



Llywodraeth Cymru  
Welsh Government

# **Standard Form Descriptive Document for use in respect of Mutual Investment Model (MIM) Projects**

## **Version 1 (September 2017)**

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**[Drafting Note to Contracting Authorities: insert appropriate logo.]**

**[\*\*\*\*] [Drafting Note to Contracting Authorities: insert name of Contracting Authority.]**

**Descriptive Document in respect of [\*\*\*\*] [Drafting Note to Contracting Authorities:  
insert name of Project.]**

**[\*\*\*\*] [Drafting Note to Contracting Authorities: insert reference number and date of the  
contract notice published by the Contracting Authority in the Official Journal of the European  
Union in relation to the Procurement Process.]**

**[\*\*\*\*] [Drafting Note to Contracting Authorities: insert the Sell2Wales portal reference  
number and date.]**

## **VOLUME ONE**

## FOREWORD

**[Drafting Note to Contracting Authorities:** insert Ministerial foreword to demonstrate political support for the procurement of the relevant MIM project. For example:

- Health - Cabinet Secretary for Health, Well-Being and Sport;
- Roads - Cabinet Secretary for Economy and Infrastructure; or
- Education - Cabinet Secretary for Education.

Also, consider inclusion of supporting statement from relevant senior person from the Contracting Authority - e.g. Chair of NHS Trust Board.]

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## GLOSSARY

**[Drafting Note to Contracting Authorities:** to be updated as required. For example, updates to the Glossary may be required when Contracting Authorities develop text which is contained in drafting notes and/or use optional text contained in square brackets.]

<b>Act</b>	has the meaning given in Section 1.2.1.
<b>Ancillary Documents</b>	means the Funders' Direct Agreement, the Collateral Agreements and the Shareholders' Agreement (as each such term is defined in the Project Agreement).
<b>Annual Service Payment</b>	has the meaning given to it in the Project Agreement.
<b>BIM</b>	means Building Information Modelling.
<b>Bootcamp</b>	means a series of intensive meetings between the Contracting Authority and each Participant following the submission of Detailed Solutions.
<b>CAPs</b>	has the meaning given to it in Section 2.9.
<b>Contract Notice</b>	means the notice published by the Contracting Authority in the OJEU in relation to the Procurement Process dated [****] and with reference number [****]. <b>[Drafting Note to Contracting Authorities:</b> insert date of notice and reference number.]
<b>Contracting Authority</b>	means [****]. <b>[Drafting Note to Contracting Authorities:</b> insert full designation of Contracting Authority.]
<b>Contractor</b>	has the meaning given in the Project Agreement.
<b>day</b>	means a calendar day(s).
<b>Descriptive Document</b>	means this document.
<b>Detailed Solution</b>	means the detailed solution received from a Participant in response to the ITCD and ITCD Document.
<b>Developer</b>	has the meaning given in the Project Agreement.
<b>Dialogue Meeting</b>	means a meeting between a Contracting Authority and a Participant during the Dialogue Period.
<b>Dialogue Period</b>	means the period commencing on the date of issue of the ITPD by the Contracting Authority and ending on the date of issue by the Contracting Authority of the notification that the dialogue has been concluded.

<b>Economic Operator(s)</b>	means any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market. Where the Economic Operator is a consortium, "Economic Operator" means each member of the consortium.
<b>Final Tender</b>	means a final tender received from a Participant in response to the ITSFT and ITSFT Document.
<b>Financial Close</b>	means the commercial and financial close of the Project immediately prior to contract award.
<b>Hold Co</b>	means the holding company of Project Co.
<b>Initial Solution</b>	means the initial solution submitted by a Participant in response to the ITPD and ITPD Document.
<b>ITCD</b>	means invitation to continue dialogue.
<b>ITCD Document</b>	means the package of documents, issued to each Participant in respect of the ITCD Stage, as may be amended from time to time by the Contracting Authority, and shall include any supplemental documents issued as part of the ITCD Stage of the Procurement Process.
<b>ITCD Stage</b>	means the period commencing on the date of issue of the ITCD by the Contracting Authority and ending on the date of issue by the Contracting Authority of the notification that the dialogue has been concluded.
<b>ITPD</b>	means invitation to participate in dialogue.
<b>ITPD Document</b>	means the package of documents, issued to each Participant in respect of the ITPD Stage, as may be amended from time to time by the Contracting Authority, and shall include any supplemental documents issued as part of the ITPD Stage of the Procurement Process.
<b>ITPD Stage</b>	means the period commencing on the date of issue of the ITPD by the Contracting Authority and ending on the date of issue by the Contracting Authority of the ITCD.
<b>ITSFT</b>	means invitation to submit Final Tenders.
<b>ITSFT Document</b>	means the package of documents, issued to each Participant in respect of the ITSFT Stage, as may be amended from time to time by the Contracting Authority, and shall include any supplemental

	documents issued as part of the ITSFT Stage of the Procurement Process.
<b>ITSFT Stage</b>	the period commencing on the date of issue of the ITSFT by the Contracting Authority and ending on the commencement of Financial Close.
<b>MIM</b>	means Mutual Investment Model.
<b>MIM Standard Form Project Agreements User Guide</b>	means the MIM Standard Form Project Agreements User Guide published by Welsh Government on 31 March 2017. <b>[Drafting Note to Contracting Authorities: please check date of latest version available and update as appropriate.]</b>
<b>MIM Standard Form Project Agreement</b>	means the MIM Standard Form Project Agreement [(Accommodation Version) / (Roads Version)] <b>[Drafting Note to Contracting Authorities: please delete reference to (Accommodation Version) or (Roads Version) as appropriate and remove square brackets]</b> published by the Welsh Government on 31 March 2017 <b>[Drafting Note to Contracting Authorities: please check date of latest version and update as required.]</b> , tailored in accordance with the MIM Standard Form Project Agreements User Guide.
<b>MIM Standard Form Shareholders' Agreement</b>	means the form of shareholders' agreement published by the Welsh Government on [***]. <b>[Drafting Note to Contracting Authorities: please check date of latest version and update as required.]</b>
<b>OJEU</b>	means the Official Journal of the European Union.
<b>Parent Company</b>	means the parent company of a Relevant Organisation or the parent company of an Economic Operator.
<b>Participant</b>	means an Economic Operator who, following submission of a PQQ Response, has been invited by the Contracting Authority to participate in the competitive dialogue for the Project.
<b>PPP</b>	means public-private partnership.
<b>PQQ</b>	means the prequalification questionnaire in respect of the Procurement Process.
<b>PQQ Response</b>	means the information that each Economic Operator (including any Relevant Organisation, Parent Company and Subcontractor which submits a response to the PQQ together with the Economic Operator) provides in response to the PQQ.

<b>PPP</b>	means public private partnership.
<b>Procurement Process</b>	means the competitive dialogue procedure adopted by the Contracting Authority for the procurement of the Project, including prequalification and shortlisting, competitive dialogue, participation in Dialogue Meetings, submission of proposals in respect of Dialogue Meetings, Initial Solutions, Detailed Solutions and Final Tenders and clarification and finalisation of the Project Agreement and any other documents to be entered into under or in relation to the Project Agreement.
<b>Project</b>	means [****]. <b>[Drafting Note to Contracting Authorities: Contracting Authority to describe its MIM project.]</b>
<b>Project Agreement</b>	means the [the contract for the design, build, finance and maintenance of ****] <b>[Drafting Note to Contracting Authorities: insert description of facilities/road.]</b> to be entered into between the Contracting Authority and the Successful Participant (as Project Co), in respect of the Project, based on the MIM Standard Form Project Agreement and adjusted to reflect project and sector specifics in accordance with the MIM Standard Form Project Agreement substantially in the form contained in Volume Two of this Descriptive Document. and as may be amended from time to time in accordance with the Procurement Process.
<b>Project Co</b>	means the counterparty to enter into the Project Agreement with the Contracting Authority.
<b>Regulations</b>	means the Public Contracts Regulations 2015 (SI 2015/102) and reference to "Regulation" is to a specific regulation thereof.
<b>Relevant Organisation</b>	has the meaning given in Section 8.6.2.
<b>Senior Debt</b>	means bank or institutional funding provided to a scheme which is unrelated to any equity investment.
<b>Service Provider</b>	has the meaning given in the Project Agreement.
<b>Shareholders' Agreement</b>	has the meaning given in the Project Agreement.
<b>Statistical Treatment Guidance</b>	means national and European guidance issued on statistical classification which may be relevant to the Project including the publication entitled <i>A Guide to the Statistical Treatment of PPPs</i> dated September 2016, issued by Eurostat and the European PPP

Expertise Centre.

<b>Subcontractors</b>	means [***]. <b>[Drafting Note to Contracting Authorities:</b> "Subcontractors" will be required to submit responses to Part 1.1, 1.2, 2 and 4 of the PQQ and such responses will be evaluated in accordance with Section 8.5. It is recommended that the definition of Subcontractors is limited to "key" subcontractors who are categorised according to scope of works and/or value of subcontract.]
<b>Successful Participant</b>	means the Participant who has achieved the highest ranking in the evaluation of the Final Tenders to establish the most economically advantageous tender.
<b>Third Party Equity</b>	has the meaning given to it in Section 4.4.3.
<b>WGCo</b>	means the Welsh Ministers themselves or such Welsh Government corporate entity that is party to the Shareholders' Agreement.
<b>WGCo Equity</b>	has the meaning given in Section 4.4.3.

## INTRODUCTION

### 1.1 Overview

#### 1.1.1 [\*\*\*\*]

**[Drafting Note to Contracting Authorities:** An overview of the Project should be inserted including details of the Contracting Authority, the nature of works and the services required. Where more than one Contracting Authority is procuring the Project, then the contractual, decision making and governance structures should be set out in the Descriptive Document. The point of contact and resource structures for the group of Contracting Authorities should also be included.]

### 1.2 Well-Being of Future Generations Act 2015

1.2.1 The Well-being of Future Generations Act 2015 (the "**Act**") focuses on how public bodies can improve the social, economic, environmental and cultural well-being of Wales. The purpose of the Act is to create a Wales that all want to live in, now and in the future. The Act puts in place seven well-being goals:

- A prosperous Wales;
- A resilient Wales;
- A healthier Wales;
- A more equal Wales;
- A Wales of cohesive communities;
- A Wales of vibrant culture and thriving Welsh language; and
- A globally responsible Wales.

**[Drafting Note to Contracting Authorities:** Guidance on the Well-being of Future Generations Act has been developed in association with the WFG Commissioner's Office, and through pilots with several public bodies in Wales. This Guidance was made available to Contracting Authorities early in the 2017/2018 financial year. Public bodies in Wales are expected to embed the Act in all activities.]

1.2.2 The Act means that, for the first time, public bodies listed in the Act must do what they do in a sustainable way. The public bodies which are listed in the Act are:

- Welsh Ministers;
- Local Authorities;
- Local Health Boards;
- Public Health Wales NHS Trust;
- Velindre NHS Trust;

- National Park Authorities;
- Fire and Rescue Authorities;
- Natural Resources Wales;
- The Higher Education Funding Council for Wales;
- The Arts Council of Wales;
- Sports Council of Wales;
- National Library of Wales; and
- National Museum of Wales.

1.2.3 The Act requires that the public bodies listed in the Act think more about the long-term, work better with people and communities and each other, and look to prevent problems and take a more joined-up approach. These public bodies need to take into account the impact their decisions could have on people living their lives in Wales in the future. The Act expects these public bodies to:

- work together better;
- involve people reflecting the diversity of their communities;
- look to the long term as well as focusing on now; and
- take action to try and stop problems getting worse - or even stop them happening in the first place.

1.2.4 The Act establishes a statutory Future Generations Commissioner for Wales whose role is to act as a guardian for the interests of future generations in Wales, and to support the public bodies listed in the Act to work towards achieving the well-being goals.

1.2.5 The Act also establishes Public Services Boards ("**PSBs**") for each local authority area in Wales. Each PSB must improve the economic, social, environmental and cultural well-being of its area by working to achieve the well-being goals.

### 1.3 Purpose of the Descriptive Document

1.3.1 The Project was advertised by the Contracting Authority in a prior information notice in the OJEU published on [\*\*\*\*] with reference number [\*\*\*\*] and in the Sell2Wales portal, [www.sell2wales.gov.wales](http://www.sell2wales.gov.wales), on [\*\*\*\*] with reference number [\*\*\*\*]. **[Drafting Note to Contracting Authorities: insert date and reference number.]**

1.3.2 The competition for the procurement of the Project was advertised by the Contracting Authority in a contract notice in the OJEU on [\*\*\*\*] with reference number [\*\*\*\*] and in the Sell2Wales portal, [www.sell2wales.gov.wales](http://www.sell2wales.gov.wales) on [\*\*\*\*] with reference number [\*\*\*\*]. **[Drafting Note to Contracting Authorities: insert date and reference number of OJEU and sell2wales publication.]**

1.3.3 The Contracting Authority now wishes to progress with a procurement competition for the Project.

1.3.4 The intent of the Contract Notice, this Descriptive Document and PQQ is to permit the Contracting Authority to identify suitably qualified and experienced Economic Operators to be invited to participate in dialogue in respect of the Project.

1.3.5 The Contracting Authority's needs and requirements in respect of the Project are identified in the Contract Notice. The Contracting Authority has defined its needs and requirements in respect of the Project in this Descriptive Document.

1.3.6 In summary, this Descriptive Document provides interested parties with:

- information in respect of the duties and responsibilities of the Contracting Authority;
- the definition of the needs and requirements of the Contracting Authority in respect of the Project including [the scope and location of the works, financing, land, community benefits, supply chain and SMEs, utilities, third parties and other stakeholders, design requirements, works requirements, ground investigation, and health and safety, quality and environmental management systems] **[Drafting Note to Contracting Authorities: to be customised.]**;
- a description of the key technical requirements for the Project and a copy of the **[\*\*\*\*] [Drafting Note to Contracting Authorities: describe documents which comprise the Contracting Authority's technical requirements. For example, this could comprise documents such as the "Authority's Construction Requirements" and the "Service Level Specification" (as defined in the MIM Standard Form Project Agreement).]**;
- a brief description of the key terms of the Project Agreement and a copy of the Project Agreement **[Drafting Note to Contracting Authorities: the form of Project Agreement will be customised to the specific project. However all amendments (termed 'derogations') will be required to have been approved by Welsh Government in advance]**;
- an overview of the proposed Procurement Process including dialogue submission requirements and down selection, the contract award criteria, the indicative timeframe for the procurement competition and a copy of the ITPD;
- rules in relation to the prequalification procedure described in this Descriptive Document; and
- the selection criteria and evaluation procedure which will be undertaken to prequalify Economic Operators who may be invited to participate in the proposed competitive dialogue for the Project.

1.3.7 The PQQ Response:

- provides Economic Operators with the opportunity to demonstrate to the Contracting Authority that they satisfy the required levels of economic and financial standing and professional and technical ability in respect of the Project;

- allows Economic Operators to describe their relevant experience on previous projects; and
  - provides the Contracting Authority with comparable information about each Economic Operator in a consistent and structured manner.
- 1.3.8 The Contracting Authority advises Economic Operators to read the Descriptive Document and PQQ carefully to ensure they are fully aware of the Contracting Authority's requirements. If Economic Operators have any queries about the PQQ or the Project generally, they should seek clarification in accordance with Section 7.1.
- 1.3.9 The information which each Economic Operator shall be required to provide in respect of its PQQ Response is set out in the PQQ.
- 1.3.10 The information contained in the Descriptive Document is given in good faith for the guidance of Economic Operators in completing their PQQ Responses. No warranty or representation of any kind is given as to the accuracy or completeness of such information. Neither the Contracting Authority nor their advisers shall be liable for any errors, omissions or lack of specificity in such information. Any reliance on or use of any information contained within the Descriptive Document is entirely at the risk of each Economic Operator.
- 1.3.11 Economic Operators shall be responsible for carrying out their own review and checks to satisfy themselves as to the adequacy and correctness of the information provided in or referred to in the Descriptive Document, before relying on and using such information as part of any PQQ Response.
- 1.3.12 No information provided in the Descriptive Document shall be construed as forming part of the Project Agreement.
- 1.3.13 Any reference herein 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, replaced, consolidated or re-enacted from time to time.

**1.4 Key Dates**

- 1.4.1 Economic Operators must note the following key dates and times in respect of the prequalification procedure:

Final date and time for submitting a query in respect of any aspect of the [Descriptive Document and PQQ]	[****] <b>[Drafting Note to Contracting Authorities:</b> to be completed. The final date should be a minimum of 5 working days prior to submission of PQQ Responses.]
Final date and time for delivery of PQQ Responses	[****] <b>[Drafting Note to Contracting Authorities:</b> The minimum time period under Regulation 30(2) for receipt of requests to participate is 30 days from the date on which the Contract Notice is sent for

	publication to the EU Publication office. Consideration should be given to Regulation 47 (Setting of Time Limits) and the time period should be at least 6 weeks from the date on which the Contract Notice is published.]
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## 2. BACKGROUND

### 2.1.1 [\*\*\*\*]

**[Drafting Note to Contracting Authorities: Insert background to the Project.]**

## 2.2 Duties and Responsibilities of the Contracting Authority

### 2.2.1 [\*\*\*\*]

**[Drafting Note to Contracting Authorities: Insert details of the Contracting Authority's statutory duties and responsibilities associated with the Project. In respect of grouped schools / colleges projects, insert details of the Contracting Authority's responsibilities with regard to any other authorities/colleges who are not the Contracting Authority but have facilities included in the Project.]**

### 2.2.2 Further information about the Contracting Authority and the Project can be accessed through the Contracting Authority's website at [\*\*\*\*].

