

Pecyn Dogfennau Cyhoeddus

Cabinet

Man Cyfarfod
**Siambwr y Cyngor - Neuadd y Sir,
Llandrindod, Powys**

Dyddiad y Cyfarfod
Dydd Mawrth, 15 Medi 2020

Amser y Cyfarfod
2.00 pm

I gael rhagor o wybodaeth cysylltwch â
Stephen Boyd
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Neuadd Y Sir
Llandrindod
Powys
LD1 5LG

Dyddiad Cyhoeddi

Mae croeso i'r rhai sy'n cymryd rhan ddefnyddio'r Gymraeg. Os hoffech chi siarad Cymraeg yn y cyfarfod, gofynnwn i chi roi gwybod i ni erbyn hanner dydd ddau ddiwrnod cyn y cyfarfod

AGENDA

1.	YMDDIHEURIADAU
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Derbyn ymddiheuriadau am absenoldeb.

2.	COFNODION
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Awdurdodi'r Arweinydd i lofnodi cofnodion y cyfarfodydd a gynhaliwyd ar 21 a 28 Gorffennaf 2020 fel cofnodion cywir.

([Tudalennau 1 - 10](#))

3.	DATGANIADAU O DDIDDORDEB
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Derbyn unrhyw ddatganiadau o ddiddordeb gan Aelodau yn ymwneud ag eitemau i'w hystyried ar yr agenda.

4.	POLISI CLUDIANT CARTREF I'R YSGOL/COLEG
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Ystyried adroddiad gan y Cynghorydd Sir Aled Davies, Aelod Portffolio ar faterion Cyllid, Cefn Gwlad a Thrafnidiaeth.

5.	CYTUNDEB PARTNERIAETH ARBENNIG WEPKO AR GYFER YSGOLION
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NEWYDD WEDI'U HARIANNU GAN REFENIW (MIM)

Ystyried adroddiad gan y Cynghorydd Sir Phyl Davies, Aelod Portffolio ar faterion Addysg ac Eiddo.

(Tudalennau 11 - 1596)

6. PENDERFYNIAD YMGYNGHORI AR GYFER CYNNYDD PREMIWM EIDDO GWAG TYMOR HIR

Ystyried adroddiad gan y Cynghorydd Sir Aled Davies, Aelod Portffolio ar faterion Cyllid, Cefn Gwlad a Thrafnidiaeth.

(Tudalennau 1597 - 1610)

7. CYNLLUNIAU CYFALAF PRIFFYRDD
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Ystyried adroddiad gan y Cynghorydd Sir Heulwen Hulme, Aelod Portffolio ar faterion yr Amgylchedd.

(Tudalennau 1611 - 1614)

8. SAFLE SIPSIWN A THEITHWYR MACHYNLLETH

Ystyried adroddiad gan y Cynghorydd Sir James Evans, Aelod Portffolio ar faterion Datblygu Economaidd, Tai a Gwarchod y Cyhoedd.

(Tudalennau 1615 - 1616)

9. PARTNERIAETHAU LLYFRGELLOEDD CYMUNEDOL
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Ystyried adroddiad gan y Cynghorydd Sir Rachel Powell, Aelod Portffolio ar faterion Pobl Ifanc a Diwylliant.

(Tudalennau 1617 - 1624)

10. CYNLLUNIO ADFERIAD POWYS

Ystyried adroddiad gan yr Arweinydd, Cynghorydd Sir Rosemarie Harris.

(Tudalennau 1625 - 1650)

11. ADOLYGIAD RHEOLI'R TRYSORLYS 2019/20

Ystyried adroddiad gan y Cynghorydd Sir Aled Davies, Aelod Portffolio ar faterion Cyllid, Cefn Gwlad a Thrafnidiaeth.

(Tudalennau 1651 - 1660)

12. ADRODDIAD BLYNYDDOL Y CYFARWYDDWR GWASANAETHAU CYMDEITHASOL
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Derbyn ac ystyried Adroddiad Blynyddol y Cyfarwyddwr Gwasanaethau Cymdeithasol.

Mae fersiwn SWAY o'r adroddiad ar gael yma

<https://sway.office.com/QIGQTWVUJZB3Kpbt?ref=Link>

(Tudalennau 1661 - 1700)

13.	PENDERFYNIADAU DIRPRWYEDIG A WNAED ERS Y CYFARFOD DIWETHAF
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Nodi'r penderfyniadau dirprwyedig a gymerwyd ers y cyfarfod diwethaf.

(Tudalennau 1701 - 1702)

14.	EITEMAU WEDI'U HEITHRIO
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Mae'r Swyddog Monitro wedi penderfynu bod yr eitemau canlynol yn destun categori 3 y Rheolau Trefn Mynediad at Wybodaeth. Ei farn o ran prawf lles y cyhoedd (wedi ystyried darpariaethau Rheol 11.8, Rheolau Mynediad at Wybodaeth y Cyngor), oedd y byddai gwneud y wybodaeth hon yn gyhoeddus yn datgelu gwybodaeth ynglyn â materion ariannol neu fusnes unrhyw unigolyn penodol (gan gynnwys yr awdurdod yn cadw'r wybodaeth honno).

Yn ei farn ef mae'r ffactorau hyn yn fwy pwysig na diddordeb y cyhoedd wrth ddatgelu'r wybodaeth. Gofynnir i Aelodau ystyried y ffactorau hyn wrth benderfynu ar brawf lles y cyhoedd, a dylent benderfynu hyn wrth iddynt ystyried eithrio'r cyhoedd o'r rhan hon o'r cyfarfod.

15.	GWERTHFAWROGI GOFAL
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Ystyried adroddiad gan y Cynghorydd Sir Myfanwy Alexander, Aelod Portffolio ar faterion Gofal Cymdeithasol Oedolion.

(Tudalennau 1703 - 1710)

16.	AUTOMOBILE PALACE
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Ystyried adroddiad gan y Cynghorydd Sir James Evans, Aelod Portffolio ar faterion Datblygu Economaidd, Tai a Gwarchod y Cyhoedd.

(Tudalennau 1711 - 1786)

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol

**MINUTES OF A MEETING OF THE CABINET HELD AT BY TEAMS ON TUESDAY,
21 JULY 2020**

PRESENT

County Councillor M R Harris (Chair)

County Councillors MC Alexander, G Breeze, A W Davies, P Davies, J Evans,
H Hulme and R Powell

1.	APOLOGIES
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There were no apologies for absence.

2.	DECLARATIONS OF INTEREST
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There were no declarations of interest reported.

3.	THE RENTING HOMES (FEES ETC.) (WALES) ACT 2019; IMPLEMENTATION ARRANGEMENTS FOR POWYS COUNTY COUNCIL AND RENT SMART WALES
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Cabinet considered a proposal to delegate authority for enforcing the provisions of the Renting of Homes (Fees etc) (Wales) Act 2019. The aim of the Act was to ensure any costs associated with renting in the private sector should be reasonable, affordable and transparent. The legislation placed the duty for enforcement on each local authority, with a power to share responsibility with Rent Smart Wales (RSW) and with Cardiff City Council appointed Licensing Authority for all local authorities in Wales.

RESOLVED

- (i) to delegate authority for enforcing provisions of the Renting of Homes (Fees etc) (Wales) Act 2019 to the Corporate Director (Economy and Environment), with appropriate powers of sub-delegation.**
- (ii) To authorise Cardiff City Council, as the Single Licensing Authority for Wales (Rent Smart Wales), to exercise any function of an enforcement authority, in relation to Powys County Council's area, for the purposes of the Renting Homes (Fees etc.) (Wales) Act 2019, including (but without limitation) taking enforcement activity and bringing criminal proceedings pursuant to section 19 of that Act.**

4.	CAR PARKING ARRANGEMENTS SUMMER 2020
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Cabinet considered a proposal to introduce two hours free parking in the Council's off-street pay and display car parks during the school summer holidays as part of the #SupportLocalPowys campaign to help boost the local town centre economy.

Cabinet was advised that the loss of irrecoverable income from providing 2 hours free parking would be approximately £85,000 for August. The Head of Finance (Section 151 Officer) confirmed that the financial loss as a result of the introduction of this would not be recoverable from the Welsh Government due to it being a change in policy, and therefore funding would be identified corporately to meet the loss so that it did not fall on the service budget.

RESOLVED

- (i) To provide 2 hours free parking in all of the Council's pay and display car parks for the period 26 July 2020 to 31 August 2020 inclusive.**
- (ii) To maintain the 1 hour free parking for half the spaces lost on street as part of the social distancing measures put in place in the most appropriate pay and display car park from 1 September 2020 until such time as those measures are removed.**
- (iii) That the loss of income due to this policy change, estimated at circa £85k, will be funded corporately to cover the lost income for August that cannot be reclaimed against Welsh Government funding.**

5.	WELFARE CALL MONITORING
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Cabinet considered a report on the welfare call scheme. Since 25th March staff redeployed from other services had made over 18,000 calls to people who were shielding. Welsh Government had announced that "shielding" was to be extended until the 16th August 2020, therefore the calls would continue at least up until that date. There had been a very positive response from residents for the support that had been provided and the Portfolio Holder and the Leader thanked the staff and Councillors involved.

6.	ANNUAL INFORMATION GOVERNANCE REPORT 2019-2020
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Cabinet considered a report on the Information Governance (IG) activities undertaken, practices implemented, and the standards of IG compliance achieved for the financial year 2019/2020.

The report gave details of the number of information security breaches and noted that the increase was likely attributable to greater staff awareness of the need to report breaches. The Information Commissioners Office had recognised that in

most cases breaches been due to human error in failing to follow organisational measures, rather than the Council not having necessary measures in place.

The report also set out the number and cost of information requests, covering the Freedom of Information Act (FOI) 2000, Environmental Information Regulations (EIR) 2004, or the General Data Regulations Subject Access Request (SAR) information regimes. Cabinet noted that it was much cheaper and quicker to ask questions direct to them and asked for a breakdown of the numbers of requests that came from the media or political organisations.

RESOLVED to note the assurance set out in 12. 6 of the report and the planned activity for 2020-2021 as set out in paragraph 13.

County Councillor M R Harris (Chair)

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol

**MINUTES OF A MEETING OF THE CABINET HELD AT BY TEAMS ON TUESDAY,
28 JULY 2020**

PRESENT

County Councillor M R Harris (Chair)

County Councillors MC Alexander, G Breeze, A W Davies, P Davies, J Evans,
H Hulme and R Powell

1.	APOLOGIES
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There were no apologies for absence.

2.	MINUTES
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The Leader was authorised to sign the minutes of the meeting held on 14th July as a correct record.

3.	DECLARATIONS OF INTEREST
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There were no declarations of interest reported.

4.	21ST CENTURY SCHOOLS PROGRAMME BRYNLLYWARCH HALL PROJECT
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Cabinet was asked to consider the submission of a combined Strategic Outline Case (SOC) and Outline Business Case (OBC) to Welsh Government's 21st Century Schools Programme for capital investment to replace the existing Brynlllywarch Hall building in Kerry, Newtown. Brynlllywarch Hall School provided education for pupils from 8 to 19-year olds, with a wide range of complex individual needs. The building was in a very poor condition and the requested investment would deliver a brand new, purpose-built school with 72 places in age appropriate environments.

The proposal was welcomed by the Cabinet and the Leader paid tribute to the Chair of Governors, County Councillor Kath Roberts-Jones for her lobbying on behalf of the school.

RESOLVED

- 1. To approve the submission of a joint Strategic Outline Case (SOC) and Outline Business Case (OBC), as set out in Appendix 1 to the report, to Welsh Government's 21st Century Schools Programme for capital investment to replace the existing Brynlllywarch Hall School building in Kerry, Newtown.**

2. **The note that the estimated cost of the overall project is £9,158,164.00 with Welsh Government funding 75% of the costs, and the Council funding 25% and that the current estimates include early stage risk contingency of 25%.**

5.	FINANCIAL FORECAST FOR THE YEAR ENDED 31ST MARCH 2021 (AS AT 30TH JUNE 2020)
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Cabinet considered a report assessing the potential impact the Covid 19 pandemic could have on the Council's revenue budget for 2020/21 and the measures that need to be considered to limit the financial impact on the Council over the immediate and longer term. The report highlighted that there were many unknowns and that it was difficult to accurately reflect the impact with any certainty. The situation had and continued to evolve, further support from Welsh Government and the delivery of further cost reductions during the year would improve the position.

The estimated impact of the pandemic on the council's revenue budget for the first quarter of the year was a deficit of £10.7m. The full year position was a projected deficit of £13.01 million (excluding Schools Delegated and Housing Revenue Account).

Corrective action must taken to reduce the level of deficit projected and ensure that the budget for the current year was managed effectively and limiting the impact on reserves. Services needed to be challenged as to how they can manage their budgets and deliver services within the budget provided including not reinstating some activity. All projects in the Capital programme needed to be reviewed and prioritised alongside the re-evaluation of services with some schemes being delayed or removed from the programme.

The report also set out a number of virements to reflect Welsh Government grants

- Local Authority Education Grant – Additional School Based Counselling - £47,672.
- Period Dignity Grant - £141,503.
- Local Authority Education Grant – Additional Learning Needs (ALN) - £278,526.
- Road Safety – the original 20/21 budget assumed a grant of £114,460 but the grant received was £64,468; a virement was required to reduce the grant funding in the 20/21 budget by £49,992.

RESOLVED

1. **That Cabinet note the budget position at the end of the first quarter and the projected full year position to the end of March 2021.**
2. **That the virements proposed in section 8 of the report are approved.**
3. **That the actions in section 10 of the report are agreed and implemented as a matter of urgency with proposals brought forward for consideration by the end of August.**

6.	CAPITAL FORECAST AS AT 30TH JUNE 2020
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Cabinet was advised that due to the current pandemic there would be further slippage on the delivery of some capital schemes. Finance would work with budget holders and project managers to ensure that schemes were reprofiled in a timely manner to reduce the borrowing requirement and debt servicing expenditure in the revenue budget. The Portfolio Holder for Young People and Culture welcomed the proposal to bring forward Leisure Services capital bids in readiness for the reopening of facilities.

The report also recommended a virement of £0.13 million to fund the purchase of four tipper vehicles to deliver the new Housing Grounds SLA contract.

RESOLVED

1. That the contents of the report are noted.
2. That the virement of £0.13 million to fund the purchase of four tipper vehicles to deliver the new Housing Grounds SLA contract.
3. That a review of the schemes included in the forward Capital Programme is undertaken to identify those which can be delayed or removed and to ensure that the schemes included remain a priority alongside the re-evaluation of services.

RECOMMENDED to Council that funding is released for the Leisure capital bids set out in Section 6 of the report.

7.	QUARTER 1 PERFORMANCE REPORT
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Cabinet considered the Performance report which set out the business critical activities undertaken during the pandemic.

The Covid-19 crisis has had a significant impact across the county and the focus during the first part of quarter 1 was on the immediate coordinated response to support the county during the lockdown period. Although this would continue for some time, preparations were now underway to manage the phased opening up of the county, and to plan ahead for the longer term challenges that lie ahead. This forward planning work would focus on preparing for the county's recovery, services and finances.

RESOLVED that Cabinet note the contents of the report whilst acknowledging the tremendous response of the organisation in these unprecedented and challenging times of a global pandemic.

