 4 (*High Value Changes*) in relation to the circumstances giving rise to the entitlement of Project Co to be paid the Incurred Change Management Fee).

9 Information and notifications by the Authority to Project Co and cooperation of the Authority

9.1 The Authority must notify Project Co as soon as it becomes aware of any matter which may have a reasonably foreseeable material adverse effect on the viability of any High Value Change including any:

9.1.1 planning issues likely to cause a material delay in the anticipated programme for the High Value Change or material cost increases; and

9.1.2 changes to funding which the Authority receives or to the way in which funding may be applied, either or both of which may affect whether a High Value Change is Affordable.

9.2 The Authority shall provide reasonable assistance to Project Co in relation to the procurement by Project Co of all relevant Consents.

10 Change Management Fee

The Change Management Fee is to reimburse Project Co for the time spent by its employees and the employees of the Contractor, the Service Provider [and the [Management Service Provider]] in project managing the development, procurement and implementation of the High Value Change and shall:

10.1 be based on actual time spent (validated by time sheets);

10.2 be calculated at the daily rates as set out in Appendix 2 Part 3 (*Consultant, Sub-Contractor or Supplier Fees*) to this Schedule 16 (*Change Protocol*), but capped at the sum set out in the High Value Change Proposal;

10.3 not include the time of any person who is not employed by Project Co the Contractor, the Service Provider [and/or the [Management Service Provider]], as the case may be;

10.4 not include any mark-up or profit or additional overheads;

10.5 be paid in three (3) stages as follows:

10.5.1 on Stage 1 Approval;

10.5.2 on Stage 2 Approval; and

10.5.3 when any works involved in the High Value Change have been completed,

and at each stage Project Co shall charge the Authority (subject to the applicable cap) only for the time incurred by its staff up to completion of that stage.

11 Implementation of the High Value Change

Project Co must implement any High Value Change approved by the Authority so as to minimise any inconvenience to the Authority and to the provision of Authority Services and in accordance with the Approved Project. Where an extension of time has been agreed as part of the Stage 2 Approval the Completion Date [relevant Phase Completion Dates] shall be extended as agreed in the Approved Project.

12 Method of Payment of Authority Contribution

12.1 This paragraph 12 shall apply where Capital Expenditure for an Approved Project is to be funded in whole or part by the Authority.

12.2 Project Co shall invoice the Authority for Capital Expenditure incurred by Project Co to implement a High Value Change that is to be borne by the Authority according to the payment schedule set out in the High Value Change Stage 2 Submission as referred to in paragraph 3.4.11 of this Section 4 (*High Value Changes*).

12.3 The Authority shall make a payment to Project Co within fifteen (15) Business Days of receipt by the Authority of invoices presented to the Authority (complete in all material respects) in accordance with paragraph 12.2 of this Section 4 (*High Value Changes*), accompanied by the relevant evidence (where applicable) that the relevant part of the High Value Change has been carried out.

13 **Adjustment to Annual Service Payment**

Any adjustment to the Annual Service Payment which is necessary as a result of the implementation of a High Value Change shall be calculated in accordance with Section 6 (*Changing the Financial Model*) of this Schedule 16 (*Change Protocol*).

14 **Due Diligence**

14.1 Where the Authority is funding the High Value Change, Project Co shall procure that the Senior Funders shall not withhold or delay any consents which are required pursuant to the Senior Funding Agreements to such High Value Change other than on the basis that the Senior Funders, acting pursuant to the terms of the Senior Funding Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply.

14.2 Where the Authority is not funding the High Value Change, Project Co shall procure that the Senior Funders do not unreasonably withhold or delay any consents which are required pursuant to the Senior Funding Agreements to such High Value Change other than on the basis that the Senior Funders, acting pursuant to the terms of the Senior Funding Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply.

14.3 The parties agree that the Senior Funders may carry out legal, financial, insurance and technical due diligence on any proposal for a High Value Change. The parties shall agree a budget for the due diligence provided that the costs may not exceed the lower of (i) three per cent (3%) of the overall value of the High Value Change in question or (ii) fifty thousand pounds (£50,000) unless, in either case, the parties (acting reasonably) agree otherwise. Any costs incurred by Project Co as a result of the Senior Funders due diligence will be reimbursed by the Authority following the conclusion of the process in this Section 4 (*High Value Changes*) within ten (10) Business Days of Project Co submitting an invoice for and evidence of such costs, subject to the invoices being in accordance with the agreed budget.

14.4 It is acknowledged that High Value Changes (particularly where they involve a change to the Works or the Facilities) may require authorisation from the insurers under the Required Insurances. Project Co shall notify the relevant insurance broker immediately upon any material High Value Change being agreed (materiality being judged in relation to the size and nature of the scope of the High Value Change).

14.5 The parties agree that paragraph 14.2 of this Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*) does not oblige the Senior Funders to provide any additional funding for the relevant High Value Change, which shall be in their absolute discretion.

15 **Project Documentation**

15.1 The only changes to the Project Documents or Ancillary Documents to be made as a result of a High Value Change shall be those identified in the Approved Project (subject to any amendments to it agreed by the parties).

15.2 Project Co shall, within [♦] days of completion of the Change, deliver updated hard copies of the "as-built" drawings, "as-built" specification and the operating and maintenance manuals [and procure the necessary 'data drops' required pursuant to the BIM Protocol,] as necessary to reflect the High Value Change.

16 **Disputes**

16.1 Except as otherwise expressly provided, any dispute concerning any matter referred to in this Section 4 (*High Value Changes*) may be referred by either party to the Dispute Resolution Procedure.

16.2 The Authority shall not be entitled to approve a High Value Change Proposal or a High Value Change Stage 2 Submission that is the subject of a dispute until the dispute has been determined.

16.3 If the Authority rejects a High Value Change Stage 2 Submission pursuant to the provisions of paragraph 8.2.2(a) of this Section 4 (*High Value Changes*), Project Co 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 Authority's decision.

16.4 If, following a referral to the Dispute Resolution Procedure, it is agreed or determined:

16.4.1 that the High Value Change rejected by the Authority pursuant to paragraph 8.2.2(a) of this Section 4 (*High Value Changes*) met the Approval Criteria the Authority shall either:

(a) declare that the relevant High Value Change has received Stage 2 Approval and that High Value Change shall proceed; or

(b) declare that its rejection of the relevant High Value Change be treated as an improper rejection and that the provisions of paragraph 8.5 of this Section 4 (*High Value Changes*) shall apply.

16.4.2 the High Value Change did not meet the Approval Criteria, save in one of the respects referred to in paragraphs 8.2.2(b)(i) or 8.2.2(b)(ii) the provisions of paragraph 8.3 of this Section 4 (*High Value Changes*) shall apply.

17 The Authority is not entitled to withdraw an Authority Change Notice and procure implementation of a High Value Change in respect of which there is a dispute that has been

referred to the Dispute Resolution Procedure, unless that dispute has been determined in its favour and Project Co has not confirmed to the Authority in writing within five (5) Business Days of the date of the determination that it will comply with its obligations under this Section 4 (*High Value Changes*) in accordance with the determination.

SECTION 5

PROJECT CO CHANGES

1 If Project Co wishes to introduce a Project Co Change, it shall serve a notice containing the information required pursuant to paragraph 2 of this Section 5 (*Project Co Changes*) (a "**Project Co Notice of Change**") on the Authority.

2 A Project Co Notice of Change shall:

2.1 set out the proposed Project Co Change in sufficient detail to enable the Authority to evaluate it in full;

2.2 specify Project Co's reasons for proposing the Project Co Change;

2.3 indicate any implications of the Project Co Change;

2.4 indicate what savings, if any, will be generated by the Project Co Change, including:

2.4.1 whether a reduction of the Annual Service Payment is proposed; or

2.4.2 whether such savings will be paid to the Authority in a lump sum,

in each case giving details in accordance with paragraph 8 of this Section 5 (*Project Co Changes*);

2.5 indicate whether there are any critical dates by which a decision by the Authority is required; and

2.6 request the Authority to consult with Project Co with a view to deciding whether to agree to the Project Co Change and, if so, what consequential changes the Authority requires as a result.

3 The Authority shall evaluate Project Co Notice of Change in good faith, taking into account all relevant issues, including whether:

3.1 a revision of the Annual Service Payment will occur;

3.2 the Project Co Change may affect the quality of the Services and/or the Works or the likelihood of successful completion of the Works and/or delivery of the Services (or any of them);

3.3 the Project Co Change will interfere with the relationship of the Authority with third parties;

3.4 the financial strength of Project Co is sufficient to perform the Works and/or Services after implementation of the Project Co Change;

3.5 the value and/or life expectancy of any of the Facilities will be reduced; or

3.6 the Project Co Change materially affects the risks or costs to which the Authority is exposed.

4 As soon as practicable after receiving the Project Co Notice of Change, the parties shall meet and discuss the matters referred to in it, including in the case of a Relevant Change in Law those matters referred to in Clause 33.4 of this Agreement. During discussions the Authority may propose modifications to, or accept or reject, the Project Co Notice of Change.

5 If the Authority accepts the Project Co Notice of Change (with or without modification) the parties shall consult and agree the remaining details as soon as practicable and upon agreement the Authority shall issue a notice confirming the Project Co Change which shall set out the agreed Project Co Change and:

5.1 shall enter into any documents to amend this Agreement or any relevant Ancillary Document which are necessary to give effect to Project Co Change;

5.2 subject to paragraph 7 of this Section 5 (*Project Co Changes*), the Annual Service Payment shall be revised in accordance with Section 6 (*Changing the Financial Model*) of this Schedule 16 (*Change Protocol*); and

5.3 the Project Co Change shall be implemented within the period specified by the Authority in its notice of acceptance.

6 If the Authority rejects the Project Co Notice of Change, it shall not be obliged to give its reasons for such a rejection and Project Co shall not be entitled to reimbursement by the Authority of any of its costs involved in the preparation of the Project Co Notice of Change.

7 Unless the Authority's written acceptance expressly agrees to an increase in the Annual Service Payment or that Project Co should be entitled to relief from any of its obligations, there shall be no increase in the Annual Service Payment or relief granted from any obligations as a result of a Project Co Change.

8 If a Project Co Change causes, or will cause, Project Co's costs or those of a sub-contractor to decrease, there shall be a decrease in the Annual Service Payment such that any cost savings (following deduction of costs reasonably incurred by Project Co in implementing such Project Co Change) will be shared on the basis of fifty per cent (50%) of the saving being retained by Project Co and fifty per cent (50%) of the saving being paid to the Authority as a lump sum within ten (10) Business Days of agreement or determination or by

way of revision of the Annual Service Payment pursuant to Section 6 (*Changing the Financial Mode*l) of this Schedule 16 (*Change Protocol*).

SECTION 6

CHANGING THE FINANCIAL MODEL

Procedure

1 If a Relevant Event occurs, the Financial Model shall be adjusted in accordance with this Section 6 (*Changing the Financial Model*) of this Schedule 16 (*Change Protocol*).

Adjusting the Logic or Formulae

2 If it is necessary to make a Logic Adjustment to permit an Input Adjustment or Assumption Adjustment to be made, Project Co shall make such Logic Adjustment only:

2.1 to the extent necessary;

2.2 in accordance with generally accepted accounting principles in the United Kingdom; and

2.3 so as to leave Project Co in no better and no worse a position.

3 In order to demonstrate that the conditions in paragraph 2 are met, Project Co shall prepare:

3.1 a run of the Financial Model before making any Assumption Adjustment or Input Adjustment and immediately prior to making the Logic Adjustment; and

3.2 a run of the Financial Model immediately following the Logic Adjustment which shows that Project Co is in no worse and no better a position following the making of the Logic Adjustment.

Adjusting the Assumptions

4 Subject to paragraph 5, Project Co may make an Assumption Adjustment so that the Assumptions in the Financial Model reflect:

4.1 reasonable economic assumptions prevailing at the Adjustment Date; and

4.2 reasonably foreseeable changes in the prospective technical performance of the Project arising as a result of the Relevant Event.

5 In making Assumption Adjustments, Project Co may make such adjustments only insofar as they relate to the Relevant Event, and such adjustments shall not have effect in relation to any period prior to the Adjustment Date, nor in relation to any aspect of the Project other than the Relevant Event in the period following the Adjustment Date.

Adjusting the Inputs

6 Project Co may make Input Adjustments to the extent required to reflect the Estimated Change in Project Costs arising out of the Relevant Event.

Adjusting the Annual Service Payments

7 In order to calculate the adjustment to be made to the Annual Service Payments, Project Co shall run the Financial Model after making the Logic Adjustments, the Assumption Adjustments and the Input Adjustments relating to the Relevant Event and permitted by this Section 6 (*Changing the Financial Model*) of this Schedule 16 (*Change Protocol*) so that, following the Relevant Event, it is in no better and no worse a position than it would have been if no Relevant Event had occurred.

8 The Annual Service Payments shall be adjusted by such amount as leaves Project Co, following the Relevant Event, in no better and no worse a position than it would have been if no Relevant Event had occurred.

No better and no worse

9 Any reference in this Agreement to "no better and no worse" or to leaving Project Co in "no better and no worse a position" shall be construed by reference to Project Co's:

9.1 rights, duties and liabilities under or arising pursuant to performance of this Agreement, the Funding Agreements, the Construction Contract and Service Contracts; and

9.2 ability to perform its obligations and exercise its rights under this Agreement, the Funding Agreements, the Construction Contract and Service Contracts,

so as to ensure that:

9.3 Project Co is left in a position in relation to the Key Ratios which is no better and no worse in the Post-Adjustment Financial Model than it is in the Pre-Adjustment Financial Model; and

9.4 following the making of the Adjustments, the ability of Project Co to comply with this Agreement is not adversely affected or improved as a consequence of the Relevant Event.

APPENDIX 1

Part 1

Catalogue

APPENDIX 1

Part 2

Small Works and Services Rates

APPENDIX 2

Part 1

Unit Cost for Construction or Installation Costs

APPENDIX 2

Part 2

Unit Costs for Lifecycle Maintenance

APPENDIX 2

Part 3

Consultant, Sub-Contractor or Supplier Fees

APPENDIX 2

Part 4

Unit Costs for Labour Rates

SCHEDULE 17

COMPENSATION ON TERMINATION

SECTION 1

COMPENSATION ON TERMINATION FOR AUTHORITY DEFAULT AND VOLUNTARY TERMINATION

1 Compensation on Termination for the Authority Default and Voluntary Termination

1.1 If Project Co terminates this Agreement pursuant to Clause 39 (*Authority Events of Default*) or the Authority terminates this Agreement pursuant to Clause 42.1 (*Authority Voluntary Termination*) the Authority shall pay to Project Co the **"Authority Default Termination Sum"** as set out in paragraph 1.2.