**[Drafting Note to Contracting Authorities: Insert link to Contracting Authority's website.]**

## 2.3 Overview of the Mutual Investment Model

### 2.3.1 The Project is being procured under the Welsh Government's Mutual Investment Model ("MIM"). The MIM provides for a procurement and contracting approach that builds upon the learning and knowledge of other UK PPP models but is tailored to meet the specific needs of the Welsh Government's infrastructure programme, Welsh Government policy, Welsh Government equity participation and Council Regulation (EC) 549/13 on the European system of national and regional accounts in the European Union, together with related Statistical Treatment Guidance. The Welsh Government's approach has generally been to:

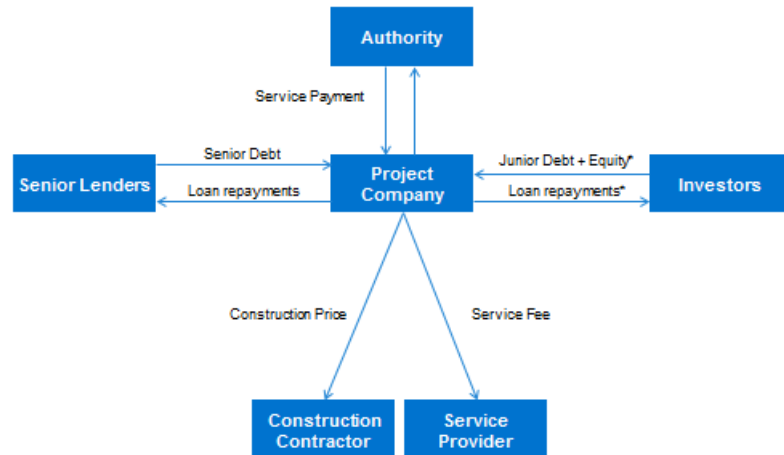
- promote maximum value for money through commercially reasonable risk transfer that fits with Welsh policy and Statistical Treatment Guidance; and
- minimise transaction costs by using UK precedent and standard project agreements), adjusted as appropriate to reflect the above principles.
- **[Drafting Note to Contracting Authorities: further narrative to be inserted here, as required, in relation to key policy drivers.]**

### 2.3.2 "Taking Wales Forward" is the Welsh Government's five year strategic plan, setting out the programme and priorities which Welsh Ministers want to deliver over the 2016-2021 term of government. The central focus of "Taking Wales Forward" is to deliver real improvements in the everyday lives of people in Wales and for future generations. Priorities include: the improvement of Welsh healthcare services; continuing to invest in new and refurbished schools, community schools and college buildings by investing nearly £2 billion by 2024; and continuing to invest in better connectivity across Wales by promoting major transport infrastructure projects.

### 2.3.3 The MIM was formally launched by the Welsh Government on 28 February, 2017. The MIM is seen as playing a useful role in "Taking Wales Forward", as procurement of projects using the MIM will drive improvement in public services and deliver a

Wales which is prosperous and secure, healthy and active, ambitious and learning, united and connected.

2.3.4 A summary of the MIM contract structure and associated payments is provided in the schematic below.



\* Equity payments are payable to shareholders in accordance with the Shareholders' Agreement, as illustrated in Section 4.4 of this Descriptive Document.

2.3.5 MIM is based on traditional PPP structures but with the following core principles embedded:

- an emphasis on wider community benefits;
- enhanced stakeholder involvement;
- potential for public sector equity investment;
- a presumption of no soft services;
- proper and ongoing scrutiny of the operations of Project Co and stringent performance monitoring; and
- consistency of approach across sectors, to the extent appropriate.

2.3.6 Further information on the MIM can be obtained at <http://gov.wales/funding/wales-infrastructure-investment-plan/mutual-investment-model>.

2.3.7 The Successful Participant/Project Co will be required to enter into a project agreement and shareholders' agreement based on the MIM Standard Form Project Agreement and MIM Standard Form Shareholders' Agreement. These documents are described further in Section 4 of the Descriptive Document.

## 2.4 Scope of the Project: Needs and Requirements of the Contracting Authority

**[Drafting Note to Contracting Authorities: Insert details of the scope of the Project.]**

## 2.5 Financing

2.5.1 Subject to Section 2.5.2 below, the Successful Participant will fully finance the design, build and maintenance of the Project, including [construction costs, management costs, tender costs, professional fees for its design team and advisers, and maintenance of the Project for the duration of the contract period] **[Drafting Note to Contracting Authorities: Insert details of the costs and fees to be covered if different from the proposed categories.]**

2.5.2 The Contracting Authority requires fully funded bids to be submitted. Whilst the Contracting Authority does not intend to request that a funding competition be conducted at the Successful Participant stage, the Contracting Authority reserves the right to do so, as part of the process of confirming financial commitments or other terms contained in the Successful Participant's Final Tender described in Regulation 30(20). Participants should note that they will be required to submit committed funding terms for the full Senior Debt funding requirement, as part of their Final Tenders. **[Drafting Note to Contracting Authorities: As part of CAP1, Contracting Authorities will need to present a broad outline of the likely structure of the financing for their Project and any probable options or concerns. If there is any concern about the status of the external funding market, then the competitive dialogue procedure will need to be designed appropriately in accordance with the Regulations, and suitable wording included in the Descriptive Document. Details of the following should be described in the Descriptive Document on a project specific basis:**

- the Welsh Government's intended equity investment, i.e. up to 20% of the issued share capital/junior debt in the Project; and
- if applicable and where compliant with the Regulations, the portion of equity that will be subject to a Third Party Equity funding competition after the appointment of the Successful Participant, i.e. up to 30% of the issued share capital/junior debt in the Project.

**Please refer to Section 4 below for further details on equity and gearing.]**

2.5.3 The Contracting Authority [does not/does] anticipate making any capital contributions towards the cost of the Project.] **[Drafting Note to Contracting Authorities: Delete as appropriate. If the Contracting Authority is making capital contributions, detail to be included here.]**

2.5.4 Whilst the above represents the anticipated financing arrangements for the Project, the Contracting Authority reserves the right, at its sole discretion, to consider alternative financing, funding and/or contractual arrangements/processes to support the delivery of the Project. **[Drafting Note to Contracting Authorities: although this Section 2.5.4 has been included in the Descriptive Document, Contracting Authorities must only exercise this discretion following consultation with the Welsh Government and having taken appropriate legal and financial advice.]**

## 2.6 Community Benefits

The Welsh Government intends to derive benefits for the community from the procurement of projects under the MIM. Community benefits will be part of the Contracting Authority's requirements for the Project. There will be a group of "core" community benefits which Participants will be required to provide. Additional community benefits will be actively encouraged.

The core community benefits will cover the following broad areas:

- recruitment and training of economically inactive people;
- opening up opportunities for small organisations, such as SME, Third Sector Organisations and Supported Factories & Businesses (materials and local sourcing);
- making a positive impact on the environment; and
- contributing to the local community in terms of education, regeneration & community engagement.

**[Drafting Note to Contracting Authorities: insert specifics of the core benefits to be added for the Project once they have been agreed.]**

## 2.7 Supply Chain and SMEs

**[Drafting Note to Contracting Authorities: include text to summarise your supply chain/SME policy as it applies to this Project. For example:**

- summarise supply chain "protections" in the Project Agreement - e.g. payment of supply chain within 30 days;
- advertisement of SME/supply chain opportunities in Sell2Wales portal;
- use of "Meet the Buyer" events; and/or
- ethical employment.

Contracting Authorities should note that SMEs may submit complaints to the [Welsh Government/Value Wales pursuant to [\*\*\*\*]], therefore, Contracting Authorities must consider carefully their supply chain/SME policy as it applies to the Project. ]

## 2.8 Statutory Process

**[Drafting Note to Contracting Authorities: Insert details of any related statutory process and conditions, where relevant, such as planning public inquiries, road orders, and compulsory purchase processes. It should be clear which elements of such statutory approval processes are complete and those that are to follow at a later date.]**

**[Drafting Note to Contracting Authorities who are carrying out education projects:**

Where education projects include changes to school provision, local authorities are required to undertake statutory consultation as set out in “the School Organisation Code”. This Code sets out requirements and provides guidance to those responsible for determining proposals in respect of school reorganisation proposals brought forward to reconfigure school provision. The Descriptive Document should set out what stage in the consultation the Project has reached.

Currently, governing bodies can federate under a single governing body using the Federation of Maintained Schools and Miscellaneous Amendments (Wales) Regulations 2010. Guidance for schools and local authorities is to be found in Circular 011/2014.

The Welsh Government does not have a policy of supporting Free Schools or Academies.

Projects should set out whether/when they have achieved outline planning consent and whether any project specific issues have been raised from this.]

**[Standard Text and Drafting Notes to Contracting Authorities who are carrying out roads projects:**

The Contracting Authority, assisted by its advisers, has completed feasibility studies into the various options for the Project, including undertaking an Environmental Impact Assessment (“EIA”) at each appropriate stage and has published the Environmental Statement and Orders **[Drafting Note to Contracting Authorities who are carrying out roads projects:** This needs to be defined but is essentially the compulsory purchase orders and Highways Act orders]. [A public local inquiry was held\*] and subsequently the Orders were made by Welsh Ministers and published in the [insert the name of the journal].

**[Drafting Note to Contracting Authorities who are carrying out roads projects:** the above reflects the process for government departments. Local highway authorities authorise the making of orders by council resolutions. The orders are then sealed by the local authority, but do not take effect unless and until confirmed by the Welsh Ministers. The wording should be adapted as necessary to reflect the relative timing of the statutory process and publication of the Contract Notice.]

[The general vesting declaration\*] was published in the [insert the name of the journal.]

**[\*Drafting Note to Contracting Authorities who are carrying out roads projects:** This needs to be amended if the Notice to Treat procedure is being used.]

**[Drafting Note for Contracting Authorities who are carrying out health projects:**

The Contracting Authority should obtain outline planning consent for the Project in advance of publishing the Contract Notice. Approval of the Outline Business Case (OBC) will also be conditional on gaining outline planning consent. The Contracting Authority should consult with the local planning authority to understand all requirements for the planning submission, including the need and scope of an EIA. The Contracting Authority should also agree the level of design information required by the local planning authority to support the outline planning application. This is expected to fall within the scope of the RIBA stage 3 reference design that will be produced to support the Procurement Process. The Contracting Authority should

also gain approval for all works that may sit outside the scope of, but support and enable the Project. This will include construction of access roads and utility connections to the new facility.]

## 2.9 Governance

Commercial Approval Points ("**CAPs**") are mandatory for MIM projects. CAPs are designed to assure the commercial aspects of MIM projects. CAPs have been designed to align with and complement the wider assurance elements that will be required e.g. gateway and departmental reviews. The CAP process has been developed by utilising existing, tried and tested, assurance products sourced from the Scottish Futures Trust, Cabinet Office and Her Majesty's Treasury. These products have been tailored for the purposes of the Welsh Government. A CAP involves the focused scrutiny of the proposed commercial elements of a potential deal with a private sector partner.

A CAP will consider the impact of project-specific commercial factors in relation to:

- affordability;
- value for money;
- deliverability; and
- commercial and compliance aspects of a project.

Five CAPS will need to be completed at the following points throughout the procurement of the Project:

1. pre advertisement of Contract Notice;
2. pre Competitive Dialogue;
3. mid Dialogue Period;
4. end of Dialogue Period; and
5. pre Financial Close.

It is anticipated that each CAP will be time limited to no more than 15 working days however this requires: all requisite information is provided by the Project Team and is ready and available at the outset; and key persons are available for interview.

**[Drafting Note to Contracting Authorities:** an overview of other local requirements should also be set out here. Also, where the Project involves more than one Contracting Authority, the governance arrangements among the Contracting Authorities should be described here.]

## 2.10 Location and Land Issues

- 2.10.1 The location of the Project is [\*\*\*\*], as shown in Figure 1 below. **[Drafting Note to Contracting Authorities:** insert plan(s) or reference drawing(s).]

2.10.2 [The Contracting Authority has [utilised their existing land ownership where possible and][acquired additional land where necessary] for the Project.

2.10.3 **[Drafting Note to Contracting Authorities:** It is not unusual for land matters to cause delay to procurements so Contracting Authorities must have carried out all title and site due diligence in advance of publication of the Contract Notice and collated the following information:

- Reserved Rights;
- Title Conditions;
- Site plan (with illustrative red-line boundary and title boundary);
- Site surveys (details on Site surveys should be included in Section 3 below); and
- Planning and development brief (including details of outline planning consent).

In this Section 2.10.3, describe the position on land by reference to the above materials and highlight any significant title risk issues. Contracting Authorities should also refer to the requirements for CAP1 and what 'Site Pack' information will be made available in the data room on release of the Descriptive Document.]

2.10.4 In making land available for the Project, the Contracting Authority will define the limits and any further restrictions associated with any of the land made available for the Project in the ITPD Document.

2.10.5 **[Drafting Note for Contracting Authorities who are undertaking roads projects:** text should be included in respect of describing the Register of Commitments. To note that there is some overlap between land and community benefits, and the text in the Descriptive Document, should be cross-referenced/adjusted accordingly. Suggested text is as follows:

"The Register of Commitments ("RoC") is contained in Schedule 34 of the Project Agreement. The RoC includes the published Register of Environmental Commitments. It is used to track actions taken to honour commitments from recording the investigations undertaken to incorporating the requests in the design or to giving reasons why requests cannot be incorporated. Examples of the types of actions this could include are;

- seasonal construction activity constraints;
- boundary treatments; and
- local community initiatives that may benefit from contractor assistance (NB. information of this type can be supplied as a means of informing the Project parties of legacy opportunities rather than as a firm commitment that must be delivered as part of the Project).

Actions are closed once completed, but remain listed in the RoC for record. The RoC will be updated on an ongoing basis throughout the Dialogue Period to provide the audit trail of relevant on site negotiations such as accommodation works and commitments completed by the Contracting Authority. Those commitments

remaining at financial close will be the responsibility of Successful Participant in accordance with the Project Agreement."

2.11 **[Traffic Management] [Equipment] [Other sector-specific issues]**

**[Drafting Note to Contracting Authorities:** Contracting Authorities to insert details of any project-specific issues. Such issues should have been identified in the Outline Business Case (OBC) for the Project and appropriate text should be included here.]

2.12 **[Third Parties/Stakeholder Engagement]**

**[Drafting Note to Contracting Authorities:** Insert details of required any required stakeholder engagement.]

2.12.1 There will be a requirement for Participants to consult with third parties during the Dialogue Period. This may include, but will not be limited to, consultation with the following types of organisations:

- (b) [local authorities;]
- (c) [environmental statutory bodies;]
- (d) [utility owners including statutory undertakers;]
- (f) [emergency services; and]
- (g) [other third parties including [\*\*\*\*] planning consultees; colleges; dioceses (in schools projects if appropriate); trade unions.]

2.13 **Environmental Issues**

**[Drafting Note to Contracting Authorities:** Insert details of any environmental issues, including Environmental Impact Assessments undertaken etc. The Well-being of Future Generations (Wales) Act 2015 requires public bodies to act "in accordance with the sustainable development principle". This means that the body must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs. For more detailed information please visit: <http://gov.wales/topics/people-and-communities/people/future-generations-act/?skip=1&lang=en>].

2.14 **Contracting Authority's Advisers**

The Contracting Authority's advisers for the Project include: **[Drafting Note to Contracting Authorities:** to be completed.]

Technical	[****]
Legal	[****]
Financial	[****]
Insurance	[****]
Other(s)	[****]

### 3. TECHNICAL REQUIREMENTS

#### 3.1 Technical Documents

**[Standard Text for Contracting Authorities who are undertaking roads projects:  
Insert:**

"The Contracting Authority's technical requirements for the design, construction, maintenance of the Project are set out respectively in Schedule 6 Section 3 "Authority's Construction Requirements", Schedule 12 "Service Requirements" and Schedule 33 "Restricted Services of the Project Agreement and included in Volume Three of this Descriptive Document.

The technical requirements have been prepared by reference to technical specifications comprising the Design Manual for Roads and Bridges (DMRB); The Manual of Contract Documents for Highway Works (MCHW); BS-EN-ISO Standards; Eurocodes and relevant Welsh Government manuals, advice notes and guidance and by reference to Project specific performance and functional requirements related to them. The Service Requirements and Restricted Services requirements also draw on the Welsh Ministers' Trunk Road Maintenance Manual (TRMM) for aspects of the performance and functional requirements for services.

The Successful Participant shall be required to ensure that the construction works and maintenance of the Project shall take account of all measures necessary to protect the environment in accordance with current legislation and the Project Agreement.

An Environmental Statement has been prepared and published in accordance with The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2016 and environmental constraints identified in the statement will be included in the ITPD Document.

Environmental enhancement measures and mitigation proposals for road traffic noise, landscape works, archaeological works, and all other environmental works shall be undertaken in accordance with, including but not limited to, the Authority's Construction Requirements and Service Requirements.

The Participants when developing the design for the Project shall be required to take full cognisance of, including but not limited to:

- the Highway Orders;
- Environmental Assessment Documents;
- the Authority's Construction Requirements; and
- the Service Requirements.

Participants shall certify in their Initial Solutions and Final Tenders that they have developed sufficiently their design for the Project such that it shall meet the requirements of the Project Agreement.

#### **Road Safety Audit**

The Participants and the Successful Participant shall be required to appoint and pay directly for an independent Safety Audit Team, each member of which shall be acceptable to the Contracting Authority. The Safety Audit Team shall be

independent of the Participants, the Successful Participant and Designer. Safety Audits shall be carried out by such Safety Audit Team in accordance with the DMRB and the Project Agreement."]

**[Standard Text for Contracting Authorities who are undertaking accommodation projects:**

**Insert:**

"The Contracting Authority's technical requirements for the design, construction and maintenance of the Project are set out in Schedules 6 and 12 of the Project Agreement and Volume Three of this Descriptive Document. These include:

- Authority's Construction Requirements (ACR) – incorporating the Schedule of Accommodation, departmental adjacency matrix and environmental matrix;
- Hard FM Service Level Specification – incorporating responsibility matrix and schedule of Gross Service Units;
- Specific [clinical/educational] specifications; and
- Specific [Non-clinical/non-core educational] Soft FM interface specifications."