8.	STRATEGIC RISK REGISTER REPORT QUARTER 1 2020/2021
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Cabinet considered the Strategic Risk Register report for Quarter 1. During quarter 1 2020/2021 no risks have been escalated to the Strategic Risk Register.

In order to effectively identify and manage risks relating specifically to the Covid-19 pandemic, a separate risk register was created to provide clarity and oversight for Gold and Silver Command. These risks were reviewed and monitored regularly and had been separated into response and recovery risks, using a new matrix developed specifically for assessing Covid-19 related risks.

Currently there were 64 risks recorded, 4 of the 64 risks are placed within the 'major' impact category 3 with a probability of likely and 1 almost certain, and another 1 placed within the 'catastrophic' impact category with a probability of possible. The register was monitored by Gold and Silver Command on a weekly basis.

RESOLVED that Cabinet notes the current Strategic Risk Register and is satisfied with progress against mitigating actions for quarter 1.

9. POST IMPROVEMENT AND ASSURANCE BOARD ARRANGEMENTS

Cabinet considered a revised framework to replace by the end of September 2020 the current Improvement and Assurance Boards to enable the Council to effectively manage its own improvement journey and provide assurance to Welsh Government. A Corporate Improvement Board, chaired by the Leader, would be established and there would be sub-groups covering Social Services, Education, Housing and Highways, Transport and Regeneration made up of the relevant Portfolio Holders and Senior Officers supported by independent experts. Cabinet welcomed the new arrangements and the progress made in the Council's improvement journey. The Leader expressed her appreciation for the advice and support of the independent Chair, Mr Jack Straw.

RESOLVED to endorse the post Improvement and Assurance Board arrangements as set out at appendix one to the report.

10. CHOICE POLICY FOR ADULT SOCIAL CARE

Cabinet considered the Choice and Payment of Additional Costs when Providing Care (Top-ups) Policy.

The purpose of this policy was to make it clear how people with eligible care needs could exercise choice over the care offered to them. It also covered when and how third-party contributions can be made for social care services, both in the person's home or in residential and nursing care.

RESOLVED that the draft policy be approved.

11. LOCAL SOURCING AND HOUSING DEVELOPMENT PROCUREMENT

Cabinet considered an update on the performance of local contractors in recent bidding processes for the Housing Development Programme. Cabinet wanted to see local companies bidding successfully for contracts and was disappointed that

the number submitting bids was low. The report outlined the steps being taken to help local companies compete for the Council's work.

County Councillor M R Harris (Chair)

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol

CYNGOR SIR POWYS COUNTY COUNCIL.**CABINET EXECUTIVE
15 September 2020**

REPORT AUTHOR: County Councillor Phyl Davies
Portfolio Holder for Property and Education

REPORT TITLE: MIM 21ST CENTURY SCHOOLS WELSH EDUCATION
PARTNERSHIP – STRATEGIC PARTNERING
AGREEMENT

REPORT FOR: Decision

1. PURPOSE

1.1 The purpose of this report is to explain the process and seek Cabinet approval to enter into a Strategic Partnering Agreement (SPA) with Welsh Education Partnership Co (WEPCo). Entering SPA will give Powys County Council the opportunity to deliver a 21st Century Schools Programme education and community facilities project via The Mutual Investment Model revenue funding stream.

1.2 To approve the appointment of the Chief Executive as the Programme SRO and 'Participant Representative' to sit on the Strategic Partnering Board.

1.3 To give delegated authority to Chief Executive in consultation with the monitoring officer, to agree the final terms of the SPA and make any necessary amendments to it, should these be required.

1.4 Annexes:

ANNEX 1: STRATEGIC PARTNERING AGREEMENT – REDACTED

ANNEX 2: STRATEGIC PARTNERING AGREEMENT SUMMARY

ANNEX 3: STRATEGIC PARTNERING BOARD SUMMARY

**ANNEX 4: APPROVAL PROCESS FOR NEW PROJECTS
SUMMARY**

2 BACKGROUND

- 2.1 Since 2016, Powys County Council's 21st Century Schools Programme has to date delivered 10 projects, with 1 project in construction and a further 8 either in design or in early development. All projects to date have been funded through capital funding through a combination of supported borrowing, prudential borrowing, and use of reserves.
- 2.2 In February 2017, Welsh Government formally launched the Mutual Investment Model "MIM" as a platform for delivery of the "Taking Wales Forward" agenda. The MIM has been designed to finance major capital projects due to a scarcity of capital funding.
- 2.3 With the establishment of the MIM 21st Century Schools Programme, local authorities will be able to access two funding streams to deliver qualifying and pipeline projects. One stream will remain as capital, whilst the MIM will be a revenue funding stream.
- 2.4 The MIM is intended to support additional investment in social and economic infrastructure projects and help to improve public services in Wales. Under the MIM, the private sector partners will build and maintain public assets, and in return the Council supported by funding from the Welsh Government will pay a fee to the private partner, which will cover the cost of construction, maintenance and financing the project. At the end of the contract the asset reverts to the Council.
- 2.5 The Welsh Government has been engaged in a competitive dialogue tender process working to the procurement of a private sector partner to work with it on the delivery of education and community facilities in Wales, under the MIM 21st Century Schools Programme. It will be the only means of delivering revenue funded Band B projects. The Welsh Government has selected and appointed a preferred bidder. The successful private sector partner and a subsidiary of the Development Bank of Wales (known as WGCo) will be required to form **WEPCo**, which will deliver infrastructure services to the Participants in Wales. If a Participant receives funding for a 21st Century Schools and Colleges Band B MIM Programme project, WEPCo has the exclusive right to develop proposals for the delivery of that project (Project Development Partnering Services) within the first 10 years of the SPA.
- 2.6 A MIM project would enable the Council to work with the WEPCo to deliver a qualifying scheme; the WEPCo contractor would lead on design and construction of a new-build education and community facility, whilst also being responsible for the maintenance and lifecycle of the building for a period of 25 years, when the maintenance responsibilities would revert to the Council.

2.7 Not all 21st Century Schools projects will qualify to become a MIM project. The projects **must**:

- be 100% new build Primary, Secondary or Further Education Institution project (special schools, PRU's, and very small primary schools are exempt from accessing MIM funding), and;
- have capital value of more than £15million (either as one facility or a group of facilities such as several primary schools to be delivered within a single Local Authority area under a single project agreement

2.8 To enable the Council to easily participate in the MIMS scheme, the Council must enter into a Strategic Partnering Agreement (“SPA”) in the manner set out in Annex 1 by 25th September 2020. The final form or wording for the SPA has not yet been concluded and minor amendments may be made. To enable the Council to approve entering the SPA without the need for a further meeting (bearing in mind the deadline to enter the SPA by 25th September 2020) it is recommended that delegated is given to the Chief Executive, in consultation with the Monitoring officer, to approve minor amendments to the SPA.

2.9 A more detailed summary of the SPA provided by Bevan Brittan is set out in Annex 2, but for ease of reference the SPA commits the Participants and WEPCo to work to the following nine (9) key principles:

- 2.9.1 to develop close working relationships between WEPCo and the Participants at all levels;
- 2.9.2 to focus on achieving the best value for money operational performance within agreed timescales;
- 2.9.3 to set in place business and cultural processes to enable the Participants and WEPCo to establish and agree challenging time and performance objectives and to meet or better them;
- 2.9.4 to recognise each other's needs, constraints, limitations, capabilities, roles and responsibilities to achieve mutually beneficial outcomes;
- 2.9.5 to identify by regular monitoring, weaknesses, and strengths in the relationship between and amongst the Participants and WEPCo and to work together to overcome the weaknesses and to build on the strengths;
- 2.9.6 to commit to the early recognition and resolution of differences, conflicts and disputes between and amongst the Participants and WEPCo in a 'no surprises' environment;

- 2.9.7 to appoint within each of the Participants and WEPCo co-ordinators at senior level who will support, defend and promote the long term strategic partnership between them and its principles of operation;
- 2.9.8 to develop openness and trust in a transparent information and data sharing environment; and
- 2.9.9 in accordance with the Equality Requirements to positively promote equal opportunities and the Ethical Employment Code by combating discrimination on the grounds of race, ethnicity, religion, nationality, gender, disability, age or sexuality and promoting good relations between all sections of the community in 'everything we do' including:
- a) Delivering high quality Education Sector Services and (where relevant) Community Services for end users; and
 - b) Working with the local community and partners in the public, private or voluntary sectors.
- 2.10 The Strategic Partnering Board (**SPB**) is the guardian vehicle of these commitments. The SPB will act as the primary mechanism for managing WEPCo's performance. The SPB will be the central forum in which the Participants can work together with WEPCo, Welsh Government and Stakeholder Representatives to ensure that the key principles of the SPA are met. Participant representation will be required on the SPB.
- 2.11 The SPB's role will be to approve the Strategic Delivery Plan (**SDP**); ensure any new project proposals are consistent with the SDP; monitor WEPCo's performance against agreed Key Performance Indicators; approve any extension to the SPA term; and approve any proposed disposal of interest in share capital resulting in a loss of control by WEPCo (or subsidiary).
- 2.12 A more detailed description of the role of the SPB provided by Bevan Brittan is set out in Annex 3.
- 2.13 By entering the Strategic Partnering Agreement with WEPCo, Powys County Council is securing (a) easy access to the MIMS scheme; (b) membership on the Strategic Partnering Board. This will allow the Council to access revenue funding for Band B, or any education and community infrastructure projects, from Welsh Government in the future through the Mutual Investment Model (MIM) to access the funding and WEPCo for delivery. It does not commit the Council to using the MIM.
- 2.14 Any future MIM project that will be delivered via WEPCo would follow the HM Treasury 5 Business Case Model and would require business case approval from cabinet. Options and benefits

appraisals of funding options would be included within the project Strategic Outline Business Case.

- 2.15 The successful private sector partner and a subsidiary of the Development Bank of Wales (known as WGCo) will be required to form WEPCo, which will deliver infrastructure services to the Participants (Local Authorities) in Wales.
- 2.16 The Participants to the arrangements will be Local Authorities and Further Education Institutions. The Participants and WEPCo will enter into a Strategic Partnering Agreement. Under the Strategic Partnering Agreement, WEPCo will be required to provide partnering services to the Participants, including (i) project development and delivery; and (ii) supply chain assembly and management. This may lead to the delivery of revenue supported Band B projects pursuant to a separate Project Agreement or, in due course, capital funded projects could be delivered through this contract structure.
- 2.17 The MIM is based on traditional PPP structures but with the following core principles embedded:
- 2.17.1 an emphasis on wider community benefits;
 - 2.17.2 enhanced stakeholder involvement;
 - 2.17.3 public sector equity investment;
 - 2.17.4 no soft services; and
 - 2.17.5 effective and efficient contract management by the public sector.
- 2.18 The Welsh Government has been procuring a private sector partner to work with it on the delivery of education and community facilities in Wales, under the MIM 21st Century Schools Programme, and a preferred bidder has been appointed. It will be the only means of delivering revenue funded Band B projects. The successful private sector partner and a subsidiary of the Development Bank of Wales (known as WGCo) will be required to form **WEPCo**, which will deliver infrastructure services to the Participants in Wales.

3 ALTERNATIVE OPTIONS CONSIDERED

- 3.1 The Council understands that if it wishes to access revenue funding for Band B projects from the Welsh Government then it will need to use the Mutual Investment Model to access the funding and WEPCo for delivery. There are no alternative delivery options for such funding.

4 ADVICE

- 4.1 In April 2020, the Leader of the Council approved the new Transforming Education Strategy. The Strategy is based on four Strategic Aims:

- Strategic Aim 1: We will improve learner entitlement and experience
- Strategic Aim 2: We will improve learner entitlement and experience for post-16 learners
- Strategic Aim 3: We will improve access to Welsh-medium provision across all key stages
- Strategic Aim 4: We will improve the provision for learners with SEN/ALN

4.2 To deliver the new Strategy, there is a requirement for a major capital investment programme that will ensure that schools in Powys have inspiring, environmentally sustainable buildings that can provide opportunities for wider community activity. This will also include developing a reliable, high quality digital infrastructure.

4.3 To deliver this ambitious Strategy requires future capital investment of approximately £350m in addition to the £202m Band A and B investment which will completely transform the county's school's estate.

4.4 Entering the Strategic Partnering Agreement (SPA) secures Powys County Council membership on the Strategic Partnering Board, the board that will oversee the WEPCo. This does not automatically mean that the council 'signs up' to the Mutual Investment Model at this stage. If a qualifying pathfinder project is identified in the future, a Strategic Outline Business Case, detailing the option of progressing with a MIM project, will be developed, and the final decision will be made by the cabinet.

4.5 It is recommended that Cabinet approves this report and enters the Strategic Partnering Agreement to ensure that Powys County Council has the option of funding the ambitious 21st Century Schools Programme through the Mutual Investment Model in the future.

5. **Resource Implications**

5.1 Financial Capital

5.1.1 The 21st Century Schools Programme is currently financed through a combination of supported borrowing, prudential borrowing, and use of reserves. The intervention rate for Welsh Government funding for Band A is 50% but has increased to 65% for Band B and 75% for special schools' projects.

5.1.2 The Council's contribution to the Band A schemes is £30m to date, the borrowing element of this amounted to £27.4m. This has cost the council over £1m per year to cover borrowing costs.

- 5.1.3 The Council's commitments to future Band A and Band B schemes is £45m, all of which will be borrowing. It is estimated that the cost the council will £2.6m per year to cover borrowing costs once all schemes are completed. There is uncertainty around future interest rates, so a prudent figure is presented.
- 5.1.4 The Welsh Government intervention rate for the MIM is 81%.
- 5.1.5 The MIM scheme will be a revenue commitment for the council and would include the construction and ongoing running costs of any new school built under this scheme.
- 5.1.6 Where new schemes are eligible for MIM funding a full costing model would be provided in the business case together with the Welsh government capital grant funding route used in Bands A and B. The Council can then decide on the preferred funding option on a scheme by scheme basis.