1.2 Subject to paragraphs 1.4 to 1.6 below the Authority Default Termination Sum shall be an amount equal to the aggregate of:

1.2.1 the Base Senior Debt Termination Amount;

1.2.2 Redundancy Payments and Sub-Contractor Losses; and

1.2.3 the aggregate amount for which the share capital of Project Co and the amounts outstanding under the Subordinated Funding Agreements could have been sold on an open market basis based on the Relevant Assumptions,

LESS, to the extent it is a positive amount, the aggregate of without double counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below:

1.2.4 the value of any right of Project Co to receive insurance proceeds (save where such insurance proceeds are held in the Insurance Proceeds Account and are to be applied in accordance with Clause 54.19 (*Application of Proceeds*) of this Agreement in reinstatement, restoration or replacement or, in the case of any third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties (but only when received from third parties) but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined or have been determined but not yet paid provided that in such case Project Co shall assign any such rights and claims under the Sub-Contracts or claims against other third parties to the Authority and give the Authority reasonable assistance in prosecuting such claims;

1.2.5 to the extent realised before the Invoice Date the market value of any other assets and rights of Project Co (other than those transferred to the Authority pursuant to this Agreement) less liabilities of Project Co properly incurred in carrying out its obligations under this Agreement as

at the Termination Date provided that no account should be taken of any liabilities and obligations of Project Co arising out of:

(a) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in connection with Project Co's obligations in relation to the Project; or

(b) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms; and

1.2.6 amounts which the Authority is entitled to set off pursuant to Clause 46.11 (*Rights of Set-Off*) of this Agreement.

1.3 To the extent that such assets and rights referred to in paragraph 1.2.5 above are not realised and applied by the Invoice Date, Project Co shall on payment of the Authority Default Termination Sum assign such assets and rights to the Authority.

1.4 If the aggregate of the amounts referred to in paragraphs 1.2.1 and 1.2.3 is less than the Revised Senior Debt Termination Amount, then the Authority Default Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 1.2.2 LESS without double counting in relation to the calculation of the Revised Senior Debt Termination Amount, the amounts referred to in paragraphs 1.2.4 to 1.2.6 above; provided always that (a) the amount referred to in paragraph 1.2.2 shall only be paid to the extent that Project Co has demonstrated to the reasonable satisfaction of the Authority that the amount will not be applied (in whole or in part) in payment of any Distribution and (b) if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Losses shall be paid in respect of any Sub Contract in circumstances where there is an event of default under such Sub-Contract which would entitle Project Co to terminate such Sub-Contract.

1.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and Project Co has wilfully, or through gross negligence failed to comply with its obligations under clause 9.4.4(a) of the Funders' Direct Agreement then in addition to the deduction of the Distribution made pursuant to paragraph v of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Authority Default Termination Sum, provided that the amount of the Authority Default Termination Sum shall never be less than the Revised Senior Debt Termination Amount.

1.6 If Project Co has wilfully or through gross negligence failed to comply with its obligations under clause 9.4.4(b) of the Funders' Direct Agreement and there has been an overstatement of the cash balances by Project Co as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination [and Termination on an Authority Break Point Date]*), then the Authority Default Termination Sum shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the

Termination Date), provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.

1.7 The Authority Default Termination Sum shall be payable in accordance with Section 4 (*General*) of this Schedule 17 (*Compensation on Termination*).

SECTION 2

COMPENSATION FOR PROJECT CO DEFAULT

1 If the Authority terminates this Agreement pursuant to Clause 40 (*Project Co Events of Default*) or Clause 43 (*Termination for Persistent Breach by Project Co*), the Authority shall pay to Project Co such sum as is calculated according to this Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*).

2 **RETENDERING ELECTION**

2.1 The Authority shall be entitled to retender the provision of the Project Operations in accordance with paragraph 3 (*Retendering Procedure*) and the provisions of paragraph 3 (*Retendering Procedure*) shall apply if:

2.1.1 the Authority notifies Project Co on or before the date falling twenty (20) Business Days after the Termination Date that it intends to retender; and

2.1.2 there is a Liquid Market; and either

(a) the Senior Funders have not exercised their rights to step-in under Clause 5 (*Representative*) of the Funders' Direct Agreement; or

(b) Project Co or the Senior Funders have not procured the transfer of Project Co's rights and liabilities under this Agreement to a Suitable Substitute Contractor and have failed to use all reasonable efforts to do so

but otherwise the Authority shall not be entitled to re-tender the provision of the Project Operations and paragraph 4 (*No Retendering Procedure*) shall apply.

3 **RETENDERING PROCEDURE**

3.1 The objective of the Tender Process shall be to enter into a New Agreement with a Compliant Tenderer.

3.2 The Authority shall (subject to any legal requirements preventing it from doing so) use all reasonable endeavours to complete the Tender Process as soon as practicable.

3.3 The Authority shall as soon as reasonably practicable notify Project Co of the Qualification Criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process, and shall act reasonably in setting such requirements and terms.

3.4 Project Co authorises the release of any information by the Authority under the Tender Process which would otherwise be prevented under Clause 62 (*Confidentiality*) that is reasonably required as part of the Tender Process.

3.5 For all or any part of a month, falling within the period from the Termination Date to the Compensation Date, the Authority shall pay to Project Co:

3.5.1 the Post Termination Service Amount for each completed month, on or before the date falling ten (10) Business Days after the end of that month; and

3.5.2 the Post Termination Service Amount for the period from the end of the last completed month until the Compensation Date, on or before the date falling twenty (20) Business Days after the Compensation Date.

3.6 Project Co may, at its own cost, appoint a person to monitor the Tender Process for the purpose of monitoring and reporting to Project Co and the Senior Funders on the Authority's compliance with the Tender Process.

3.7 The Tender Process Monitor shall enter into a confidentiality agreement with the Authority in a form acceptable to the Authority and shall be entitled to attend all meetings relating to the Tender Process, inspect copies of all the tender documentation and bids and make representations to the Authority as to compliance with the Tender Process. The Authority shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by Project Co in the event that Project Co refers a dispute as to the Adjusted Highest Compliant Tender Price to the Dispute Resolution Procedure. The Tender Process Monitor will not disclose confidential information to Project Co or the Senior Funders or any other person (and shall provide an undertaking to the Authority to such effect as a condition of his appointment) but shall be entitled to advise Project Co and the Senior Funders on whether it considers that the Authority has acted in accordance with the Tender Process and correctly determined the Adjusted Highest Compliant Tender Price.

3.8 If any Post Termination Service Amount is less than zero then it may be carried forward and may be set off against any future positive Post Termination Service Amounts.

3.9 The Authority shall require bidders to bid on the basis that they will receive the benefit of any outstanding claims under Physical Damage Policies and the amount (if any) standing to the credit of the Insurance Proceeds Account on the date that the New Agreement is entered into.

3.10 As soon as practicable after tenders have been received, the Authority shall (acting reasonably) review and assess the Compliant Tenders and shall notify Project Co of:

3.10.1 the Highest Compliant Tender Price;

3.10.2 the Tender Costs; and

3.10.3 the Adjusted Highest Compliant Tender Price.

3.11 If Project Co refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with Clause 57 (*Dispute Resolution*), the Authority shall irrespective of such dispute be entitled to enter into a New Agreement.

3.12 The Adjusted Highest Compliant Tender Price, shall be paid in accordance with Section 4 (*General)* of this Schedule 17 (*Compensation on Termination*).

3.13 Subject to paragraphs 1.7 and 1.9 of Section 4 *(General)* of this Schedule 17 (*Compensation on Termination*), if the Authority has not paid an amount equal to the Adjusted Highest Compliant Tender Price to Project Co on or before the date falling two (2) years after the Termination Date then the following provisions of this paragraph 3 shall not apply to that termination and the provisions of paragraph 4 (*No Retendering Procedure*) shall apply instead.

3.14 Subject to paragraph 2.1 of this Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*),the Authority may elect at any time prior to the receipt of a Compliant Tender, to follow the No Retendering Procedure under paragraph 4 (*No Retendering Procedure*) by notifying Project Co that this election has been made.

3.15 In the event that the Adjusted Highest Compliant Tender Price exceeds the Maximum Termination Amount, the Adjusted Highest Compliant Tender Price shall be deemed to be an amount equal to the Maximum Termination Amount.

4 NO RETENDERING PROCEDURE

4.1 Subject to paragraph 4.2, if the provisions of this paragraph 4 (*No Retendering Procedure*) apply Project Co shall not be entitled to receive any Post Termination Service Amount.

4.2 If the Authority elects to follow the no retendering procedure in accordance with this paragraph 4 (*No Retendering Procedure*) after it has elected to follow the procedure under paragraph 3 (*Retendering Procedure*), then the Authority shall continue to pay to Project Co each Post Termination Service Amount until the Compensation Date, in accordance with paragraph 3 (*Retendering Procedure*).

4.3 In agreeing or determining the Estimated Fair Value of the Agreement the parties shall be obliged to follow the principles set out below:

4.3.1 all forecast amounts of revenues and costs should be calculated in nominal terms at current prices, recognising the adjustment for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in this Agreement;

4.3.2 the total of all payments of the full Monthly Service Payments forecast to be made from the Termination Date to the Expiry Date shall be calculated and discounted at the Discount Rate;

4.3.3 the total of all costs reasonably forecast to be incurred by the Authority as a result of termination shall be calculated and discounted at the Discount Rate and deducted from the payment calculated pursuant to paragraph 4.3.2 above, such costs to include (without double counting):

(a) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant base case;

(b) the costs of providing the Services reasonably forecast to be incurred by the Authority from the Termination Date to the Expiry Date in providing the Project Operations to the standard required; and

(c) any rectification costs required to deliver the Project Operations to the standard required (including any costs reasonably forecast to be incurred by the Authority to complete the Works) and additional operating costs required to restore operating services standards less (to the extent that such sums are included in any calculation of rectification costs for the purposes of this paragraph) the aggregate of:

(i) any insurance proceeds received (or held in the Insurance Proceeds Account) or which will be received pursuant to policies maintained in accordance with Clause 54 (*Insurance*): and

(ii) amounts payable by the Authority in respect of Capital Expenditure under this Agreement which have not been paid,

in each case such costs to be forecast at a level that will deliver the Services to the standards required by this Agreement;

4.4 If the parties cannot agree on the Adjusted Estimated Fair Value of the Agreement on or before the date falling twenty (20) Business Days after the date on which the Authority elected or was required pursuant to paragraph 2 (*Retendering Election*) or paragraph 3 (*Retendering Procedure*) to follow the no retendering procedure in accordance with this paragraph 4 (*No Retendering Procedure*), then the Adjusted Estimated Fair Value of the Agreement shall be determined in accordance with Clause 57 (*Dispute Resolution*).

4.5 The Adjusted Estimated Fair Value of the Agreement shall be paid in accordance with Section 4 (*General*) of this Schedule 17 (*Compensation on Termination*).

4.6 In the event that the Adjusted Estimated Fair Value of the Agreement exceeds the Maximum Termination Amount, the Adjusted Estimated Fair Value of the Agreement shall be deemed to be an amount equal to the Maximum Termination Amount.

SECTION 3

COMPENSATION ON TERMINATION FOR FORCE MAJEURE

1 CONSEQUENCES OF TERMINATION FOR FORCE MAJEURE

1.1 If Project Co or the Authority terminates this Agreement pursuant to Clause 32.1 (*Force Majeure*) or Clause 54.14.2 the Authority shall pay to Project Co the **"Force Majeure Termination Sum"** as set out in paragraph 1.2.

1.2 Subject to paragraphs 1.4 to 1.6 below the Force Majeure Termination Sum shall be an amount equal to the aggregate of:

1.2.1 the Base Senior Debt Termination Amount;

1.2.2 Redundancy Payments and Sub-Contractor Losses (but excluding therefrom any claims for loss of profit);

1.2.3 an amount equal to the Subordinated Debt less an amount equal to the aggregate of payments of interest paid on the Subordinated Debt provided that where such figure is a negative number it shall be instead fixed at zero; and

LESS, to the extent it is a positive amount, the aggregate of (without double counting) in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below:

1.2.4 the value of any right of Project Co to receive insurance proceeds (save where such insurance proceeds are held in the Insurance Proceeds Account and are to be applied in accordance with Clause 54.19 of this Agreement in reinstatement, restoration or replacement, or in the case of third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties (but only when received from third parties) but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined or have been determined but not yet paid provided that in such case Project Co shall assign any such rights and claims under the Sub-Contracts or claims against other third parties to the Authority and give the Authority reasonable assistance in prosecuting such claims;

1.2.5 to the extent realised before the Invoice Date, the market value of any other assets and rights of Project Co (other than those transferred to the Authority pursuant to this Agreement) less liabilities of Project Co properly incurred in carrying out its obligations under this Agreement as at the Termination Date provided that no account should be taken of any liabilities and obligations of Project Co arising out of:

(a) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered

into in connection with Project Co's obligations in relation to the Project; and

(b) agreements or arrangements entered into by Project Co to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms; and

1.2.6 amounts which the Authority is entitled to set off pursuant to Clause 46.11 (*Rights of Set-Off*) of this Agreement.

1.3 To the extent that such assets and rights referred to in paragraph 1.2.4 above are not realised and applied pursuant to that paragraph Project Co shall on payment of the Force Majeure Termination Sum assign such assets and rights to the Authority.

1.4 If the aggregate of the amounts referred to in paragraphs 1.2.1 and 1.2.3 is less than the Revised Senior Debt Termination Amount, then the Force Majeure Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 1.2.2 LESS without double counting in relation to the calculation of the Revised Senior Debt Termination Amount the amounts referred to at paragraphs 1.2.4 to 1.2.6 above; provided always that (a) the amount referred to in paragraph 1.2.2 above shall only be paid to the extent that Project Co has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid (in whole or in part) in payment of any Distribution and (b) if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Losses shall be paid in respect of any Sub Contract in circumstances where there is an event of default under such Sub-Contract which would entitle Project Co to terminate such Sub-Contract.

1.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and Project Co has wilfully, or through gross negligence failed to comply with its obligations under clause 9.4.4(a) of the Funders' Direct Agreement then in addition to the deduction of the Distribution made pursuant to paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Force Majeure Termination Sum, provided that the amount of the Force Majeure Termination Sum shall never be less than the Revised Senior Debt Termination Amount.

1.6 If Project Co has wilfully or through gross negligence failed to comply with its obligations under clause 9.4.4(b) of the Funders' Direct Agreement and there has been an overstatement of the cash balances by Project Co as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Section 3 (*Compensation on Termination for Force Majeure*), then the Force Majeure Termination Sum shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.

1.7 The Force Majeure Termination Sum shall be paid in accordance with Section 4 (*General*) of this Schedule 17 (*Compensation on Termination*).

SECTION 4

GENERAL

1 PAYMENT AND INTEREST

1.1 Subject to paragraphs 1.2 and 1.6 below, the Authority shall pay to Project Co the Termination Sum, together with interest on any Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount element of the Termination Sum at the No Default Interest Rate, on or before the date falling sixty (60) days after the Notice Date provided that, if the Authority fails to pay the Termination Sum in full by such date, interest shall accrue at the Default Interest Rate on any unpaid amount from (but not including) such date until the date such amount is paid.