### 3.2 Site Surveys

**[Drafting Note to Contracting Authorities: insert information such as:**

- a list of surveys which have already been carried out;
- identify where any consultant warranties are available;
- survey information will be made available in the data room which will be accessible to Participants (i.e. shortlisted Economic Operators) but Contracting Authorities to consider if it would be useful to Economic Operators to provide any site surveys in advance of the data room being available;
- the ability of Participants during the dialogue to carry out additional surveys; and
- consider including text such as:

*In accordance with the Project Agreement, the Contracting Authority should have carried out surveys (which are capable of being relied upon by the Successful Participant). The surveys will be included in a "Site Pack". However, the Contracting Authority will not itself warrant the survey information contained in the Site Pack.]*

### 3.3 BIM, Health, Safety, Quality And Environmental Management Systems

**[Drafting Note to Contracting Authorities: insert information such as:**

- use of accredited systems;
- use of BIM or such alternatives that are relevant to the specific Project;
- BREEAM: A BREEAM 'Excellent' rating is required for projects included in the education/health programme; and
- use of CEEQUAL (roads projects).]

**[Standard Text for Contracting Authorities who are carrying out roads projects:**

The Successful Participant shall be required to institute and maintain until the earlier of the Expiry Date or Termination Date, a quality management system [complying with the requirements of] [accredited to]:

- BS EN ISO 9001:2015 (Quality management systems, Requirements);
- BS EN ISO 14001:2015 (Environmental management systems, Requirements with guidance for use); and
- OHSAS 18001:2007 (Occupational health and safety management systems

for the purpose of ensuring and demonstrating that the Works and the Services conforms in all respects with the Project Agreement.

The Quality Assurance requirements including the associated manuals and plans shall be described in the ITPD Document and the Project Agreement.

The Participants and Project Co shall be required to adopt BIM when developing the design for the Project. Naming conventions, file types and data structures for the delivery and transfer of CAD / BIM files shall comply with [\*\*\*] [Insert details of appropriate Welsh Government protocol.]

## 4. THE PROJECT AGREEMENT AND SHAREHOLDERS' AGREEMENT

### 4.1 Overview of the Project Agreement

- 4.1.1 The MIM Standard Form Project Agreement is mandated by Welsh Government for use on MIM [accommodation projects/roads projects] **[Drafting Note to Contracting Authorities: please delete reference to (accommodation version) or (roads version) as appropriate and remove square brackets]**. The Project Agreement for the Project is set out in Volume Two of this Descriptive Document and reflects the MIM Standard Form Project Agreement, with project specific amendments that have been approved in accordance with the CAPs procedure as described in Section 2.9.
- 4.1.2 The key principles embodied in the MIM Standard Form Project Agreement will be familiar to those who operate in the UK PPP market. The MIM Standard Form Project Agreement is based on various UK precedent and standard project agreements which have been updated in order to accommodate the specific needs of the Welsh Government's infrastructure programme, Welsh Government policy, Welsh Government equity participation and Council Regulation (EC) 549/13 on the European system of national and regional accounts in the European Union, together with related Statistical Treatment Guidance. Further background to MIM is contained in Section 2.3 of this Descriptive Document.
- 4.1.3 The Project Agreement should be read with the Shareholders' Agreement which sets out a number of key requirements in terms of the structure of the Project. Please refer to Section 4.4 below for further details on the shareholding structure that is required to be adopted on this Project.
- 4.1.4 Details of the project specific amendments proposed by the Contracting Authority to the MIM Standard Form Project Agreement and agreed to by Welsh Government are set out in Section 4.3 below.
- 4.1.5 The Successful Participant will be expected to enter into the Project Agreement substantially in the form contained in Volume Two of this Descriptive Document.

### 4.2 Derogations and Amendments to the Project Agreement and Ancillary Documents

- 4.2.1 The Contracting Authority expects Participants to accept the terms of the Project Agreement, which reflects the MIM Standard Form Project Agreement. The Contracting Authority recognises Participants may wish to propose a limited number of project specific amendments to the MIM Standard Form Project Agreement during the Dialogue Period, where such amendments offer value for money to the Contracting Authority or are required to take account of demonstrable changing market circumstances. However, it should be noted that derogations are strongly discouraged and any derogations to the Project Agreement agreed between the Contracting Authority and Participant(s) during the Dialogue Period will require Welsh Government approval, which shall be managed by the Contracting Authority through the Welsh Government's derogations process. **[Drafting Note to Contracting Authorities: please refer to separate guidance on the derogations process format and timings.]**
- 4.2.2 The Contracting Authority requires the Funders' Direct Agreement and Collateral Agreements (each as defined in the Project Agreement) to be entered into by the relevant parties in the form substantially set out in the Project Agreement.

- 4.2.3 Welsh Government approval will only be given to changes requested by Participants which are justified on the basis of project specific and value for money reasons, or to reflect changing Welsh Government guidance or demonstrable market circumstances. Participants should also be mindful that the Contracting Authority will be seeking to ensure that the Project receives an off balance sheet classification and are accordingly requested to familiarise themselves with Council Regulation (EC) 549/13 on the European system of national and regional accounts in the European Union, together with related Statistical Treatment Guidance, and to be mindful of this when requesting any derogations.
- 4.2.4 Participants will be responsible for ensuring that funders and sub-contractors carry out due diligence on the Project Agreement and Ancillary Documents as early as possible in the Dialogue Period and that any material issues that impact on price or risk are raised prior to submission of Initial Solutions and down-selection. Whilst it is recognised preferred funders may not have been appointed by this stage, Participants will be expected to arrange legal, technical and insurance diligence on behalf of funders and to manage the funders' appointment in light of this requirement [Following selection of the Successful Participant the Contracting Authority will not consider: any amendment to the Project Agreement which has the effect of either (a) materially modifying essential aspects of the tender or of the public procurement, including the needs and requirements set out in the Contract Notice or in this Descriptive Document; or (b) which risks distorting competition or causing discrimination.]
- 4.2.5 Participants should note that Welsh Government guidance requires the approval of the Welsh Ministers to all amendments to the MIM Standard Form Project Agreement.
- 4.2.6 Please refer to Section 6 of this Descriptive Document for further details on the requirements for the competitive dialogue procedure to be followed during the Dialogue Period.

**4.3 Project Specific Amendments Incorporated into the Project Agreement**

- 4.3.1 The Contracting Authority has obtained prior Welsh Government approval to all project specific amendments to the MIM Standard Form Project Agreement which are incorporated within the Project Agreement. To assist Economic Operators, the key project specific amendments can be summarised as follows:

a)		
b)		
c)		
d)		

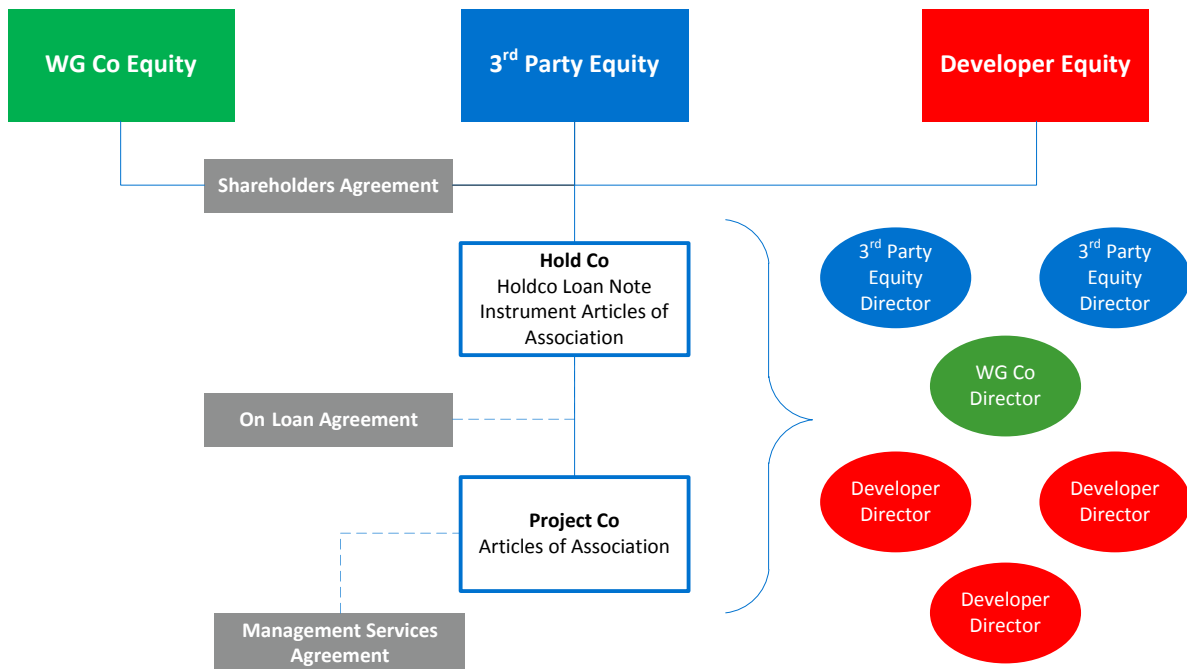
**[Drafting Note to Contracting Authorities:** a high level summary of the key project specific issues on which derogation approval has been provided by the Welsh Government should be included above. It is suggested that a heading is included in the second column and that in the third column a short paragraph provides details of the project specifics and the associated derogation.]

#### 4.4 Shareholders' Agreement

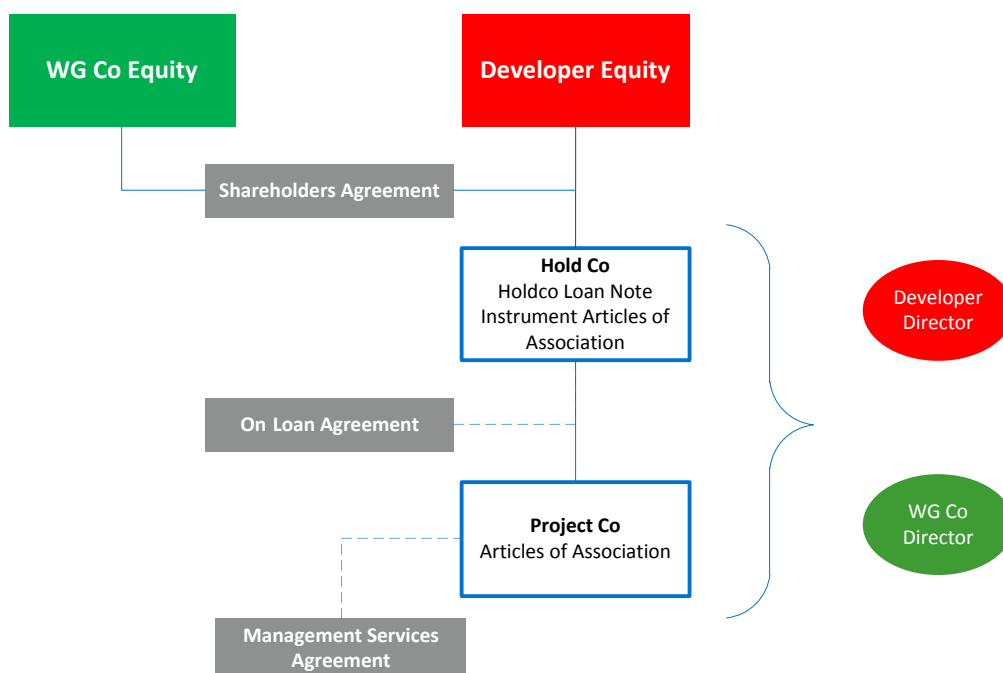
4.4.1 **[Drafting Note to Contracting Authorities:** This Section 4.4 (and the Descriptive Document generally) assumes Welsh Government have indicated their intent to invest in the Project. A decision on this will be required prior to finalisation of the Descriptive Document and other Procurement Documents.] The Successful Participant/Project Co will be expected to enter into the Shareholders' Agreement in the form set out in Volume Five of this Descriptive Document, tailored to reflect Participants individual equity solutions at Successful Participant stage, in accordance with the guidance contained in footnotes therein. The Shareholders' Agreement is based on the MIM Standard Form Shareholders' Agreement and has been approved by the Welsh Government.

4.4.2 The Shareholders' Agreement regulates matters as between the equity investors, Hold Co and Project Co in accordance with the diagram below.

[Diagram 1]



[Diagram 2]



**[Drafting Note to Contracting Authorities:** Diagram 1 to be used where Third Party Equity is to be included in the Project. Where there is no Third Party Equity in the Project, diagram 2 should be used. Diagram 1/2 headings to be deleted in final version of Descriptive Document.]

4.4.3 Project Co is to be wholly owned by Hold Co, as is usual for PPP projects. Ownership of Hold Co will be determined on a project by project basis, as follows:

- **WGCo Equity** - 'Welsh Government' will have a right to invest alongside one or more private sector equity providers. The Shareholders' Agreement assumes the creation of a statutory corporation, referred to as '**WGCo**', however in the event that a corporate vehicle is not used, the Welsh Ministers or another such body as it may determine, may assume the role of WGCo.
- **Developer Equity** - Project sponsors will invest equity in the traditional way. The private sector equity investors within the Successful Participant are represented as 'Developer Equity'.
- **[Third Party Equity** - Welsh Government has also elected that an equity competition is held in respect of a portion of 'Third Party Equity', post Successful Participant appointment. Third Party Equity is distinct from Developer Equity and is a tranche of equity that will be invested by parties unrelated to the sponsoring project parties. This approach is intended to encourage long-term investors to invest at the outset of a project, thereby limiting the potential for excessive profits and, consequently, the potential for windfall gains on secondary market sales. **[Drafting Note to Contracting Authorities:** Reference to Third Party Equity to be deleted where Welsh Government does not require this.]

## 5. PAYMENT MECHANISM AND THE ANNUAL SERVICE PAYMENT

### 5.1 Overview of the Payment Mechanism

- 5.1.1 The payment mechanism will be the method for remunerating Project Co for services provided and defines the allocation of financial risks between the Contracting Authority and Project Co. The underlying objective of the payment mechanism for the Project is to provide an incentive to Project Co to deliver [\*\*\*]. **[Drafting Note to Contracting Authorities:** insert drafting which describes, at a high level, what it is the Contracting Authority wants to receive by way of service from the Project Co. Example wording that might be contemplated is set out below:

*a safe, reliable, high quality and responsive service to [road users / patients, staff and visitors / pupils, staff and visitors] in line with the strategic aims and objectives for the Project.]*

Incentivisation is achieved where the payment mechanism strikes the right balance between incentivising good performance and proportionate remedies. This is achieved by applying financial deductions to the Annual Service Payment in circumstances where service standards are not met and by paying the Annual Service Payment in full when they are. This has been the guiding principle for the Contracting Authority in developing the Project's payment mechanism.

- 5.1.2 The payment mechanism is availability and performance based. The Service Level Specification sets out the standards of availability and performance which Project Co is required to meet to entitle it to payment of the Annual Service Payment.
- 5.1.3 The payment mechanism shall calculate the Annual Service Payment due to Project Co on a monthly basis. The Annual Service Payment, as outlined above, will be subject to potential deductions and adjustments, which may include, but shall not be limited to, the following measures:

**[Drafting Note to Contracting Authorities:** insert drafting which describes the main features of the proposed payment mechanism. Example wording that might be contemplated for a roads project is set out below:

- (i) Lane Availability – this relates to the extent to which lanes are available for use by the travelling public/ Availability – this relates to the extent to which the asset is available for use by the Contracting Authority;
- (ii) Condition Criteria – this relates to the need to maintain the project road(s) in a safe and useable condition/ performance standards – this relates to the need to maintain the asset to the standards as set out in the service specification;
- (iii) Indexation – an element of the Annual Service Payment will be adjusted annually, in accordance with an agreed methodology, to reflect movements, up or down, in the rate of inflation; and
- (iv) Project Insurance - operational project insurance costs will be managed on a 'pass through basis'.

5.1.4 Some key features of the MIM that impact the payment mechanism are:

- the exclusion of any soft services [**Drafting Note to Contracting Authorities:** this may not be applicable language for non-accommodation projects and should be adjusted accordingly.]; and
- the pass through nature of operational insurance costs; rates and council tax (where appropriate), utilities (including water) and any group 3 or 4 equipment costs [**Drafting Note to Contracting Authorities:** the latter may not be appropriate for some schemes and should be adjusted accordingly.]

5.1.5 Should the asset be made available to the Contracting Authority on a gradual basis the Annual Service Payment will be proportionately aligned in accordance with agreed handover arrangements. [**Drafting Note to Contracting Authorities:** this is likely on accommodation schemes and should be adapted to align with specifics for each project.]

## 5.2 Capital Contributions

5.2.1 See Section 2.5.3.

## 5.3 Senior Debt

5.3.1 [There is the possibility that a multilateral institution will be involved in the scheme and this will be communicated once known. However, there should be no assumption of such involvement by Participants unless advised by the Contracting Authority.] [**Drafting Note to Contracting Authorities:** this should be adapted for each MIM project.]

5.3.2 The Contracting Authority requires fully funded Final Tenders to be submitted by Participants, with robust funding proposals for the total funding requirement. Whilst the Contracting Authority does not intend to request that a funding competition be conducted at the Successful Participant stage, the Contracting Authority reserves the right to do so, as part of the process of confirming financial commitments or other terms contained in the Successful Participant's Final Tender described in Regulation 30(20).

## 5.4 Equity

5.4.1 [**Drafting Note to Contracting Authorities:** confirm whether a Third Party Equity Funding competition will be held.]

5.4.2 The Welsh Government will undertake due diligence and an equity investment appraisal independently of procurement of the Project and will have no obligation to invest the quantum specified. The Successful Participant will therefore be expected to meet the full risk capital requirement of Hold Co in the event WG Co chooses not to invest [and/or the Third Party Equity funding competition does not achieve the best value for money outcome]. [**Drafting Note to Contracting Authorities:** adjust as necessary for Third Party Equity involvement. Participants should be reminded that they have previously confirmed their willingness to underwrite the full risk capital requirement and (where applicable) run and underwrite a Third Party Equity Funding competition, if appointed the Successful Participant.]