5.2 Financial Revenue

- 5.2.1 The schools running and maintenance costs are currently funded by individual delegated budgets allocated via the Schools Funding Formula which forms part of the Council's revenue budget.
- 5.2.2 If used, the MIM will create revenue maintenance and lifecycle financial liabilities. It is not currently clear from which budget these costs will be funded. This element needs to be considered as the funding model is explored further. The School Funding regulations dictate the way in which funding is delegated to schools and changes to the Schools Funding Formula will need to be considered to accommodate the MIM liabilities. Other Authorities are already using this model and we discuss how they are accommodating these costs.
- 5.2.3 Each Project would be subject to an individual options and benefits appraisal to decide the appropriate funding route. The council is currently undertaking financial modelling work in comparing the revenue and capital funding streams.
- 5.2.4 The head of Finance (Section 151 Officer) supports the recommendation. Entering the Strategic Partnering Agreement (SPA) secures Powys County Council membership on the Strategic Partnering Board, the board that will oversees the WEPCo. Entering the SPA grants the council a seat on the Strategic Partnering Board; this does not automatically mean that the council 'signs up' to the Mutual Investment Model at this stage. Each Project would be subject to an individual options and benefits appraisal to decide the appropriate funding route, this includes a full assessment of the revenue impact, how that is funded and the implications on the schools delegated budget and schools funding formula

5.3 Procurement

- 5.3.1 If the Council were to choose not to sign the SPA or the DoA and then wanted in the future to access Partnering Services or Project Services from WEPCo, it will not be able to do so in a procurement safe manner. Whilst there is a mechanism within the SPA that will allow for those Participants (named in the OJEU) to sign up after 25th September 2020 by way of a deed of adherence (**DoA**), this will (a) require all existing parties to re-execute the SPA. This will require all Participants to take further decisions to re-enter the SPA, creating delays in the delivery ; and (b) create a procurement risk in entering into the DoA, based on time elapsed argument, if the DoA is not entered into within 6 months
- 5.3.2 Similarly, with regards to 21st Century Schools and Colleges Band B funding, if a Participant were to choose not to sign the SPA or the DoA but then wanted to utilise WEPCo to deliver a Band B funded project (whether capital or revenue) in the future, it will also not be able to do so in a procurement safe manner.
- 5.3.3 Should for example, a Participant secure MIM Band B funding downstream from the Welsh Government for a project not currently identified and it was required to use WEPCo, it would not be able to do so in a procurement safe manner if it had not signed the SPA or the DoA. WEPCo has the exclusive right to develop proposals for the delivery of a 21st Century Schools and Colleges Band B MIM Programme project (Project Development Partnering Services) within the first 10 years of the SPA.
- 5.3.4 It is therefore recommended that Cabinet approve entering into the SPA as set out this report to ensure that the SPA can be completed in the Autumn as planned and that the Council is able to utilize the SPA from its go-live date.

5.4 Corporate Property

- 5.4.1 There are no resource implications in entering the Strategic Partnering Agreement.
- 5.4.2 However, if a pathfinder project qualifies for MIM funding and WEPCo delivery in the future, the maintenance and lifecycle costs of the new building will be the responsibility of the WEPCo contractor for the duration of the contract, which would be 25 years. Corporate Property as corporate landlord would engage with the school and WEPCo contractor in maintaining the new facility and a full analysis of implications and benefits would be done on a case by case basis and highlighted in the project business case.

6. Legal implications

6.1. Approval to enter into the Strategic Partnering Agreement (SPA) is an executive function requiring a decision of the Cabinet.

6.2 To enter and participate in the SPA referred to in this report, the Council will be relying upon several statutory powers:

6.2.1 the “well-being” powers contained in section 2 Local Government Act 2000;

6.2.2 powers contained in the Education Acts 1996 and 2002;

6.2.3 the “incidental” provisions of section 111 Local Government Act 1972.

6.3 The well-being powers contained in section 2 Local Government Act 2000 permit the Council to do anything which it considers is likely to achieve any one or more of the following objects—

(a) the promotion or improvement of the economic well-being of their area;

(b) the promotion or improvement of the social well-being of their area, and

(c) the promotion or improvement of the environmental well-being of their area

6.4 The incidental provisions of section 111 Local Government Act 1972 permit the Council to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.

6.5 The programme will need to operate in line with the Well-being of Future Generations (Wales) Act 2015. The Act sets a framework of seven goals to develop and protect the social, economic, development and cultural well-being of Wales and five ways of working to achieve sustainable development.

6.6 Entering into the SPA does not bind the Council in any way. However, the Council will be required to appoint a representative to act on its behalf in relation to the SPA. The identity of the representative may change at any time following written notice to WEPCo and all other Participants. Each representative may also at any time, by written notice to WEPCo, authorise others to exercise the functions and powers of the Council.

6.7 The power to appoint an individual to the Strategic Partnering Board (SPB) pursuant to Schedule 2 Local Authorities (Executive Arrangements) (Functions and Responsibilities) (Wales) Regulations 2007 is reserved to the Cabinet. Cabinet is asked to recommend the

Chief Executive for appointment as 'Participant Representative' to sit on the Strategic Partnering Board (SPB).

6.8 Whilst a preferred bidder has now been appointed, it is recognised that Cabinet is being asked to agree to enter into the SPA before the document is in its final form. It is recommended that delegated authority is given to the Council's [insert relevant] Director, in consultation with the monitoring officer, to agree the final terms of the SPA and make any necessary minor amendments to it, should these be required.

6.9 At a future date, if a pathfinder project qualifies for MIM funding and WEPCo delivery, there will be implications on HOWPS contract, which will need to be considered by cabinet at the appropriate time.

6.10 The Head of Legal and Democratic Services (Monitoring Officer) has commented as follows: "I note the legal comment and have nothing to add to the report".

7. Data protection

7.1 Data Protection Officer comment: "This proposal does not involve the processing of personal data at this stage."

8. Comment from local member(s)

8.1 N/A

9. Integrated Impact Assessment

9.1 Impact assessment is not required at this stage.

10. Recommendation

- Cabinet approves the Strategic Partnering Agreement with Welsh Education Partnership Co (WEPCo) to facilitate the delivery of education and community facilities.
- Cabinet approves the appointment of the Chief executive as Programme SRO as 'Participant Representative' to sit on the Strategic Partnering Board.
- To give delegated authority is given to Chief Executive in consultation with the monitoring officer, to agree the final terms of the SPA and make any necessary minor amendments to it, should these be required.

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Head of Transformation and Communication/Programme Lead: Emma Palmer
Corporate Director: Ness Young

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol



Llywodraeth Cymru
Welsh Government

Template MIM Education Project Agreement (WEP Strategic Partnering Delivery Model)

ITPDSB Version 1.4

Template MIM Education Project Agreement, WEP Strategic Partnering Delivery Model Version

Important Notice¹

1. This is the Template Project Agreement for education sector Mutual Investment Model ("**MIM**") projects (the "**Template MIM Education PA**") as referred to in and set out in Section 1 of Schedule 7 (*Template Project Agreement*) of the WEP Strategic Partnering Agreement ("**SPA**"). Under the terms of the SPA, the parties are obliged to use this Template MIM Education PA, subject to the amendments described below. It is based on the MIM Standard Form Project Agreement (Accommodation Version), version 1, published in March 2017 (the "**Accommodation PA**") which has been amended to include:
 - (a) sector specific drafting to make the document suitable for delivering accommodation in the education sector;
 - (b) footnotes to provide information and recommendations to assist local authorities and further education institutions (as contracting counterparties) with project specific amendments;
 - (c) the Welsh Government's preferred procurement route for its "Band B" MIM education sector procurements, using a strategic partnering framework;
 - (d) inclusion of a sector specific standard form of Service Level Specification and Authority's Construction Requirements; and
 - (e) other updates, to reflect developments in legislation and good industry practice.

Please note, this Template MIM Education PA (together with footnotes) supersedes guidance contained in the MIM Standard Form Project Agreements User Guide, dated March 2017, in respect of education sector MIM projects.
2. This Template MIM Education PA assumes that:
 - (a) in respect of further education college projects, the relevant "Further Education Corporation" or "Designated Institution" shall be the "Authority" (and a Participant under the SPA);
 - (b) in respect of schools projects, the relevant local authority shall be the "Authority" (and a Participant under the SPA).
3. The Template MIM Education PA has been drafted on the basis of a maintained community school project with some alternative drafting and/or drafting notes provided where it is to be used on a further education college project. Amendments may be required where the Template MIM Education PA is to be used for different educational facilities such as a voluntary aided school. The Template MIM Education PA has also been drafted to facilitate

¹ It is anticipated amendments to reflect the UK's withdrawal from the European Union will require to be made to the Template MIM Education PA by Welsh Government.

project specific tailoring for batched facility projects and post completion works (i.e. demolition of an existing facility and external works/pitches post completion). On the basis that the draft assumes a standard schools approach, the "ICT Handover" provisions may not be appropriate for all types of further education college projects and should be specifically considered by further education institutions and their advisers. Any alternative phasing solutions will also require project specific tailoring. The standard form of Authority's Construction Requirements, Service Level Specification, Payment Mechanism, Outline Commissioning Programme, Joint Operating Protocol and Equipment Schedule have been developed primarily in the context of a schools project, albeit generic terminology and footnotes have been used for ease of tailoring. It is expected that a significant amount of the drafting will be equally applicable to further education college projects and Welsh Government expects a standardised approach to be adopted unless there is project specific justification for departures, for example to accommodate college opening hours in the definition of Core Sessions.

4. The Authority's Construction Requirements are divided into two parts. The first part is the Generic Design Requirements which refers to requirements applicable to all Facilities and requirements that are applicable only to school projects or further education college projects. Project specific derogations or supplements to the Generic Design Requirements are to be included within the Site-Specific Brief and this document is to be prepared on a project by project basis. Cross references to specific sections of the Generic Design Requirements will need to be checked prior to Financial Close and updated to reflect where additional or alternative references ought to be made to the Site-Specific Brief.
5. The Authority, as a 'Participant' under the SPA, will issue the project specific version of this agreement (including appropriate technical schedules) with the 'New Project Request' that it issues under the SPA.
6. Whilst drafting and guidance has been included in the footnotes of this Template MIM Education PA, Authorities should note:
 - (a) Use of the Template MIM Education PA is not a substitute for project specific advice and Authorities must take appropriate legal, financial and technical advice when using them. Authorities should also obtain professional insurance advice on all insurance related provisions in the context of the insurance market at that time.
 - (b) The footnotes in the Template MIM Education PA do not represent an exhaustive list of project specific matters that need to be considered by each Authority and its advisers, who must analyse and review them in detail to ensure that they are tailored to the requirements of the specific project and that their terms (and their impact) are clearly understood by the Authority.
 - (c) The Template MIM Education PA should be used in conjunction with any further guidance issued/adopted by the Welsh Government from time to time. It should also be read in conjunction with the accompanying SPA and Template Project Co Shareholders' Agreement, referred to therein.
 - (d) All changes to the Template MIM Education PA require the prior approval of the Welsh Government, acting through the relevant officials. For the avoidance of doubt, this includes any amendments to "technical" schedules, such as the Service Level Specification, Authority's Construction Requirements and Payment Mechanism and relates to the process for the procurement of "WEPCo", as well as the new project approvals process under the SPA.

- (e) It should be noted derogations to the Template MIM Education PA are strongly discouraged and it is expected Welsh Government approval will be strictly limited to changes that represent value for money and are required for project specific reasons, or to reflect a change to Welsh Government guidance or demonstrable changing market circumstances. Further, amendments which may adversely affect an "off-balance sheet" statistical classification by ONS/EUROSTAT will be rejected by Welsh Government. Project teams are therefore advised to read EPEC/EUROSTAT's Guide before contacting Welsh Government for approval. For ease, attention has been drawn to certain key aspects of EPEC/EUROSTAT's Guide within footnotes but it is not intended to be a substitute for reading EPEC/EUROSTAT's Guide in its entirety.
 - (f) Authorities must propose a detailed timetable indicating when requests for derogations to the Template MIM Education PA will be presented to the Welsh Government, and such programme shall then be updated in discussion with the Welsh Government as required. An Authority/the project team must give Welsh Government no less than one (1) month notice of when it intends to submit a request for derogations and the dates should generally tie in with Commercial Approval Point ("**CAP**") dates. The Welsh Government will endeavour to respond to a request for approval to derogations within two (2) weeks of receipt. In requesting derogations the Authority must provide its amended version of the Template MIM Education PA (including the Schedules) and provide explanations for the proposed amendments by way of accompanying commentary. Authorities should liaise with Welsh Government regarding the level of detail required. The Welsh Government will do a comparison of the document submitted against its master version of the Template MIM Education PA. It will then decide whether to approve each derogation, or whether to decline to do so, and in each case will inform the Authority and the relevant project team of its decision in writing.
 - (g) As noted above, this Template MIM Education PA contains optional/required drafting to deal with matters that are specific to the education sector and in some instances specific to schools (only) or colleges (only) and particular circumstances that are commonly encountered. Use of such drafting must nevertheless be reported to the Welsh Government and approval obtained.
 - (h) All footnotes (and optional drafting) should be used/implemented/deleted as appropriate before the document is issued by the relevant Authority for a specific project. For ease of future contract management, the Welsh Government does not expect to see the Template MIM Education PA amended to any individual law firm's house style. Clause and paragraph numbering should be preserved through the use of lettered additions and "not used" deletions. Automatic numbering and hyperlinked cross references should be maintained.
7. Under the terms of the SPA, the parties are obliged to use this Template MIM Education PA, subject to the amendments described above on all revenue (MIM) funded 21st Century Schools and Colleges Band B projects being procured through the SPA.

AGREEMENT

between

[AUTHORITY]

and

[PROJECT CO]

[Project]

[Date]

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THIS AGREEMENT is made the _____ day of _____

BETWEEN:

- (1) [♦] (the "**Authority**"); and
- (2) [♦] (registered under number [♦]) whose registered office is [♦] ("**Project Co**").

RECITALS:

- (A) The Authority wishes to procure the design, build, finance and maintenance of [♦]² (the "**Project**");
- (B) The Authority and WEPCo are parties to a strategic partnering agreement dated [♦], which establishes a long-term strategic partnering relationship within Wales between the Authority and inter alios, WEPCo (the "**Strategic Partnering Agreement** or **SPA**");
- (C) Pursuant to the Strategic Partnering Agreement, the Authority issued a new project request in respect of the Project to WEPCo, in response to which WEPCo prepared staged development proposals, as required by the new project approval process detailed therein;
- (D) Following approval by the Authority of WEPCo's stage 2 submission for the Project, the Authority has appointed the nominated Project Co to design, build, finance and provide certain maintenance services in connection with [♦]³;
- (E) This Agreement is entered into pursuant to a project applying principles similar to the principles of the private finance initiative and is excluded from the Housing Grants, Construction and Regeneration Act 1996 by virtue of the Construction Contracts (England and Wales) Exclusion Order 1998 (SI 1998/646); and
- (F) The Project has been approved by the Minister for Finance and Trefnydd and the Minister for Education, on behalf of the Welsh Ministers.

NOW IT IS HEREBY AGREED as follows:

PART 1: GENERAL

1. DEFINITIONS AND INTERPRETATION

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

2. EXECUTION AND DELIVERY OF DOCUMENTS

On or prior to execution of this Agreement:

- 2.1 Project Co shall deliver to the Authority the documents referred to in Section 1 (*Documents To Be Delivered By Project Co*) of Schedule 2 (*Completion Documents*)

² Insert description of project i.e. name and location of School(s)/ College(s).

³ Insert name of Facilities.

(unless the requirement to deliver any such document is waived by the Authority by written notice to Project Co); and

- 2.2 the Authority shall deliver to Project Co the documents referred to in Section 2 (*Documents To Be Delivered By The Authority*) of Schedule 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by Project Co by written notice to the Authority).

3. COMMENCEMENT AND DURATION

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

4. PROJECT DOCUMENTS

Ancillary Documents

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

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

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

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

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

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

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

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

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

Changes to Funding Agreements and Refinancing

- 4.2 Subject to Clauses 4.3 and 4.4 (*Changes to Funding Agreements and Refinancing*), Project Co shall be free, at any time, to enter into, terminate, amend, waive its rights and generally deal with its Funding Agreements on such terms and conditions as it sees fit without the prior written consent of the Authority provided that (at the time such action is contemplated and effected) the same will not materially and adversely affect the ability of Project Co to perform its obligations under the Project Documents or this Agreement.
- 4.3 No amendment, waiver or exercise of a right under any Funding Agreement or Ancillary Document shall have the effect of increasing the Authority's liabilities on early termination of this Agreement unless:
- 4.3.1 Project Co has obtained the prior written consent of the Authority to such increased liability for the purposes of this Clause 4.3 (*Changes to Funding Agreements and Refinancing*)⁴; or
- 4.3.2 it is a Permitted Borrowing.
- 4.4 Any amendment or variation of any Funding Agreements which constitutes a Refinancing shall be carried out in accordance with the provisions of Schedule 23 (*Refinancing*).
- 4.5 Without prejudice to Clause 4.2 (*Changes to Funding Agreements and Refinancing*), Project Co shall liaise with the Authority, and shall use all reasonable endeavours to provide the Authority with a copy of the relevant agreement in settled draft form, not less than ten (10) Business Days before it enters into any Funding Agreement (other than the Initial Funding Agreements).