1.2 The Authority may, other than where payment is to be made pursuant to Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of this Schedule 17 (*Compensation on Termination*), elect to pay the Adjusted Estimated Fair Value of the Agreement or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum:

1.2.1 in instalments as follows:

1.2.1.1 where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant) is greater than or equal to the Outstanding Principal:

(a) in respect of that element of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant) representing the Outstanding Principal, on the dates (the "**Instalment Dates**") and in the amounts that Project Co would have been required to pay principal to the Senior Funders under the terms of the [Credit Agreement] had the Termination Date not occurred; and

(b) in respect of the sum (if any) remaining after deducting the Outstanding Principal from the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant), in equal instalments on the Instalment Dates;

1.2.1.2 where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant) is less than the Outstanding Principal, on the Instalment Dates pro rata to the amounts that Project Co would have been required to pay to the Senior Funders on each Instalment Date under the terms of the [Credit Agreement] had the Termination Date not occurred; or

1.2.2 as the parties may otherwise agree.

1.3 From the Notice Date until the date of payment, interest shall accrue on any unpaid element of the Termination Sum at the No Default Interest Rate and be payable on the next occurring Instalment Date.

1.4 If the Authority has elected to pay in accordance with paragraph 1.2 above, it may (on twenty-eight (28) days' prior written notice to Project Co) elect to pay the outstanding part of the Adjusted Estimated Fair Value of the Agreement or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in full on any Instalment Date. If the Authority fails to make a payment to Project Co in accordance with paragraphs 1.1 or 1.2 or 1.3 above, Project Co may issue a notice to the Authority declaring any unpaid and outstanding element of (as applicable) the Adjusted Estimated Fair Value of the Agreement or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum and any accrued but unpaid interest to be immediately due and payable.

1.5 To the extent that the Adjusted Estimated Fair Value of the Agreement is less than zero, then an amount equal to the Adjusted Estimated Fair Value of the Agreement shall be due and payable by Project Co to the Authority on the Compensation Date.

Following Retendering

1.6 Subject to paragraphs 1.8 and 1.9 following a retendering exercise under Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*) the Authority shall pay to Project Co an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling twenty (20) Business Days after the later of:

1.6.1 the date of the New Agreement; and

1.6.2 if Project Co has referred a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution pursuant to paragraph 3.11 of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*), the date on which the dispute is finally determined in accordance with Clause 57 (*Dispute Resolution*),

provided that, to avoid doubt, if the dispute referred by Project Co to dispute resolution (pursuant to paragraph 1.6.2 above) concerns only a proportion of the Adjusted Highest Compliant Tender Price then the Authority shall pay the undisputed proportion of such sum no later than twenty (20) Business Days after the date referred to in paragraph 1.6.1 above (the "**Undisputed Payment Date**") and the Authority shall pay interest to Project Co on any amount of the Adjusted Highest Compliant Tender Price which has been withheld, from the Undisputed Payment Date until the date on which payment is due under paragraph 1.6.2 above at the No Default Interest Rate.

1.7 If the Authority has received all bids from bidders under the Tender Process and has received a Compliant Tender but decides not to complete the Tender Process, it shall notify Project Co of this decision and (if the Adjusted Highest Compliant Tender Price is a positive number) pay to Project Co an amount equal to the Adjusted Highest Compliant Tender Price within twenty (20) Business Days of such notification.

1.8 If the Authority fails to pay the Adjusted Highest Compliant Tender Price (or any proportion thereof) by the date on which payment is due in accordance with paragraph 1.6 or paragraph 1.7 above, the Authority shall pay to Project Co interest

on such unpaid amount, which shall accrue on such amount at the Default Interest Rate from (but not including) the date on which payment is due in accordance with paragraph 1.6 or paragraph 1.7 above until such amount is paid.

1.9 If the Adjusted Highest Compliant Tender Price is zero or a negative number then, on entering into the New Agreement with the New Project Co, the Authority shall have no obligation to make any payment to Project Co and (if a negative number) an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by Project Co to the Authority on the date of the New Agreement or (where paragraph 1.7 applies) within twenty (20) Business Days of notification from the Authority pursuant to that paragraph.

2 FULL AND FINAL SETTLEMENT

2.1 Any and all sums irrevocably paid by the Authority to Project Co under this Schedule 17 (*Compensation on Termination*) will be in full and final settlement of each party's rights and claims against the other for breaches and/or termination of this Agreement and any other Project Document whether under contract, tort, restitution or otherwise but without prejudice to:

2.1.1 any antecedent liability of Project Co to the Authority which the Authority has been unable to set off pursuant to Clause 46.11 (*Rights of Set-Off*) of this Agreement;

2.1.2 any antecedent liability of either party to the other that arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining or agreeing the Authority Default Termination Sum, Adjusted Highest Compliant Tender Price, or Adjusted Estimated Fair Value of the Agreement or the Force Majeure Termination Sum as the case may be; and

2.1.3 any liabilities arising in respect of any breach by either party of their obligations under Clause 47.6 (*Continuing Obligations*) of this Agreement which arises or continues after the Termination Date.

3 COSTS

The costs and/or expenses to be taken into account in the calculation of all termination sums due pursuant to this Schedule 17 (*Compensation on Termination*) shall only be such costs and/or expenses to the extent that they are reasonable and proper in quantum and shall have been or will be reasonably and properly incurred and shall only be counted once.

4 UNDISPUTED AMOUNTS

If the calculation of any termination amount is disputed then any undisputed element of that amount shall be paid in accordance with this Section 4 (*General*) of this Schedule 17 (*Compensation on Termination*) and the disputed element shall be dealt with in accordance with Schedule 20 (*Dispute Resolution Procedure*).

5 OUTSTANDING SENIOR DEBT AMOUNT

5.1 The Authority shall be entitled to rely on the certificate of the [Senior Funders' Agent] as conclusive as to the amount of the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount (as the case may be) outstanding at any relevant time.

5.2 The receipt by the [Senior Funders' Agent] of the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount or elements thereof (as appropriate) (as the case may be) (and where appropriate any accrued interest or breakage costs as certified in accordance with paragraph 5.1 above) shall discharge the Authority's obligations to pay such sums to Project Co.

SECTION 5

DEFINITIONS

"Adjusted Estimated Fair Value of the Agreement" means, subject to paragraph 4.6 of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*), the Estimated Fair Value of the Agreement adjusted as follows:

(a) where in respect of any month or part of a month from the Termination Date to the Compensation Date the Post Termination Service Amount is a negative number, the aggregate of all such negative Post Termination Service Amounts shall be set against and shall reduce the Estimated Fair Value of the Agreement (whether or not such amounts have been set-off by the Authority pursuant to paragraph 3.8 of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*));

and the aggregate of the following amounts shall be deducted from the Estimated Fair Value of the Agreement:

(b) the Post Termination Service Amounts actually paid by the Authority to Project Co prior to the Compensation Date;

(c) the Tender Costs; and

(d) amounts that the Authority is entitled to set off or deduct;

and the aggregate of the following amounts shall be added to the Estimated Fair Value of the Agreement:

(e) all credit balances on any bank accounts held by or on behalf of Project Co on the date that the Estimated Fair Value of the Agreement is calculated; and

(f) any insurance proceeds and other amounts owing to Project Co (and which

Project Co is entitled to retain), to the extent not included in (e);

to the extent that:

(i) (e) and (f) have not been directly taken into account in calculating the Estimated Fair Value of the Agreement; and

(ii) the Authority has received such amounts in accordance with this Agreement or such amounts are standing to the credit of the Insurance Proceeds Account;

"Adjusted Highest Compliant Tender Price" means, subject to paragraph 3.15 of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*), the Highest Compliant Tender Price adjusted as follows:

(a) where in respect of any month or part of a month from the Termination Date to the Compensation Date the Post Termination Service Amount is a negative number, the aggregate of all such negative Post Termination Service Amounts shall be set against and shall reduce such highest tender price (whether or not such amounts have been set-off by the Authority pursuant to paragraph 3.8 of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*));

and the aggregate of the following amounts shall be deducted from the Highest Compliant Tender Price:

(b) the Post Termination Service Amounts actually paid by the Authority to Project Co prior to the Compensation Date;

(c) the Tender Costs; and

(d) amounts that the Authority is entitled to set off or deduct under this Agreement,

and the aggregate of the following amounts shall be added to such highest tender price:

(e) all credit balances on any bank accounts held by or on behalf of Project Co on the date that the highest priced Compliant Tender is received; and

(f) any insurance proceeds and other amounts owing to Project Co (and which Project Co is entitled to retain), to the extent not included in (c);

to the extent that:

(i) (e) and (f) have not been directly taken into account in that Compliant Tender; and

(ii) the Authority has received such amounts in accordance with this Agreement;

"APB Distribution" means, for the period during which the Additional Permitted Borrowing subsists, an amount equal to the aggregate of all Distributions made during that period up to an amount equal to the principal of the Additional Permitted Borrowing on the first day of that period;

"Authority Default Termination Sum" has the meaning given in paragraph 1.1 of Section 1 (Compensation on Termination for Authority Default and Voluntary Termination) of Schedule 17 (Compensation on Termination);

"Base Senior Debt Termination Amount" means, subject to Clause 4.3 (*Changes to Funding Agreements and Refinancing*):

(a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from Project Co to the Senior Funders in respect of Permitted Borrowings (other than in respect of Additional Permitted Borrowing); and

(b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by Project Co to the Senior Funders as a result of a prepayment in

respect of Permitted Borrowings (other than in respect of Additional Permitted Borrowing), or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement, subject to Project Co and the Senior Funders mitigating all such costs to the extent reasonably possible;

less, to the extent it is a positive amount the aggregate of (without double counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below)

i. any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;

ii. all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Funders to Project Co as a result of prepayment of amounts outstanding in respect of Permitted Borrowings (other than in respect of Additional Permitted Borrowing), or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement;

iii. all other amounts received by the Senior Funders on or after the Termination Date and before the date on which any compensation is payable by the Authority to Project Co as a result of enforcing any other rights they may have; and

iv. all credit balances on any bank accounts (but excluding the Insurance Proceeds Account) held by or on behalf of Project Co on the Termination Date;

"Compensation Date" means either:

(a) if paragraph 3 (*Retendering Procedure*) of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*) applies, the earlier of:

i. the date that the New Agreement is entered into; and

ii. the date on which the Authority pays the Adjusted Highest Compliant Tender Price to Project Co; or

(b) if paragraph 4 (*No Retendering Procedure*) of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*) applies, the date that the Adjusted Estimated Fair Value of the Agreement has been agreed or determined;

"Compliant Tender" means a tender that meets all of the Qualification Criteria;

"Compliant Tenderer" means a Suitable Substitute Contractor who submits a Compliant Tender;

["Contingent Funding Liabilities" [insert any contingent liabilities of the shareholders in respect of financial obligations owed to Project Co and/or Funders under the Funding Agreements which are triggered as a result of or in relation to the termination of the Agreement, e.g. guarantees or letters of credit in respect of deferred equity];

"Credit Agreement" means [♦] as at the date of this Agreement or as amended as permitted pursuant to Clause 4 (*Project Documents*);

"Deemed New Agreement" means an agreement on the same terms and conditions as this Agreement, as at the Termination Date, but with the following amendments:

a) if this Agreement is terminated prior to the Actual Completion Date [a Phase Actual Completion Date], then the Longstop Date [relevant Longstop Date(s)] shall be extended by a period to allow a New Project Co (had one been appointed) to achieve the Actual Completion Date [relevant Phase Actual Completion Date(s)] prior to the Longstop Date [relevant Longstop Date(s)];

b) any accrued Deductions and/or Warning Notices shall, for the purposes of termination only, and without prejudice to

the rights of the Authority to make financial deductions, be cancelled; and

c) the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date;

"Discount Rate" means a discount rate expressed as [(1+ real base case project IRR + Gilt B – Gilt A)* (1 + i) -1]

where:

"**real base case project IRR**" is the real pre-tax [Project IRR] as set out in the Financial Model at Financial Close;

"**i**" is the agreed assumed forecast rate of increase in RPI set out in the Financial Model as at Financial Close, for the remaining term of the Agreement;

"**Gilt A**" is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Financial Model at Financial Close; and

"**Gilt B**" is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Financial Model as on the Termination Date;

"Distribution" has the meaning given in Schedule 23 *(Refinancing)*;

"Estimated Fair Value of the Agreement" means the amount determined in accordance with paragraph 4 (*No Retendering Procedure*) of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*) that a third party would pay to the Authority as the market value of the Deemed New Agreement;

"Fair Value" means the amount at which an asset or liability could be exchanged in an arm's length transaction between informed and willing parties, other than in a forced or liquidated sale;

"Highest Compliant Tender Price" means the price offered by the Compliant Tenderer (if any) with the highest tender price, and, if no Compliant Tenders are received,

means zero;

"Invoice Date" means, in respect of the Authority Default Termination Sum, the Force Majeure Termination Sum or the Corrupt Gifts Termination Sum (as appropriate), the date that is the later of:

(a) the date on which the Authority receives an invoice from Project Co for the relevant termination sum; and

(b) the date on which the Authority receives the supporting evidence required pursuant to paragraph [♦] of Section 4 (*General*) of this Schedule 17 (*Compensation on Termination*);

"Liquid Market" means that there are sufficient willing parties (being at least two (2) parties, each of whom is capable of being a Suitable Substitute Contractor) in the market for design, build, finance and maintain contracts or similar contracts for the provision of services (in each case the same as or similar to this Agreement) for the price that is likely to be achieved through a tender to be a reliable indicator of Fair Value provided always that any vehicle controlled and established by the Senior Funders specifically for the purposes of the Project and to which this Agreement may be novated shall be discounted in assessing whether there are sufficient willing parties in the market for such purposes;

["Market Value Availability Deduction Amount" means for any month or part of a month, an amount equal to the availability deduction that was made to the Monthly Service Payment under paragraph [♦] of Schedule 14 (*Payment Mechanism*) in the month immediately preceding the Termination Date, less an amount equal to any availability deduction that was made for a Functional Area which was unavailable at the Termination Date but which has subsequently become available whether as a result of the Authority incurring Rectification Costs or otherwise];

"Maximum Service Payment" means one twelfth of the Annual Service Payment payable at any time before any deductions under paragraph [♦] of Schedule 14 (*Payment Mechanism*) but allowing for indexation under the [indexation provisions];

"Maximum Termination Amount" means either an amount equal to the aggregate of:

(a) the Base Senior Debt Termination Amount; and

(b) the principal amount of the Subordinated Debt outstanding; and

(c) Redundancy Payments and Sub-Contractor Losses;

OR, if the aggregate of the amounts referred to in (a) and (b) above is less than the Revised Senior Debt Termination Amount then an amount equal to the aggregate of:

(d) the Revised Senior Debt Termination Amount; and

(e) Redundancy Payments;

"New Agreement" means an agreement on the same terms and conditions as this Agreement at the Termination Date, but with the following amendments:

(a) if this Agreement is terminated prior to the Actual Completion Date [a Phase Actual Completion Date], then the Longstop Date [relevant Longstop Date(s)] shall be extended by a period to allow a New Project Co to achieve the Actual Completion Date [relevant Phase Actual Completion Date(s)] prior to the Longstop Date [relevant Longstop Date(s)];

(b) any accrued Deductions and/or Warning Notices shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions, be cancelled;