5.4.3 Subject to Section 5.4.2, the following equity split [and gearing] will apply to the Project:

5.4.4

	Party	Split
a)	Developer Equity	[Drafting Note to Contracting Authorities: 50% or above (to be adjusted as necessary to reflect approach to (b) and (c) below)]
b)	WGCo Equity (subject to due diligence)	[Drafting Note to Contracting Authorities: up to 20% (and may be described as a range between [x and y])]
c)	[Third Party Equity]	[Drafting Note to Contracting Authorities: up to 30%]
d)	[Debt:Equity gearing]	[Drafting Note to Contracting Authorities: insert where Third Party Equity applicable.]

**[Drafting Note to Contracting Authorities:** The Contracting Authority should engage with Welsh Government early in the pre-procurement process in order to complete the details of the relevant percentage shareholdings in the table above. Welsh Government will advise the Contracting Authority of (a) the level of issued share capital it shall have a right to subscribe for in Hold Co; and (b) whether a Third Party Equity funding competition will be required (and if so the portion of equity to be classified as Third Party Equity together with any required adjustment to the traditional gearing ratios), on a project by project basis and this will also be referred to in the Contract Notice. Where Third Party Equity is not adopted on a project, the third and fourth rows of the table should be deleted. Where there is no Third Party Equity, a traditional Senior Debt to Equity gearing of 90:10 will be the starting point for each Project. Where a Third Party Equity structure is adopted, Welsh Government has discretion to lower the gearing to 75:25, debt to equity.]

**[Drafting Note to Contracting Authorities:** This is a complex area and Contracting Authorities should discuss their plans with Welsh Government in good time. The precise wording of this Section must be determined on a project specific basis.]

**[Drafting Note to Contracting Authorities:** If Third Party Equity participation is adopted, subject to compliance with the Regulations, a funding competition will be run following selection of the Successful Participant and the parameters of the funding competition should be set out here. The principles on which any competition may be based include:

- the equity funding competition shall commence after selection of the Successful Participant and be executed in advance of Financial Close;
- it shall be run by the private sector with input and approvals from the public sector;
- Participants will compete based on finalised project documentation as agreed between the Successful Participant and Contracting Authority;
- the competition shall **not** allow for re-negotiation of the Project Agreement, Shareholders' Agreement and/or any other associated contract documents; and
- Equity funding competitions may result in a tranche of equity with lower equity return. Savings generated through this lower equity return requirement of the winner of the competition will be passed on in full through the Annual Service Payment.]

5.4.5 To ensure an effective role is played by the public sector as an equity investor (and to minimise the potential for conflicts of interest between the public sector acting as both investor and procurer), the WGCo equity investment will be managed by a commercially-focused team within [Treasury's Innovative Finance unit].

5.4.6 To facilitate new equity investors in MIM projects, WGCo may subscribe for a higher equity stake at Financial Close and sell down part of its shareholding thereafter, including during the lock in period. If WGCo wishes to do this, Economic Operators will be, wherever possible, advised at the start of the procurement.

5.4.7 In accordance with the MIM Standard Form Shareholders' Agreement, investors will be entitled to nominate one director for every [fifteen per cent (15%)] of the issued share capital of Hold Co held by it, provided that WGCo shall, for as long as it holds issued share capital in Hold Co, be entitled to nominate and appoint in writing one (1) person as a director of Hold Co and to remove such person from office, irrespective of whether it holds [fifteen per cent (15%)] of the issued share capital of Hold Co.

## 5.5 Affordability

5.5.1 Participants will be required to meet an affordability threshold as part of the evaluation. **[Drafting Note to Contracting Authorities:** Any affordability threshold should be explained in terms of its basis i.e. first full year Annual Service Payment and what it is. The decision to have an affordability threshold which is in addition to any evaluation of price and finance, will be determined on a project specific basis.]

## 5.6 Successful Participant's Advisers

5.6.1 **[Drafting Note to Contracting Authorities:** Contracting Authorities should liaise with Welsh Government as regards the extent to which it will seek independent advice or require letters of reliance/due diligence reports from the Successful Participant's advisers. Where Third Party Equity is being adopted, Contracting

Authorities should include an obligation on the Successful Participant to procure that letters of reliance and/or due diligence reports addressed to the Third Party Equity provider from its legal, technical and insurance advisers (and the model auditor) are delivered to the Third Party Equity provider at Financial Close.]

5.6.2 Participants will be expected to have carried out legal, technical and insurance due diligence on behalf of senior funders at on submission of Initial Solutions, Detailed Solutions and Final Tenders, and should scope appointments accordingly.

## 5.7 Insurance

**[Drafting Note to Contracting Authorities:** insurance requirements to be developed on a Project-specific basis.]

## 6. THE PROCUREMENT PROCESS

### 6.1 Use of the Competitive Dialogue Procedure

6.1.1 The procurement competition for the Project will be conducted in accordance with the provisions of the Regulations.

6.1.2 The Contracting Authority has satisfied itself that, in terms of the Regulations, it can use the competitive dialogue procedure. Accordingly, the procurement competition in respect of the Project will be conducted under the competitive dialogue procedure.

### 6.2 Overview of the Competitive Dialogue Procedure

6.2.1 It has been decided by the Contracting Authority that, following publication of the Contract Notice, the competitive dialogue procedure for the procurement of the Project will be structured in the following successive stages:

6.2.1.1 prequalification and shortlisting;

6.2.1.2 invitation to participate in dialogue (ITPD) issued to three (3) shortlisted Economic Operators if sufficient compliant PQQ Responses are received;

6.2.1.3 invitation to continue dialogue (ITCD) - if sufficient compliant Initial Solutions are received in response to the ITPD, two (2) Participants will be selected to continue in the dialogue (the third Participant will be down-selected), submit Detailed Solutions and receive feedback on those Detailed Solutions at a Bootcamp;

6.2.1.4 close dialogue and invitation to submit Final Tenders (ITSFT); and

6.2.1.5 Financial Close, standstill and contract award.

**[Drafting Note to Contracting Authorities:** Departures from this model of conducting the competitive dialogue procedure in MIM projects are discouraged. However, it is acknowledged that there may be sector/market-specific reasons for departing from this model e.g. removing the need for a down-selection. If a Contracting Authority wishes to vary this model then this must be approved in advance by the Welsh Government. If any departure is approved, then appropriate amendments to this Descriptive Document must be included.]

### 6.3 Prequalification and Shortlisting

6.3.1 Economic Operators are required to complete the PQQ and provide all information required by the PQQ. PQQ Responses shall be provided by Economic Operators to the Contracting Authority in accordance with the instructions provided in the Descriptive Document, the PQQ and [on the Sell2Wales website]. **[Drafting Note to Contracting Authorities:** Welsh Government supports the use of BRAVO product and the AWARD software by Contracting Authorities. In the event of an alternative system being used then approval to this as part of CAP1 will need to be obtained from the Welsh Government.]

6.3.2 PQQ Responses shall be evaluated in accordance with the prequalification evaluation process set out in Section 8 of this Descriptive Document on the basis of

each Economic Operator's economic and financial standing and technical and professional ability to deliver the Project.

- 6.3.3 The Contracting Authority stated in the Contract Notice that if there was a sufficient number of Economic Operators suitable to be selected to participate in the competitive dialogue, then the Contracting Authority would limit the number of Economic Operators to be invited to participate in the competitive dialogue to three, subject to those Economic Operators satisfying the minimum levels of economic and financial standing and/or technical and professional ability identified in this Descriptive Document. The three Economic Operators will be selected in accordance with the shortlisting procedure identified in Section 8 of this Descriptive Document.
- 6.3.4 Shortlisted Economic Operators will each receive a letter of intention to invite participation in the competitive dialogue and will be asked at that time, as a condition of participating in the competitive dialogue, to sign a confidentiality and non-collusion undertaking which is set out at Appendix 1 of this Descriptive Document.

#### 6.4 The Dialogue Period

- 6.4.1 The aim of the competitive dialogue procedure is to enable the Contracting Authority to "identify the solution or solutions which are capable of meeting its needs". Accordingly, the Contracting Authority will commence dialogue with the shortlisted Participants, and will continue the competitive dialogue procedure until the Contracting Authority can identify one or more solutions capable of meeting the Contracting Authority's needs.
- 6.4.2 It is anticipated that the Dialogue Period will be approximately [\*\*\*] months. Further information on the Dialogue Period is included in the ITPD Document and will be included in the ITCD Document. **[Drafting Note to Contracting Authorities: the duration of the Dialogue Period should be considered on a project specific basis. As a guide, it is anticipated that the overall Dialogue Period could last around 12 months and the overall process from advertisement of the Contract Notice to the end of Financial Close should last no longer than 24 months (preferably shorter).]**
- 6.4.3 During the Dialogue Period, dialogue will be held with each of the Participants prior to submission of Initial Solutions, Detailed Solutions and Final Tenders. The Contracting Authority expects to hold a number of meetings with Participants to discuss and clarify the Contracting Authority's requirements. The dates for these meetings shall be arranged at times which the Contracting Authority considers appropriate points in the dialogue process. Agendas and attendees should be agreed and confirmed in accordance with the requirements set out in the ITPD Document.
- 6.4.4 In order for the dialogue to be productive, it will be important that all attendees for Dialogue Meetings are, as far as possible, empowered to reach conclusions on issues.
- 6.4.5 During the Dialogue Period, dialogue in respect of each Participant's developing solutions shall take place between the Contracting Authority and each Participant as to the acceptability or otherwise of their solutions. Matters to be discussed between the Contracting Authority and each Participant during the Dialogue Period will focus on key technical, legal and financial matters. Further details are included in the ITPD Document and will be included in the ITCD Document.

6.4.6 **[Drafting Note to Contracting Authorities: insert details here in respect of any variants which are required in respect of the Project..]**

## 6.5 Invitation to Participate in Dialogue (ITPD)

6.5.1 Following receipt of a signed confidentiality and non-collusion undertaking as described in Section 6.3.4, the ITPD and associated documents will be issued by the Contracting Authority to the shortlisted Economic Operators. The ITPD Document will describe the requirements for the ITPD Stage and the submission of Initial Solutions.

6.5.2 As described in Section 6.4 above, comprehensive dialogue will be held with each of the Participants prior to submission of Initial Solutions.

6.5.3 Following submission of Initial Solutions, the Contracting Authority will commence its evaluation of the Initial Solutions by applying the contract award criteria described in Section 6.11 of this Descriptive Document and the ITPD Document using the evaluation methodology described in the ITPD Document. Each Participant may be required to present its Initial Solution to the Contracting Authority's dialogue team to enable the dialogue team to seek clarification in respect of such Initial Solution. Each Participant's performance at the presentation will not form part of the evaluation, although information gathered by the dialogue team may be used to clarify aspects of the Initial Solutions and Participants may be asked to confirm points mentioned at the presentations in writing.

6.5.4 Following any presentations of Initial Solutions and any further clarification, the Contracting Authority will conclude its evaluation of the Initial Solutions by applying the evaluation methodology described in the ITPD Document. If sufficient compliant Initial Solutions are received in response to the ITPD Document, two Participants will be selected to continue in the dialogue submit Detailed Solutions and ultimately submit Final Tenders.

6.5.5 Any Participant who is not invited to participate in the ITCD Stage will be notified of this by the Contracting Authority in writing. The Contracting Authority will include reasons as to why such Participant has been excluded in such notification. Any unsuccessful Participant shall also be entitled to request a debriefing from the Contracting Authority.

## 6.6 Invitation to Continue Dialogue (ITCD) and Invitation to Submit Final Tenders (ITSFT)

6.6.1 Following conclusion of the ITPD Stage, the Participants selected to proceed to the ITCD Stage will be issued with the ITCD Document.

6.6.2 The Contracting Authority shall continue the dialogue with each Participant until the Contracting Authority can identify one or more solutions capable of meeting its needs.

6.6.3 To enable the Contracting Authority to do this, each Participant shall be required to submit a Detailed Solution so that the Contracting Authority can consider these Detailed Solutions and assess whether or not these Detailed Solutions are capable of development to meet the Contracting Authority's needs. The requirements for these Detailed Solutions will be described in the ITCD Document.

- 6.6.4 Following submission of a Detailed Solution from each Participant, the Contracting Authority shall provide comments to each Participant in respect of the acceptability or otherwise of the Detailed Solutions. These comments will be provided to Participants at Bootcamp.
- 6.6.5 Following Bootcamp and when the Contracting Authority can identify one or more solutions capable of meeting its needs as described in the ITCD Document, it shall:
- 6.6.5.1 inform each Participant that the dialogue is concluded;
  - 6.6.5.2 invite each Participant by issue of the ITSFT to submit a Final Tender containing all the elements required and necessary for the performance of the Project on the basis of the Detailed Solutions presented; and
  - 6.6.5.3 in the ITSFT Document, confirm the instructions for submission of Final Tenders.
- 6.6.6 Following submission of Final Tenders, the Contracting Authority may request a Participant clarify, specify or optimise a Final Tender, but such clarification, specification or optimisation shall not involve changes to the essential features of the Final Tender or the public procurement (including the needs and requirements set out in the Contract Notice and this Descriptive Document) if such changes are likely to distort competition or have a discriminatory effect.

## 6.7 Evaluation of Final Tenders

- 6.7.1 The Contracting Authority shall evaluate the Final Tenders received on the basis of the contract award criteria specified in Section 6.11 of this Descriptive Document and the ITSFT Document using the evaluation methodology described in the ITSFT Document, and shall, subject to the Contracting Authority's discretion to choose not to award a contract, award the contract to the Participant who submits the best quality-price tender in accordance with the contract award criteria set out in Section 6.11 of this Descriptive Document and the ITSFT Document using the evaluation methodology described in the ITSFT Document.

## 6.8 Confirmation of the Successful Participant's Final Tender

- 6.8.1 The Contracting Authority may request the Participant identified as having submitted the best quality-price tender to negotiate its Final Tender to confirm financial commitments or other terms contained in the Final Tender provided that this does not have the effect of materially modifying essential aspects of the Final Tender or the procurement (including the needs and requirements set out in the Contract Notice or this Descriptive Document) and does not risk distorting competition or causing discrimination.
- 6.8.2 **[Drafting Note to Contracting Authorities: insert details of whether the Welsh Government or the Contracting Authority intends to request (respectively) a Third Party Equity funding competition or Senior Debt funding competition between appointment of Successful Participant and Financial Close. See further guidance at Section 6 of Part A of Volume One of the ITPD Document.]**

6.9 **Standstill**

6.9.1 Subject to the Regulations, the Contracting Authority shall by notice in writing, (the "**Standstill Notice**"), as soon as possible after the decision has been made, inform all relevant Participants of the Contracting Authority's decision to award the contract advertised by the Contract Notice. Such Standstill Notice will include all information required by the Regulations and it is intended that such Standstill Notice will be issued electronically to all such Participants. The Contracting Authority will allow a period of at least 10 days to elapse between the date of despatch of such Standstill Notice and the date on which the Contracting Authority enters into the Project Agreement (the "**Relevant Standstill Period**"). The date on which the Relevant Standstill Period will end will be stated in the Standstill Notice.

6.9.2 The unsuccessful Participants shall also be entitled to request a debriefing from the Contracting Authority.

6.10 **Financial Close and Award of Contract**

6.10.1 Following expiry of the Standstill Period, the Successful Participant will be required to execute the Project Agreement (as completed with information from the Successful Participant's Final Tender) together with all other associated project and finance documents required to be entered into by the Contracting Authority, Project Co, sub-contractors and/or the funders, in order to trigger release of funding for the Project.

6.10.2 Financial Close will generally be scheduled to facilitate the execution and delivery of all project documents, finance documents and associated conditions precedent to funding by the Project parties and the "financial swap", hedging interest rate risk for the Project, prior to formal contract award. Prior to Financial Close, the Successful Participant will produce a protocol that outlines the role and responsibilities of all parties involved in the Financial Close meeting. The Financial Close meeting will be preceded by a number of "dry runs" whereby the principles outlined in the protocol will be rehearsed and adapted where necessary.

6.11 **Contract Award Criteria**

**[Drafting Note to Contracting Authorities:** in accordance with the Regulations, the contract award criteria which will be used in the evaluation of Initial Solutions and Final Tenders needs to be included in the Descriptive Document. Accordingly, full details of the contract award criteria (including weightings) should be included here. Please refer to the Welsh Government's Competitive Dialogue for further information in respect of the development and use of contract award criteria within a competitive dialogue process.]

6.12 **Indicative Procurement Timeframe**

The illustrative dates for key anticipated milestones for the Procurement Process are identified below, and these dates may be amended by the Contracting Authority from time to time (at the Contracting Authority's absolute discretion). **[Drafting Note to Contracting Authorities:** dates to be inserted as appropriate.]