Delivery

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

⁴ The Authority's consent should not be given unless the Additional Permitted Borrowing Limit has been reached.

Funding Default

- 4.7 Project Co shall promptly upon the occurrence of a Funding Default notify the Authority of such Funding Default.⁵
- 4.8 The Authority may, in circumstances referred to in Clause 4.7 (*Funding Default*) above (regardless of whether the Senior Funders have exercised any enforcement or similar rights under the Senior Funding Agreements), require Project Co to provide an Interim Project Report⁶ and to attend, and use all reasonable endeavours to ensure that the Senior Funders attend, such meetings as the Authority may convene to discuss such Interim Project Report and the circumstances giving rise to it.
- 4.9 Project Co shall promptly upon a failure by the Senior Funders to advance amounts due under the Senior Funding Agreements (or in circumstances that might reasonably be expected to lead to such a failure) notify the Authority of such failure (or expected failure).
- 4.10 The Authority may, in the circumstances referred to in Clause 4.9 (*Funding Default*) above, require Project Co to attend, and use all reasonable endeavours to ensure that the Senior Funders attend, such meetings as the Authority may convene to discuss the circumstances.

5. THE PROJECT OPERATIONS

Scope

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

General Standards

- 5.2 Project Co shall at its own cost be solely responsible for procuring that the Project Operations are at all times performed:
- 5.2.1 in compliance with all Law and Consents (including without limitation the giving of notices and the obtaining of any such Consents) and so as not to prejudice the renewal of any such Consents⁷;

⁵ The term "**Funding Default**" should be defined by reference to the borrower defaults under the Senior Funding Agreement(s) (and applies whether or not the Senior Funders choose to accelerate their loan). Please note this obligation is additional to the obligation of the Agent under paragraph 9.4 of Schedule 4 (*Funders' Direct Agreement*).

⁶ The Interim Project Report ought to include any information Project Co is required to provide to the Senior Funders under the Senior Funding Agreements in the circumstances described in Clauses 4.7 and 4.8. A template form is included at Schedule 33.

⁷ Refer to guidance in footnote at Clause 11.3.

- 5.2.2 in a manner that is not likely to be injurious to health or to cause damage to property; and
- 5.2.3 in a manner consistent with the Authority discharging its statutory duties and other functions undertaken by it as the same may be notified to Project Co from time to time.

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

Authority's Undertaking

- 5.3 The Authority undertakes to Project Co that it shall:
 - 5.3.1 subject to the provisions of this Agreement, comply with all Laws and Consents applicable to it which relate to the Project Operations;
 - 5.3.2 not wilfully impede Project Co in the performance of its obligations under this Agreement (having regard always to the interactive nature of the activities of the Authority and/or Authority Parties and of Project Co and to the Authority's use of the Facilities to provide the relevant Authority Services and any other operations or activities carried out by the Authority and/or Authority Parties on or at the Site[s] for the purposes contemplated by this Agreement and any other of the Authority's statutory functions);
 - 5.3.3 inform Project Co as soon as reasonably practicable if at any time it becomes unable to meet any of its financial obligations and in such case inform, and keep Project Co informed, of any course of action to remedy the situation recommended or required by the Welsh Government, the Authority or other competent authority; and
 - 5.3.4 to the extent permitted by Law, supply to Project Co within sixty (60) Business Days of their publication, a copy of the Authority's Annual Reports and Accounts,

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

Notification of Terms and Examination Periods

- 5.4 The Terms for the [first] Academic Year for each Facility are [♦].

- 5.5 No later than [31st December] in each Contract Year the Authority must notify Project Co of the dates for Terms (including any half-term holidays) in the period [1st September] to [31st August] following that notice.
- 5.6 Without prejudice to Clause 5.7 (*Notification of Terms and Examination Periods*), in the event the Authority wishes either:
- 5.6.1 to have an aggregate yearly duration in excess of the number of Core Days detailed in the Academic Year; or
- 5.6.2 to make a change to Core Sessions,
- it must propose a change to Appendix 1 to Schedule 14 (*Payment Mechanism*) in accordance with Section 3 (*Medium Value Changes*) of Schedule 16 (*Change Protocol*).
- 5.7 The Authority is entitled, without proposing a change to Appendix 1 to Schedule 14 (*Payment Mechanism*) in accordance with Section 3 (*Medium Value Changes*) Schedule 16 (*Change Protocol*), to make de minimis changes to the Core Sessions, provided the total number of hours falling within Core Sessions remains the same and Project Co cannot demonstrate to the Authority (acting reasonably) that such change will have more than a de minimis impact on the cost of and/or delivery of the Services.
- 5.8 The Examination Periods for the current [and subsequent]⁸ Academic Year[s] following the date of this Agreement have been notified by the Authority to Project Co.
- 5.9 Where such dates have not already been notified pursuant to Clause 5.8 (*Notification of Terms and Examination Periods*), then no later than [31 August] in each Academic Year prior to the [final] Actual Completion Date for the Facilities, the Authority shall notify Project Co of the dates of the Examination Periods for the next Academic Year.

[Additional Periods]

- 5.10 The Services shall be provided at [each of the]/[the] Facilities by Project Co for Additional Periods pursuant to this Clause 5.10 to Clause 5.13 (*Additional Periods*).
- 5.11 The Authority shall be entitled to use [each of the]/[the] Facilities (or any part thereof) for the amount of Additional Periods as specified in accordance with Appendix 1 to Schedule 14 (*Payment Mechanism*).

⁸ Depending on when in the Academic Year the date of financial close falls.

- 5.12 The Authority shall notify Project Co:
- 5.12.1 within ten (10) Business Days prior to the last day of each Academic Year of the timings of the proposed Additional Periods for the following Academic Year; and
- 5.12.2 (without prejudice to Clause 5.10) in relation to Additional Periods not notified to Project Co pursuant to Clause 5.12.1 (*Additional Periods*) as soon as is reasonably practicable and in any event not less than forty-eight (48) hours in advance of each proposed Additional Period,
- including details of the intended use, the dates and times of such use, the Areas of [each of the]/[the] Facilities required.
- 5.13 The obligation of Project Co to provide Services at [each of the]/[the] Facilities in accordance with Clause 5.10 (*Additional Periods*) shall be satisfied if, and only if, the Areas of the [relevant] Facility identified by the Authority in accordance with Clause 5.12 (*Additional Periods*) are Available and the other requirements of the Service Level Specification relevant to those areas are satisfied throughout the Additional Period concerned.⁹

Co-operation

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

Use other than During Core Sessions [and Additional Periods]

- 5.15 At all times outside of the Core Sessions [and Additional Periods] an [Authority]/ [School Entity] shall, subject to access in order to perform the Services always in accordance with agreed Access to Work Permits, be for the exclusive use of the relevant [Authority]/ [School Entity] and its invitees and Project Co will not be entitled to make a charge for any such use.

6. GENERAL OBLIGATIONS AND RESPONSIBILITIES OF PROJECT CO

Other Business

- 6.1 Project Co shall not engage in any business or activity other than the business or activities related to, and conducted for, the purpose of the Project Operations.¹⁰

⁹ Approach to Additional Hours and Core Days to be considered on college projects, in light of the type of college and its use.

¹⁰ The Template MIM Education PA does not envisage any third party revenue generation activities will form part of the Project. However, some MIM projects may charge for services or activities that are ancillary to the primary use of the asset (e.g. renting school/ college facilities to third parties outside of Core Sessions). Authorities should note, under Chapter 2 of the

Project Co Parties

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

Safety

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

7. AUTHORITY'S DATA

No Liability

- 7.1 [Subject to Clause 53 (*Warranties*),]¹¹ the Authority shall not be liable to Project Co for and Project Co shall not seek to recover from the Authority (or from any Authority Party) any damages, losses, costs, liabilities or expenses which may arise (whether in contract, tort or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, Project Co, the Independent Tester or any Project Co Party.

No Warranty

- 7.2 [Subject to Clause 53 (*Warranties*),] the Authority gives no warranty or undertaking of whatever nature in respect of the Disclosed Data and, specifically (but without limitation), the Authority does not warrant that the Disclosed Data represents all of the information in its possession or power (either during the conduct of the tender process for the Project or at the time of execution of this Agreement) relevant or material to or in connection with the Project or the obligations of Project Co under this Agreement or under any of the Project Documents. In addition, without prejudice to the application of [Clause 53 (*Warranties*),] Clause 30.11

EPEC/EUROSTAT Guide, EUROSTAT will not classify a project as off balance sheet if, at Financial Close, the revenues that the Authority (and/or government more widely) is forecast to receive from users of the asset over the life of the contract will exceed 50% of the total value of payments that the Authority is forecast to make to Project Co over the life of the contract. Revenues and forecast payments should be compared on a net present value basis at Financial Close. The amount of revenues forecast should be those specifically related to the MIM asset. Comprehensive details of revenue generation activities related to the MIM asset must be included in the Authority's outline business case and approved by Welsh Government. Authorities must also seek approval from Welsh Government to any anticipated change to such forecast revenues, to allow ongoing review of statistical treatment. Consideration will also be required in connection with defining the Authority Services to include such activities. Where Project Co undertakes third party revenue schemes, this Clause (and the Agreement generally) will need to be amended, as appropriate. However, as noted above, the amount of third party revenues that the Authority is forecast to receive over the life of the contract (whether through itself charging for the use of the asset or through sharing of revenues Project Co generates) will influence statistical treatment so reference must be made to the thresholds set out at section 5.5 of Chapter 3 the EPEC/EUROSTAT Guide.

¹¹ Any warranties to be given by the Authority must be justified on a project specific basis and should be set out in Clause 53. The drafting in square brackets should be deleted where no relevant warranties are to be provided by the Authority.

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

Project Co Investigation

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

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

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

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

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

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

Fraudulent Statements

7.4 Nothing in this Clause 7 (*Authority's data*) shall exclude any liability which the Authority or any of its agents or employees would otherwise have to Project Co in respect of any statements made fraudulently prior to the date of this Agreement.

8. REPRESENTATIVES

Representatives of the Authority

- 8.1 The Authority's Representative shall be [♦] or such other person appointed pursuant to Clause 8.3 (*Representatives of the Authority*). The Authority's Representative shall exercise the functions and powers of the Authority in relation to the Project Operations which are identified in this Agreement as functions or powers to be carried out by the Authority's Representative. The Authority's Representative shall also exercise such other functions and powers of the Authority under this Agreement as may be notified to Project Co from time to time.
- 8.2 The Authority's Representative shall be entitled at any time, by notice to Project Co, to authorise any other person to exercise the functions and powers of the Authority delegated to him pursuant to this Clause 8 (*Representatives*), either generally or specifically. Any act of any such person shall, for the purposes of this Agreement, constitute an act of the Authority's Representative and all references to the "**Authority's Representative**" in this Agreement (apart from this Clause 8 (*Representatives*)) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.
- 8.3 The Authority may by notice to Project Co change the Authority's Representative. The Authority shall (as far as practicable) consult with Project Co prior to the appointment of any replacement for the Authority's Representative, taking account of the need for liaison and continuity in respect of the Project. Such change shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to Project Co in the execution of its obligations under this Agreement).
- 8.4 During any period when no Authority's Representative has been appointed (or when the Authority's Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement) the Authority shall carry out the functions which would otherwise be performed by the Authority's Representative.
- 8.5 No act or omission of the Authority, the Authority's Representative or any officer, employee or other person engaged by the Authority shall, except as otherwise expressly provided in this Agreement:
- 8.5.1 in any way relieve or absolve Project Co from, modify, or act as a waiver or personal bar of, any liability, responsibility, obligation or duty under this Agreement; or
- 8.5.2 in the absence of an express order or authorisation under Schedule 16 (*Change Protocol*), constitute or authorise a Change.
- 8.6 Except as previously notified in writing before such act by the Authority to Project Co, Project Co and Project Co's Representative shall be entitled to treat any act of the Authority's Representative which is authorised by this Agreement as being expressly authorised by the Authority and Project Co and Project Co's

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

Representative of Project Co

- 8.7 Project Co's Representative shall be [♦] or such other person appointed pursuant to Clause 8.8 (*Representative of Project Co*). Project Co's Representative shall have full authority to act on behalf of Project Co for all purposes of this Agreement. Except as previously notified in writing before such act by Project Co to the Authority, the Authority and the Authority's Representative shall be entitled to treat any act of Project Co's Representative in connection with this Agreement as being expressly authorised by Project Co and the Authority and the Authority's Representative shall not be required to determine whether any express authority has in fact been given.
- 8.8 Project Co may by reasonable notice to the Authority change Project Co's Representative. Where Project Co wishes to do so it shall by written notice to the Authority propose a substitute for approval, taking account of the need for liaison and continuity in respect of the Project. Such appointment shall be subject to the approval of the Authority (not to be unreasonably withheld or delayed).
- 8.9 Project Co's Key Personnel are identified in Schedule 3 (*Key Personnel*). Project Co shall, as far as it is within Project Co's control, ensure that such persons retain their involvement in the Works and, in particular, will not, for the duration of the Works, require or request any of them to be involved in any other project on behalf of Project Co or any of the Shareholders or its or their Associated Companies if, in the reasonable opinion of the Authority, this would adversely affect the Project. In the event that due to matters outwith Project Co's control it is necessary for there to be a change in any Key Personnel, Project Co shall by written notice to the Authority propose a substitute for approval, taking account of the need for liaison and continuity in respect of the Project. Such appointment shall be subject to the approval of the Authority (not to be unreasonably withheld or delayed).

[Liaison Procedures

- 8.10 The Authority and Project Co shall establish and maintain throughout the Project Term a joint Liaison Committee and shall initiate, develop, agree, distribute, implement, control and maintain liaison procedures, all in accordance with the provisions of Schedule 24 (*[Liaison Procedure]*).¹²
- 8.11 **Facility Representative**
- 8.11.1 The [head teacher/principal] of [each]/[the] Facility or such other member of staff of [a]/[the] Facility as the [head teacher/principal] may notify in advance to Project Co from time to time, shall undertake the role of a Facility representative (the "**Facility Representative**"), which Facility

¹² Liaison procedures may be adopted where this is considered beneficial to a specific project. The role of the Liaison Committee should only be to make recommendations to the parties, which they may accept or reject in their complete discretion. Neither the Liaison Committee itself, nor the members acting in that capacity, should have the authority to vary any of the provisions of the Project Agreement or make any decision that is binding on the parties.

Representative shall provide a day to day contact with Project Co for the routine operation of this Agreement.