(c) the term of such agreement shall be equal to the term from the [Termination Date] until the Expiry Date; and

(d) any other amendments which do not adversely affect the Project Co;

"New Project Co" means the person who has entered or who will enter into the New Agreement with the Authority;

"No Default Interest Rate" means [incorporate the non-default interest rate definition in the Senior Funding Agreements];

"Notice Date" means the later of the Termination Date and (if paragraph 4 (*No Retendering Procedure*) of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*) applies) the date that the Adjusted Estimated Fair Value of the Agreement has been agreed or determined;

"Outstanding Principal" means the principal amount outstanding at the Termination Date of each borrowing (other than any borrowing under any equity bridge facility) under the [Credit Agreement];

"Post Termination Service Amount" means for the purposes of paragraph 3 (*Retendering Process*) of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*), for the whole or any part of a month for the period from the Termination Date to the Compensation Date, an amount equal to the Maximum Service Payment (pro rata for part of a month) which would have been payable under this Agreement had this Agreement not been terminated, less an amount equal to the aggregate of (without double counting):

(a) (where relevant) the amount by which the Post Termination Service Amounts for the previous month was less than zero;

(b) the [Market Value Availability Deduction Amount] for that month; and

(c) the Rectification Costs incurred by the Authority in that month;

"Qualification Criteria" means the criteria that the Authority requires tenderers to meet as part of the Tender Process, which (subject to compliance with procurement regulations) shall be:

(a) the New Agreement terms;

(b) tenderers should have the financial ability to pay the capital sum tendered for the New Agreement and the financial ability to deliver the Works and/or the Services (as appropriate) for the price

tendered;

(c) the tenderers may only bid on the basis of a single capital payment to be made on the date of the New Agreement;

(d) the tenderer is experienced in providing the Services or similar services;

(e) the technical solution proposed by the tenderers is capable of delivery and the tenderer is technically capable of delivery of the Services; and

(f) any other tender criteria agreed by the Authority and the Project Co;

"Rectification Costs" means, for the purposes of any Termination Date that occurs after the Actual Completion Date [a Phase Actual Completion Date], an amount equal to the reasonable and proper costs incurred by the Authority in a particular month or part of a month in ensuring that the Services are available;

"Redundancy Payments" means redundancy payments and other termination payments which are required under Law to be made to employees of Project Co reasonably and properly incurred by Project Co arising as a direct result of terminating this Agreement (provided that Project Co shall use all reasonable endeavours to mitigate its loss) and provided that in calculating such amount no account should be taken of any liabilities and obligations of Project Co arising out of:

(a) contracts of employment or other agreements or arrangements entered into by Project Co to the extent that such contracts of employment agreements or arrangements were not entered into in connection with the Project; and/or

(b) contracts of employment or other agreements or arrangements entered into by Project Co to the extent that such contracts of employment agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms;

"Relevant Assumptions" means the assumptions that the sale of Project Co is on the basis that there is no default by the Authority, that the sale is on a going concern basis, that no restrictions exist on the transfer of

share capital, that no Additional Permitted Borrowing has taken place and therefore that the effect of the Additional Permitted Borrowing on the calculation of such amount is disregarded but that otherwise the actual state of affairs of Project Co and the Project is taken into account;

"Revised Senior Debt Termination Amount" means, subject to Clause 4.3:

(a) all amounts outstanding at the Termination Date, including interest and (other than in respect of Additional Permitted Borrowing) Default Interest accrued as at that date, from Project Co to the Senior Funders in respect of Permitted Borrowing; and

(b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by Project Co to the Senior Funders as a result of a prepayment in respect of Permitted Borrowing, or, in the case of early termination or interest rate hedging arrangements only, as a result of termination of this Agreement subject to Project Co and the Senior Funders mitigating all such costs to the extent reasonably possible;

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Revised Senior Debt Termination Amount or the amounts below):

i. all credit balances on any bank accounts (but excluding the Insurance Proceeds Account) held by or on behalf of Project Co on the Termination Date;

ii. any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;

iii. all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Funders to Project Co as a result of prepayment of amounts outstanding in respect of Permitted Borrowing, or, in the case of early termination of interest rate hedging arrangements only, as a result of

termination of this Agreement;

iv. all other amounts received by the Senior Funders on or after the Termination Date and before the date on which any compensation is payable by the Authority to Project Co as a result of enforcing any other rights they may have; and

v. all APB Distributions;

"Senior Debt" means the financing provided by the Senior Funders under the Senior Funding Agreements;

"Senior Funding Agreements" has the meaning given in Schedule 1 (*Definitions and Interpretation*);

"Sub-Contractor Losses" means:

(a) the amount reasonably and properly payable by Project Co to the Contractor under the terms of the Construction Contract as a direct result of the termination of this Agreement provided that such amount shall be reduced to the extent that Project Co fails to use all reasonable endeavours to mitigate such amount; and

(b) the amount reasonably and properly payable by Project Co to the Service Providers [under their respective contracts with Project Co] (as the case may be) as a direct result of the termination of this Agreement provided that such amount shall be reduced to the extent that Project Co fails to use all reasonable endeavours to mitigate such amount;

provided that in both cases no account should be taken of any liabilities and obligation of Project Co to the Sub-Contractors arising out of:

i. agreements or arrangements entered into by Project Co and/or the Sub-Contractors to the extent that such agreements or arrangements were not entered into in connection with those parties obligations in relation to the Project; and/or

ii. agreements or arrangements entered into by Project Co and/or the Sub-Contractors to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms;

"Suitable Substitute Contractor" has the meaning given in the Funders' Direct Agreement;

"Subordinated Debt" means [♦];

"Tender Costs" means the reasonable and proper costs of the Authority incurred in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value of the Agreement;

"Tender Process" means the process by which the Authority requests tenders from any parties interested in entering into a New Agreement, evaluates the responses from those interested parties and enters into a New Agreement with a new service provider, in accordance with paragraph 3 (*Retendering Process*) of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*);

"Tender Process Monitor" means the person appointed under paragraph 3.6 of Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*);

"Termination Sum" means any compensation payable by the Authority to Project Co pursuant to this Schedule 17 (*Compensation on Termination*) (excluding the Adjusted Highest Compliant Tender Price).

SCHEDULE 18

HANDBACK PROCEDURE[120]

1 **DEFINITIONS**

In this Schedule 18 (*Handback Procedure*) and elsewhere in this Agreement (save where Schedule 1 (*Definitions and Interpretations*) provides to the contrary) the following words shall have the following meanings:

"Handback Works"	means the maintenance works (if any) required to be carried out in respect of the Facilities in order to procure that they will, on the Expiry Date, satisfy the Handback Requirements;
"Handback Programme"	means the programme for carrying out the Handback Works over the remainder of the Project Term describing the total works to be carried out and the method of carrying out such works during the overall period in which the Handback Works are to be executed;
"Handback Amount"	means the estimated cost of carrying out the Handback Works.

2 On the Expiry Date, each element of the Facilities shall be in a condition which is:

2.1 consistent with due performance by Project Co of the Service Level Specification and Method Statements; and

2.2 consistent with the Facilities and each of the elements of them having been designed and constructed in accordance with the applicable design life requirements set out in paragraph [♦] of the Authority's Construction Requirements,

together referred to as (the "**Handback Requirements**").

3 Not less than [two (2) years] prior to the Expiry Date, Project Co and the Authority's Representative shall conduct a joint inspection of the Facilities.

4 Within [♦] Business Days after the completion of the inspection, if it is found that any element of the Facilities is not in a condition consistent with the Handback Requirements, Project Co shall forthwith provide to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*):

[120] Refer to Health Sector Specific Guidance in the User Guide, if applicable.

4.1 Project Co's proposal as to the Handback Works;

4.2 Project Co's proposal as to the Handback Programme; and

4.3 Project Co's estimate of the cost of the Handback Amount.

5 The Authority's Representative may, within [fifteen (15)] Business Days after receipt of the details set out in paragraph 4 from Project Co, raise comments in accordance with paragraph 3 of Schedule 8 (*Review Procedure*) on Project Co's proposals and estimate referred to in paragraph 4 above.

6 On agreement, or determination in accordance with Schedule 20 (*Dispute* Resolution *Procedure*), of the Handback Works, the Handback Programme and/or the Handback Amount (as the case may be), Project Co shall procure that the Handback Works are carried out in accordance with the Handback Programme so as to meet the Handback Requirements. Project Co shall carry out the Handback Works at its own cost notwithstanding that the actual cost of the Handback Works may be higher than the Handback Amount.

7 From the date of the agreement (or determination in accordance with Schedule 20 (*Dispute Resolution Procedure*)) of the matters identified in paragraph 6, the Authority shall be entitled to withhold [thirty (30)] % of each subsequent Monthly Service Payment up to the amount of the Handback Amount (the "**Withheld Amount**") and the provisions of paragraph 11 shall apply. The Authority shall pay such amounts into an interest bearing account in its own name (the "**Retention Fund**").

8 Project Co may elect by notice in writing to the Authority within ten (10) Business Days of the agreement (or determination in accordance with Schedule 20 (*Dispute Resolution Procedure*)) of the matters identified in paragraph 6 to procure the provision of a bond (the **"Handback Bond"**) in favour of the Authority (and in a form acceptable to the Authority (acting in its sole discretion)) for an amount equal to the Handback Amount and from a bank or insurance company authorised to carry out business in the United Kingdom, and upon delivery of the same to the Authority, the provisions of paragraph 7 shall not apply.

9 Project Co shall carry out the Handback Works to the satisfaction of the Authority's Representative in accordance with Good Industry Practice and in accordance with the Handback Programme so as to meet the Handback Requirements.

10 Notwithstanding:

10.1 the agreement of the Authority's Representative to any Handback Works, the Handback Programme or the Handback Amount;

10.2 the participation of the Authority's Representative in any inspection under this Schedule; and/or

10.3 the complete or partial carrying out of the Handback Works,

Project Co shall not be relieved or absolved from any obligation to conduct any other inspection or to perform any other works in accordance with the Service Level Specification and Method Statement for the [describe relevant facilities service].

11 Where this paragraph 11 applies, if and to the extent that Project Co carries out any material part of the Handback Works in accordance with paragraph 6, Project Co may make a claim for payment for the work carried out. Any such claim shall be accompanied by a certificate by Project Co setting out the works performed and the value of such works. The Authority shall be entitled to require any reasonable further evidence in respect of the valuation of the works. The Authority shall make payment of the amount of a valid claim within [♦] Business Days of the date of the claim and shall be entitled to withdraw that amount from the Retention Fund. If at any time the amount in the Retention Fund is insufficient to cover the costs claimed by Project Co, the Authority shall pay the unpaid portion of such valid claim from any amounts which subsequently stand to the credit of the Retention Fund. In the event that the amount remaining in the Retention Fund on the Expiry Date is insufficient to cover Project Co's costs which have not been paid, Project Co shall bear the balance of such costs itself.

12 Not later than sixty (60) Business Days before the Expiry Date, Project Co and the Authority's Representative shall conduct a joint inspection of the Facilities. Such inspection shall confirm whether or not the condition of the Facilities is in accordance with paragraph 2 above.

13 On, or within ten (10) Business Days after, the Expiry Date, the Authority's Representative shall either:

13.1 issue to Project Co a Handback Certificate and return the Handback Bond or pay any balance standing to the credit of the Retention Fund (as appropriate), to Project Co; or

13.2 notify Project Co of its decision not to issue the Handback Certificate stating the reasons for such decision.

14 Any notice given by the Authority's Representative in accordance with paragraph 13.2 shall set out each respect in which the Handback Works have not been completed or the Facilities do not comply with the Handback Requirements and shall state the Authority's Representative's estimate of the cost of procuring that the Facilities comply in all respects with the Handback Requirements.

15 Project Co may, within [♦] Business Days after receipt of the notice given in accordance with paragraph 13.2 by notice to the Authority's Representative, object to any matter set out in the Authority's Representative's notice. The notice from Project Co shall give details of the grounds of such objection and shall set out Project Co's proposals in respect of such matters.

16 If no agreement is reached between Project Co and the Authority's Representative as to any matter referred to in Project Co's notice given in accordance with paragraph 15 within [♦] Business Days of receipt of that notice by the Authority's Representative, then either Project Co or the Authority's Representative may refer the matter for determination in accordance with Schedule 20 (*Dispute Resolution Procedure*) as to:

16.1 whether the Facilities comply in all respects with the Handback Requirements; and

16.2 the estimated cost of procuring that the Facilities comply in all respects with the Handback Requirements, where the Facilities do not comply in all respects with the Handback Requirements.

17 If it is agreed or determined in accordance with Schedule 20 (*Dispute Resolution Procedure*) that the Facilities did not, at the Expiry Date, comply in all respects with the Handback Requirements, Project Co shall pay to the Authority an amount equal to the estimated cost of completing such Handback Works (less, where applicable, any amounts standing to the credit of the Retention Fund at that time) or procuring that the Facilities comply in all respects with the Handback Requirements. Such payment shall be made not later than twenty (20) Business Days after the estimated cost has been agreed or determined and, upon such payment being received by the Authority, the Authority's Representative shall issue the Handback Certificate and return (where applicable) the Handback Bond to Project Co.

SCHEDULE 19

RECORD PROVISIONS[121]

SECTION 1

GENERAL REQUIREMENTS

1 Project Co shall retain and maintain all the records (including superseded records) referred to in Section 2 (*Records to be Kept*) of this Schedule 19 (*Record Provisions*) in accordance with this Section 1 (*General Requirements*) of this Schedule 19 (*Record Provisions*), the requirements of Good Industry Practice, in chronological order, in a form that is capable of audit and at its own expense. Project Co shall make such records available for inspection to the Authority where it has reasonable cause for requiring such records, on giving reasonable notice shall provide such facilities as the Authority may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this Schedule 19 (*Record Provisions*).

2 Wherever practical, original records shall be retained and maintained in hard copy form. True copies of the original records may be kept by Project Co where it is not practicable to retain original records.

3 Those records relating to the Project Operations (including the design, construction, development, enhancement and maintenance of the Facilities) shall be retained for the duration of the Agreement.

4 Financial and other records (including without limitation all information provided in support of any Change) shall be retained and maintained by Project Co for a period of at least six (6) years after the end of the Project Term in sufficient detail, in appropriate categories and generally in such a manner to enable Project Co to comply with its obligations under Clause 64.1 and where appropriate to enable the data in such records to be entered into the Financial Model so that the output from the Financial Model (on the basis of such data) can be directly compared with the actual financial cashflow and performance of Project Co.

5 Where Project Co wishes to dispose of any records maintained as provided in this Schedule 19 (*Record Provisions*) which are more than fifteen (15) years old, or in respect of which the required period for their retention has expired, then Project Co shall notify the Authority and if, within forty (40) Business Days of such notice, the Authority elects to receive certain of those records, then Project Co shall deliver up such records to the Authority in the manner and at the location as the Authority shall reasonably specify, and the costs of retaining those records in safe storage and delivering up the same shall be borne by Project Co.