Shortlisting and Selection of Participants following evaluation of PQQ Responses	***
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Issue of the ITPD and the ITPD Document	***
Submission of Initial Solutions	***
Down selection and issue of the ITCD and ITCD Document	***
Submission of Detailed Solutions	***
Bootcamp	***
Issue of the ITSFT and the ITSFT Document	***
Submission of Final Tenders	***
Successful Participant selected	***
Anticipated award of the contract <b>[Drafting Note to Contracting Authorities:</b> the date of the contract award is (generally) subject to planning consent and to final approvals etc.]	***
Anticipated completion of the Works <b>[Drafting Note to Contracting Authorities:</b> this date will need to be amended where separate phases or PTUs are envisaged on the relevant MIM project.]	***
Anticipated Service Commencement <b>[Drafting Note to Contracting Authorities:</b> additional dates will need to be specified where phases or PTUs are envisaged on the relevant MIM project.]	***

## 7. RULES IN RESPECT OF THE PREQUALIFICATION STAGE

### 7.1 Clarifications

- 7.1.1 In respect of this Project, Economic Operators are only permitted to make contact with the Contracting Authority and members of the Contracting Authority's project team in accordance with the clarification process described in this Section 7.1.
- 7.1.2 Economic Operators must not lobby or unduly influence the Contracting Authority, or members of the Contracting Authority's team (including external advisers) in respect of this Project and the Procurement Process. Lobbying of Assembly Members or public officials and attempts to influence or engage with Assembly Members or public officials in respect of the Project, the Procurement Process or any related matter is not permitted.
- 7.1.3 Any request by Economic Operators for clarification of the Descriptive Document and/or the PQQ shall be made to the Contracting Authority using [Bravo]. **[Drafting Note to Contracting Authorities: Describe details of required electronic format. Section to be aligned and customised with any stated requirements in respect of Bravo/any approved alternative.]**
- 7.1.4 The Contracting Authority may not respond to any request for clarification from an Economic Operator received **after [\*\*\*\*]**. **[Drafting Note to Contracting Authorities: Insert final date for clarification responses. Suggest that this is at least 5 working days prior to submission of the PQQ Response.]**
- 7.1.5 [The Contracting Authority reserves the right to transmit any request for clarification and subsequent response by the Contracting Authority to that request for clarification to all Economic Operators who have [expressed an interest to participate in the Procurement Process]. Notwithstanding this, there may be occasions when the Contracting Authority considers the response to any such request for clarification to be commercially sensitive and, as such, the response may only be transmitted to the Economic Operator who has requested the clarification.]
- 7.1.6 [Where the requesting Economic Operator considers a request for clarification to be one which should be treated as commercially sensitive, then the Economic Operator should indicate this in its request. ]
- 7.1.7 [The decision whether a request for clarification shall be considered commercially sensitive or not, rests solely at the absolute discretion of the Contracting Authority. If the Contracting Authority considers, in its absolute discretion, that it is able to answer the request for clarification on a commercially sensitive basis, then it will do so. If the Contracting Authority considers, in its absolute discretion, that it cannot provide an answer on a commercially sensitive basis, the Contracting Authority shall notify the Economic Operator and that Economic Operator will have the opportunity to withdraw the request for clarification. However, if that Economic Operator does not withdraw the request for clarification, or the Contracting Authority considers in its absolute discretion that the response to such request for clarification should be released to all Economic Operators to comply with the Contracting Authority's obligations pursuant to the Regulations or otherwise, then the request for clarification and the associated response may be released to all Economic Operators.]
- 7.1.8 The Contracting Authority shall not be responsible in any way to Economic Operators as a result of any delay or failure in answering any request for clarification or any

decision not to answer a request for clarification (either in full or in part) or to treat any request for clarification as commercially sensitive or not commercially sensitive. Absence of a response from the Contracting Authority shall not entitle Economic Operators to qualify their PQQ Responses.

## 7.2 PQQ Response Requirements

7.2.1 The PQQ Response shall be in Welsh or English. Any material which has been translated into Welsh or English shall be certified by the translator as a **true and fair** translation.

7.2.2 Economic Operators shall in their PQQ Responses provide the information required in the PQQ in a clear and concise manner and only material specifically required by the PQQ shall be included. General promotional or publicity material shall not be submitted as part of the PQQ Response.

7.2.3 All financial information or data forming part of the PQQ Response shall be submitted in, or converted to, pounds sterling GBP. Where any documents include financial data in a foreign currency, Economic Operators must convert that data into a GBP equivalent using the relevant currency exchange rate published in the Financial Times on [insert date]. The conversion should be transparent and Economic Operators should provide the underlying data in both the foreign currency and the converted equivalent. **[Drafting Note to Contracting Authorities: a list of the relevant currency exchange rates as at the date above is to be inserted.]**

7.2.4 The PQQ shall be completed by Economic Operators under the headings given in the PQQ and shall follow the order and numbering contained in the PQQ. Economic Operators shall comply with the requirements identified in the PQQ in respect of the permitted number of words. Should the permitted number of words be exceeded, once the permitted number of words is used, the remainder of the text will not be considered for evaluation purposes. The permitted number of words excludes headers, footers and illustrative diagrams. The font of the text to be used by Economic Operators in the PQQ Response shall be Arial 12 pt.

7.2.5 Any Economic Operator whose PQQ Response is not in accordance with the prescribed format may be rejected by the Contracting Authority.

7.2.6 [PQQ Responses should arrive not later than [insert time and date]. It is the responsibility of all Economic Operators to ensure that their PQQ Response is delivered not later than the appointed time. All PQQ Responses must be submitted through the [sell2wales website]. The system will not accept PQQ Responses submitted after this time. The Contracting Authority may not consider PQQ Responses received after the closing date and time.]

**[Drafting Note to Contracting Authorities: Describe details of required electronic format. Section to be aligned and customised with any stated requirements/rules in respect of the sell2wales website, Bravo/any approved alternative.]**

### 7.3 Clarifications to Economic Operators

7.3.1 The Contracting Authority shall be entitled at any time to seek clarifications from the Economic Operators in relation to PQQ Responses. This shall include the following:

7.3.1.1 the Contracting Authority shall be entitled at any time to seek clarifications and verifications from any of the clients and contacts who have been named in respect of the reference projects. In order to ensure that any such clarifications and verifications can be made, Economic Operators shall ensure that all such clients and contacts have been notified in writing by the Economic Operator (prior to delivering the PQQ Response to the Contracting Authority) that they may be contacted by the Contracting Authority for verification of information contained in the PQQ Response. In addition, Economic Operators shall ensure that such clients and contacts have consented in writing to any such approach by or on behalf of the Contracting Authority; and

7.3.1.2 the Contracting Authority shall be entitled to seek clarification and verification from any of the named referees (from banks and other financial institutions) arising from the economic and financial standing evaluation. In order to ensure that any such clarifications and verifications can be made, Economic Operators shall ensure that all such referees have been notified in writing by the Economic Operator (prior to delivering the PQQ Response to the Contracting Authority) that they may be contacted by the Contracting Authority for verification of information contained in the PQQ Response. In addition Economic Operators shall ensure that such referees have consented in writing to any such approach by or on behalf of the Contracting Authority.

7.3.2 The Contracting Authority shall be entitled at any time to invite Economic Operators to clarification meetings to clarify any aspect of their PQQ Responses.

7.3.3 [The Contracting Authority may carry out meetings in [\*\*\*]] in the week commencing [\*\*\*]. Economic Operators will be given a minimum of three (3) calendar days' notice to attend such meetings. Economic Operators who have made a PQQ Response shall keep themselves available for any such meeting during such dates.] **[Drafting Note to Contracting Authorities: to be included if meetings will be required.]**

7.3.4 The Contracting Authority shall be entitled to take account of any subsequent information provided as clarification in any Economic Operator's responses to:

7.3.4.1 written queries from the Contracting Authority;

7.3.4.2 queries from the Contracting Authority to the clients or contacts provided in respect of the reference projects;

7.3.4.3 queries from the Contracting Authority to referees in respect of the financial submission; and/or

7.3.4.4 queries from the Contracting Authority at any clarification meetings.

#### **7.4 Changes in the Composition of Economic Operators, Participants or the Successful Participant**

7.4.1 In the event that an Economic Operator, a Participant or the Successful Participant experiences any material change in its or their economic and financial standing and/or technical and professional ability or alters its composition (which shall include, but not be limited to, a change in the identity of any entity named in any PQQ Response whose capacity has been relied upon in making the PQQ Response) or legal character after prequalifying, the Contracting Authority reserves the right to require any proposed reconstituted Economic Operator, Participant or the Successful Participant to complete another copy of the PQQ for re-evaluation in accordance with the criteria used in relation to the evaluation of the original PQQ Response.

7.4.2 Economic Operators, Participants or the Successful Participant are required to inform the Contracting Authority immediately of any changes to the information provided in their PQQ Response. The Contracting Authority reserves the right to withdraw the prequalification of an Economic Operator, a Participant or the Successful Participant at any time, if the Contracting Authority believes that the Economic Operator, Participant or Successful Participant no longer has the required economic and financial standing and/or technical and professional ability, or the Economic Operator, Participant or Successful Participant is otherwise ineligible in terms of the Regulations. The Contracting Authority may terminate the Project Agreement if the Successful Participant was, at the time of contract award, in one of the situations referred to in Regulation 57(1), including as a result of Regulation 57(2), and should therefore have been excluded from the Procurement Process.

#### **7.5 Freedom of Information**

7.5.1 Economic Operators should be aware that, whilst the Contracting Authority shall use its reasonable endeavours to hold information submitted to the Contracting Authority as confidential information or commercial information (where such categorisation or marking is indicated by the Economic Operator at the time when such information is submitted to the Contracting Authority), this shall be subject to the Contracting Authority's obligations under law and may need to be disclosed and published by the Contracting Authority. Without prejudice to the foregoing generality, the Contracting Authority is subject to the Freedom of Information Act 2000 and the Environmental Information Regulations 2004. This means that any person who makes a valid request for information held by the Contracting Authority will be entitled to receive it, unless all or part of that information can be withheld as a result of one or more of the exemptions or exceptions in the relevant legislation. The decisions of the Contracting Authority in the interpretation of the relevant legislation shall be final and conclusive in any dispute, difference or question arising in respect of disclosure under its terms, subject to determination of an appeal against any agreement or refusal to release any information by the Information Commissioner.

7.5.2 The Contracting Authority may be required to disclose information (including commercial information or confidential information) in circumstances including but not exclusive to the following:

7.5.1.1 for purposes connected with the exercise of the Contracting Authority's functions, including:

- (i) any audit or examination of the Contracting Authority's accounts or the use of its resources; and

- (ii) scrutiny by the National Assembly for Wales (or any of its committees or sub-committees) or any other department, office or agency of the Welsh Government and/or Her Majesty's Government in Wales or the United Kingdom, and their servants or agent, of the exercise of its functions;

7.5.1.2 for the purposes of:

- (i) the prevention or detection of crime;
- (ii) the apprehension or prosecution of offenders;
- (iii) any regulatory or investigatory activity;
- (iv) any legal obligation (including any order of a court of competent jurisdiction); or
- (v) seeking legal, accounting, tax or other professional advice for the purposes of the Procurement Process;

7.5.1.3 which is or becomes public knowledge (otherwise than by virtue of a failure to comply with the terms of this Descriptive Document);

7.5.1.4 in accordance with the Freedom of Information Act 2000 and / or the Environmental Information Regulations 2004 in response to a request for information made to the Contracting Authority; and

7.5.1.5 in compliance with any other law, or, as a consequence of judicial order, or order by any court or tribunal with the authority to order disclosure.

7.5.3 Economic Operators should be aware that, when disclosing information in the manner described in Section 7.5.2 above, the Contracting Authority may be unable to impose any restriction upon the information provided to Elected Members of the National Assembly for Wales, or Members of the United Kingdom Parliament.

7.5.4 Accordingly, if any Economic Operator considers that any of the information included in the PQQ Response is commercially sensitive or confidential this shall be identified with an explanation (in broad terms) of what prejudice or detriment might result from disclosure and/or publication. The Contracting Authority will then consult with the Economic Operator in considering any valid request received before replying to such request. It should be noted that even where an Economic Operator has indicated that information is commercially sensitive or confidential, the Contracting Authority may still choose to disclose this information.

7.5.5 Receipt by the Contracting Authority at any time of any material marked as commercially sensitive, confidential, commercial in confidence or equivalent should not be taken to mean that the Contracting Authority accepts any duty of confidence by virtue of that marking or be otherwise bound by that marking in handling any subsequent requests under the Freedom of Information Act 2000 or Environmental Information Regulations 2004.

## 7.6 **Copyright**

7.6.1 The copyright in this Descriptive Document and the PQQ and its related materials belong to the [Welsh Ministers/and the Contracting Authority.]

7.6.2 Except for the purposes of participating in the Procurement Process, Economic Operators shall not reproduce the Descriptive Document in any form (including photocopying or storing by electronic means) without the specific written permission of the Contracting Authority.

7.6.3 The Descriptive Document (and any copies thereof and/or any supplemental documents issued at any time) is and shall remain the property of the Contracting Authority which is entitled to demand their return and/or destruction at any time.

## 7.7 Confidentiality

Clarifications sent to the Contracting Authority and responses thereto supplied by the Contracting Authority should be kept confidential and shall not be copied, reproduced, disclosed or distributed to others at any time by Economic Operators without the prior written consent of the Contracting Authority (other than to directors, officers, employees and professional advisers of the Economic Operator who need to know the confidential information contained therein, and only to the extent necessary for the purpose of evaluating whether or not and on what terms the Economic Operator might proceed with a more detailed review of the matters discussed in the Descriptive Document and provided that such persons undertake the same responsibilities as set out herein). Any party who the Contracting Authority considers is in breach of this requirement may be excluded from this Procurement Process, without prejudice to any other rights which the Contracting Authority may have.

**[Drafting Note to Contracting Authorities: to be reviewed and considered in light of individual Contracting Authority requirements.]**

## 7.8 Publicity and Media Statements

**[Drafting Note to Contracting Authorities: Contracting Authorities must agree, in advance, what types of statements and disclosures must be sanctioned by Welsh Government. For example, notification of a Project's OBC being approved and/or the agreement of a shortlist or a down selection would most likely each be statements which would need the agreement of both Welsh Government and the Contracting Authority. This will be agreed on a project by project basis.]**

Economic Operators shall obtain the Contracting Authority's prior written consent (on form, content and purpose) before any statements or other disclosures regarding the Descriptive Document, the PQQ Response and the Economic Operator's participation in the Procurement Process generally are made to the press, media, industry journals or into any other public domain (including seminars, conferences and parties' own promotional or technical literature and internal and external intranet or website). Failure to obtain the Contracting Authority's prior written consent (at the Contracting Authority's absolute discretion) may result in curtailment of further participation in this Procurement Process or such other sanctions as the Contracting Authority considers appropriate. It shall be each Economic Operator's responsibility to ensure that any statement or disclosure, if consented to by the Contracting Authority, is used in a manner which does not depart materially from the form and content so consented.

## 7.9 Disqualification

Any breach of the requirements of this Section 7, or the commission of any offence under the Bribery Act 2010 by an Economic Operator or anyone employed by it or

acting on its behalf (whether such breach or offence is with or without the knowledge of the Economic Operator) shall entitle the Contracting Authority to disqualify the Economic Operator.

#### **7.10 Revisions by the Contracting Authority to the Descriptive Document and Procurement Process**

The Contracting Authority reserves the right to make revisions to any volume of the Descriptive Document (including the technical requirements for the Project and the Project Agreement), PQQ and ITPD Document (together with any associated documents) and/or the context, process, timing and structure of the Procurement Process at any time. No additional time in relation to submission deadlines for the PQQ Responses will be granted, following notification of any such revision, unless the Economic Operators are expressly notified of any extension by the Contracting Authority. **[Drafting Note to Contracting Authorities: although this paragraph has been included in the Descriptive Document, Contracting Authorities must only exercise this following consultation with the Welsh Government and having taken legal advice.]**

#### **7.11 No Liability for Costs**

7.11.1 Each Economic Operator shall be solely responsible for all costs, expenses and liabilities incurred in connection with the Procurement Process including preparation and submission of any PQQ Response, preparation and submission of any Initial Solution, Detailed Solution or Final Tender, attendance at Dialogue Meetings, preparation of deliverables for Dialogue Meetings and all related activities.

7.11.2 The Contracting Authority shall not, under any circumstances, be liable for any costs howsoever incurred by those participating in this Procurement Process or otherwise.

#### **7.12 Discontinuance or Suspension of the Competition for the Project**

7.12.1 The Contracting Authority may elect to discontinue or suspend the Procurement Process at any time without selecting any Participants or a Successful Participant. The Contracting Authority may do so without responsibility or liability to any Economic Operators, the Participants and the Successful Participant resulting from such discontinuation or suspension, including any liability for any costs or expenditure incurred by, or inconvenience caused.

7.12.2 Should the Contracting Authority require to suspend the Procurement Process, the Contracting Authority will issue instructions to Economic Operators regarding the expected duration of the suspension and other related matters.

7.12.3 The Contracting Authority reserves the right not to award the contract as a result of the Procurement Process.

7.12.4 In the event that at any stage an Economic Operator decides not to pursue its interest in the Procurement Process, that Economic Operator shall notify the Contracting Authority as soon as possible.

#### **7.13 Conflict of interest**

7.13.1 Without prejudice to Part 2.3 of a PQQ Response, Economic Operators are instructed to ensure that their participation in this Procurement Process their

appointment, if successful, and their use of any advisers, consultants or sub-contractors has not and will not create any conflict of interest or any situation which might compromise the Contracting Authority's duty to manage an open, fair, non-discriminatory and competitive procurement process and the Contracting Authority's interests generally. Any conflict or potential conflict shall be reported in writing to the Contracting Authority immediately.

- 7.13.2 The declaration of a potential conflict of interest shall not result in automatic disqualification of an Economic Operator.
- 7.13.3 The Contracting Authority will assess the likelihood of any conflict affecting the Procurement Process, taking into account the Economic Operator's proposal for dealing with the conflict, in deciding whether or not to consider the Economic Operator ineligible to participate in this Procurement Process.
- 7.13.4 If it appears that the conflict will have such an effect, the Contracting Authority will discuss the matter with the Economic Operator and seek to agree a method for dealing with the conflict satisfactorily.
- 7.13.5 In the event that agreement is not reached on terms acceptable to the Contracting Authority, the Economic Operator will be excluded from further consideration.
- 7.13.6 The Contracting Authority's decision on the matter shall be final.

## 8. PREQUALIFICATION EVALUATION PROCESS

**[Drafting Note to Contracting Authorities:** this evaluation process must be reviewed and amended to match the final version of the PQQ, current best practice in evaluation and relevant procurement case law. Once this is done, the evaluation process must be "calibrated" in order to ensure that it works correctly with the PQQ and is compliant with the Regulations. It is recommended that Contracting Authorities seek specialist financial, technical and legal advice to amend and calibrate this evaluation process.]