- 8.11.2 Unless pursuant to a specific delegation under Clause 8.11.3 or otherwise specifically provided for in terms of this Agreement, the Facility Representative[s] shall have no power or authority to bind the Authority or vary the terms of this Agreement in any way and Project Co acknowledges that it shall not act on the instructions of or as a consequence of or otherwise rely upon any act or omission of a Facility Representative for the purposes of this Agreement unless under a specific [delegation issued pursuant to Clause 8.11.3 or otherwise specifically provided for in this Agreement].
- 8.11.3 The Authority's Representative may from time to time by notice to Project Co in writing, delegate any of his powers, duties or responsibilities under this Agreement to a Facility Representative, subject to such terms and conditions, and for such duration as may be specified by the Authority's Representative.]

PART 2: LAND ISSUES

9. NATURE OF LAND INTERESTS¹³

Access During Construction¹⁴

9.1 From the Commencement Date until the Actual Completion Date [for a Facility] [and from the Actual Completion Date until the Actual Post Completion Works Date in respect of the [relevant] Post Completion Works Areas of [a]/[the] Facility only] or (if earlier) the Termination Date, the Authority shall grant to Project Co and Project Co Parties, or procure that Project Co and the Project Co Parties are granted:

9.1.1 access to the [relevant] Site; and

9.1.2 the Ancillary Rights;

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

Access Following Construction

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

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

¹³ The Authority must arrange for suitable title due diligence to be carried out by its own or external legal advisors prior to issuing a New Project Request under the SPA in order to determine whether any title matters might reasonably be expected to interfere with the carrying out of the Works and/or Services. Where Project Co would reasonably be expected to be the party best placed to manage any identified issues, these issues should be disclosed as Reserved Rights or Title Conditions associated with the relevant Site, in Schedule 5. See further guidance at Schedule 5 below. The drafting assumes a licence structure.

¹⁴ To be reviewed on a project specific basis. Where a project involves phased construction or post-completion works, a phased programme of access may be required.

- 9.2.2 remedying Defects and Snagging Items [relating to the relevant Facility];
and
- 9.2.3 exercising the Ancillary Rights.

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

Extent of Rights

- 9.3 The rights referred to at Clauses 9.1 (*Access During Construction*) and 9.2 (*Access Following Construction*) shall not operate or be deemed to operate as a lease of the Facilities or the Site[s] or any part of the Facilities or the Site[s] and Project Co shall not have or be entitled to exclusive possession (save to the extent expressly included within the Ancillary Rights) or any estate, right, title or interest in and to the Site[s] or the Facilities except as provided herein and shall occupy the Site[s] as a licensee only.
- 9.4 The rights referred to at Clause 9.1 (*Access During Construction*) and 9.2 (*Access Following Construction*) are personal to Project Co and the Project Co Parties.
- 9.5 Project Co shall procure that:
 - 9.5.1 all Project Operations carried out at [the]/[each] Site by or on behalf of Project Co (whether before, during or after the completion of the Works) shall be carried out in a manner which does not breach any of the [relevant] Title Conditions and/or the Reserved Rights; and
 - 9.5.2 there shall be no action, or omission to act by Project Co or a Project Co Party, which shall give rise to a right for any person to obtain title to [the]/[any] Site or any part of [it]/[them].
- 9.6 Notwithstanding the terms of Clauses 9.1 (*Access During Construction*) and 9.2 (*Access Following Construction*) or any other rights granted under this Agreement, the Authority shall (if it is the legal owner of [the]/[a] Site), or (if it is not the legal owner of [the]/[a] Site) shall procure that the legal owner of [the]/[a] Site shall, enter into such wayleaves, deeds of easement and grant or other similar agreements with any third party that Project Co or any Project Co Party may require to be granted in favour of or by any third party, in order to exercise its rights or perform its obligations under this Agreement (other than Utilities Agreements which are subject to the provisions of Clause 10.15 (*Utilities*)). The Authority shall enter into (or, where appropriate, shall procure that the legal owner of [the]/[a] Site shall enter into) any such wayleave, deed of easement and grant or other similar agreement (other than Utilities Agreements which are subject to the provisions of Clause 10.15 (*Utilities*)), as soon as reasonably practicable after Project Co has provided to the Authority all relevant information in connection therewith provided always that Project Co has obtained at its own cost the prior agreement of the third party in terms acceptable to the Authority (acting reasonably). Project Co shall reimburse the Authority for all costs and expenses reasonably and properly incurred by the Authority (and/or the legal owner of [the]/[a] Site) in connection with entering into such wayleaves, deeds of easement and grant or other similar agreements at the request of Project Co.

10. THE SITE[S]¹⁵

- 10.1 The condition of the Site[s] shall[, subject to Clauses 10.3 [and 10.4] (*[Responsibility for Ground Conditions and Contamination]*) / [to 10.14 (*[Asbestos]*),] be the sole responsibility of Project Co. Accordingly (without prejudice to any other obligation of Project Co under this Agreement), Project Co shall be deemed to have:
- 10.1.1 carried out the Ground Physical and Geophysical Investigation and to have inspected and examined the Site[s] and [its][their] surroundings and (where applicable) any existing structures or works on, over or under the Site[s];
 - 10.1.2 satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the form and nature of the Site[s], the load bearing and other relevant properties of the Site[s], the risk of injury or damage to property affecting the Site[s], the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials necessary for the execution of the Works;
 - 10.1.3 satisfied itself as to the extent and adequacy of the Site[s] and of the rights of access to and through the Site[s] granted hereunder and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the Site[s]) without prejudice to Project Co's rights under this Agreement in respect of a breach by the Authority of its obligations under Clause 9.1 (*Access During Construction*) and/or Clause 9.2 (*Access Following Construction*);
 - 10.1.4 satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties (except where such matters can only be ascertained by a review of title conditions, not included in the Title Conditions); and
 - 10.1.5 satisfied itself as to the conditions, burdens, restrictions and reservations set out in the Title Conditions and the Reserved Rights.

¹⁵To the extent that it is not practical to investigate areas of the Site(s) (for example, due to Authority occupation of existing premises on the Site(s) to be developed in order to construct the Facilities), the drafting at Clauses 10.3 and 10.4 can be included to provide Project Co with appropriate relief. These Clauses provide that the Authority bears any additional costs arising out of unforeseen conditions in areas which Project Co cannot investigate and which cannot be reasonably identified by Project Co. Areas of the Site(s) to which this carve out applies should be clearly identified in the Project Agreement.

WEPCo will be required to undertake Ground Physical and Geophysical Investigations at stage 1 of the New Project Approval Process under the SPA, where these have not already been procured by the relevant Authority in advance of the New Project Request (and included in the site brief. It may be appropriate, where updated or additional surveys are obtained by WEPCo (acting in accordance with Good Industry Practice and in good faith during the New Project Approval Process under the SPA), that these should also be specifically carved out of Clause 10.3.

The risk that an Authority assumes in terms of Clauses 10.3 and 10.4 where relevant (i.e. where there are areas of the Site(s) under or within existing buildings that are not capable of survey) will not include the risk of asbestos.

Where a specific asbestos risk has been identified and the risk of Additional Asbestos is to be an Authority risk, the drafting at Clauses 10.5 to 10.14 should also be used.

- 10.2 To avoid doubt, Project Co accepts full responsibility for all matters referred to in Clause 10.1 and [subject to Clause 10.3 [and Clause 10.4] (*[Responsibility for Ground Conditions and Contamination]*)] / [to 10.14 (*[Asbestos]*)] [and Clause 53 (*[Warranties]*)],] Project Co shall:
- 10.2.1 not be entitled to make any claim against the Authority of any nature whatsoever save, if applicable, as expressly provided in Clause 30 (*[Delay Events and Compensation Events]*), on any grounds including (without limitation) the fact that incorrect or insufficient information on any matter relating to [any of] the Site[s] was given to it by any person, whether or not the Authority or an Authority Party; and
- 10.2.2 be responsible for, and hold the Authority harmless from, cleaning up and/or otherwise dealing with any Contamination at [any of] the Site[s] so that it shall at all times comply with its obligations under this Agreement including (without limitation) complying with, at its own cost, any applicable Laws and any Consents, orders, notices or directions of any regulatory body (whether made against the Authority or Project Co).

[Responsibility for Ground Conditions and Contamination]

- 10.3 To the extent that unforeseen ground conditions and/or Contamination exist in any parts of the Site[s] which are under existing buildings as at the Commencement Date and which it is not practical for Project Co to investigate or survey, Project Co shall not be responsible for them unless they were discovered by the Ground Physical and Geophysical Investigation[s] and accordingly identified in Section 3 (*[Authority's Construction Requirements]*) of Schedule 6 (*[Construction Matters]*) or unless they should reasonably have been discoverable if the Ground Physical and Geophysical Investigation[s] had been properly carried out or unless they would have been identified had Project Co carried out such additional surveys as it would have been reasonable to expect an experienced contractor to have carried out in the circumstances. The Authority shall be responsible for any ground conditions and/or Contamination for which Project Co is not responsible by virtue of this Clause 10.3 (*[Responsibility for Ground Conditions and Contamination]*). This Clause 10.3 (*[Responsibility for Ground Conditions and Contamination]*) applies to the following areas: [♦].
- 10.4 Where pursuant to Clause 10.3 (*[Responsibility for Ground Conditions and Contamination]*) the Authority is responsible for any of the matters referred to then the following provisions shall apply:
- 10.4.1 during the Construction Phase any such matter shall be deemed to be a Delay Event (to the extent that there will be (or is likely to be) delay to [satisfaction of the [relevant] ICT Handover Requirements or,] completion of the relevant [Main] Works [or the [relevant] Post Completion Works (as applicable)]) and/ or a Compensation Event (where Project Co has incurred a loss (including a loss in revenue) and/or expense as a direct result);
- 10.4.2 where any such matter arises during the Operational Term it shall, for the avoidance of doubt, be deemed to be an Excusing Cause for the purposes of Clause 52 (*[Excusing Causes]*);

- 10.4.3 further where any such matter arises during the Operational Term and any work or change to the Services is required or instructed to be done in consequence of it, it shall be deemed to be a Qualifying Change; and
- 10.4.4 where any such matter is Contamination (whether during the Construction Phase or the Operational Term) the Authority shall further hold Project Co harmless from cleaning up and otherwise dealing with the Contamination and shall indemnify Project Co in respect of all Direct Losses incurred by Project Co resulting from such Contamination.]

[Asbestos¹⁶

- 10.5 Subject to Clauses 10.6 to 10.14 below, Project Co shall be responsible for and shall hold the Authority harmless from the removal of any Asbestos at the Site(s) and the Authority shall have no liability in respect of the removal of any Asbestos at the Site(s) other than as set out in Clauses 10.6 to 10.14.
- 10.6 Prior to the commencement of the Works at a Demolition Site, Project Co shall procure¹⁷:
- 10.6.1 the appointment of an Asbestos Surveyor in accordance with Clause 10.7 and 10.9; and
- 10.6.2 the Asbestos Surveyor (appointed in accordance with Clause 10.7 and 10.9) carries out an Asbestos Survey and submits an Asbestos Survey Report in respect of the relevant Demolition Site.
- 10.7 Project Co shall seek competitive tenders from a minimum of three [(3)] licensed Asbestos surveyors with the necessary skills, qualifications and experience to carry out Asbestos Surveys on the basis that the successful tenderer shall:
- 10.7.1 provide Asbestos Surveys in respect of all of the Demolition Sites;
- 10.7.2 for each Demolition Site, as soon as reasonably practicable after the relevant Asbestos Survey has been carried out, produce the Asbestos Survey Report to include its recommendations as to updates required to the Asbestos Schedule and with all information required to complete the Asbestos Schedules pursuant to Clause 10.7.3;

¹⁶ This drafting should be included where Project Co is required to carry out demolition work and initial Asbestos Management Surveys carried out under the SPA have identified an asbestos risk.

¹⁷The drafting assumes that (a) an Asbestos Surveyor has not been appointed to carry out Demolition survey(s), HSG 264; and (b) a Licensed Contractor has not priced and been appointed in respect of associated works, prior to financial close. If it is the case that these appointments have been made prior to financial close (and the HSG 264 Refurbishment/Demolition survey(s) carried out before financial close), Asbestos risk should sit entirely with Project Co.

- 10.7.3 liaise with the Authority and/ or its designated asbestos specialist¹⁸ on the content of the updated Asbestos Schedule, in order to agree (where applicable) the items to be included and the quantities to be inserted and such Asbestos Schedule shall be in a format suitable for pricing by a Licensed Contractor tendering for the Asbestos Works;
- 10.7.4 for each Demolition Site, on a monthly basis in respect of the period when the Asbestos Works are being undertaken by the Licensed Contractor, produce updated Asbestos Survey Reports to include its recommendations as to updates required to the Asbestos Schedules and with all information required to complete the Asbestos Schedules referred to in Clause 10.7.5;
- 10.7.5 for each Demolition Site, on a monthly basis in respect of the period when the Asbestos Works are being undertaken by the Licensed Contractor, liaise with the Authority and/ or its designated asbestos specialist¹⁹ on the content of the updated Asbestos Schedules, for the purpose of agreeing the nature and extent of any Additional Asbestos; and
- 10.7.6 comment upon and provide guidance in connection with the proposed methodologies included within the tenders submitted pursuant to Clause 10.8 by the Licensed Contractors.
- 10.8 Project Co shall procure competitive tenders from a minimum of [three (3)] Licensed Contractors, based on the Asbestos Schedule as updated pursuant to Clause 10.10.1 and to include the scope of materials identified in the relevant Asbestos Survey Report and a target programme that is aligned so far as practicable (and without prejudice to Project Co's obligations pursuant to Clause 30.2.1, 30.4.5 and 30.13 (*Delay Events and Compensation Events*)) with the Asbestos Works Period. Tenders are to be invited and evaluated on the basis of the scope of materials shown in such Asbestos Schedule, with each individual line being priced on an open book basis in order to derive the total tendered price including analytical costs of associated asbestos removal and subject to any discount (the "**Asbestos Tendered Sum**"). Tenders shall include a schedule of rates to assist in the pricing of the Asbestos Works and which shall apply in respect of transparent verification of allowances (which may be subject to discounting) within the Asbestos Tendered Sum and the calculation of any Additional Asbestos pursuant to Clause 10.13.1(b)
- 10.9 As soon as reasonably practicable following receipt of the tender referred to in Clauses 10.7 and 10.8, Project Co shall submit copies of such tenders to the Authority together with Project Co's recommendation as to which tenders should be accepted and the Authority shall notify Project Co within five (5) Business Days which tender to accept (such period shall commence on the date which the Authority has all relevant information including any responses to clarifications that the Authority may, acting reasonably, request.)²⁰. Project Co or the Contractor (but not any other subcontractor) shall appoint the Licensed Contractor and Asbestos Surveyor that are selected by the Authority (and shall take on board any reasonable

¹⁸ It is anticipated that the Authority will appoint its own specialist asbestos technical adviser who will provide support through the project development phase under the SPA and through the procedure for Project Co's appointment of an Asbestos Surveyor and Licensed Contractor, to payment for any Further Asbestos and/or an extension of time for any Further Asbestos Delay.

¹⁹ Please note comments above as regards the Authority's appointment of its own asbestos specialist.