6 Subject to paragraph 5, for a period of not more than six (6) years following the termination for whatever reason of this Agreement, Project Co shall retain in safe storage all such records as are referred to in Section 2 (Records to be Kept) of this Schedule 19 (*Record Provisions*) which were in existence at the date of termination of this Agreement. On the expiry of such period or at the earlier request of the Authority (and the Parties acknowledge that such a request shall be deemed to have been issued by the Authority upon the occurrence of any of the events set out in Clause 40.1.1 whether prior to or following termination of this Agreement), Project Co shall deliver up all those records (or where those records are required by statute to remain with Project Co or a Contracting Associate of Project Co, copies thereof) to the Authority in the manner and at the location as the

[121] Refer to Health Sector Specific Guidance in the User Guide, if applicable.

Authority shall reasonably specify. The Authority shall make available to Project Co all the records Project Co delivers up pursuant to this paragraph subject to reasonable notice. The costs of retaining those records in safe storage and delivering up the same shall be borne:

6.1 by Project Co where the termination arises as a result of a Project Co Event of Default; and

6.2 by the Authority where the termination arises for any other cause.

7 Without prejudice to the foregoing, Project Co shall provide the Authority:

7.1 as soon as they may be available and in any event within sixty (60) Business Days after the end of the first six (6) months of each financial year of Project Co which falls during the Project Term, a copy, certified as a true copy by an officer of Project Co, of its unaudited interim accounts and, if appropriate, of consolidated unaudited interim accounts of Project Co, its Subsidiaries and Holding Company (if any) which would (if Project Co were listed on the London Stock Exchange whether or not it is) be required to be sent to shareholders as at the end of and for each such six (6) month period; and

7.2 as soon as they shall have been sent to its shareholders in order to be laid before an annual general meeting of Project Co but not later than one hundred and thirty (130) Business Days after the end of each accounting reference period of Project Co part or all of which falls in a Contract Year, a copy of Project Co's audited accounts and if appropriate, of the consolidated audited accounts of Project Co and, its Associated Companies (if any), in respect of that period, prepared in accordance with the Companies Act 1985 and generally accepted accounting principles and bases in England and Wales, consistently applied together with copies of all related directors' and auditors' reports and all other notices/circulars to shareholders.

8 Project Co shall provide to the Authority on 31 March, 30 June, 30 September and 31 December each year a document listing all information provided by it to the Senior Funders during the preceding three (3) month period and, at the request of the Authority, provide to the Authority any information provided to it by the Senior Funders during the Project Term and any other information relating to the Project that the Authority may reasonably require.

9 Any drawings required to be made or supplied pursuant to this Agreement shall be of a size appropriate to show the detail to be depicted clearly without magnifying aids and shall conform to British Standards 1192 or 308 or equivalent as appropriate. Where by prior agreement the Authority has agreed to accept microfilm, microfiche or other storage media (which must include secure back up facilities), drawings and other documents shall be made or supplied in such form as has been agreed.

10 Upon termination or expiry of this Agreement, and in the event that the Authority wishes to enter into another contract for the operation and management of the Project, Project Co shall (and shall ensure that the sub-contractors will) comply with all reasonable requests of the Authority to provide information relating to Project Co's costs of operating and maintaining the Project.

11 Project Co shall use all reasonable endeavours to assist the Authority in its preparation of any report and/or return required pursuant to regulations, directions or guidance applicable to the Authority (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 the Facilities, health and safety, under the Regulatory Reform (Fire Safety) Order 2005, relating to environmental health or required by the Welsh Ministers, from time to time.

SECTION 2

RECORDS TO BE KEPT

1 This Agreement, its Schedule and the Project Documents including all amendments to such agreements.

2 Project Co shall at all times maintain a full and easily searchable record of particulars of the costs of performing the Project Operations, including those relating to the design, construction, maintenance, operation and finance of the Facilities. This shall require Project Co to keep (and where appropriate to procure that the sub-contractors shall keep) books of account in accordance with best accountancy practice with respect to the Agreement showing in detail:

2.1 administrative overheads;

2.2 payments to Sub-Contractors and to sub-contractors;

2.3 capital and revenue expenditure;

2.4 such other items as the Authority may reasonably require to conduct cost audits for verification of cost expenditure or estimated expenditure, for the purpose of Clause 30.11 (*Compensation*), Schedule 16 (*Change Protocol*) and Clause 33 (*Changes in Law*).

and Project Co shall have (and procure that the sub-contractors shall have) the books of account evidencing the items listed in paragraphs 2.1 to 2.4 available for inspection by the Authority (and any expert) upon reasonable notice, and shall present a report of these to the Authority as and when requested.

3 All other documents, software or other information expressly referred to in this Agreement.

4 Records relating to the appointment and supersession of the Authority's Representative and Project Co's Representative.

5 Project Data.

6 Documents, drawings, design data or submissions raised in accordance with Schedule 8 (*Review Procedure*).

7 Documents relating to planning applications, consents, refusals and appeals.

8 Records relating to any specialist or statutory inspections of the Facilities, including any roadways.

9 Notices, reports, results and certificates relating to completion of the Works and completion of the commissioning activities (including all documents related to the building warrant).

10 All operation and maintenance manuals and a full record of all maintenance procedures carried out during the Project Term.

11 Documents relating to events of Force Majeure, Delay Events and Relief Events and the consequences of the same.

12 All formal notices, reports or submissions made to or received from the Authority's Representative in connection with the provision of Services, the Monitoring of Performance [or the availability of the Facilities].

13 All certificates, licences, registrations or warranties related to the provision of Services.

14 Documents in support of claims for Services Payments.

15 Documents submitted in accordance with Schedule 16 (*Change Protocol*) and all documents provided in support.

16 Documents related to referrals to the Dispute Resolution Procedure.

17 Documents related to change in ownership or any interest in any or all of the shares in Project Co and/or Hold Co.

18 Documents relating to the rescheduling of the indebtedness of Project Co or refinancing of the Project.

19 Tax invoices and records related to Value Added Tax.

20 Financial records, including audited and unaudited accounts of [Hold Co and] Project Co and related reports

21 Records required by Law (including in relation to Health and Safety matters and health and safety files prepared pursuant to CDM Regulations) and all Consents.

22 Documents relating to insurance and insurance claims.

23 All other records, notices or certificates required to be produced and/or maintained by Project Co pursuant to this Agreement or any Project Document.

24 Records of all persons employed by Project Co or its sub-contractors and who are wholly or mainly engaged in the delivery of Services [including information equivalent to that referred

to in Section 1 *(Employee Information)* of Schedule 31 *(Employment and Pensions)* and identifying any person who is a Eligible Employee].[122]

25 For the avoidance of doubt, all items listed above should be stored in a secure but easily searchable and retrievable format.

[122] Delete where 'No Employee Transfer' provisions adopted.

SCHEDULE 20

DISPUTE RESOLUTION PROCEDURE

1 The procedure set out in this Schedule 20 (*Dispute Resolution Procedure*) shall apply to any dispute, claim or difference arising out of or relating to this Agreement ("**Dispute**") except where it has been excluded from this procedure by an express term of this Agreement.

2 This Dispute Resolution Procedure shall not impose any pre-condition on either party or otherwise prevent or delay either 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 interlocutory 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 Further, this Dispute Resolution Procedure shall not impose any pre-condition on either party or otherwise prevent or delay either party from commencing proceedings in any court of competent jurisdiction in relation to any Dispute where an Adjudication in accordance with paragraph 6 of this Schedule 20 (*Dispute Resolution Procedure*) has not been commenced or concluded. However, in such circumstances, the parties shall jointly apply to the Court for such proceedings to be stayed until no earlier than twenty-eight (28) days from the provision of a decision to be issued in accordance with paragraph 6.5 of this Schedule 20 (*Dispute Resolution Procedure*).

4 **LIAISON COMMITTEE**

Subject to paragraph 2 of this Schedule 20 (*Dispute Resolution Procedure*), any Dispute shall first be referred to the Liaison Committee.

5 **MEDIATION**

5.1 The parties may (if both parties so agree) refer the Dispute to mediation on such conditions as may be agreed. Any mediation shall be completed within thirty (30) Business Days of such referral (unless otherwise agreed by the parties) and any agreement arising therefrom shall be recorded in writing and signed by the parties and shall be binding and final to the extent set out in such agreement unless otherwise agreed.

5.2 For the avoidance of doubt, mediation shall not be a precondition to the commencement of Adjudication or court proceedings.

6 **ADJUDICATION**

6.1 Any Dispute shall be referred to Adjudication by either party at any time (notwithstanding that other dispute resolution procedures are running concurrently)

giving the other party to the Dispute notice of its intention to refer the Dispute to adjudication (the **"Notice of Adjudication"**). The party giving the Notice of Adjudication (the **"Referring Party"**) shall by the same means of communication send a copy of the Notice of Adjudication to an adjudicator selected in accordance with paragraph 6.2 below or paragraph 6.14 (*Related Adjudicator*) below (the **"Adjudicator"**).

6.2 The Adjudicator nominated to consider a Dispute referred to him shall, subject to paragraph 6.14, be selected from the relevant panel of adjudicators appointed in accordance with the following:

6.2.1 there shall be two (2) panels of experts, one in respect of construction matters (the "**Construction Panel**") and one in respect of operational and maintenance matters (the "**Operational Panel**"). All the adjudicators on each panel shall be wholly independent of Project Co, the Authority, the relevant Sub-Contractor and any of the major competitors of Project Co or the relevant Sub-Contractor;

6.2.2 the Construction Panel shall be comprised of three (3) experts [as identified in paragraph 9 (*Panel Members*)] [who shall be selected jointly by Project Co and the Authority. Such selections shall take place within twenty-eight (28) days of the date of this Agreement];

6.2.3 the Operational Panel shall be comprised of three (3) experts [as identified in paragraph 9 (*Panel Members*)] [who shall be selected to the panel jointly by Project Co and the Authority. Such selections shall take place on or before the Actual Completion Date];

6.2.4 if any member of either panel resigns during the term of the Agreement, a replacement expert shall be appointed by Project Co and the Authority as soon as practicable;

6.2.5 if Project Co and the Authority are unable to agree on the identity of [the expert to be selected for the panels or] any replacement expert, the President for the time being of the Chartered Institute of Arbitrators Wales Branch shall appoint such adjudicators(s) within seven (7) days of any application for such appointment by either party;

6.2.6 in the event that the first panel member approached is unable or unwilling to confirm acceptance of his appointment as Adjudicator or where he fails to respond within two (2) days of the date of the Notice of Adjudication, then the Referring Party shall invite an alternative person from the relevant panel to act as Adjudicator. In the event that the second panel member is unwilling or unable to confirm acceptance of his appointment as Adjudicator within four (4) days of the date of the Notice of Adjudication or if the parties disagree as to the relevant panel of adjudicators to be used, then the Referring Party may apply to the President for the time being of the Chartered Institute of Arbitrators Wales Branch who shall within seven (7) days of the date of the Notice of Adjudication, nominate an Adjudicator (who shall also within the same period, confirm acceptance of his appointment as Adjudicator) to determine the Dispute described in the Notice of Adjudication;

6.2.7 no member of either panel shall be entitled to accept an appointment to act as Adjudicator unless he is willing also to be appointed as the adjudicator to adjudicate any dispute which:

(a) may arise between Project Co and the Contractor and raises issues which, in the opinion of Project Co, are substantially the same as or connected with the Dispute in relation to which he has been appointed; and/or

(b) may arise between Project Co and the Service Provider and raises issues which, in the opinion of Project Co, are substantially the same as or connected with the Dispute in relation to which he has been appointed; and/or

(c) may arise between Project Co and the Independent Tester and raises issues which, in the opinion of Project Co, are substantially the same as or connected with the Dispute in relation to which he has been appointed.

6.3 The Referring Party shall, within seven (7) days of the date of the Notice of Adjudication, serve its statement of case (the **"Referral Notice"**) on the Adjudicator (appointed pursuant to paragraph 6.2) and the other party to the Dispute (the **"Responding Party"**). The Referral Notice shall set out each element of the Referring Party's claim and the relief or remedy sought in sufficient detail so as to enable the Responding Party to understand and, where appropriate, respond to the claim and the Referral Notice shall be accompanied by copies of, or relevant extracts from, this Agreement and such other documents as the Referring Party intends to rely upon. The date of the referral of the Dispute (the **"Referral"**) shall be the date of the Referral Notice.

6.4 Within seven (7) days of appointment in relation to a particular Dispute, the Adjudicator shall establish the procedure and timetable for the adjudication. The Adjudicator shall have absolute discretion as to how to conduct the adjudication, including whether a meeting is necessary. He shall establish the procedure and timetable subject to any limitation within this Agreement. The parties shall comply with any request or direction of the Adjudicator in relation to the adjudication.

6.5 The Adjudicator shall reach a decision on the Dispute within twenty-eight (28) days of the date of the Referral (or such other period as the parties may agree). The Adjudicator may extend the period of twenty-eight (28) days by up to fourteen (14) days with the consent of the Referring Party. Unless the parties otherwise agree, the Adjudicator shall give reasons for his decision. Unless and until the Dispute is finally determined by Court proceedings or by an agreement in writing between the parties, the Adjudicator's decision shall be binding on both parties who shall forthwith give effect to the decision.

6.6 The Adjudicator's costs of any reference shall be borne as the Adjudicator shall specify or, in default, equally by the parties. Each party shall bear its own costs arising out of the adjudication, including legal costs and the costs and expenses of any witnesses.

6.7 The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an adjudicator and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.

6.8 The Adjudicator shall act fairly and impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Agreement.

6.9 All information, data or documentation disclosed or delivered by a party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by Clause 62 (*Confidentiality*), disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the party disclosing or delivering the same and all copies shall be returned to such party on completion of the Adjudicator's work.

6.10 The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.

6.11 The Adjudicator may on his own initiative or on the request of the Referring Party or Responding Party correct his decision so as to remove a clerical or typographical error arising by accident or omission.

6.12 Any correction of a decision shall be made within five (5) days of the date upon which the Adjudicator's decision was delivered to the parties.

6.13 Any correction of a decision shall form part of the decision.

6.14 If any Dispute raises issues which, in the opinion of Project Co, are substantially the same as or connected with issues raised in a dispute or difference arising out of or relating to any other agreement (all such agreements being referred to as the "Related Agreements") between:

6.14.1 Project Co and the Contractor;

6.14.2 Project Co and the Service Provider; and/or,

6.14.3 Project Co and the Independent Tester,

which was or has been referred to adjudication (the "**Related Adjudication**") and an adjudicator has already been appointed (the "**Related Adjudicator**") then Project Co may request that the Dispute be referred to the Related Adjudicator and paragraphs 6.15 to 6.17 shall apply.