### 8.1 Introduction

8.1.1 PQQ Responses shall be evaluated in accordance with the prequalification evaluation process stated in this Descriptive Document.

8.1.2 The objectives of the PQQ evaluation process are:

8.1.2.1 to evaluate PQQ Responses in accordance with the criteria set out in this Descriptive Document; and

8.1.2.2 to enable selection and shortlisting of the required number of Participants to proceed to the ITPD Stage.

8.1.3 PQQ Responses will be checked for completeness and compliance and evaluated (as appropriate) on a consensus basis by four separate panels as follows:

8.1.3.1 Panel A: Compliance and Completeness Check;

8.1.3.2 Panel B: Exclusion Grounds;

8.1.3.3 Panel C: Financial Evaluation; and

8.1.3.4 Panel D: Technical Evaluation.

8.1.4 The panels will be responsible for checking and evaluating (as appropriate) the specific Parts of the PQQ Responses as identified in the following table.

Part of the PQQ		Panel
Part 1	Information about the Economic Operator	A
Part 2	Exclusion Grounds	A and B
Part 3	Additional Selection Questions	
	3.1 - Resourcing the Project	A and C
	3.2 - Economic and Financial Standing	A and C
	3.3 - Minimum standards of technical and professional ability	A and D

Part of the PQQ		Panel
	3.4 - Technical requirements	A and D
	3.5 - Management	A and D
	3.6 - Sustainability	A and D
	3.7 - Health and Safety	A and D
	3.8 - Relevant experience	A, D and C (in respect of question [3.8.7] only)
Part 4	Declaration	A

## 8.2 Evaluation Methodology

8.2.1 The table below provides an overview of the evaluation methodology which the Contracting Authority will apply to each Part of the PQQ Responses.

Part of the PQQ		Evaluation Method	
Part 1	Information about the Economic Operator	Not scored	Information provided will be reviewed but will not be scored or evaluated other than for completeness.
Part 2	Exclusion Grounds	Pass/Fail	Information provided will be reviewed and evaluated in accordance with Section 8.4, and a fail will automatically exclude the Economic Operator from further participation in the Procurement Process.
Part 3	Additional Selection Questions	-	-
	3.1 - Resourcing the Project	Not scored	Information provided will be reviewed but will not be scored or evaluated other than for completeness and (where appropriate) for the purposes of the evaluation described in Sections 8.6.6 and 8.6.7.

Part of the PQQ		Evaluation Method	
	3.2 - Economic and Financial Standing	Pass/Fail	Information provided will be reviewed and evaluated in accordance with Section 8.6, and a fail will automatically exclude the Economic Operator from further participation in the Procurement Process.
	3.3 - Minimum standards of technical and professional ability	Pass/Fail	Information provided will be reviewed and evaluated in accordance with Section 8.7, and a fail will automatically exclude the Economic Operator from further participation in the Procurement Process.
	3.4 - Technical requirements	Pass/Fail	Information provided will be reviewed and evaluated in accordance with Section 8.7, and a fail will automatically exclude the Economic Operator from further participation in the Procurement Process.
	3.5 - Management	Pass/Fail	Information provided will be reviewed and evaluated in accordance with Section 8.7, and a fail will automatically exclude the Economic Operator from further participation in the Procurement Process.
	3.6 - Sustainability	Pass/Fail	Information provided will be reviewed and evaluated in accordance with Section 8.7, and a fail will automatically exclude the Economic Operator from further participation in the Procurement Process.
	3.7 - Health and Safety	Pass/Fail	Information provided will be reviewed and evaluated in accordance with Section 8.7, and a fail will automatically exclude the

Part of the PQQ		Evaluation Method	
			Economic Operator from further participation in the Procurement Process.
	3.8 - Relevant experience	Scored with minimum pass/fail threshold	Information provided in response to each question will be reviewed and evaluated in accordance with Section 8.7.  The completed templates for each reference project will not be scored but the templates do require to be completed in order for Economic Operators to answer Part 3.8 of the PQQ.
Part 4	Declaration	Pass/Fail	Not scored but is required to be signed otherwise the PQQ Response shall be declared non-compliant.

8.2.2 In the event that an Economic Operator (including, where relevant, a member of a consortium or group where the Economic Operator is a consortium or group, a Relevant Organisation, a Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response) is marked 'fail' for any Pass/Fail question, the Economic Operator will not be considered any further in the selection process and evaluation of other parts of that Economic Operator's response to the PQQ will cease.

### 8.3 Compliance and Completeness Check

8.3.1 Panel A will check each PQQ Response for compliance and completeness.

8.3.2 The Contracting Authority reserves the right to seek clarification from the Economic Operators, Relevant Organisations, Parent Companies, any parties on whom the Economic Operator relies for the purposes of the PQQ Response and [Subcontractors] at any time in respect of any missing, incomplete or ambiguous information in the PQQ Responses.

8.3.3 The Contracting Authority shall treat any incomplete or ambiguous PQQ Response (or errors in a PQQ Response) in such manner as the Contracting Authority shall determine in its absolute discretion.

8.3.4 Economic Operators shall note that the submission of an incomplete or non-compliant PQQ Response may result in rejection of the Economic Operator at the absolute discretion of the Contracting Authority. For example, although certain

information is not scored, if such information is not provided in the PQQ Response, the Economic Operator may be rejected and not given any further consideration.

#### **8.4 Exclusion Grounds**

8.4.1 Panel B shall review Part 2 of the PQQ Responses, and Panel B shall evaluate the response to each question in Part 2 on the basis of pass or fail; Part 2 is not scored.

8.4.2 In respect of Part 2.1 of the PQQ, if an Economic Operator, Relevant Organisation, Parent Company and any other parties on whom the Economic Operator relies for the purposes of the PQQ Response has provided an unequivocal 'no' to the question contained in Part 2.1, this will be marked as a 'pass'. If an Economic Operator, Relevant Organisation, Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response has answered 'yes' to the question contained in Part 2.1, then the Economic Operator, Relevant Organisation, Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response shall fail and the Contracting Authority shall exclude the Economic Operator from the Procurement Process, unless the Contracting Authority determines otherwise in accordance with the following principles:

8.4.2.1 the Contracting Authority may decide not to exclude the Economic Operator, on an exceptional basis, for overriding reasons relating to the public interest; and

8.4.2.2 the Economic Operator, Relevant Organisation, Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response may provide evidence in its answer to the question in Part 2.1 of the PQQ to the effect that measures taken by the Economic Operator, Relevant Organisation, Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion ("self-cleaning"). If the Contracting Authority considers such evidence to be sufficient, the Economic Operator concerned shall not be excluded from the Procurement Process. The measures taken by the Economic Operator, Relevant Organisation, Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response shall be evaluated by the Contracting Authority taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the Contracting Authority considers such measures to be insufficient and that the Economic Operator should be excluded from the Procurement Process, the Contracting Authority shall give the Economic Operator a statement of the reasons for that decision.

8.4.3 In respect of Part 2.2 of the PQQ, if an Economic Operator, Relevant Organisation, Parent Company and any other parties on whom the Economic Operator relies for the purposes of the PQQ Response has provided an unequivocal 'yes' to the question contained in Part 2.2, this will be marked as a 'pass'. If an Economic Operator, Relevant Organisation, Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response has answered 'no' to the question contained in Part 2.2 and the breach had been established by judicial or administrative decision having binding effect, then the Economic Operator shall fail and the Contracting Authority shall exclude the Economic Operator from the Procurement Process, unless the Contracting Authority determines otherwise in accordance with the following principles:

- 8.4.3.1 the Contracting Authority may decide not to exclude the Economic Operator, on an exceptional basis, for overriding reasons relating to the public interest;
- 8.4.3.2 the Contracting Authority may decide not to exclude the Economic Operator where an exclusion would be clearly disproportionate, in particular:
- (a) where only minor amounts of taxes or social security contributions are unpaid, or
  - (b) where the Economic Operator, Relevant Organisation, Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of fulfilling its obligations in a manner described below before expiration of the deadline for requesting participation in this Procurement Process; and
- 8.4.3.3 the Contracting Authority shall not have the right to exclude the Economic Operator if the Economic Operator, Relevant Organisation, Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response has fulfilled its obligations by paying, or entering into a binding arrangement with a view to paying, the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

If an Economic Operator, Relevant Organisation, Parent Company and any other parties on whom the Economic Operator relies for the purposes of the PQQ Response has answered 'yes' to the question contained in Part 2.2 and a breach had not been established by judicial or administrative decision having binding effect but the Contracting Authority had demonstrated by appropriate means that the Economic Operator, Relevant Organisation, Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response is in breach of its obligations relating to the payment of taxes or social security contributions, then the Economic Operator may fail and the Contracting Authority may exclude the Economic Operator from the Procurement Process. However, the Contracting Authority shall not have the right to exclude the Economic Operator if the Economic Operator, Relevant Organisation, Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response has fulfilled its obligations by paying, or entering into a binding arrangement with a view to paying, the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

- 8.4.4 In respect of Part 2.3 of the PQQ, if an Economic Operator, Relevant Organisation, Parent Company and any other parties on whom the Economic Operator relies for the purposes of the PQQ Response has provided an unequivocal 'no' to the questions contained in Part 2.3, this will be marked as a 'pass'. If an Economic Operator, Relevant Organisation or Parent Company has:
- 8.4.4.1 answered 'yes' to any question contained in Part 2.3; or
  - 8.4.4.2 irrespective of the response from the Economic Operator, Relevant Organisation, Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response:

- (a) in respect of questions 2.3.1 or 2.3.3, the Contracting Authority can demonstrate by any appropriate means that the relevant ground for discretionary exclusion has arisen; or
- (b) in respect of question 2.3.4, the Contracting Authority has sufficiently plausible indications that the relevant ground for discretionary exclusion has arisen; or
- (c) in respect of question 2.3.5, there is a conflict of interest in respect of this Procurement Process; or
- (d) in respect of question 2.3.6, there has been a distortion of competition in respect of this Procurement Process,

then the Economic Operator, Relevant Organisation, Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response may fail and the Contracting Authority may exclude the Economic Operator from the Procurement Process.

8.4.5 In exercising its discretion to exclude an Economic Operator from the Procurement Process as described above, the Contracting Authority shall apply the following principles:

8.4.5.1 an Economic Operator, Relevant Organisation, Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response may provide evidence in its answers to the questions in Part 2.3 of the PQQ to the effect that measures taken by the Economic Operator, Relevant Organisation, Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion ("self-cleaning"). If the Contracting Authority considers such evidence to be sufficient, the Economic Operator concerned shall not be excluded from the Procurement Process. The measures taken by the Economic Operator, Relevant Organisation, Parent Company or any other parties on whom the Economic Operator relies for the purposes of the PQQ Response shall be evaluated by the Contracting Authority taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the Contracting Authority considers such measures to be insufficient and that the Economic Operator should be excluded from the Procurement Process, the Contracting Authority shall give the Economic Operator a statement of the reasons for that decision; and

8.4.5.2 in respect of questions 2.3.5 and 2.3.6, the Economic Operator shall only be excluded if there are no other means to ensure the Contracting Authority's compliance with its duty to treat all Economic Operators equally.

## 8.5 Evaluation of Subcontractors

8.5.1 If a Subcontractor fails any of the questions in Part 2.1, 2.2 or 2.3 of the PQQ, the Contracting Authority:

8.5.1.1 shall require that the Economic Operator replaces such Subcontractor where the Subcontractor has failed any of the questions in Part 2.1 and 2.2 (where

the breach had been established by judicial or administrative decision having binding effect); and

8.5.1.2 may require that the Economic Operator replaces such Subcontractor where the Subcontractor has failed any of the questions in Part 2.2 (where the breach had not been established by judicial or administrative decision having binding effect but the Contracting Authority had demonstrated by appropriate means that the Subcontractor is in breach of its obligations relating to the payment of taxes or social security contributions) and 2.3.

## 8.6 Evaluation of Economic and Financial Standing

**[Drafting Note to Contracting Authorities:** it is recommended that Contracting Authorities seek specialist financial advice to develop the evaluation of economic and financial standing.]

### 8.6.1 Overview of the Evaluation of Economic and Financial Standing

The Contracting Authority will evaluate whether the Economic Operators have the requisite economic and financial standing in accordance with the criteria and methodology set out in this Section 8.6.

The evaluation of economic and financial standing is split into two parts:

Part 1 – a quantitative evaluation based on financial statements; and

Part 2 – a qualitative evaluation based on trend analysis and other information not contained in financial statements

### 8.6.2 Evaluation of Economic and Financial Standing

The evaluation of economic and financial standing will be a pass/fail process comprising a quantitative analysis and a qualitative analysis of each of the following relevant organisations, where relevant to the Economic Operator's contractual structure:

- Developer;
- Contractor; and/or
- Service Provider,

**[Drafting Note to Contracting Authorities:** Contracting Authority to delete as appropriate.]

each a "Relevant Organisation".

The process by which the two stages of the analysis will be combined to result in a final pass or fail is described below in Section 8.6.5.

Each Relevant Organisation must pass the evaluation of economic and financial standing for the Economic Operator to pass.

### 8.6.3 Guarantors

Where a Relevant Organisation would like its economic and financial standing evaluation to be based on its parent company/group, this will only be done where the relevant Parts of the PQQ (as indicated in the PQQ) are also completed for its parent company/group, and a letter of support is submitted to the Contracting Authority.

### 8.6.4 Quantitative Analysis

The quantitative analysis will be performed with reference to the financial statements and annual reports of the Relevant Organisations which will be provided in response to the PQQ. The quantitative evaluation criteria are set out in Table 1 of Section 8.6.5. A detailed explanation of the evaluation criteria and scoring is provided in Appendix 2 of this Descriptive Document. Relevant Organisations who score [\*\*\*] or more will provisionally pass the evaluation of economic and financial standing and those who score under [\*\*\*] will provisionally fail.

**[Drafting Note to Contracting Authorities: Contracting Authority to decide on what the pass mark should be. Starting assumption is 50% but there may be instances where it is felt that a lower threshold is more appropriate.]**

It should be noted that where a Relevant Organisation is an investment fund (or similar), the quantitative analysis will not apply, as investments are funded not from a fund's balance sheet, but from uncalled capital commitments. As a result, where the Relevant Organisation is an investment fund (or similar), the organisation will be subject to a qualitative analysis as to whether sufficient funds are available to inject the required equity/risk capital.

### 8.6.5 Qualitative Analysis

For the qualitative analysis, consideration will be given to trend analysis from the quantitative evaluation and other information (including post balance sheet events) provided by the Relevant Organisation in response to the PQQ. To help inform this process, the Contracting Authority will carry out its own review of publicly available financial information on the Factiva database back to [DATE TO BE INSERTED].

**[Drafting Note to Contracting Authorities: this date would ordinarily be 6-12 months prior to the date of the Contract Notice in order to capture any relevant information that may not have been reflected in the most recently available accounts.]**

Relevant Organisations should note that they are responsible for checking the information on the Factiva database and highlighting in their PQQ Response any material misreporting or other additional explanation which may be required. Where appropriate, additional clarification questions will be raised with Relevant Organisations.

In the event that information is identified through the above qualitative analysis which, in the reasonable opinion of the Contracting Authority, would affect whether or not a Relevant Organisation would have passed or failed the quantitative analysis had such information been available to the quantitative analysis, the provisional pass or fail will be amended accordingly to produce the final pass/fail evaluation for the evaluation of economic and financial standing.

Economic Operators will be informed of the information which may result in an amendment from a provisional pass to a final fail evaluation, before the Contracting Authority's qualitative analysis is finalised. Economic Operators will be given an opportunity to comment on such information and to provide any additional information or explanation which they feel may be relevant to the Contracting Authority's analysis. The Contracting Authority will (where appropriate) take such comments and information into account when finalising the qualitative analysis.

**Table 1: Quantitative evaluation criteria (detailed breakdown)**

	<b>Weighting %</b>
<b>Financial Attributes</b>	<b>[**%]</b>
<b>Profitability</b> The Relevant Organisation's profitability trend will be reviewed.	[**%]
<b>Gearing</b> Assessing the financial gearing of each Relevant Organisation will assist the Contracting Authority in reviewing the financial risk of each Relevant Organisation. The interest cover is also assessed under this criterion.	[**%]
<b>Liquidity</b> In reviewing the financial and economic robustness of each Relevant Organisation, the Contracting Authority will test that each Relevant Organisation has sufficient liquidity such that, in the short term, the Relevant Organisation is in sound financial health and can meet its obligations as they fall due.	[**%]
<b>Significance of Project to the [Relevant Organisation]</b>	<b>[**%]</b>
<b>Turnover analysis</b> In assessing the ability of each Relevant Organisation to deliver the Project, the Contracting Authority will review the turnover of the Relevant Organisation.	[**%]
<b>Net Assets</b> In assessing the ability of each Relevant Organisation to deliver the Project, the Contracting Authority will review the Net Assets of the Relevant Organisation.	[**%]
<b>Total</b>	<b>100.00%</b>

	<b>Weighting %</b>
<b>Financial Attributes</b>	<b>[**%]</b>
<b>Total Marks available</b>	<b>100</b>

**8.6.6 Evaluation of Economic and Financial Standing where there is more than one member of a Developer**

Where there is more than one member of a Developer, the overall quantitative analysis score will be the weighted average score for the Developer as a whole, using the percentages of Equity/Risk Capital finance to be held by each member of Developer indicated in response to the question in Part 3.1 of the PQQ. Where the weighted average quantitative analysis score for the Developer lies above the minimum score referred in Section 8.6.4, the Developer as a whole will be deemed to have provisionally passed the evaluation of economic and financial standing, subject to any further adjustments that may be required following the qualitative evaluation of each member of the Developer as detailed in Section 8.6.5.

For the avoidance of doubt, provided that the quantitative analysis score for the Developers exceeds the minimum on a weighted average basis, the Developer as a whole will be deemed to have provisionally passed the evaluation of economic and financial standing even if one or more members of the Developer scores below the minimum on an individual basis.