²⁰ Authorities should liaise with their specialist asbestos technical advisor and Welsh Government in connection with the appointment of the Licensed Contractor.

representations of the Authority as to the terms of those appointments), provided that where the Authority does not respond to Project Co within five (5) Business Days of receipt of the information to be provided by Project Co pursuant to this Clause 10.9, Project Co or the Contractor (but not any other subcontractor) shall be entitled to appoint the Licensed Contractor and/or Asbestos Surveyor (as the case may be) that Project Co has recommended to the Authority pursuant to this Clause 10.9.

10.10 Project Co shall procure that a copy of each Asbestos Survey Report (and updates thereto) issued by the Asbestos Surveyor is submitted to the Authority within seven (7) Business Days of receipt of the same by Project Co and, the Parties shall agree the items to be included and the quantities to be inserted in the relevant updated Asbestos Schedule:

10.10.1 in the case of an Asbestos Schedule to be issued as part of the tender for a Licensed Contractor, as referred to in Clause 10.8, within ten (10) Business Days of receipt by the Authority of the Asbestos Survey Report²¹; and,

10.10.2 in the case of the updated Asbestos Survey Reports to be issued on a monthly basis while Asbestos Works are being undertaken by the Licensed Contractor within 10 Business Days receipt by the Authority of:

(a) the relevant Asbestos Survey Report; and

(b) complete, true and up to date records and all other documentation that the Health and Safety Executive require to be maintained by the Licensed Contractor and complete, true and up to date records and documentation as is required to be produced or maintained in respect of the Asbestos Works in accordance with Law, demonstrating the nature, extent and location of all asbestos forming part of the Asbestos Works²².

10.11 Project Co shall procure the Asbestos Works are completed by the Licensed Contractor in accordance with the requirements of Clause 10.2.

10.12 To the extent that, only as a result of the nature and/or extent and/or location of Further Asbestos, the period of time taken to complete the Asbestos Works at a Demolition Site is longer than the relevant Asbestos Works Period ("**Further Asbestos Delay**"), Project Co will be entitled to apply for relief from its obligations and/or compensation in accordance with Clause 30 (*Delay Events and Compensation Events*) provided compensation for any additional direct costs and associated expenditure incurred by Project Co for the removal and disposal of Further Asbestos (including any Additional Asbestos) shall be calculated on the

²¹ Authorities should liaise with their specialist asbestos technical advisor and Welsh Government in connection with the Asbestos Survey Report and Asbestos Schedule.

²² Authorities should liaise with their specialist asbestos technical advisor and Welsh Government in connection with the Asbestos Survey Report and Asbestos Schedule.

basis provided for in Clause 10.13 below and Clause 30 (*Delay Events and Compensation Events*) shall be construed accordingly.²³

10.13 In respect of any additional direct costs and associated expenditure incurred by Project Co as a result of the nature and/or extent and/or location of Further Asbestos at a Demolition Site (whether or not there has been a Further Asbestos Delay):

10.13.1 Project Co shall deliver to the Authority a valid VAT invoice for such additional direct costs and associated expenditure, calculated on the basis of:

- (a) in respect of Identified Asbestos, the Licensed Contractor's Asbestos Tendered Sum, less any sum identified in respect of such Asbestos Works in the column titled "Total allowance" of the asbestos schedule set out at Schedule [♦] (*Asbestos Surveys and Schedule*); and
- (b) in respect of Additional Asbestos, the schedule of rates set out in [the Licensed Contractor's tender and the relevant Asbestos Schedule, as updated at that time pursuant to Clause 10.10.2,

provided that in each case no sums may be claimed for Further Asbestos to the extent such sums have already been claimed in respect of such Further Asbestos and where a sum calculated in respect of Identified Asbestos in accordance with paragraph (a) of this Clause 10.13.1 is a negative figure, such sum shall be deducted from any sum due by the Authority to Project Co under Clause 10.13.2 or otherwise may be set off to reduce any amount owed by the Authority to Project Co in accordance with Clause 35.6 (*Set-Off*); and

10.13.2 where sums are due to Project Co from the Authority under Clause 10.13.1 above, the Authority shall pay to Project Co the amount of each such invoice that is provided in accordance with Clause 10.13.1 above, within twenty (20) Business Days of receipt of the same.

10.14 Unless the exposure arises directly or indirectly as a result of any act or omission of Project Co or any Project Co Party, the Authority accepts full responsibility, including any financial and other consequences which result (whether directly or indirectly) for death and personal injury in respect of exposure to Asbestos on the Site, where the exposure takes place prior to the date on which Project Co is given possession of the Site for the purposes of carrying out the Works.]

²³ As part of the New Project Approval and tendering process under the SPA, consideration should be given to weekly prelim cost for any additional time on Site as a result of Asbestos Works having to be carried out beyond the Asbestos Works Period, as a consequence of Further Asbestos being identified. The asbestos drafting should be updated to refer to any agreed weekly prelim cost.

10.15 Utilities

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

- (a) be responsible for determining the location of such Utilities as may be at the Site[s] and for the maintenance of access to such Utilities at the Site[s];
- (b) make and rely upon all necessary investigations and surveys as to such Utilities at the Site[s];
- (c) be responsible and make provision for lawfully diverting, connecting, disconnecting or otherwise dealing as may be necessary with any Utilities not within the Site[s];
- (d) pay to all Relevant Authorities or undertakings all costs and expenses incurred in diverting, disconnecting or otherwise carrying out works in respect of such Utilities within the Site[s]; and
- (e) otherwise do all that is required in relation to the Utilities required for the purpose of the carrying out of the Works including but not limited to: (i) using all reasonable endeavours to conclude with each Utilities Third Party the terms of the relevant Utilities Agreement and gaining the execution of the relevant Utilities Agreement by the relevant Utilities Third Party; (ii) keeping the Authority updated at reasonable intervals as to the content and progress of discussions with any Utilities Third Party (including any difficulty or reasonably anticipated difficulty in obtaining any Utilities Agreement along with reasons for such difficulty); (iii) giving due regard to any comments made by the Authority in relation to each Utilities Agreement; (iv) being party to any Utilities Agreement when properly required for the purpose of the Works; (v) executing such agreed Utilities Agreement within ten (10) Business Days of receipt; and (vi) complying with its obligations as party to such Utilities Agreement.

10.15.2 Provided that Project Co has complied with Clause 10.15.1 (e), the Authority shall procure that the legal owner of [the]/[a] Site:

- (a) be party to any Utilities Agreement when properly required for the purpose of the Works (including as grantor, grantee or consentor);
- (b) within ten (10) Business Days of receipt of a Utilities Agreement agreed pursuant to Clause 10.15.1 (e) execute such Utilities Agreement; and

(c) complies with its obligations as party to any Utilities Agreement.

10.15.3 Any delay in the obtaining of a Utilities Agreement not due to an Authority breach of Clause 10.15.2, shall be deemed to be a Relief Event, provided in each case that such event does not arise (directly or indirectly) as a result of any wilful act or default of the party claiming relief and/or (i) in the case of Project Co claiming relief, any Project Co Party; and (ii) in the case of the Authority claiming relief, any Authority Party subject to and in accordance with Clause 31 (*Relief Events*).

Off Site Contamination²⁴

10.16 To the extent that any part(s) of the Site[s] suffer from or are affected by Contamination arising from a source off [the relevant] Site (whether or not on adjacent land) Project Co shall be responsible for cleaning up or otherwise dealing with such Contamination and for taking reasonable steps to prevent the recurrence of such Contamination on [a]/ [the] Site and then the following provisions shall apply:

10.16.1 where any such matter arises [(a)] prior to the Actual Completion Date [for that Facility] [or (b) prior to the Actual Post Completion Works Date in respect of the Post Completion Works Areas only], it shall be deemed to be a Relief Event for a reasonable period (to be agreed between the Parties acting reasonably) for the purposes of this Agreement;

10.16.2 where any such matter arises [(a)] after the Actual Completion Date [for that Facility] [or (b) after the Actual Post Completion Works Date in respect of the Post Completion Works Areas only] it shall be deemed to be a Relief Event and an Excusing Cause and no Deductions may be made in respect of the relevant Area for a reasonable period (to be agreed between the Parties acting reasonably) but any work or change to the Services required or instructed to be done in consequence of it, shall be Project Co's responsibility and shall not constitute an Authority Change;

10.16.3 before or after the [relevant] Actual Completion Date Project Co shall:

(a) clean up, or otherwise deal with, such Contamination, and take steps reasonably necessary to prevent the recurrence of the same, all in accordance with Good Industry Practice, all relevant Consents and Law; and

(b) other than where Clause 10.16.4 applies, hold the Authority harmless from, and indemnify the Authority in respect of, all Direct Losses incurred by the Authority resulting from such Contamination; and

²⁴ To the extent that WEPCo can demonstrate that it is not feasible to insure against a project specific risk of off site contamination, an Authority may discuss approach to this risk and scope for derogation from the existing provisions further with WEPCo and Welsh Government.

10.16.4 the Authority shall, but only to the extent that Project Co is able to demonstrate to the Authority that it does not have the right to take action against third parties in its own name to recover the losses suffered or incurred by Project Co in cleaning up or otherwise dealing with such Contamination, at the Authority's option either:

- (a) take such action against third parties in its own name as Project Co may (acting reasonably) direct; or
- (b) permit Project Co to take such action in the name of the Authority at Project Co's own expense in which case the provisions of Clauses 49.3(*Conduct of Claims*) shall apply as if Project Co were the Indemnifier and the Authority were the Beneficiary,

subject to Project Co indemnifying the Authority in respect of all costs properly and reasonably incurred by the Authority in respect of such action. Where the Authority takes action under Clause 10.16.4(a) or 10.16.4(b), the Authority shall be liable to Project Co for all losses suffered or incurred by Project Co as a result of its obligations under this Clause 10.16.4, provided that Project Co's entitlement in respect of any matter to which this Clause 10.16.4 applies shall be limited to the amount recovered by or in the name of the Authority from the relevant third party in respect of the losses referred to in this Clause 10.16.4.

11. CONSENTS AND PLANNING APPROVAL²⁵

11.1 Project Co shall be responsible for:

11.1.1 obtaining all Consents which may be required for the performance of the Project Operations²⁶; and

11.1.2 implementing each Consent within the period of its validity in accordance with its terms.²⁷

11.2 In the event that:

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

²⁵ Authorities will require WEPCo to deal with detailed planning prior to FBC approval and financial close.

²⁶ Where, on a project specific basis, there are certain Consents which only the Authority can obtain, or Consents which Project Co can obtain only with input from the Authority, appropriate drafting should be included in this Clause 11 (*Consents and Planning Approval*) and cross referred to in Clause 5.2.1 (*General Standards*). Acceptance of any such responsibility by the Authority should be narrowly prescribed. A similar approach should be followed where there are legislative requirements in relation to the Facilities which can only be complied with by, or that require the input or co-operation of the Authority as occupier or user of the Facilities or any part of them. Again, acceptance of any such responsibility by the Authority should be narrowly prescribed.

²⁷ The costs associated with any planning agreements etc should be for the account of Project Co.

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

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

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

11.3 Each party shall, at its own cost, comply with its responsibilities for complying with or discharging the conditions attached to the Planning Approval, as determined by reference to the table set out at Schedule 27 (*Planning Responsibilities Matrix*).²⁸

11.4 **[²⁹Judicial Proceedings**

11.4.1 Either party shall notify the other forthwith upon becoming aware of any Judicial Proceedings.

11.4.2 If in accordance with Clause 11.4.1 either party serves a notice then:

(a) the Authority shall be entitled by notice in writing to Project Co (the "**Suspension Notice**") to require Project Co to suspend the Works (or the relevant part thereof) and Project Co shall forthwith suspend the Works (or the relevant part thereof) upon receipt of the Suspension Notice at the Site which is the subject of any Judicial Proceedings and such suspension shall subsist subject to Clause 11.4.5(a) until such time as (i) such Judicial Proceedings are finally dismissed or withdrawn leaving in place a valid planning permission; or (ii) provided there is no subsisting Judicial Proceedings Action the Authority informs Project Co that the Works (or the relevant part thereof) should be resumed (whichever is the earlier); and/or

(b) Project Co must suspend the Works (or the relevant part thereof) at the Site which is the subject of any Judicial Proceedings Action and forthwith give notice of such suspension in writing to the Authority (the "**Project Co Suspension Notice**") and such suspension shall subsist subject to Clause 11.4.5(b) until such time as (i) such Judicial Proceedings Action is finally overturned leaving in place a valid planning permission; (ii) this Agreement

²⁸ Planning Responsibilities Matrix will be agreed by the parties prior to financial close. If the detailed planning permission includes conditions with which the Authority (as owner/occupier of the Facilities) must comply, appropriate drafting should be included at Clause 11.3 (*Consents and Planning Approval*) and cross-referred to in Clause 5.2.1 (*General Standards*). Authorities should seek advice on the extent and consequences of any such obligations.

²⁹ This drafting must be used where Financial Close is reached less than six (6) weeks after detailed planning permission is granted. In line with market practice, this drafting places the risk of judicial review of the planning permission within that six (6) week period with the Authority. Thereafter judicial review risk transfers to Project Co. The risk transferred to the Authority excludes any judicial review or challenge that arises from Project Co's conduct during or compliance with the planning process.

is varied by means of an Authority Change in order to permit Project Co lawfully to resume the Works (or the relevant part thereof) and/or perform its obligations under this Agreement; or (iii) the parties otherwise agree in writing that the Works (or the relevant part thereof) should be resumed (whichever is the earlier).

11.4.3 Save for where Project Co or a Project Co Party (and for the purposes of this Clause 11.4.3 only "Project Co or a Project Co Party" shall exclude an employee or agent of Project Co or of a Project Co Party acting in a personal capacity) has brought or caused to be brought on its behalf Judicial Proceedings, any suspension of the Works (or the relevant part thereof) pursuant to Clause 11.4.2(a) or 11.4.2(b) shall be deemed to be:

- (a) a Delay Event (to the extent that there will be (or is likely to be) delay to [satisfaction of the [relevant] ICT Handover Requirements or,] completion of the relevant [Main] Works [or the [relevant] Post Completion Works (as applicable)] as a result (and for the purposes of the provisions of Clause 65 (*Notices*) Project Co is deemed to have become aware that there will be or is likely to be a delay in the commencement or completion of the relevant Works on the date of receipt of the Suspension Notice or the date of Project Co Suspension Notice as appropriate); and/or
- (b) a Compensation Event (in respect of the Works pertaining to the relevant Site) where Project Co has incurred a loss (including a loss in revenue) and/or expense as a direct result of the Suspension Notice or Project Co Suspension Notice, from the date of the Suspension Notice or Project Co Suspension Notice as appropriate.

11.4.4 Where a Project Co Party (and for the purposes of this Clause 11.4.4 only "Project Co Party" shall exclude an employee or agent of Project Co or any Project Co Party acting in a personal capacity) has brought or caused to be brought on its behalf Judicial Proceedings any suspension of the Works (or the relevant part thereof) pursuant to Clause 11.4.2(a) or 11.4.2(b) shall be deemed to be a Relief Event from the date of the Suspension Notice or Project Co Suspension Notice as appropriate and the provisions of Clause 31 (*Relief Events*) shall apply but solely for the purpose of entitling Project Co to apply for relief from any rights of the Authority to terminate this Agreement for a Project Co Event of Default pursuant to Clauses 40.1.2 and/or 40.1.4 (*Project Co Event of Default*).