6.15 Subject to paragraphs 6.16 and 6.17 below, in the event that a Related Adjudicator orders that a Dispute under this Agreement be consolidated with a Related Adjudication with which he is dealing under the Related Agreement, then:

6.15.1 with effect from the time of such order, the Dispute shall be determined by the Related Adjudicator, who shall become the Adjudicator; and

6.15.2 such order shall be binding on Project Co and the Authority and both of them shall acknowledge the appointment of the Related Adjudicator as the adjudicator of the Dispute, with Project Co or the Authority (as the case may be) using its best endeavours to procure that the third party who is a party to the Related Agreement shall with effect from the time of such order comply with the requirements of the Related Agreement (including if applicable any requirement or direction of the Related Adjudicator appointed under such Related Agreement) as to the future conduct of the determination of the Dispute and the Related Adjudication; and

6.15.3 notwithstanding paragraph 6.6, Project Co and the Authority shall be jointly responsible with the third party who is a party to the Related Agreement for the Related Adjudicator's fees and expenses including those of any specialist consultant appointed under the adjudication procedure in the Related Agreement, in respect of the period in which the Dispute is consolidated with the Related Adjudication pursuant to an order of the Related Adjudicator (**"Consolidated Adjudication Costs"**). Project Co and the Authority agree that the Related Adjudicator shall have the discretion to make directions to require Project Co, the Authority and the third party who is a party to the Related Agreement to pay or make contribution to the Consolidated Adjudication Costs in different proportions. If no such directions are made, Project Co, the Authority and the third party who is a party to the Related Agreement shall bear the Consolidated Adjudication Costs in equal shares, and if Project Co, the Authority or the third party has paid more than such equal share, that party or third party shall be entitled to a contribution from the other party, parties or third party, as the case may be.

6.16 Notwithstanding anything to the contrary a Dispute under this Agreement may only be consolidated with a Related Adjudication, if the Related Adjudicator receives particulars of the Dispute within ten (10) days of the referral of the Related Adjudication to the Related Adjudicator under the Related Agreement.

6.17 Where Project Co requests that a Dispute under this Agreement be consolidated (in terms of paragraph 6.14) with a Related Adjudication and heard by the Related Adjudicator, the Dispute may only be consolidated where the Authority has previously consented in writing to the identity of the Related Adjudicator appointed in respect of the Related Adjudication. The Authority's consent to such request shall not be unreasonably withheld and if the Authority refuses to consent, it must give reasons in writing for its refusal. Should the Authority fail to respond within two (2) days of receipt of such a request it shall be deemed to have consented to the appointment of the Related Adjudicator. Where the Related Adjudicator is on the Construction Panel or Operational Panel at the time of the Referral then the Authority shall be deemed to have consented to the appointment of the Related Adjudicator.

7 COURT PROCEEDINGS

Subject to paragraph 6 (*Adjudication*) all Disputes, to the extent not finally resolved pursuant to the procedures set out in the foregoing provisions of this Schedule 20 (*Dispute Resolution Procedure*), shall be referred to the Courts of England and Wales.

8 SUBMISSIONS IN RELATION TO ADJUDICATION

8.1 If any Dispute raises issues which relate to:

8.1.1 any dispute between Project Co and the Contractor arising under the Construction Contract or otherwise affects the relationship or rights of Project Co and/or the Contractor under the Construction Contract (the **"Construction Contract Dispute"**); or

8.1.2 any dispute between Project Co and the Service Provider arising under the Service Contract or otherwise affects the relationship or rights of Project Co and/or the Service Provider under the Service Contract (the **"Service Contract Dispute"**); or

8.1.3 any dispute between Project Co and the Independent Tester arising under the Independent Tester Contract or otherwise affects the relationship or rights of Project Co and/or the Independent Tester under the Independent Tester Contract (the **"Independent Tester Contract Dispute"**),

then Project Co may include as part of its submissions made to the Adjudicator submissions made by the Contractor or by the Service Provider or the Independent Tester as appropriate.

8.2 Any submissions made by the Contractor or the Service Provider or the Independent Tester shall:

8.2.1 be made within the time limits applicable to the delivery of submissions by Project Co to the Adjudicator; and

8.2.2 concern only those matters which relate to the Dispute between the Authority and Project Co arising out of this Agreement or in connection therewith.

8.3 Where the Contractor or the Service Provider or the Independent Tester makes submissions in any reference before the Adjudicator, the Adjudicator's costs of such reference shall be borne as the Adjudicator shall specify, or in default, one-third by the Authority and two-thirds by Project Co.

8.4 The Authority shall have no liability to the Contractor or the Service Provider or the Independent Tester arising out of or in connection with any decision of the

Adjudicator or in respect of the costs of the Contractor or the Service Provider or the Independent Tester in participating in the resolution of any Dispute under this Agreement.

8.5 Project Co shall not allow the Contractor or the Service Provider or the Independent Tester access to any Confidential Information relevant to the issues in dispute between the Authority and Project Co save where:

8.5.1 the Confidential Information is relevant also to the issues relating to the Construction Contract Dispute or the Service Contract Dispute or the Independent Tester Contract Dispute as the case may be; and

8.5.2 Project Co has first delivered to the Authority a written undertaking from the Contractor and/or the Service Provider and/or the Independent Tester (as appropriate) addressed to the Authority that they shall not use any such Confidential Information otherwise than for the purpose of the dispute resolution proceedings under this Agreement and that they shall not disclose such Confidential Information to any third party other than the Adjudicator or the courts or any professional adviser engaged by the Contractor or the Service Provider or Independent Tester (as appropriate) to advise in connection with the Dispute.

9 PANEL MEMBERS

The panel members referred to in paragraph 6 are as follows:

Construction Panel [♦]

Operational Panel [♦]

10 NO LOSS

Where the Authority would otherwise be expressly liable to make payment to Project Co of sums which include amounts payable in turn by Project Co to any Sub-Contractor, the Authority shall not be entitled to withhold, reduce or avoid any such payment to Project Co in reliance only on the fact that the amount which is due from Project Co to the Sub-Contractor or the entitlement of the Sub-Contractor to payment of such amount as a result of the circumstances giving rise to the Authority's obligation to pay, is conditional on the entitlement of, or receipt of payment by Project Co from the Authority.

11 CONTINUING OBLIGATIONS

Unless this Agreement has already been repudiated or terminated, the parties shall, (notwithstanding that any Dispute is subject to the Dispute Resolution Procedure set out in this Schedule 20 (*Dispute Resolution Procedure*)), continue to carry out their obligations in accordance with this Agreement.

SCHEDULE 21

PROJECT CO INFORMATION

SECTION 1

PROJECT CO INFORMATION

Name :

Date of Incorporation :

Registered number :

Registered office :

Directors :

Name	**Address**

Secretary :

Subsidiary undertakings at the date of this Agreement :

Authorised and issued share capital at the date of this Agreement :

Name and address of registered holder	**Number and class held**	**Amount paid up**

Loan Stock at the date of this Agreement issued as follows:

Name and address of registered holder	**Nominal value of Loan stock**

Loan Stock Provisions :

SECTION 2

HOLD CO INFORMATION

Name :

Date of Incorporation :

Registered number :

Registered office :

Directors :

Name	**Address**

Secretary :

Subsidiary undertakings at the date of this Agreement :

Authorised and issued share capital at the date of this Agreement :

Name and address of registered holder	**Number and class held**	**Amount paid up**

Loan Stock at the date of this Agreement issued as follows:

Name and address of registered holder	**Nominal value of Loan stock**

Loan Stock Provisions :

SCHEDULE 22

CERTIFICATES

Handback Certificate

Issued by: Authority's Representative

Address: [*INSERT ADDRESS*]

Authority: [***INSERT NAME***]

Address: [*INSERT ADDRESS*]

Issued to:

Project Co: [***INSERT NAME***]

Address: [*INSERT ADDRESS*]

Issue date: ……

Works :

Situated at :

Design Build Finance and Maintain Agreement between [*insert name of the* Authority] and [*insert name of Project* Co] dated: ……

Under the terms of the above-mentioned Design Build Finance and Maintain Agreement, *I/we certify that the condition of the Facilities is in accordance with paragraph 2 of Schedule 18 (*Handback Procedure*) of above mentioned Design Build Finance and Maintain Agreement.

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design Build Finance and Maintain Agreement (except where they are defined specifically in this Certificate).

To be signed by or for the issuer named above.

Signed.....
[***INSERT NAME OF AUTHORITY***]

**delete as appropriate*

***Certificate of Practical Completion**

Issued by: Independent Tester – **[*INSERT NAME*]**

Address: [*INSERT ADDRESS*]

Issued to:

Project Co: **[*INSERT NAME*]**

Address: [*INSERT ADDRESS*]

Authority: **[*INSERT NAME*]**

Address: [*INSERT ADDRESS*].

Issue date: ……..

[Phase:]

Works:

Situated at:

Design Build Finance and Maintain Agreement between [*insert name of the* Authority] and [*insert name of Project* Co] dated: ……..

Independent Tester Contract among [*insert name of the Authority*], [*insert name of Project Co*], [*insert name of Contractor*] and [*insert name of Senior Funder*] dated: ……..

Under the terms of the above-mentioned Design Build Finance and Maintain Agreement and Independent Tester Contract, *I/we certify that the [Phase [♦]] Actual Completion Date [for Phase No. [♦]] of the Works was achieved on [♦] and that [building warrant/temporary occupation] approval was achieved on [♦], reference [♦].

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design Build Finance and Maintain Agreement (except where they are defined specifically in this Certificate).

To be signed by or for the issuer named above.

Signed.....……..
[*INSERT NAME OF INDEPENDENT TESTER*]

**delete as appropriate*

***Commissioning Completion Certificate**

Issued by: Independent Tester – **[*INSERT NAME*]**

Address: [*INSERT ADDRESS*]

Issued to:

Project Co: **[*INSERT NAME*]**

Address: [*INSERT ADDRESS*]

Authority: **[*INSERT NAME*]**

Address: [*INSERT ADDRESS*]

Issue date: ……

Works:

Situated at:

Design Build Finance and Maintain Agreement between [*insert name of the* Authority] and [*insert name of Project* Co] dated: ……

Independent Tester Contract among [*insert name of the Authority*], [*insert name of Project Co*], [*insert name of Contractor*] and [*insert name of Senior Funder*] dated: ……

Under the terms of the above-mentioned Design Build Finance and Maintain Agreement and Independent Tester Contract, *I/we certify that the Actual Commissioning End Date [for Phase No [♦]] was achieved on [♦].

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design Build Finance and Maintain Agreement (except where they are defined specifically in this Certificate).

To be signed by or for the issuer named above.

Signed.....
[*INSERT NAME OF INDEPENDENT TESTER*]

**delete as appropriate*

1.2 Snagging Items Completion Certificate

Issued by: **Independent Tester – [*INSERT NAME*]**

Address: [***INSERT ADDRESS***]

Issued to:

Project Co: **[*INSERT NAME*]**

Address: [***INSERT ADDRESS***]

Authority: **[*INSERT NAME*]**

Address: [***INSERT ADDRESS***]

Issue date: ……

Works:

Situated at:

Design Build Finance and Maintain Agreement between [*insert name of the Authority*] and [*insert name of Project Co*] dated: ……

Independent Tester Contract among [*insert name of the Authority*], [*insert name of Project Co*], [*insert name of Contractor*] and [*insert name of Funder*] dated: ……

Under the terms of the above-mentioned Design Build Finance and Maintain Agreement and Independent Tester Contract, *I/we certify that the Snagging Items included on Snagging List [Insert List Number.....] have been completed and that the Snagging Completion Date for Phase No. [♦] was achieved on [♦].

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design Build Finance and Maintain Agreement (except where they are defined specifically in this Certificate).

To be signed by the issuer named above

Signed…….. Date

[***INSERT NAME OF INDEPENDENT TESTER***]

Receipt of this Certificate must to be acknowledged by Project Co's Representative.

Signed…….. Date

Name:

Receipt of this Certificate must be acknowledged by the Authority's Representative.

Signed…….. Date

Name:

**delete as appropriate*

[Certificate of WiFi Completion

Issued by: **Independent Tester – [*INSERT NAME*]**

Address: [***INSERT ADDRESS***]

Issued to:

Project Co: **[*INSERT NAME*]**

Address: [***INSERT ADDRESS***]

Authority: **[*INSERT NAME*]**

Address: [***INSERT ADDRESS***]

Issue date: ……

Works:

Situated at:

Design Build Finance and Maintain Agreement between [*insert name of the Authority*] and [*insert name of Project Co*] dated: ……

Independent Tester Contract among [*insert name of the Authority*], [*insert name of Project Co*], [*insert name of Contractor*] and [*insert name of Funder*] dated: ……

Under the terms of the above-mentioned Design Build Finance and Maintain Agreement and Independent Tester Contract, *I/we certify that the WiFi Actual Completion Date [for Phase No. [♦]] was achieved on [♦].

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design Build Finance and Maintain Agreement (except where they are defined specifically in this Certificate).

To be signed by the issuer named above

Signed…….. Date

[***INSERT NAME OF INDEPENDENT TESTER***]

**delete as appropriate]*

SCHEDULE 23

REFINANCING

Requirement for Authority Consent

1 Project Co shall obtain the Authority's prior written consent to any Qualifying Refinancing and both the Authority and Project Co shall at all times act in good faith with respect to any Refinancing.

2 The Authority shall be entitled to receive a one-third share of any Refinancing Gain arising from any Qualifying Refinancing.

3 The Authority shall not unreasonably withhold or delay its consent to a Qualifying Refinancing.

Project Co Details

4 Project Co shall promptly provide the Authority with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Authority shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with the Refinancing whether that Refinancing is a Qualifying Refinancing or not.

Receipt of Gain

5 The Authority shall receive its share of any Refinancing Gain as:

5.1 a single payment of the amount which, but for the provisions of this Schedule 23 (*Refinancing*), would otherwise be capable of being released as a Distribution on or about the date of the Refinancing;

5.2 a reduction in the Annual Service Payments over the remaining term of this Agreement; or

5.3 a combination of the above.

Method of Calculation

6 The Authority and Project Co will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain and payment of the Authority's share of the Refinancing Gain. For the avoidance of doubt the calculation of the Authority's share of any Refinancing Gain pursuant to this Agreement shall be treated wholly separately from the calculation of Distributions which may be due and payable to the Authority as a Relevant Person. If the parties fail to agree the basis and method of calculation of the Refinancing Gain or the

payment of the Authority's share, the dispute shall be determined in accordance with Schedule 20 (*Dispute Resolution Procedure*).

Costs

7 The Refinancing Gain shall be calculated after taking into account the reasonable and proper professional costs that each party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Authority will be paid to the Authority by Project Co within twenty-eight (28) days of any Qualifying Refinancing.

8 Without prejudice to the other provisions of this Schedule 23 (*Refinancing*), Project Co shall:

8.1 notify the Authority of all Notifiable Financings on becoming aware of the same and again when they are entered into and provide full details of the same; and

8.2 include a provision in the Funding Agreements (other than the Subordinated Funding Agreements) whereby it is entitled to be informed of any proposals which the Senior Funders may have to refinance the Funding Agreements (other than the Subordinated Funding Agreements).