**8.6.7 Evaluation of Economic and Financial Standing where there is more than one member of a Contractor and/or a Service Provider**

If there is more than one member of a Contractor and/or Service Provider, which will be party to the same contract with the Successful Participant, the overall quantitative analysis score will be the weighted average score for the Contractor and/or Service Provider(as relevant) as a whole using the percentages of their intended shares of the relevant contract as indicated in response to the question in Part 3.1 of the PQQ. Where the weighted average quantitative analysis score for the Contractor and/or Service Provider(as relevant) lies above the minimum score referred in Section 8.6.4, the Contractor and/or Service Provider as a whole will be deemed to have provisionally passed the evaluation of economic and financial standing subject to any further adjustments that may be required following the qualitative evaluation of each member of the Contractor and/or Service Provider as detailed in Section 8.6.5.

For the avoidance of doubt, provided that the qualitative analysis score for the Contractor and/or Service Provider exceeds the minimum on a weighted average basis, the Contractor and/or Service Provider as a whole will be deemed to have provisionally passed the evaluation of economic and financial standing even if one or more members of the Contractor and/or Service Provider scores below the minimum on an individual basis.

**8.7 Experience Evaluation**

8.7.1 Panel D shall review Parts 3.3 to 3.7 of the PQQ Responses, and Panel D shall evaluate the response to each question in Parts 3.3 to 3.7 of on the basis of pass or fail; Parts 3.3 to 3.7 are not scored.

Part	Evaluation Method		Definition of Pass/Fail
3.3 - Minimum standards of technical and professional ability	Pass/Fail	Information provided will be reviewed and evaluated, and a fail will automatically exclude the Economic Operator from further participation in the Procurement Process.	<p>Pass = the response to all of the questions in Part 3.3 of the PQQ is 'Yes' and the response provided for each question provides a reference project within the required parameters.</p> <p>Fail = the response to any of the questions in Part 3.3 of the PQQ is 'No' or any response fails to provide a reference project within the required parameters.</p>
3.4 - Technical requirements	Pass/Fail	Information provided will be reviewed and evaluated, and a fail will automatically exclude the Economic Operator from further participation in the Procurement Process.	<p>Pass = the response to all of the questions in Part 3.4 of the PQQ is 'Yes'.</p> <p>Fail = the response to any of the questions in Part 3.4 of the PQQ is 'No'.</p>
3.5 - Management	Pass/Fail	Information provided will be reviewed and evaluated, and a fail will automatically exclude the Economic Operator from further participation in the Procurement Process.	<p>Pass = the response to the question in Part 3.5 of the PQQ is 'Yes'.</p> <p>Fail = the response to the question in Part 3.5 of the PQQ is 'No'.</p>
3.6 - Sustainability	Pass/Fail	Information provided will be reviewed and evaluated, and a fail will automatically exclude the Economic Operator from further participation in the Procurement Process.	<p>Pass = the response to all of the questions in Part 3.6 of the PQQ is 'Yes'.</p> <p>Fail = the response to any of the questions in Part 3.6 of the PQQ is</p>

Part	Evaluation Method		Definition of Pass/Fail
			'No'.
3.7 - Health and Safety	Pass/Fail	Information provided will be reviewed and evaluated, and a fail will automatically exclude the Economic Operator from further participation in the Procurement Process.	<p>Pass = the response to all of the questions in Part 3.7 of the PQQ is 'Yes' or 'Not applicable' in the case of 3.7.4.</p> <p>Fail = the response to any of the questions in Part 3.7 of the PQQ is 'No'.</p>

8.7.2 Panel D shall evaluate the response to each question in Part 3.8 of the PQQ, except for question [3.8.7] which shall be evaluated by Panel C, by allocating a score in accordance with the scoring system identified in the following table(s). Intermediate scores are not permitted. A PQQ response shall be marked as a fail and shall not be considered further if the score for any question in Part 3.8 is [40 or less].

**[Drafting Note to Contracting Authorities:** there are many different methods of scoring which could be adopted - 0 to 10, 0 to 100 etc. The key principles which should be applied by Contracting Authorities are that the scoring system must be clear, auditable and easy for evaluators to use. Depending on the questions which are being asked, whilst the scoring system (e.g. 0 to 100) should be consistent, the required evidence for each question in Part 3.8 may differ. It is recommended that Contracting Authorities seek specialist technical, financial and legal advice to develop the scoring systems, and to calibrate the scoring systems against each question in Part 3.8. Set out below is an example scoring table for consideration by Contracting Authorities. In addition, based on the scoring system chosen, Contracting Authorities should set a pass/fail threshold which will be applied in respect of each question in Part 3.8.]

Score	Required Evidence
100	Evidence submitted shows the ability to deliver very strongly, supported by relevant and transferable past experience and achievements.
80	Evidence submitted shows the ability to deliver, supported by relevant and transferable past experience and achievements.
60	Evidence submitted shows the ability to deliver in most areas, but the Contracting Authority has concerns in a few areas, about the relevance and transferability of past experience and achievements.
40	Evidence submitted shows the ability to deliver in some areas, but the

	Authority has concerns in some areas, about the relevance and transferability of past experience and achievements.
<b>20</b>	Evidence submitted shows the ability to deliver in a few areas, but the Authority has concerns in most areas, about the relevance and transferability of past experience and achievements.
<b>0</b>	Evidence submitted does not show the ability to deliver or no evidence has been provided.

8.7.3 The score for each question in Part 3.8 of the PQQ shall be weighted in accordance with the weighting identified in the following table, and the weighted scores shall be combined into an overall score for Part 3.8.

**[Drafting Note to Contracting Authorities:** it is recommended that Contracting Authorities seek specialist technical, financial and legal advice to develop the weighting for each question in Part 3.8, and to calibrate the weighting for each question in Part 3.8. The weightings in the table in 8.7.3 should sum to 100% to give a total weighted full marks score of 100. These weightings should reflect the importance of the experience to the MIM project.]

3.8	Relevant Experience	Weighting
3.8.1	[Health and Safety Management]	
3.8.2	[Design and Construction]	
3.8.3	[Maintenance]	
3.8.4	[Environment]	
3.8.5	[Working with stakeholders]	
3.8.6.	[Community Benefits]	
3.8.7	[Raising Finance]	
[...]		

## 8.8 Selection of Participants

8.8.1 The three Economic Operators who have:

- (a) submitted a compliant PQQ Response; and
- (b) gained a **PASS** in respect of the evaluation of each question in Part B of the PQQ carried out pursuant to Section 8.4 of this Descriptive Document; and

- (c) gained a **PASS** in respect of the evaluation of economic and financial standing carried out pursuant to Section 8.6 of this Descriptive Document; and
- (d) gained a **PASS** in respect of the technical evaluation of Parts 3.3 to 3.7 of the PQQ carried out pursuant to Section 8.7 of this Descriptive Document; and
- (e) following technical evaluation carried out by the Contracting Authority pursuant to Section 8.7.2 of this Descriptive Document, **scored [\*\*\*] or more** for each question in Part 3.8 of the PQQ; and
- (f) achieved the highest combined weighted scores in respect of technical evaluation carried out pursuant to Section 8.7.2 of this Descriptive Document,

will be selected as the Participants.

8.8.2 **[Drafting Note to Contracting Authorities: consideration to be given as to whether a methodology for dealing with tied scores is utilised. It is recommended that Contracting Authorities seek specialist technical, financial and legal advice to consider this issue.]**

## 8.9 **Validating PQQ Responses and subsequent exclusion from the Procurement Process**

8.9.1 The Contracting Authority reserves the right to validate each Participant's PQQ Response at any time in the Procurement Process, to confirm that the PQQ Response has not changed or information provided was incorrect or has been superseded. In particular, the Contracting Authority will repeat the tests set out in Part 3.2 of the PQQ during the Dialogue Period and contract award stage. If the Contracting Authority considers that the Participant's PQQ Response has changed, with the effect that the Participant no longer pre-qualifies to participate in the Procurement Process, the Contracting Authority may exclude the Participant from further participation in the Procurement Process.

**APPENDIX 1  
CONFIDENTIALITY AND NON-COLLUSION LETTER**

**[TO BE TYPED ON LETTERHEAD OF CONTRACTING AUTHORITY]**

**[Drafting Note to Contracting Authorities: if the MIM procurement is to be carried out by a group of Contracting Authorities, then this Confidentiality and Non-Collusion Letter must be customised appropriately.]**

[Insert Participant Name and Address]

□ [20xx]

Dear Sirs

**[INSERT NAME OF CONTRACTING AUTHORITY] ("CONTRACTING AUTHORITY")  
PROPOSED AWARD OF A CONTRACT FOR THE DESIGN, BUILD, FINANCE AND  
MAINTENANCE OF THE [ ] ("CONTRACT")  
CONTRACT REFERENCE: [ ]**

**CONFIDENTIALITY AND NON-COLLUSION LETTER**

Further to your selection as one of the Dialogue Participants to proceed to the invitation to participate in dialogue ("**ITPD**") stage of the Procurement Process, set out below are the confidentiality and non-collusion undertakings to be given by you to the Contracting Authority.

**1. DEFINITIONS**

In this letter, the following phrases have the meanings set out below:

- 1.1 **"Associate"** means:
  - 1.1.1 [any subsidiary, holding company or subsidiary of a holding company of the Participant; and
  - 1.1.2 any other person who it is proposed should jointly bid with the Participant, as part of a consortium or other joint bid; and
  - 1.1.3 any company formed or acquired to be formed or acquired by the Participant and/or your Associates to bid for or enter into the Contract;] **[Note: Participant to delete please if not relevant.]**
- 1.2 **"Authorised Disclosee"** means any Associate, Funder or Professional Adviser in respect of whom the requirements of paragraph 2.1.3 have been fully satisfied;

1.3 **"Contracting Authority Party"** means any of the Contracting Authority, and any advisers appointed by the Contracting Authority or any of Contracting Authority's agents, employees, consultants, contractors and sub-contractors of any tier and its or their directors, officers and employees, and **"Contracting Authority Parties"** shall be construed accordingly;

1.4 **"Confidential Information"** means all information (whether disclosed orally, or in written, electronic or machine readable form) comprising or relating to:

1.4.1 the information contained in the ITPD, ITCD and ITSFT Documents (which will be provided to the Dialogue Participants), and any associated documents, and any other information supplied to or by the Participant as part of the Procurement Process (including clarifications);

1.4.2 the terms of the proposed Contract to be entered into between the Successful Participant and the Contracting Authority and any proposals (including any legal, financial, technical and insurance proposals) made by the Participant, the Contracting Authority and/or any Contracting Authority Party in relation to the Contract or any discussions or arrangements, and proposed discussions or arrangements between any of the Contracting Authority Parties, the Contracting Authority and/or the Participant in relation to the Project;

1.4.3 any contracts or arrangements, proposed contracts or arrangements, discussions or negotiations between the Contracting Authority Parties inter se or between the Contracting Authority Parties or any of them and any other party involved in the Procurement Process or the Project;

1.4.4 the terms of, or terms being sought in respect of, any licence, consent, authorisation, approval or certificate required for the purposes of the Project or any information relating to any application or negotiations relating to the same, or the terms on which any party has agreed to withdraw any objection to any application for such a licence, consent, authorisations, approval or certificate or to support, co-operate with or provide any land, supplies, works or services for the purposes of the Project;

1.4.5 any information relating to the financial position, financial or business affairs or financial or business prospects of any Disclosing Party;

1.4.6 any other negotiations, discussions, contracts, arrangements, specifications, plans or proposals of any Disclosing Party relating to any part of the Project or the Procurement Process; and

1.4.7 any other information relating to any Disclosing Party or to the Project which is of evident commercial sensitivity to any Disclosing Party,

other than any information which:

1.4.7.1 is in the public domain or has otherwise been published other than due to a breach by the Participant or any Disclosee of the terms of any Confidentiality Undertaking; or

- 1.4.7.2 is proven to have been in possession of the Participant or any Disclosee and freely disclosable by it prior to such disclosure other than due to a breach of any Confidentiality Undertaking;
- 1.5 **"Confidentiality Undertaking"** means any of the undertakings set out below and any similar undertakings given by the Participant in relation to the Procurement Process;
- 1.6 **"Contract"** means the contract to be entered into by the Contracting Authority and the Successful Participant in respect of the Project;
- 1.7 **"Contract Notice"** means the notice published by the Authority in the Official Journal of the European Union in relation to the competition for the procurement of the Contract dated [\*\*\*\*] and with reference number. **[Drafting Note to Contracting Authorities: complete date prior to issue and include sell2wales details.]**;
- 1.8 **"Dialogue Participant"** means, as the context requires, those economic operators who have been invited to participate in dialogue, invited to continue dialogue or invited to submit final tenders by the Contracting Authority in respect of the Project. ;
- 1.9 **"Disclosee"** means any Associate, Funder or Professional Adviser of the Participant and any other person to whom Confidential Information is disclosed by or on behalf of the Participant in accordance with the terms of the Confidentiality Undertaking;
- 1.10 **"Disclosing Party"** means such of the Contracting Authority and any Contracting Authority Party as may directly, or indirectly through the agency of any other party, disclose Confidential Information to the Participant or its Associates, Funders or Professional Advisers;
- 1.11 **"Funder"** means [Note: Participant to delete/amend please as appropriate];
- 1.12 **"ITCD"** means the invitation to continue dialogue to be issued by the Contracting Authority to Dialogue Participants for the ITCD stage of the Procurement Process;
- 1.13 **"ITPD"** means the invitation to participate in dialogue to be issued by the Contracting Authority to Dialogue Participants for the ITPD stage of the Procurement Process;
- 1.14 **"ITPD, ITCD and ITSFT Documents"** means the package of documents, issued to the Participant in respect of each of the ITPD stage, ITCD stage and the ITSFT stage, as may be amended from time to time by the Contracting Authority, and shall include any supplemental documents issued as part of the ITPD stage, ITCD stage or the ITSFT stage of the Procurement Process;
- 1.15 **"ITSFT"** means the invitation to submit final bids to be issued by the Contracting Authority to Dialogue Participants for the ITSFT stage of the Procurement Process;
- 1.16 **"Participant"** means **[Note: Participant to insert name of company/ firm, registration details and registered office]**;

- 1.17 **"Procurement Process"** means the competitive dialogue procedure adopted by the Contracting Authority for the procurement of the Project, including prequalification and shortlisting, competitive dialogue, participation in dialogue period meetings, submission of proposals in respect of dialogue period meetings, Initial Solutions, Detailed Solutions and Final Tenders and clarification and finalisation of the Contract and any other documents to be entered into under or in relation to the Contract.
- 1.18 **"Professional Adviser"** means any legal, financial, technical or other adviser retained by the Participant or any Funder of the Participant to advise in relation to the Procurement Process, the Contract or the Project and **"Professional Advisers"** shall be construed accordingly;
- 1.19 **"Project"** means the **Drafting Note to Contracting Authorities: describe project** which is being procured by the Contracting Authority pursuant to the Contract Notice; and
- 1.20 **"Successful Participant"** means the Dialogue Participant who achieves the highest ranking following the evaluation of the Final Tenders submitted in response to the ITSFT to establish the most economically advantageous tender.

## 2. CONFIDENTIALITY AND OTHER OBLIGATIONS

- 2.1 In consideration of the disclosure to the Participant of the ITPD, ITCD and ITSFT Documents and other Confidential Information as may be disclosed during the course of the Procurement Process, the Participant acknowledges and undertakes to the Contracting Authority and the Contracting Authority Parties, subject to paragraph 2.4, that all Confidential Information (and all intellectual property therein) which is disclosed to the Participant:
- 2.1.1 shall remain the property of the Disclosing Party or Disclosing Parties who are entitled to the same, and no rights whatsoever in any Confidential Information shall be deemed to have been conferred upon the Participant, its Associates, Funders or Professional Advisers except as expressly stated in this letter;
- 2.1.2 will not be used by the Participant or any of its Associates, Funders or Professional Advisers except for the purpose of participating in the Procurement Process pursuant to the ITPD, ITCD and ITSFT Documents and preparing and submitting proposals for the award of the Contract or otherwise for the purposes of clarifying and fine-tuning, funding its potential obligations under, or making arrangements for the award of, the Contract, or otherwise for the purposes of the Procurement Process;
- 2.1.3 shall not be disclosed to, or permitted to come into the possession of, any person other than to any Associates, Funders or Professional Advisers:
- 2.1.3.1 the identity of whom, and the proposal to disclose information to whom, has previously been notified in writing to the Contracting Authority;
- 2.1.3.2 who have confirmed in writing to the Participant that they have been made aware of the requirements of this letter;

- 2.1.3.3 who have confirmed in writing to the Participant that they will observe and perform the same duties in relation to the Confidential Information as the Participant is required to observe hereunder; and
    - 2.1.3.4 who the Participant shall otherwise use all reasonable endeavours to ensure observe and perform such duties as are referred to in paragraph 2.1.3.3 above; and
  - 2.1.4 will only be disclosed by the Participant to employees or officers of the Participant who have been made aware of the Confidentiality Undertakings and who are directly engaged in relation to the Procurement Process (a list of whom the Participant will supply to the Contracting Authority on request).
- 2.2 The Participant further undertakes to the Contracting Authority and the Contracting Authority Parties that it will keep confidential and not reveal to any person, firm or company (save for its Authorised Disclosees who it shall procure observe like obligations to those set out in this paragraph 2.2) the Confidential Information and the fact of its participation or selection, or non-selection, for any stage of the Procurement Process or withdrawal from the Procurement Process, details of the terms of, or any discussions with the Contracting Authority and/or any Contracting Authority Party over the terms of, any proposal from the Participant or the proposed Contract and any other proposed agreement, arrangement or associated documents relating to the Contract or the Procurement Process or any information concerning the terms which are or were included, or proposed to be included, in any proposal or the proposed Contract or any other offer made by, or sought from the Participant, in the course of the Procurement Process.
- 2.3 The Participant further undertakes to the Contracting Authority and the Contracting Authority Parties that it:
  - 2.3.1 will, upon written demand from the Contracting Authority, forthwith:
    - 2.3.1.1 return or procure the return to the Contracting Authority of any Confidential Information (and any and all copies extracts or reproductions thereof or any part thereof whether made by the Participant or any Disclosee);
    - 2.3.1.2 delete or procure the deletion of any and all data, records or other stored information from any disc, software, computer, word processor, or other system or device in the Participant's or any Disclosee's possession, custody or control to the extent containing any Confidential Information; and
    - 2.3.1.3 destroy or procure the destruction of all copies of any notes, analyses, computations, studies or other documents prepared by or on behalf of the Participant or by any Disclosees, to the extent containing or reflecting any of the Confidential Information.