11.4.5 If by the date falling [twelve (12)]³⁰ months after the date of the:

- (a) Suspension Notice, the Works (or the relevant part thereof) are still suspended pursuant to Clause 11.4.2(a); or

³⁰ The time limit must be realistic and take into account the likely time for the Judicial Proceedings to be heard.

(b) Project Co Suspension Notice, the Works (or the relevant part thereof) are still suspended pursuant to Clause 11.4.2(b),

then unless agreed otherwise in writing between the parties, the Authority shall either (i) issue an Authority Change Notice to remove the affected Facilities from the scope of the Project and/or varying the Authority's Construction Requirements to remove those requirements relating to the affected Facilities to which the Judicial Proceedings relate; or (ii) serve notice of termination under Clause 42 (*Authority Voluntary Termination*) of this Agreement.]

PART 3: DESIGN AND CONSTRUCTION

12. THE DESIGN CONSTRUCTION AND COMMISSIONING PROCESS

Overall Responsibility

- 12.1 Project Co shall carry out the Works:
- 12.1.1 so as to procure satisfaction of the Authority's Construction Requirements;
 - 12.1.2 in accordance with Project Co's Proposals;
 - 12.1.3 in accordance with the Quality Plans;
 - 12.1.4 in accordance with Good Industry Practice; and
 - 12.1.5 in accordance with the terms of this Agreement.
- 12.2 To avoid doubt, the obligations in Clauses 12.1.1 to 12.1.5 are independent obligations and, in the case of conflict between obligations requiring different levels of performance, the default position is that the obligation requiring the highest standard of performance shall take precedence. In particular:
- 12.2.1 the fact that Project Co has complied with Project Co's Proposals and/or the Quality Plans shall not be a defence to an allegation that Project Co has not satisfied the Authority's Construction Requirements; and
 - 12.2.2 the fact that Project Co has satisfied the Authority's Construction Requirements shall not be a defence to an allegation that Project Co has failed to comply with Project Co's Proposals and/or the Quality Plans,

provided always that where there is any conflict between the Authority's Construction Requirements, Project Co's Proposals and/or Quality Plans, the Authority shall, subject to any applicable default order of precedence, be entitled (in its sole discretion) to decide which shall take precedence and shall inform Project Co of its decision (within five (5) Business Days of Project Co's reasonable request for such decision of the Authority pursuant to this Clause 12.2) and Project Co shall, at its own cost, be obliged to implement the Authority's decision.

Design Responsibility

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

Corporate Identity and Signage

- 12.4 The parties acknowledge that the Authority may, from time to time during the Construction Phase, be required to procure the erection of hoarding, site boards, plaques and/or other signage in connection with the Project. Accordingly:
- 12.4.1 where requested by the Authority (acting reasonably), Project Co shall procure the erection and maintenance of such hoarding, site boards, plaques and/or other signage as the Authority may require; and
 - 12.4.2 the size, design, information disclosed, position and materials used in connection with such hoarding, site boards, plaques or other signage shall be approved by the Authority, such approval not to be unreasonably withheld; and
 - 12.4.3 for the purposes of this Clause 12.4 (*Corporate Identity and Signage*), the Authority shall be deemed to be acting reasonably where any proposals made by it and/or any approvals exercised by it conform with the Welsh Language Standards and any further relevant guidance, amendments or supplements issued by the Welsh Government from time to time in connection with bilingual use of the Welsh and English language.

Authority Design Review³¹

- 12.5 Project Co shall develop and finalise the design and specification of the Works and the Authority shall review the Reviewable Design Data in accordance with Schedule 8 (*Review Procedure*) and the provisions of this Clause 12.5 (*Authority Design Review*):
- 12.5.1 Project Co shall submit the Reviewable Design Data and the design of any Changes developed in accordance with the [Reviewable Design Data Programme and the] procedure set out in Schedule 16 (*Change Protocol*) to the Authority's Representative for review under Schedule 8 (*Review Procedure*). Project Co shall not commence or permit the commencement of construction of the part or parts of the Facilities to which such Reviewable Design Data relates until it has submitted the appropriate Reviewable Design Data and either it is confirmed by the Authority's Representative that Project Co is entitled to proceed with construction in accordance with paragraph 3.3 of Schedule 8 (*Review Procedure*) or Project Co is:
 - (a) disputing the status of such Reviewable Design Data pursuant to paragraph 1.3.1 or paragraph 4.3 of Schedule 8 (*Review Procedure*); and

³¹ A timetable for submission of RDD will need to be developed by Project Co and agreed by the Authority. This can be developed along with a process protocol and should tie in with the BIM Protocol.

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

- 12.5.2 with effect from the date at which any item of Reviewable Design Data is or becomes an Approved RDD Item in accordance with Schedule 8 (*Review Procedure*), Project Co is entitled to proceed with construction of the relevant part or parts of the Works (subject to the need to submit any associated Reviewable Design Data for review) in accordance with that Approved RDD Item;
- 12.5.3 Project Co shall allow the Authority's Representative, at any time, a reasonable opportunity to view any items of Design Data, which shall be made available to the Authority's Representative as soon as practicable following receipt of any written request from the Authority's Representative; and
- 12.5.4 Project Co shall procure that the Contractor establishes and maintains a computerised design database which Project Co and the Authority's Representative may access remotely by computer to view drawings comprised within the Design Data (including Reviewable Design Data) and electronically store and/or print copies of such Design Data. In the event of the Authority's Representative being unable to access such design database, Project Co shall procure that it is made available for inspection by the Authority's Representative, or any other person authorised by the Authority's Representative.

Rectification of Project Co's Proposals

- 12.6 Without prejudice to Clause 12.1 (*Overall Responsibility*), if it should be found that Project Co's Proposals do not meet the requirements of the Authority's Construction Requirements, Project Co shall at its own expense, and in accordance with Clause 12.7 (*Rectification of Project Co's Proposals*) below, amend Project Co's Proposals and rectify the Works or any part affected. Such amendment and rectification shall have the effect that:
- 12.6.1 Project Co's Proposals shall satisfy the Authority's Construction Requirements; and
- 12.6.2 following the amendment or rectification, the structural, mechanical and electrical performance of the Facilities will be of an equivalent standard of performance to that set out in Project Co's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made).
- 12.7 Where Clause 12.6 (*Rectification of Project Co's Proposals*) applies, Project Co shall submit its proposal for amending Project Co's Proposals and rectifying the Works (or any part affected) to the Authority's Representative for review under Schedule 8 (*Review Procedure*) and shall not amend Project Co's Proposals or commence or allow the commencement of the rectification of the Works (or any

part affected) until it is permitted to proceed in accordance with Schedule 8 (*Review Procedure*).

Construction Skills Certification Scheme

- 12.8 Project Co shall ensure that all persons engaged in carrying out the Works (or part thereof) on the Site[s] are accredited under the Construction Skills Certification Scheme or an equivalent scheme and where Project Co enters into a sub-contract for the purposes of carrying out the Works, Project Co shall cause a term to be included in such sub-contract:
- 12.8.1 which requires the Sub-Contractor to ensure that such persons are accredited under the Construction Skills Certification Scheme or an equivalent scheme; and
 - 12.8.2 in the same terms as that set out in this Clause 12.8 (*Construction Skills Certification Scheme*) (including for the avoidance of doubt this Clause 12.8.2) subject only to modification to refer to the correct designation of the equivalent party as Project Co and sub-contractor as the case may be.

Building Information Model³²

- 12.9 The Authority and Project Co shall:
- 12.9.1 comply with their respective obligations set out in the BIM Protocol;
 - 12.9.2 have the benefit of any rights granted to them in the BIM Protocol; and
 - 12.9.3 have the benefit of any limitations or exclusions of their liability contained in the BIM Protocol.

13. RIGHT OF ACCESS OF AUTHORITY'S REPRESENTATIVE³³

Access to the Site[s]

- 13.1 Project Co shall procure that:
- 13.1.1 subject to complying with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans

³² Welsh Government requires the use of Building Information Modelling on all MIM Projects delivered under the SPA.

³³ Authorities are reminded of the duty they ultimately owe to the public to ensure the provision of a safe environment. Authorities should therefore consider what internal resource and/or specialist technical support is needed to perform the role of the 'intelligent client' and carry out the appropriate degree of internal assurance, notwithstanding the services being provided by the Independent

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

- (a) monitor and view the Works at the Site[s] on reasonable prior notice appropriate to the circumstances, provided that the notice procedures in this Clause 13.1.1(a) shall not apply to the right of access for the Authority's Representative and his staff and visitors to the office and other facilities provided at the Site[s] for his use; and
- (b) subject to obtaining the consent of the relevant manufacturer or supplier (which Project Co agrees to use all reasonable endeavours to obtain), visit any site or workshop where materials, plant or equipment are being manufactured, prepared or stored for use in the Works for the purposes of general inspection and of attending any test or investigation being carried out in respect of the Works;

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

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

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

Increased Monitoring

13.2 If, following any viewing, visit or inspection made pursuant to Clause 13.1.1 (*Access to the Site[s]*), it is discovered that there are Defects in the Works or that Project Co has failed to comply with the Authority's Construction Requirements or Project Co's Proposals, the Authority's Representative may (without prejudice to any other right or remedy available to the Authority) by notice to Project Co increase the level of monitoring of Project Co until such time as Project Co shall have demonstrated to the satisfaction of the Authority that it is capable of performing and will perform all

Tester. Authorities should discuss their intended approach with the Welsh Government and seek guidance in relation to assurance processes.

its obligations to the Authority under this Agreement. Project Co shall compensate the Authority for any reasonable additional costs incurred as a result of such increased monitoring.

Right to Open Up

13.3 Subject to Clause 13.4 (*Right to Open Up*), the Authority's Representative shall have the right at any time prior to:

13.3.1]the Actual Completion Date, to request Project Co to open up and inspect any part or part of the [Main] Works]; and

13.3.2 the [relevant] Actual Post Completion Works Date, to request Project Co to open up and inspect any part or parts of the relevant Post Completion Works],³⁴

where the Authority's Representative reasonably believes that such part or parts of the [Main] Works [or the Post Completion Works (as appropriate)] is or are defective and Project Co shall comply with such request.

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

13.5 If, following the exercise by the Authority's Representative of his right pursuant to Clause 13.3 (*Right to Open Up*), the inspection shows that the relevant part or parts of the Works are not defective then Clause 30 (*Delay Events and Compensation Events*) shall apply.

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

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

13.8 Without prejudice to the rights of the Authority's Representative pursuant to this Clause 13 (*Right of Access of Authority's Representative*) the parties acknowledge that the exercise of such rights shall not in any way affect the obligations of Project

³⁴ An Authority should decide whether to require a right to open up in respect of Post Completion Works (if relevant to the Project depending on the nature of those Works).

Co under this Agreement save as expressly set out in this Clause 13 (*Right of Access of Authority's Representative*).

Safety during Construction

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

14. PROGRAMME AND DATES FOR COMPLETION

Dates for Completion

14.1 Project Co shall [in respect of each Facility]:

14.1.1 [satisfy the ICT Handover Requirements by the [relevant] ICT Handover Date; and]

14.1.2 complete the [Main] Works and satisfy the Payment Commencement Requirements by the [relevant] Completion Date [; and]

14.1.3 [complete the [relevant] Post Completion Works and satisfy the Post Completion Works Requirements by the [relevant] Post Completion Works Date.]

Without prejudice to [Clause 14.9 (*Provision of Temporary Accommodation*)], Clause [14.10 (*Unavailability of Existing Facilities*)], [Clause 14.11 (*Post Completion Works Phase*)], Clause 40 (*Project Co Event of Default*), 42 (*Authority Voluntary Termination*), 46 (*Compensation on Termination*) and 47 (*Consequences of Termination*), the Authority shall not be entitled to claim [liquidated or] general damages in respect of any delay which elapses between the [relevant] ICT Handover Date and the corresponding Actual ICT Handover Date[,/or] the [relevant] Completion Date and corresponding Actual Completion Date [and the [relevant] Post Completion Works Date and [relevant] Actual Post Completion Works Date].

14.2 [The Certificate of Practical Completion [in respect of the [relevant] Facility] shall not be issued any less than [twenty (20)] Business Days after the issue of the ICT Handover Acceptance Certificate.]³⁵

The Programme

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

³⁵ To be reviewed in the context of college commissioning needs.

- 14.4 The initial Programme is set out at Schedule 7 (*The Programme*). Any change to the Programme shall only be made in accordance with this Clause 14 (*Programme and Dates for Completion*) and Schedule 8 (*Review Procedure*). Project Co shall promptly submit to the Authority's Representative a copy of any version of the Programme varied in accordance with this Clause 14 (*Programme and Dates for Completion*) and Schedule 8 (*Review Procedure*).
- 14.5 If it appears to the Authority's Representative at any time that the actual progress of the Works has significantly fallen behind the Programme, then the Authority's Representative shall be entitled to require Project Co to submit to the Authority's Representative a report identifying the reasons for the delay and, unless the event causing the delay is still subsisting and it is not possible to predict with any certainty when the delay might come to an end, require Project Co (at the Authority's option):
- 14.5.1 to produce and submit to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*) a revised Programme showing the manner and the periods in which the Works will be carried out to ensure completion; and/or
- 14.5.2 to produce and submit to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*) a revised Programme showing the steps which are to be taken to eliminate or reduce the delay.

[Early Completion³⁶

- 14.6 Notwithstanding that the [Main] Works [or Post Completion Works] may have been completed in accordance with this Agreement[:
- 14.6.1]the Actual Completion Date [for a Facility] may only occur on a date on or (subject to Clause 14.8 (*Handover Dates*)) after the [relevant] Completion Date[; and
- 14.6.2 the [relevant] Actual Post Completion Works Date may only occur on a date on or after the [relevant] Post Completion Works Date],
- unless the Authority, in its absolute discretion, agrees otherwise in writing.]
- 14.7 Project Co shall notify the Authority's Representative if at any time the actual progress of the Works is significantly ahead of the Programme such that Project Co anticipates that [the]/[an] Actual Completion Date [or Post Completion Works Date, as appropriate] could occur earlier than the [relevant] Completion Date [or [relevant] Post Completion Works Date, as appropriate] in which case the Authority's

³⁶ Provision for notification of early completion has been included to enable the parties (at their discretion) to consider early occupation by the Authority of the Facilities. The consequential amendments required as a result of agreeing to early completion (e.g. in relation to commissioning, phasing, equipment procurement, service payments, as appropriate) would have to be considered and agreed on a project specific basis at the time and Authorities will be required to seek Welsh Government approval prior to agreeing to early completion. If the Authority is not willing to accept early completion of the Facilities under any circumstances, this Clause may be deleted. However, an Authority should be mindful that there may be circumstances where these provisions are useful e.g. where a Delay Event has impacted upon the Completion Date and Project Co has subsequently made up time in its Programme.

Representative shall be entitled to require Project Co to produce and submit to the Authority's Representative a revised Programme showing the manner and the periods in which the relevant Works will be carried out and what the revised date for completion would be to enable:

- 14.7.1 the Authority to consider (at its absolute discretion) whether to agree an earlier date for completion if requested by Project Co to do so; and
- 14.7.2 the parties to consider what modifications (if any) will be required to the Agreement in order to accommodate such earlier date for completion if agreed to by the Authority pursuant to Clause 14.6 (*[Early Completion]*).