Definitions

In this Schedule 23 (*Refinancing*) and elsewhere in this Agreement (save where Schedule 1 (*Definitions and Interpretation*) provides to the contrary) the following words and expressions shall have the following meanings:

"Distribution" means:

(a) whether in cash or in kind, any:

i. dividend or other distribution in respect of share capital (whether made validly in accordance with the Articles of Association or otherwise);

ii. reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;

iii. payments under the Subordinated Funding Agreements (whether of principal, interest, breakage costs or otherwise);

iv. payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business

nor on reasonable commercial terms;

v. the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms; or

(b) the early release of any Contingent Funding Liabilities, the amount of such release being deemed to be a gain for the purposes of any calculation of Refinancing Gain;

"EEA" means from time to time the European Economic Area as created by The Agreement on the European Economic Area 1992 or any successor or replacement body, association, entity or organisation which has assumed either or both the function and responsibilities of the European Economic Area;

"Equity IRR" means the projected blended rate of return to the Relevant Persons over the full term of the Contract, having regard to Distributions made and projected to be made;

"Exempt Refinancing" means:

(a) any Refinancing that was fully taken into account in the calculation of the Annual Service Payments;

(b) a change in taxation or change in accounting treatment;

(c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of:

i. breach of representations and warranties or undertakings;

ii. movement of monies between the [Project Accounts] in accordance with the terms of the Senior Funding Agreements as at Financial Close;

iii. late or non-provision of information, consents or licences;

iv. amendments to Sub-Contracts;

v. approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the

Funding Agreements);

vi. restrictions imposed by Senior Funders on the dates at which the Senior Debt can be advanced to Project Co under the Senior Funding Agreements [and/or amounts released from [Escrow Account] during the [Initial Availability Period], each as defined in the Senior Funding Agreements and which are given as a result of any failure by Project Co to ensure that the construction work is performed in accordance with the agreed construction programme and which is notified in writing by Project Co or the Senior Funders to the Authority prior to being given];

vii. changes to milestones for drawdown [and/or amounts released from the [Escrow Account] during the [Initial Availability Period] set out in the Senior Funding Agreements and which are given as a result of any failure by Project Co to ensure that construction work is performed in accordance with the agreed construction programme and which is notified in writing by Project Co or the Senior Funders to the Authority prior to being given];

viii. failure by Project Co to obtain any consent by statutory bodies required by the Senior Funding Agreements; or

ix. voting by Senior Funders and the voting arrangements between the Senior Funders in respect of the levels of approval required by them under the Senior Funding Agreements;

(d) any amendment, variation or supplement of any agreement approved by the Authority as part of any Qualifying Change under this Agreement;

(e) any sale of shares in Project Co [or Hold Co] by the Shareholders or securitisation of the existing rights and/or interests attaching to shares in Project Co [or Hold Co provided that this paragraph (e) shall, in respect of shares in Hold Co,

only apply for so long as Hold Co holds one hundred per cent (100%) of the issued share capital of Project Co];

(f) any sale or transfer of the Subordinated Funders' existing rights and/or interests under the Subordinated Funding Agreements or securitisation of the Subordinated Funders' existing rights and/or interests under the Subordinated Funding Agreements; or

(g) any Qualifying Bank Transaction;

"Insurance Undertaking" has the meaning given in the rules from time to time of the Financial Conduct Authority;

"Net Present Value" means the aggregate of the discounted values, calculated as at the estimated date of the Refinancing, of each of the relevant projected Distributions, in each case discounted using the Threshold Equity IRR;

"Notifiable Financings" means any Refinancing described in paragraphs (a) or (c) of the definition of Refinancing and any other arrangement which has or would have a similar effect or which has or would have the effect of limiting Project Co's or any Associated Company's ability to carry out any such refinancing or other arrangements that would have a similar effect;

"Project Accounts" means accounts referred to in and required to be established under the Senior Funding Agreements;

"Qualifying Bank Transaction" means:

(a) the syndication by a Senior Funder, in the ordinary course of its business, of any of its rights or interests in the Senior Funding Agreements;

(b) the grant by a Senior Funder of any rights of participation, or the disposition by Senior Funder of any of its rights or interests (other than as specified in paragraph (a) above in respect of the Senior Funding Agreements in favour of:

i. any other Senior Funder;

ii. any institution which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2006/48/EC relating to the taking up and pursuit of business of credit institutions or

which is otherwise permitted to accept deposits in the United Kingdom or any other EEA member state;

iii. a local authority or public authority;

iv. a trustee of a charitable trust which has (or has had at any time during the previous two (2) years) assets of at least ten million pounds (£10 million) (or its equivalent in any other currency at the relevant time);

v. a trustee of an occupational pension scheme or stakeholder pension scheme where the trust has (or has had at any time during the previous two (2) years) at least 50 members and assets under management of at least ten million pounds (£10 million) (or its equivalent in any other currency at the relevant time);

vi. an EEA or Swiss Insurance Undertaking;

vii. a Regulated Collective Investment Scheme;

viii. any Qualifying Institution; or

ix. any other institution in respect of which the prior written consent of the Authority has been given; and/or

(c) the grant by a Senior Funder of any other form of benefit or interest in either the Senior Funding Agreements or the revenues or assets of Project Co [or Hold Co], whether by way of security or otherwise, in favour of:

i. any other Senior Funder;

ii. any institution specified in paragraphs (b)ii to (b)vii above;

iii. any Qualifying Institution; or

iv. any other institution in respect of which the prior written consent of the Authority has been given;

"Qualifying Institution" means [♦];

"Qualifying Refinancing" means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing;

"Refinancing" means:

(a) any amendment, variation, novation, supplement or replacement of any Funding Agreement (other than any Subordinated Funding Agreement);

(b) the exercise of any right, or the grant of any waiver or consent, under any Funding Agreement (other than any Subordinated Funding Agreement);

(c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Funding Agreements (other than the Subordinated Funding Agreements) or the creation or granting of any other form of benefit or interest in either the Funders' Agreements (other than the [Subordinated Funding Agreements]) or the contracts, revenues or assets of Project Co whether by way of security or otherwise; or

(d) any other arrangement put in place by Project Co or another person which has an effect which is similar to any of (a) to (c) above or which has the effect of limiting Project Co's or any Associated Company's ability to carry out any of (a) to (c) above;

"Refinancing Gain" means an amount equal to the greater of zero and (A – B), where:

A = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing but disregarding any Distribution that, but for the Refinancing, would not be made) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing; and

B = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial

Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing; and

"Regulated Collective Investment Scheme" has the meaning given in the rules from time to time of the Financial Conduct Authority;

"Relevant Person" means a Shareholder and any of its Affiliates;

"Shareholder" means any person from time to time holding share capital in Project Co or [Hold Co].

"Threshold Equity IRR" means [♦]%

[SCHEDULE 24

LIAISON PROCEDURE][123]

1. The Authority and Project Co shall establish and maintain throughout the Project Term a joint liaison committee (the "**Liaison Committee**"), consisting of [three (3)] representatives of the Authority (one of whom shall be appointed Chairman) and [three (3)] representatives of Project Co which shall have the functions described below.

2. The functions of the Liaison Committee shall be:

   2.2.1 to provide a means for the joint review of issues relating to all day to day aspects of the performance of this Agreement;

   2.2.2 to provide a forum for joint strategic discussion, considering actual and anticipated changes in the market and business of the Authority, and possible variations of this Agreement to reflect those changes or for the more efficient performance of this Agreement; and

   2.2.3 in certain circumstances, pursuant to Schedule 20 (*Dispute Resolution Procedure*), to provide a means of resolving disputes or disagreements between the parties amicably.

3. The role of the Liaison Committee is to make recommendations to the parties, which they may accept or reject at their complete discretion. Neither the Liaison Committee itself, nor its members acting in that capacity, shall have any authority to vary any of the provisions of this Agreement or to make any decision which is binding on the parties. Neither party shall rely on any act or omission of the Liaison Committee, or any member of the Liaison Committee acting in that capacity, so as to give rise to any waiver or personal bar in respect of any right, benefit or obligation of either party.

4. The parties shall appoint and remove their representatives on the Liaison Committee by written notice delivered to the other at any time. A representative on the Liaison Committee may appoint and remove an alternate (who may be another representative of that party) in the same manner. If a representative is unavailable (and the other party's representatives may rely on the alternate's statement that the representative is unavailable) his alternate shall have the same rights and powers as the representative.

5. Subject to the provisions of this Agreement, the members of the Liaison Committee may adopt such procedures and practices for the conduct of the activities of the Liaison Committee as they consider appropriate from time to time and:

   5.1 may invite to any meeting of the Liaison Committee such other persons as its members may agree; and

   5.2 receive and review a report from any person agreed by its members.

6. Recommendations and other decisions of the Liaison Committee must have the affirmative vote of all those voting on the matter, which must include not less than one (1) representative of the Authority and not less than one (1) representative of Project Co.

[123] To be used on a project specific basis. Refer to the User Guide for further guidance.

7. Each member of the Liaison Committee shall have one (1) vote. The Chairman shall not have a right to a casting vote.

8. The Liaison Committee shall meet at least once each quarter (unless otherwise agreed by its members) and from time to time as necessary.

9. Any member of the Liaison Committee may convene a meeting of the Liaison Committee at any time.

10. Meetings of the Liaison Committee shall be convened on not less than ten (10) Business Days' notice (identifying the agenda items to be discussed at the meeting) provided that in emergencies a meeting may be called at any time on such notice as may be reasonable in the circumstances.

11. Where the Liaison Committee decides it is appropriate, meetings may also be held by telephone or another form of telecommunication, by which each participant can hear and speak to all other participants at the same time.

12. Minutes of all recommendations (including those made by telephone or other form of telecommunication) and meetings of the Liaison Committee shall be kept by Project Co and copies circulated promptly to the parties, normally within five (5) Business Days of the making of the recommendation or the holding of the meeting. A full set of minutes shall be open to inspection by either party at any time, upon request.]

SCHEDULE 25

INSURANCE PROCEEDS ACCOUNT AGREEMENT

AGREEMENT

AMONG:

(1) [PROJECT CO] of [♦] (the "**Issuer**");

(2) [AUTHORITY] (the "**Authority**");

(3) [FUNDER] of [♦] (the "**Account Bank**"); and

(4) [TRUSTEE] of [♦] (the "**Security Trustee**").

WHEREAS

(A) The Issuer and the Authority have agreed to open an insurance proceeds account in their joint names.

(B) The parties hereto have agreed to set out the terms on which payments may be made to or from that account in this Agreement.

IT IS AGREED as follows:

1 **[DEFINITIONS AND INTERPRETATION**

"Account Holders"	has the meaning given to it in Clause 2 (*Insurance Proceeds Account*);
"Account"	has the meaning given to it in Clause 2.1 (*Insurance Proceeds Account*);
"Credit Provider"	means [♦];
"Design, Build, Finance and Maintain Agreement"	means the agreement dated [♦] between the Project Co and the Authority in relation to [♦];
"Event of Default"	has the meaning given in Clause 4.5 (*General Provisions for the Account*) of this Agreement;
"Qualifying Bank"	means any institutions which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2006/48EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EU member state;
"Senior Finance Documents"	means [♦];

"Security Documents" means [♦].

1.1 Capitalised terms defined in the Design Build Finance and Maintain Agreement shall have the same meaning in this Agreement.]

2 INSURANCE PROCEEDS ACCOUNT

Each of the Issuer and the Authority (together the "**Account Holders**") hereby appoint [♦] as the Account Bank.

2.1 The Account Bank has opened on its books, at its office at [♦], an account in the joint names of the Account Holders designated the Authority Insurance Proceeds Account (the "**Account**").

2.2 The Account Bank shall, save as otherwise provided herein, maintain the Account in accordance with its usual practices, provided that, in the event of any conflict between the provisions of this Agreement and any applicable mandate, the provisions of this Agreement shall prevail.

2.3 Notwithstanding anything else in this Agreement, no person shall request or require that any withdrawal be made from the Account if it would cause the Account to become overdrawn and to the extent that any withdrawal (if made in full) would cause the Account to become so overdrawn, such withdrawal shall be made in part in as great an amount as possible as will not result in such Account becoming overdrawn.

2.4 Where any withdrawal required under this Agreement cannot be made in its entirety, the Account Bank shall promptly notify both of the Account Holders of that fact and provide details of the payment not made, the date on which it should have been made and the amount unpaid.

2.5 Each amount from time to time standing to the credit of the Account shall bear interest at the rate agreed between the Account Bank and the Account Holders from time to time, such interest to be credited to the Account in accordance with the relevant mandate.

2.6 Subject to and in accordance with the provisions of this Agreement, including without limitation Clause 4 (*General Provisions for the Account*) of this Agreement, the Account Bank agrees that it shall make such payments out of the amount standing to the credit of the Account as may from time to time be requested by the Account Holders jointly subject to the restrictions as contained in this Agreement. Save as otherwise provided in this Agreement, no party shall be entitled to require the Account Bank to make, and the Account Bank shall not make, any payment out of the amount standing to the credit of the Account.

2.7 Subject to Clause 8.6 (*The Account Bank*) of this Agreement, the Account Holders shall maintain the Account with the Account Bank until the termination of the Design Build Finance and Maintain Agreement. If so instructed after the termination of the Design Build Finance and Maintain Agreement, the Account Bank shall, at the sole cost and expense of the Issuer, terminate the Account in accordance with the relevant instructions and pay any amount standing to the credit of such accounts as the Account Holders may elect in accordance with Clause 4.1 (*General Provisions for the Account*) of this Agreement.

3 RECEIPTS AND PAYMENTS

3.1 The Account may only be used in accordance with the terms of and for the purposes set out in this Clause 3 (*Receipts and Payments*).

3.2 The Account shall be used for receiving, to the extent required by Clause 54 (*Insurance*) of the Design Build Finance and Maintain Agreement, the proceeds of all Insurances (as defined in the Design Build Finance and Maintain Agreement).

3.3 Subject to restrictions set out in this Agreement, the Account shall only be used for applying the proceeds of the Authority Insurances in accordance with Clause 54 (*Insurance*) of the Design Build Finance and Maintain Agreement either directly or indirectly by way of the reimbursement to the Issuer of costs or expenses incurred or monies paid by it (or on its behalf) in or towards satisfaction of the reinstatement restoration or replacement requirements of that Clause 54 (*Insurance*). In the event that any amount standing to the credit of the Account is not so required to be applied, such amount shall (subject to Clause 4.3 and 4.5 (*General Provisions for the Account*) below) be paid by the Account Bank to the [Receipts Account][124], or as otherwise instructed by the Security Trustee pursuant to Clause 4.5 (*General Provisions for the Account*) below.

4 GENERAL PROVISIONS FOR THE ACCOUNT

4.1 Subject to Clauses 4.3 and 4.5 (*General Provisions for the Account*) below, and provided that:

4.1.1 the Account Bank has received notice in writing from two (2) signatories, one of which shall be an authorised signatory of the Issuer and the other an authorised signatory of the Authority, as listed under the applicable mandate that such payment is authorised under this Agreement; and

4.1.2 no notice has been given to the Account Bank by the Credit Provider prior to the making of such payment or transfer of an Event of Default which is subsisting and the Account Bank has no actual notice that an Event of Default will occur as a result of the making of any such payment or transfer,

the Account Bank agrees that it shall only make payments or transfers from the Account on the request of the Account Holders.

[124] To be defined on a project specific basis.