2.4 Nothing in this paragraph 2 shall prevent such disclosures of Confidential Information as are reasonably required:

2.4.1 for the Participant to prosecute or defend any action relating to the proposed Contract or the Procurement Process; or

2.4.2 to be disclosed in accordance with a requirement imposed by law, or by the rules of any recognised investment exchange to which the Participant may be subject,

subject to prior notification of such disclosure to the Contracting Authority where legally permissible.

### 3. **APPROACHES TO THE AUTHORITY - COLLUSIVE TENDERING**

The Participant hereby undertakes not:

3.1 to hold discussions with, solicit the support of, or otherwise approach in connection with the award of the Contract, or the Procurement Process, or discuss the Procurement Process with any Disclosing Party other than the contacts nominated to the Participant in writing by the Contracting Authority from time to time;

3.2 to make or offer any gift, loan, fee, or other advantage to any member, employee, officer, consultant, professional adviser or agent of any Disclosing Party as a bribe or other inducement or reward:

3.2.1 for doing or not doing any act (or procuring the same) in relation to the Procurement Process or the award of the Contract; or

3.2.2 for showing or not showing favour or disfavour to any person in relation to the Procurement Process or the award of the Contract;

3.3 other than with its Associates, Funders and Professional Advisers, acting in those capacities, or with the prior written consent of the Contracting Authority, to enter into any agreement, arrangement or understanding with any person:

3.3.1 to coordinate or collude together over the terms of any indicative or final proposals or other offers in respect of the Procurement Process or to exchange information about the contents of any such proposal or offer; or

3.3.2 to offer particular terms or refrain from offering particular terms to the Contracting Authority or to pursue or refrain from actively pursuing the award of the Contract or otherwise to do or not to do any particular thing in relation to the Procurement Process or any dialogue with the Contracting Authority and/or any Contracting Authority Party;

3.4 to knowingly or recklessly make any false or misleading statement or submit any false or misleading information to any Disclosing Party or their respective consultants or professional advisers, in expressing interest in the Contract or in connection with any discussions, offers or proposals in respect of the Procurement Process; or

- 3.5 to instruct, encourage, assist or permit any other person to do or refrain from doing any act or omission which if it had been done or not done by the Participant would have breached its obligations under this paragraph 3 (including, without limitation, encouragement or assistance in that regard to other Dialogue Participants).

#### 4. FREEDOM OF INFORMATION

- 4.1 We acknowledge that, for the purposes of the Freedom of Information Act 2000 ("**Act**") and Environmental Information Regulations 2004 ("**Regulations**"), the Contracting Authority is a "public authority" within the meaning of the Act and Regulations and is, therefore, bound by the provisions of the Act and Regulations. This means that all information (including any material, data, records, drawings or other records) submitted to the Contracting Authority as part of the Procurement Process may need to be disclosed and/or published by the Contracting Authority in compliance with the Act / Regulations or, as a consequence of judicial order, or order by any court, tribunal or body with the Contracting Authority to order disclosure (including the Information Commissioner) or as otherwise specified in Clause 4.2. Information will be considered as exempt from disclosure at the Contracting Authority's discretion and in accordance with the specific exemptions contained in the Act or Regulations. Information that is designated by the Participant as 'confidential' or 'not for disclosure' or equivalent should not be taken to mean that the Contracting Authority accepts any duty of confidence by virtue of that marking.
- 4.2 The Contracting Authority may be required to disclose information (including Confidential Information) in circumstances including but not exclusive to the following:
- 4.2.1 for purposes connected with the exercise of the Contracting Authority's functions, including:
- 4.2.1.1 (i) any audit or examination of the Contracting Authority's accounts or the use of its resources; and
- 4.2.1.2 (ii). scrutiny by the National Assembly for Wales (or any of its committees or sub-committees) or any other department, office or agency of the Welsh Government and/or Her Majesty's Government in Wales or the United Kingdom, and their servants or agent, of the exercise of its functions;
- 4.2.2 for the purposes of:
- 4.2.2.1 the prevention or detection of crime;
- 4.2.2.2 the apprehension or prosecution of offenders;
- 4.2.2.3 any regulatory or investigatory activity;
- 4.2.2.4 any legal obligation (including any order of a court of competent jurisdiction); or

- 4.2.2.5 seeking legal, accounting, tax or other professional advice for the purposes of the Procurement Process;
- 4.2.3 which is or becomes public knowledge (otherwise than by virtue of a failure to comply with the terms of this letter);
- 4.2.4 in accordance with the Freedom of Information Act 2000 and / or the Environmental Information Regulations 2004 in response to a request for information made to the Contracting Authority; and
- 4.2.5 in compliance with any other law, or, as a consequence of judicial order, or order by any court or tribunal with the authority to order disclosure.

## 5. MISCELLANEOUS

- 5.1 Nothing in this letter obliges the Contracting Authority:
  - 5.1.1 to proceed with, or complete the Procurement Process or any stage of the Procurement Process or to enter into the Contract (or any related contractual document), either at all or in any particular terms or manner; or
  - 5.1.2 to enter into the Contract (or any related contractual document) with the Participant, or any other Participant either at all or in any particular terms or manner.
- 5.2 The Contracting Authority may elect to discontinue, suspend or alter the Procurement Process at any time without selecting a Successful Participant with whom to enter into the Contract (or any related contractual documentation). The Contracting Authority shall not be liable for any costs, expenditure or losses incurred or suffered by the Participant resulting from such discontinuation, suspension or alteration, including any liability for any inconvenience caused.
- 5.3 This letter shall not constitute a commitment by any person to supply any Confidential Information or enter into any transaction with the Participant in relation to the Procurement Process.
- 5.4 The exercise of the Contracting Authority's rights referred to under paragraph 5.2, the termination of the dialogue with the Participant, the disqualification of the Participant and/or the Participant's return of Confidential Information in accordance with the terms of this letter will not release the Participant from any continuing obligations under this letter.
- 5.5 The undertakings and commitments of the Participant in this letter shall continue to apply until the Participant is released by the Contracting Authority (such release not to be unreasonably withheld).
- 5.6 [Where two or more constituent organisations of the Participant jointly sign this letter, they shall be jointly and severally liable for observing and performing these terms.] **[Note: Participant to delete if not applicable.]**

Please acknowledge and confirm your acceptance of the terms set out in paragraphs 1 to 5 above by signing and returning to us the attached duplicate of this letter by [ ]. **[Drafting Note to Contracting Authorities: insert return date.]**

The agreement constituted by the exchange of copies of this letter (and any non-contractual obligations and any disputes, proceedings or claims of whatsoever nature arising out of or in any way relating to this letter) shall be construed in accordance with the laws of England and Wales and be subject to the exclusive jurisdiction of the courts of England and Wales.

Yours faithfully

[ ]

**[Drafting Note to Contracting Authorities: insert designation of person with signing authority.]**

**For and on behalf of the Contracting Authority**

We hereby acknowledge and undertake to the Contracting Authority to comply with the terms set out in the above letter:

**Participant [Note : Participant to delete /amend signing blocks as appropriate]**

Name of [Participant/constituent organisation]  
.....

Address of [Participant/ constituent organisation] .....  
.....

**Signed:**  
.....

*Duly authorised signatory for and on behalf of the [Participant/constituent organisation]*

Date ..... [\*\*\*\*]

**[Witness]**

**APPENDIX 2  
DETAIL OF SCORING CRITERIA  
QUANTITATIVE SCORING GUIDANCE**

**1. Financial Attributes**

The financial attributes of each Relevant Organisation are assessed using the last three years' statutory accounts. Where appropriate, adjustments will be made for exceptional items. The scoring matrices for the various financial criteria are set out in the tables below. The evaluator will examine absolute values in each of the following measures:

**a. Profitability**

The profitability of each Relevant Organisation is assessed by evaluating profit on ordinary activities before tax against turnover, to give a net profit margin.

**Table 1: Scoring Framework - Profitability**

Net Profit	
Margin (%)	Score
	0
	1
	2
	3
	4
	5
	6
	7
	8
	9
	10

**[Drafting Note to Contracting Authorities:** Contracting Authorities may choose narrower scoring bands/scales to the one proposed in the table above e.g. a profit margin of  $<x\%$  = 1 mark;  $>x\%$  but  $<y\%$  = 5 marks;  $>y\%$  = 10 marks. As a guide, a profit margin greater than [0%] should be required to achieve a pass mark for this criterion.]

A net profit margin will be generated from the three previous years of results. Based on these values, scores for each year will be derived from the table above. The overall score for this criterion will then be generated as a weighted average; with the most recent year's score counting for [60%]; the next most recent counting for [30%]; and the third most recent counting for [10%].

**b. Gearing**

Assessing the financial gearing of each Relevant Organisation will assist the Contracting Authority in reviewing the financial risk of each Relevant Organisation.

The following gearing ratios will be assessed using information provided in statutory accounts:

- Interest Cover (EBITDA/Interest Payable and similar charges); and
- Financial Gearing (Long term debt/Long term debt plus equity).

Interest cover represents the number of times historical interest expense is covered by operating profits and is an important indicator of an organisation's historical financial risk. The financial gearing of an organisation is an indication of the debt burden borne by that organisation. The lower the gearing, the less constrained by debt the organisation is.

The following scoring framework will be applied:

**Table 2: Scoring Framework - Interest Cover**

Interest Cover	
Ratio	Score
	0
	1
	2
	3
	4
	5
	6
	7
	8
	9

Interest Cover	
Ratio	Score
	10

**[Drafting Note to Contracting Authorities:** Contracting Authorities may choose narrower scoring bands/scales to the one proposed in the table above e.g. a ratio of  $<x = 1$  mark;  $>x$  but  $<y = 5$  marks;  $>y = 10$  marks. As a guide, interest cover of at least [2x] should be required to achieve a pass mark for this criterion.]

**Table 3: Scoring Framework - Financial Gearing**

Financial Gearing	
Ratio	Score
	0
	1
	2
	3
	4
	5
	6
	7
	8
	9
	10

**[Drafting Note to Contracting Authorities:** Contracting Authorities may choose narrower scoring bands/scales to the one proposed in the table above e.g. a ratio of  $<x = 1$  mark;  $>x$  but  $<y = 5$  marks;  $>y = 10$  marks. As a guide, a gearing ratio of approximately [50%] should be required to achieve a pass mark for this criterion.]

For each of the three years being reviewed, the interest cover ratio will be calculated and a score derived for each year. The overall score for this measure will then be calculated as a weighted average of these scores (the most recent year counting for [60%], the second most recent year counting for [30%], and the third most recent

year counting for [10%] of the average). A weighted average gearing score will also be calculated in the same manner (using the [60:30:10] split).

Financial Gearing and Interest Cover are each worth [50%] of the marks available for gearing.

**c. Liquidity**

Each Relevant Organisation’s liquidity will be assessed by reviewing the following ratio:

$$\text{Current ratio (Current Assets / Current Liabilities)}$$

In reviewing the financial and economic robustness of each Relevant Organisation, the evaluator will need to test that each Relevant Organisation has sufficient liquidity such that, in the short term, the Relevant Organisation is in sound financial health and can meet its obligations as they fall due.

The ratio above, when calculated, is a simple indication of the current trading position of the Relevant Organisation. Year on year comparisons will also show the trend in the liquidity position of an organisation through the years. The following scoring framework will be applied:

**Table 4: Scoring Framework - Liquidity**

Current Ratio	
Ratio	Score
	0
	1
	2
	3
	4
	5
	6
	7
	8
	9
	10

**[Drafting Note to Contracting Authorities:** Contracting Authorities may choose narrower scoring bands/scales to the one proposed in the table above e.g. a ratio of  $<x = 1$  mark;  $>x$  but  $<y = 5$  marks;  $>y = 10$  marks. As a guide, a current ratio of at least [1.0x] should be required to achieve a pass mark for this criterion.]

For each of the three years being reviewed, the current ratio will be calculated and a score derived from the table above. A weighted average of these scores will then be calculated (the most recent year counting for [60%], the second most recent year counting for [30%], and the third most recent year counting for [10%] of the average) to derive the overall score for that measure.

## 2. Significance of the Project to the Relevant Organisation

In assessing the ability of each Relevant Organisation to deliver the Project the evaluators will review:

- the Relevant Organisation's turnover; and
- the net asset position of the Relevant Organisation.

For each of the three years being reviewed, the turnover/net asset position will be calculated and scores derived from the tables below. As for the previous measures, a weighted average score will be calculated (with the most recent year counting for [60%], the next most recent counting for [30%], and the third most recent counting for [10%] of the average) to derive the overall score for each measure.

**Table 5: Scoring Framework - Turnover**

Turnover	
Organisation Turnover (£000s)	Score
	0
	1
	2
	3
	4
	5
	6
	7
	8
	9

	10
--	----

**[Drafting Note to Contracting Authorities:** Contracting Authorities may choose narrower scoring bands/scales to the one proposed in the table above e.g. turnover of  $<x = 1$  mark;  $>x$  but  $<y = 5$  marks;  $>y = 10$  marks. As a guide, turnover ought to be at least  $[2.5x]$  the annual contract value of the project concerned e.g. a £200m capex project to be delivered over a 2 year construction period would have an annual contract value of £100m. Therefore, annual construction turnover of at least £250m would be required to achieve a pass mark for this criterion. A similar test would be applied to the turnover of the **Service Provider**, relevant to the annual Service Contract value of the project concerned. No turnover test should be applied to Developer.]

**Table 6: Scoring Framework - Net Assets**

Net Assets	
Net assets (£000s)	Score
	0
	1
	2
	3
	4
	5
	6
	7
	8
	9
	10

**[Drafting Note to Contracting Authorities:** Contracting Authorities may choose narrower scoring bands/scales to the one proposed in the table above e.g. net assets of  $<x = 1$  mark;  $>x$  but  $<y = 5$  marks;  $>y = 10$  marks. Different Net Asset thresholds will need to be set for each of the Developer, Contractor and Service Provider. As a guide, for the Developer the threshold should be at least  $[3x]$  the estimated equity/risk capital amount; for the Contractor and the Service Provider ought to be at least  $[1x]$  the respective contract values.]

**[Drafting Note to Contracting Authorities: insert appropriate logo.]**

**[\*\*\*\*] [Drafting Note to Contracting Authorities: insert name of Contracting Authority.]**

**Descriptive Document in respect of [\*\*\*\*] [Drafting Note to Contracting Authorities:  
insert name of Project.]**

**[\*\*\*\*] [Drafting Note to Contracting Authorities: insert reference number and date of the  
contract notice published by the Contracting Authority in the Official Journal of the European  
Union in relation to the Procurement Process.]**

**[\*\*\*\*] [Drafting Note to Contracting Authorities: insert the Sell2Wales portal reference  
number and date.]**

## **VOLUME TWO**

### **PROJECT AGREEMENT**

**[Drafting Note to Contracting Authorities: insert version 1 of the Project Agreement and  
schedules.]**

**[Drafting Note to Contracting Authorities: insert appropriate logo.]**

**[\*\*\*\*] [Drafting Note to Contracting Authorities: insert name of Contracting Authority.]**

**Descriptive Document in respect of [\*\*\*\*] [Drafting Note to Contracting Authorities:  
insert name of Project.]**

**[\*\*\*\*] [Drafting Note to Contracting Authorities: insert reference number and date of the  
contract notice published by the Contracting Authority in the Official Journal of the European  
Union in relation to the Procurement Process.]**

**[\*\*\*\*] [Drafting Note to Contracting Authorities: insert the Sell2Wales portal reference  
number and date.]**

### **VOLUME THREE**

### **TECHNICAL REQUIREMENTS**

**[Drafting Note to Contracting Authorities: insert version 1 of the documents which  
comprise the technical requirements for the Project - such as the Authority's Construction  
Requirements and Service Level Specification.]**

**[Drafting Note to Contracting Authorities: insert appropriate logo.]**

**[\*\*\*\*] [Drafting Note to Contracting Authorities: insert name of Contracting Authority.]**

**Descriptive Document in respect of [\*\*\*\*] [Drafting Note to Contracting Authorities:  
insert name of Project.]**

**[\*\*\*\*] [Drafting Note to Contracting Authorities: insert reference number and date of the  
contract notice published by the Contracting Authority in the Official Journal of the European  
Union in relation to the Procurement Process.]**

**[\*\*\*\*] [Drafting Note to Contracting Authorities: insert the Sell2Wales portal reference  
number and date.]**

## **VOLUME FOUR**

### **ITPD DOCUMENT**

**[Drafting Note to Contracting Authorities: insert version 1 of the ITPD Document.]**

**[Drafting Note to Contracting Authorities: insert appropriate logo.]**

**[\*\*\*\*] [Drafting Note to Contracting Authorities: insert name of Contracting Authority.]**

**Descriptive Document in respect of [\*\*\*\*] [Drafting Note to Contracting Authorities:  
insert name of Project.]**

**[\*\*\*\*] [Drafting Note to Contracting Authorities: insert reference number and date of the  
contract notice published by the Contracting Authority in the Official Journal of the European  
Union in relation to the Procurement Process.]**

**[\*\*\*\*] [Drafting Note to Contracting Authorities: insert the Sell2Wales portal reference  
number and date.]**

## **VOLUME FIVE**

### **SHAREHOLDERS' AGREEMENT**

**[Drafting Note to Contracting Authorities: insert version 1 of the Shareholders' Agreement  
and schedules.]**