4.2 The Authority undertakes to provide notice to the Account Bank as prescribed in Clause 4.1.1 for, the purposes of applying any part of the balance standing to the credit of the Account in accordance with Clause 3.3 (*Receipts and Payments*) of this Agreement. Each of the Account Bank and the Issuer shall be entitled to treat any act of the authorised signatory of the Authority as being expressly authorised by the Authority and neither the Account Bank nor the Issuer shall be required to determine whether an express authority has in fact been given.

4.3 No payments or transfers from the Account shall be made after an Event of Default which is continuing until the Credit Provider has confirmed to the Account Bank that such payment or transfer may be made except as expressly permitted under this Agreement. The Account Bank shall not be under any obligation to investigate the compliance of any payment with this Agreement.

4.4 All amounts withdrawn from the Account for transfer to another account or for application in or towards making a specific payment or meeting a specific liability shall be transferred to that account or applied in or towards making that payment or meeting that liability, and for no other purpose.

4.5 Notwithstanding any other provision of this Agreement, at any time following the occurrence of any Event of Default (as defined in Schedule 4 (*Funders' Direct Agreement*) of the Design Build Finance and Maintain Agreement) which is continuing and has not been waived or remedied, the Security Trustee may at any time give notice to the Account Bank instructing it not to act on the instructions of or at the request of the Issuer in relation to any sums at any such time standing to the credit of the Account. Without prejudice to the foregoing, the Account Bank agrees that it shall pay any amount standing to the credit of the Account and payable to the Issuer in accordance with Clause 3.3 (*Receipts and Payments*) of this Agreement to such a bank account as the Security Trustee shall direct following the occurrence of any Event of Default. The Account Bank agrees that it shall not so act and shall act on the instructions of the Security Trustee in place of the Issuer.

4.6 In establishing the balance standing to the credit of the Account at any time, the Account Bank may take into account credits to and withdrawals from such Account which are to be made on such day.

5 QUALIFYING BANK

If at any time the Account Bank ceases to be a Qualifying Bank, the Account Holders shall promptly open or cause to be opened a new account with a Qualifying Bank on the same terms as the Account and the Account Holders shall take all such action as may be required to open the new account.

6 CHARGES

The charges of the Account Bank (if any) for the operation of the Account shall be for the account of the Account Holders in equal amounts and shall be debited from the balance standing to the credit of the Account as from time to time agreed between the Account Bank, the Authority and the Issuer.

7 MANDATES

Each of the Account Holders will deliver to the Account Bank on or prior to the date hereof the applicable mandate together with authorised signature lists for both the Issuer and the Authority.

8 THE ACCOUNT BANK

8.1 The Account Bank may:

8.1.1 engage and pay reasonable fees for the advice or services of any lawyers, accountants or other experts whose advice or services may to it seem necessary, expedient or desirable and rely upon any advice so obtained;

8.1.2 rely upon any communication or document believed by it to be genuine and, in particular, rely upon any notice, request or other communication of the Account Holders for the purposes of this Agreement if such notice, request or other communication purports to be signed or sent by or on behalf of an authorised signatory of the Account Holders;

8.1.3 assume that no Event of Default has occurred unless it has actual notice to the contrary; and

8.1.4 assume that all conditions for the making of any payment out of the amount standing to the credit of the Account which is specified in the Design Build Finance and Maintain Agreement or any of the Senior Finance Documents has been satisfied, unless it has actual notice to the contrary.

8.2 Notwithstanding anything to the contrary expressed or implied herein and subject to Clause 2 (*Insurance Proceeds Account*) of this Agreement, the Account Bank shall not:

8.2.1 be bound to enquire as to the occurrence or otherwise of an Event of Default or be affected by notice of any of the same except by reason of and to the extent expressly provided in this Agreement;

8.2.2 be bound to account to any other party hereto for any sum or the profit element of any sum received by it for its own account;

8.2.3 save as provided in this Agreement be bound to disclose to any other person any information relating to any other party hereto;

8.2.4 be under any fiduciary duty towards any other party hereto or under any obligations other than those for which express provision is made in this Agreement;

8.2.5 have any responsibility to ensure that the information set out in any instructions received by it hereunder are correct or to check or enquire as to or otherwise be affected by whether any condition has been or will be met or fulfilled or any instruction is properly given on behalf of the person from whom it purports to be given or any instruction is given properly other than to exercise the bankers duty of care; or

8.2.6 have any responsibility to any party if any instruction which should be given by the Account Holders to the Account Bank under or in connection with this Agreement is for any reason not received by the Account Bank or is not made at the time it should be made.

8.3 The Account Bank does not have and does not accept any responsibility for the accuracy and/or completeness of any information (other than statements provided in accordance with Clause 9.2 of this Agreement (*Acknowledgements by the Account Bank*)) and the Account Bank shall not be under any liability as a result of taking or omitting to take any action in relation to the Account, save in the case of negligence or wilful misconduct or breach of its obligations under this Agreement.

8.4 Each of the other parties hereto agrees that it will not assert or seek to assert against any director, officer or employee of the Account Bank any claim it might have against the Account Bank in respect of the matters referred to in Clause 8.3 above.

8.5 The Account Bank may accept deposits from, lend money to, invest in and generally engage in any kind of banking or other business with the Account Holders, the Shareholders and any other party to any of the Project Documents.

8.6 The Account Bank may, at any time, (without assigning any reason therefor) notify the Account Holders in writing that it wishes to cease to be a party hereto as Account Bank (a **"cessation notice"**). Upon receipt of a cessation notice the Account Holders may nominate a Qualifying Bank as a successor to the Account Bank (a **"successor Account Bank"**). If no such nomination is made before the date specified in the cessation notice as being the date on which the Account Bank wishes to cease to be a party hereto (the "cessation date") (which date shall be a Business Day falling not less than thirty (30) days after the date of delivery of the cessation notice to the Account Holders) then the Account Bank may nominate a Qualifying Bank as successor Account Bank itself.

8.7 If a successor Account Bank is nominated under the provisions of Clause 8.6 above, then on the cessation date, provided the successor Account Bank has executed and delivered to the Account Holders a deed of novation in such form as the Account Holders may require undertaking to become a party to and bound by the terms and conditions of this Agreement and to become a party to such other documents as may be required by the Security Trustee in order to perfect the security created by the Senior Finance Documents:

8.7.1 the successor Account Bank shall open on its books at its principal office an account equivalent to that described in Clause 2 (*Insurance Proceeds Account*) of this Agreement and any amounts standing to the credit of the Account shall be transferred to the corresponding one of such account;

8.7.2 any reference in the Design Build Finance and Maintain Agreement or any Senior Finance Document to the Account shall be deemed to refer to the corresponding account opened pursuant to Clause 8.7.1;

8.7.3 the Account Bank shall cease to be a party hereto as Account Bank and shall cease to have any obligation hereunder in such capacity (but without prejudice to any accrued liabilities under this Agreement and its obligations under this Clause 8 (*The Account Bank*)) (but shall remain entitled to the benefit of the provisions of this Clause 8 (*The Account Bank*)); and

8.7.4 the successor Account Bank and each of the other parties hereto shall have the same rights and obligations amongst themselves as they would have had if such successor Account Bank had been an original party hereto as Account Bank.

9 ACKNOWLEDGEMENTS BY THE ACCOUNT BANK

9.1 Notwithstanding anything to the contrary in any applicable mandate, the Account Bank hereby waives so far as it may validly and lawfully do so any right it has or may hereafter acquire to combine, consolidate or merge the Account with any other account of the Account Bank, Account Holders or the Security Trustee or any other person or with any liabilities of Account Holders or the Security Trustee or any other person to the Account Bank. In addition, the Account Bank agrees so far as it may validly and lawfully do so that it may not set off, combine, withhold or transfer any sum standing to the credit of the Account in or towards satisfaction of any liabilities to the Account Bank of the Account Holders, the Security Trustee or any other person.

9.2 After the date hereof and until the Account Bank has been notified by the Account Holders of the termination of the Design Build Finance and Maintain Agreement or until the Account Bank ceases to be a party to this Agreement pursuant to the provisions of Clause 8.7 (*The Account Bank*) above, the Account Bank shall provide each of the Account Holders and the Security Trustee with statements in respect of the Account, such statement to be supplied in accordance with any reasonable request therefore by the Account Holders.

10 ASSIGNMENT

The Account Holders may not assign any of their rights under this Agreement or in relation to the Account otherwise than pursuant to the Security Documents or as permitted under the Design Build Finance and Maintain Agreement. The Security Trustee may assign its rights under this Agreement to a successor Security Trustee appointed in accordance with the [Security Trustee and Intercreditor Deed] and shall promptly give notice of any such assignment to the Account Bank. The Account Bank shall not be entitled to novate (except in accordance with Clause 8.7 (*The Account Bank*) above) or assign all or any part of its rights under this Agreement.

11 SECURITY TRUSTEE

The Security Trustee is party hereto solely for the purpose of receiving the benefits and exercising the rights specifically allocated to it under the terms of this Agreement.

12 FURTHER ASSURANCE

The parties hereto agree that they will co-operate fully to do all such further acts and things and execute any further documents as may be necessary or reasonably desirable to give full effect to the arrangements contemplated by this Agreement, subject to any such party being reimbursed to its satisfaction for any costs, expenses (including VAT) liabilities or fees reasonably incurred by it in the negotiation, preparation or execution of any such further documents.

13 AMENDMENTS

The provisions of this Agreement may not be amended (otherwise than in accordance with the terms hereof) except by written agreement between all the parties hereto.

14 NOTICES

14.1 Each communication to be made hereunder shall be made in writing and, unless otherwise stated, may be made by [email or letter] delivered by first class registered post.

14.2 Subject to Clauses 14.3 and 14.4 (*Notices*) any communication or document to be made or delivered by one person to another pursuant to or in connection with this Agreement shall (unless that other person has by ten (10) days' written notice to the other specified another address) be made or delivered to that other person at the address set out in Clauses 14.5 to 14.8 signed by an authorised signatory or signed by an authorised signatory in any deed of novation and shall be deemed to have been made or delivered:

14.2.1 (in the case of any communication made by letter) when delivered to that address provided that if such communication or document would otherwise be deemed to have been received on a day which is not a Business Day of after 5pm on a Business Day it shall be deemed to have been received on the next subsequent Business Day; or

14.2.2 (in the case of any communication by email):

(a) at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the email address specified in Clauses 14.5 to 14.8 (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

(b) by 11am on the next following Business Day, if 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 no error message indicating failure has been received by the sender and provided that within twenty-four (24) hours of transmission a hard copy of the email (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 this Clause 14 (*Notices*) and where such notice is addressed to the Authority, copied to [♦[125]].

14.3 If any communication is made or document is delivered to the Security Trustee, such communication or document shall be effective only if the same is expressly marked for the attention of the officer identified by the Security Trustee, as the case may be, in Clause 14.8 (*Notices*) (or such other officer as the Credit Provider or the Security Trustee, as the case may be, shall from time to time specify for this purpose).

14.4 If any communication or document is made or delivered to the Account Bank or the Security Trustee, such communication or document shall be effective only when received by the Account Bank, or the Security Trustee.

14.5 Any notice to be given to the Authority should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing by the Authority.

14.6 Any notice to be given to the Issuer should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing by the Issuer.

14.7 Any notice to be given to the Account Bank should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing by the Account Bank.

14.8 Any notice to be given to the Security Trustee should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing by the Security Trustee.

15 MISCELLANEOUS

The parties hereto each acknowledge that the Security Trustee when acting hereunder shall be acting in accordance with and subject to the terms of the [Security Trustee and Intercreditor Deed].

16 COUNTERPARTS

[125] Insert Welsh Government details.

16.1 This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes

17 GOVERNING LAW AND JURISDICTION

This Agreement is governed by, and shall be construed in accordance with, the laws of England and Wales.

18 THIRD PARTY RIGHTS

It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that save to the extent expressly provided in this Agreement, it is expressly declared that no rights shall be conferred under and arising out of this Agreement upon any person who is not a party to this Agreement.

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

SCHEDULE 26

COMMERCIALLY SENSITIVE INFORMATION

Where information or material falls within more than one category identified in column 1 of the table below, it shall be deemed to fall within the category whose corresponding period of confidentiality identified in column 2 of the table below will expire the soonest.

Category of Information/Material	**Period for which information is to be kept confidential**
Financial Model (as at Financial Close)	From the Effective Date until the date falling two (2) years after the [first Phase] Actual Completion Date
Financial Model (amended from time to time in accordance with this Agreement)	From the date of the relevant Financial Model until the date falling two (2) years after the later of: - the [first Phase] Actual Completion Date; and - the date on which the amendments to Financial Model are agreed in accordance with this Agreement
Prices within the Catalogue of Small Works and Services	Period during which the relevant prices are applicable
Small Works and Services Rates	Period during which the relevant Small Works and Services Rates are applicable
Project Co bank account information	Project Term
[IRR]	In the case of the [IRR] contained in the Financial Model as at Financial Close from the Effective Date until the date falling two (2) years after the [first Phase] Actual Completion Date In the case of the [IRR] contained in the Financial Model as amended from time to time in accordance with this Agreement, from the date of the relevant Financial Model until the date falling two (2) years after the later of: - the [first Phase] Actual Completion Date; and - the date of the Financial Model containing the relevant information
Ancillary Documents	Project Term
Funding Agreements	Project Term
Information about Project Co's processes, methodologies, working methods and information relating to the development of new processes and methodologies which amounts to a trade secret or which, if	Trade secrets – Project Term All other cases – five (5) years from the date on which the information is produced to the Authority

disclosed, could reasonably be considered to provide a commercial advantage to Project Co's competitors	
Breakdown of prices within the overall contract price (to the extent not disclosed within the Financial Model)	Project Term
Information on Project Co's costing mechanisms including information obtained from Project Co relating to project risks and pricing of the same and cost information relating to third party contractors and the Sub-Contractors	Project Term
Financial term sheets and related funding information including any funder pricing	Two (2) years from the date on which the information is produced to the Authority
Information relating to the appointment of Project Co as the preferred bidder to the Project (including the preferred bidder letter and correspondence and minutes relating to the same)	Until the date falling two (2) years after the [first Phase] Actual Completion Date
Information contained within or relating to Project Co's bid for the Project except as otherwise listed in this Schedule 26 (*Commercially Sensitive Information*) or otherwise provided in the Agreement	Until the date falling two (2) years after the [first Phase] Actual Completion Date

[**SCHEDULE 27**

PLANNING RESPONSIBILITIES MATRIX][126]

Ref	Condition	Responsibility		Obligations
		Authority	**Project Co**	

[126] To be developed on a project specific basis, where relevant. Refer to the User Guide for further guidance.

SCHEDULE 28

DISASTER PLAN[127]

[127] To be developed on a project specific basis. Refer to Health and Education Sector Specific Guidance in the User Guide, if applicable..

SCHEDULE 29

COMMUNITY BENEFITS[128]

Section 1

Authority's Community Benefits Requirements

[128] To be developed on a project specific basis. Refer to the User Guide for further guidance.

Section 2

Project Co's Community Benefit Method Statements

[SCHEDULE 30

BIM PROTOCOL[129]]

[129] To be developed on a project specific basis. Refer to the User Guide for further guidance.

[SCHEDULE 31

EMPLOYMENT AND PENSIONS]