Handover Dates

- 14.8 [Subject to Clause 14.6 (*[Early Completion]*), the Actual ICT Handover Date for [the]/[a] Facility shall be the date on which the ICT Handover Acceptance Certificate is issued [in respect of that Facility] provided that if:
 - 14.8.1 the ICT Handover Acceptance Certificate [in respect of a Facility] is not issued by the ICT Handover Date [in respect of a Facility], it shall not thereafter be issued until the [twenty-fifth (25th)] Business Day before the first day of the half term (other than the summer half term) or Term commencing after the ICT Handover Date, and, if not issued by that date, it shall not thereafter be issued until the [twenty-fifth (25th)] Business Day before any subsequent start of half term (other than summer half term) or Term; and
 - 14.8.2 a Certificate of Practical Completion [in respect of a Facility] is not issued by the Completion Date [in respect of that Facility], it shall not thereafter be issued until the [fifth (5th)] Business Day before the first day of the half term (other than the summer half term) or Term commencing after the Completion Date [in respect of that Facility] and, if not issued by that date it shall not thereafter be issued until the [fifth (5th)] Business Day before any subsequent start of half term (other than summer half term) or Term.]³⁷

[Provision of Temporary Accommodation]³⁸

- 14.9 If for any reason a Certificate of Practical Completion is not issued [in relation to a Facility] by the Completion Date [for that Facility] then:
 - 14.9.1 from the Completion Date [for that Facility] until:
 - (a) the Actual Completion Date [for that Facility]; or

³⁷ Approach to be reviewed on a project specific basis in the case of colleges.

³⁸ In the event the Certificate of Practical Completion has not been issued by the Completion Date for that Facility, the Authority may need recourse to either liquidated damages or the provision of temporary accommodation. Drafting has been included above in relation to provision of temporary accommodation in respect of delay to the main facility. The Authority must decide

- (b) if earlier, the Termination Date; or
- (c) the date on which the Actual Completion Date [for that Facility] would otherwise have occurred if a Delay Event occurs following the Completion Date [for that Facility] and this delays the achievement of the Certificate of Practical Completion,

other than where Clause 14.9.2 applies, Project Co shall be responsible for ensuring that suitable temporary accommodation is available to the Authority that (i) complies with paragraph [2.13.10.1] (*Temporary Accommodation*) of the Generic Design Requirements [and [◆]] of the Site-Specific Brief]; and (ii) can be used without interfering with the provision of education to all Students, including any increase in Student numbers due to be accommodated at the [relevant] Facility.

14.9.2 [Subject to:

- (a) Project Co complying with its obligations to survey and carry out any necessary remedial works required pursuant to Clauses 14.9.3 and 14.9.4; and
- (b) the [relevant] Existing Facility meeting the requirements of:
 - (i) paragraph (a) of this Clause 14.9.2; and
 - (ii) paragraphs [2.13.10.1(a), to (f), and paragraph 2.13.10.2] (*Temporary Accommodation*) of the Generic Design Requirements [and [◆]] of the Site-Specific Brief],

the [relevant] Existing Facility shall be deemed to be suitable temporary accommodation under Clause 14.9.1, provided always Project Co provides or funds such additional temporary accommodation (within or outside of the curtilage of the site of the Existing Facility) as may be necessary in accordance with Clause 14.9.5, in order to satisfy in full the requirements of [(a) to (f)] of paragraph 2.13.10.1 and 2.13.10.2] (*Temporary Accommodation*) of the Generic Design Requirements [and [◆]] of the Site-Specific Brief].³⁹

14.9.3 Where this Clause 14.9 applies and an Existing Facility is proposed for use as temporary accommodation (with or without additional temporary

which option is the most appropriate for its project. It will not generally be appropriate to include provision for temporary accommodation where LADs are payable. However, one example where LADs may be appropriate is where delay impacts payment of a capital receipt for land. Generally, insistence on LADs without a project specific need for them is unlikely to offer value for money. Welsh Government approval must be sought in respect of any proposed LAD drafting.

³⁹ This drafting will require to be reviewed on a project specific basis. The general principle to be followed is that where the relevant requirements are met, the Existing Facility should be used to the extent such Facilities are suitable for the relevant educational services that are to be delivered from the Completion Date. If for example, the Existing Facility is too small to accommodate Student numbers at that time, Project Co's obligation to provide or pay for additional alternative accommodation (such as portacabins) shall only apply to the extent necessary to accommodate those Students / classes that cannot be taught in the Existing Facility.

accommodation within the curtilage of the site of the Existing Facility), Project Co shall be responsible for and shall procure (at its cost) an independent survey of the Existing Facility, to ascertain the extent to which such accommodation is suitable for temporary use in accordance with Clause 14.9.1.

- 14.9.4 To the extent that Project Co is seeking to utilise an Existing Facility as temporary accommodation, pursuant to Clause 14.9.1, the Authority shall not be required to accept such temporary accommodation unless and until the survey referred to in Clause 14.9.3 has been carried out and Project Co has completed all necessary remedial works identified in the survey.
- 14.9.5 If the provision of temporary accommodation in accordance with Clauses 14.9.2 to 14.9.4 is not possible or practical [to accommodate some or all Students of [the Authority]/[the [relevant] School Entity]] at the Existing Facility (with or without additional temporary accommodation within the curtilage of the site of the Existing Facility), Project Co shall at the option of the Authority either:
- (a) reimburse to the Authority the proper costs reasonably incurred by the Authority in the provision of alternative accommodation and any additional or alternative ancillary services as may be required to enable that accommodation to be used for the provision of Educational Services, including, if relevant, the cost of providing temporary facilities or accommodation and/or the costs of transportation to and from any facilities or accommodation so provided; or
 - (b) provide at Project Co's expense equivalent alternative accommodation that meets the requirements of Clause 14.9.1 in a location within [one (1) mile of the [relevant] Facility / [relevant] Existing Facility] and provide such additional or alternative ancillary services as may be required to enable that accommodation to be used for the provision of Educational Services.

[Unavailability of Existing Facilities⁴⁰

- 14.10 If a Disruption Event occurs at an Existing Facility (or part thereof) prior to the Actual Completion Date [for the corresponding Facility]:
- 14.10.1 where the Disruption Event arises from a breach by Project Co of the site conduct requirements set out in paragraph [2.13.9] (*Construction*) of the Generic Design Requirements [and [♦] of the Site Specific Brief] of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*) and the Disruption Event will cease upon suspension of the part of the Works which are the subject of that breach, the Authority may require a suspension of that part of the Works. Project Co shall comply with such request until such time as it can carry out such

⁴⁰ Only applicable where Works are being carried out on existing sites.

Works in accordance with this Agreement and shall not be entitled to claim any relief or compensation in respect of any delay to the Works arising in such circumstances; and

14.10.2 where the Disruption Event arises from a breach by Project Co of the site conduct requirements set out in paragraph [2.13.9] (*Construction*) of the Generic Design Requirements [and [♦] of the Site Specific Brief] of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*) and the Works are not suspended in accordance with Clause 14.10.1, Project Co and the Authority shall agree (acting reasonably) as expeditiously as possible the steps to be taken to ensure any unavailable parts of an Existing Facility may be re-provided as soon as practicable. The steps the parties agree to consider are the following (in the agreed order of preference set out below) or any combination of the following as appropriate:

- (a) remediation of the Disruption Event through temporary and/or permanent measures;
- (b) use of other facilities at the Existing Facility;
- (c) use of temporary accommodation at the Existing Facility;
- (d) use of facilities at another [school] / [college] or Authority property;
- (e) use of temporary accommodation at another [school] / [college] or Authority property; and/or
- (f) use of commercial facilities (in the case only if specialist facilities cannot be otherwise provided under this Clause).

14.10.3 Project Co shall be responsible for providing such facilities or accommodation as are agreed appropriate pursuant to Clause 14.10.2 and paragraph [2.13.10.1] (*Temporary Accommodation*) of the Generic Design Requirements [and [♦] of the Site-Specific Brief] and shall be responsible for all proper costs arising from all administrative arrangements associated with providing such facilities or accommodation, including, if relevant, the cost of providing temporary facilities or accommodation and/or costs of transportation to and from any facilities or accommodation so provided. Whenever Project Co fails to implement any steps in the manner agreed pursuant to Clause 14.10.2, the Authority may (provided it has first served written notice on Project Co to that effect) take such steps itself and Project Co shall reimburse to the Authority the costs incurred by the Authority in so doing, on demand.

14.10.4 Where in any circumstances the Authority requires suspension of part of the Works and notifies Project Co that this is because the Works are interfering with or otherwise disrupting examinations at an Existing Facility during the Examination Period, Project Co shall immediately cease such

part of the Works and/or take or refrain from taking such other steps as are necessary to cease interference with examinations until the end of the Examination Period in question (or such other time is reasonably decided by the Authority [or the [relevant] School Entity]).]

14.10.5 Where Clause 14.10.4 applies, provided:

- (a) Project Co has complied with its obligations under Clause 14.10.4; and
- (b) it is agreed (or determined) that the interference or disruption in question did not arise from a Disruption Event,

there shall be deemed to be a Delay Event (to the extent that there will be (or is likely to be) delay to [satisfaction of the [relevant] ICT Handover Requirements or,] completion of the relevant [Main] Works [or the [relevant] Post Completion Works (as applicable)] as a result and/ or a Compensation Event (where Project Co has incurred a loss (including a loss in revenue) and/or expense as a direct result).

[Post Completion Works Phase⁴¹

14.11 Subject to Clauses 14.12 and 14.13 following issue of a Certificate of Practical Completion [in relation to a Facility], Project Co shall or shall procure that the Contractor shall carry out the Post Completion Works at the Site relating to such Facility so that such Post Completion Works are completed by the [relevant] Post Completion Works Date provided:

14.11.1 where the Certificate of Practical Completion for the [relevant] Post Completion Works has not been issued by the [relevant] Post Completion Works Date, the Authority shall be entitled to levy liquidated and ascertained damages in respect of each calendar week (or part thereof) that elapses after the [relevant] Post Completion Works Date up to and including the date that a Certificate of Practical Completion for the Post Completion Works is issued, for the following amount:

For each calendar week following the [relevant] Post Completion Works Date	£[INSERT FIGURE] ⁴²
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and

⁴¹ Where Post Completion Works are required to demolish Existing Facilities and/or build playing fields for example on multi-facility projects, this drafting should be inserted. However, there may be occasions where it is appropriate to instead have a step-up of the Monthly Service Payment in respect of Post Completion Works, where the latter approach sufficiently incentivises Project Co. Such approach is more likely to be suited to single facility projects. Where there are different phases of Post Completion Works project specific drafting to reflect different LAD levels should be included with reference to specific phases of works, such as Soft Landscaping Works at a particular Facility.

⁴² Where the Post Completion Works are sports pitches the LADs figure will need to include all costs to be incurred in hiring alternative facilities, transporting pupils to the alternative facilities etc.

- 14.11.2 after the date that falls [♦] after the [relevant] Post Completion Works Date the Authority shall be entitled to employ an alternative contractor to carry out the [relevant] Post Completion Works and shall be entitled to be reimbursed by Project Co for all costs properly and reasonably incurred in the carrying out of any such Post Completion Works, within [♦] days of a valid invoice.⁴³
- 14.12 Where the Authority employs an alternative contractor to carry out any Post Completion Works in accordance with Clause 14.11.2 it shall cease to have the right to levy liquidated damages in accordance with Clause 14.11.1 once a reasonable period of time for completing the relevant Post Completion Works (having regard to the nature and extent of the relevant Post Completion Works outstanding and the programme for carrying out of such Post Completion Works by the Authority's alternative contractor) has expired.
- 14.13 For the avoidance of doubt Clause 14.11 and Clause 14.12 shall be the Authority's sole remedy in connection with any delays to the completion of the Post Completion Works and the Authority shall not be entitled to levy any Deductions under Schedule 14 (*Payment Mechanism*) in relation to any Areas which are subject to Post Completion Works prior to the [relevant] Actual Post Completion Works Date.
- 14.14 If a Disruption Event occurs between the Actual Completion Date and the [final] Actual Post Completion Works Date [for a Facility], where the Disruption Event arises from a breach by Project Co of the site conduct requirements set out in paragraph [2.13.9] (*Construction*) of the Generic Design Requirements [and [♦] of the Site Specific Brief] of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*), the Authority may by written notice require suspension of that part of the Post Completion Works on the basis that the [relevant] Post Completion Works are interfering with or otherwise disrupting examinations at the Facility during the Examination Period and Project Co shall immediately cease such part of the Post Completion Works and/or take or refrain from taking such other steps as are necessary to cease interference with examinations until the end of the Examination Period in question (or such other time as is reasonably decided by the Authority [or the relevant School Entity]) and Project Co shall not be entitled to claim any relief or compensation in respect of any delay to the [relevant] Post Completion Works arising in such circumstances.]
- 14.15 It is acknowledged and agreed by the Authority and Project Co that the damages provided for in Clause 14.11 (*[Post Completion Works Phase]*) are in all respects fair and reasonable and represent a genuine pre estimate of the losses, damages and expenses, arising out of any breach by Project Co if its obligations under this Agreement to complete the [relevant] Post Completion Works by the [relevant] Post Completion Works Date.
- 14.16 In the event that the provisions of Clause 14.11 (*[Post Completion Works Phase]*) are unenforceable so that the Authority is unable to recover any payment to which the Authority would otherwise have been entitled under Clause 14.11 (*[Post Completion Works Phase]*) the Authority shall be entitled to claim general damages from Project Co in respect of the loss and/or damage and/or expense suffered or incurred by the Authority up to, but not exceeding the sum that would have been

⁴³ Appropriate number of days to be considered on a project-specific basis.

payable under Clause 14.11 (*Post Completion Works Phase*) had the same been enforceable.

15. INDEPENDENT TESTER

Appointment

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

Changes to Terms of Appointment

- 15.2 Neither the Authority nor Project Co shall without the other's prior written approval (not to be unreasonably withheld or delayed):
- 15.2.1 terminate, repudiate or discharge the Independent Tester Contract or treat the same as having been terminated, repudiated or otherwise discharged;
 - 15.2.2 waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Independent Tester; or
 - 15.2.3 vary the terms of the Independent Tester Contract or the service performed or to be performed by the Independent Tester.
- 15.3 The parties shall comply with and fulfil their respective duties and obligations arising under or in connection with the Independent Tester Contract.

Co-operation

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

Replacement

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

his appointment shall, unless otherwise agreed, be as set out in the Independent Tester Contract.

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

16. EQUIPMENT

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

17. PRE-COMPLETION COMMISSIONING AND COMPLETION⁴⁴

- 17.1 Not less than [six (6)] months before the Completion Date [for each Facility] [and the [relevant] Post Completion Works Date [for each Facility]], Project Co shall provide the Authority with a draft of the Final Commissioning Programme in respect of the Works relative thereto, as jointly developed by the Authority and Project Co in accordance with the provisions of Clause 17.2 and 17.3 (*Pre-Completion Commissioning and Completion*) and Schedule 10 (*Outline Commissioning Programme*). The Authority shall provide Project Co with comments on the draft Final Commissioning Programme submitted to it within [fifteen (15)] Business Days. The parties shall, within [fifteen (15)] Business Days of receipt by Project Co of the Authority's comments agree the terms of the Final Commissioning Programme provided that the Authority may by prior notice to Project Co change the scope and time of the Authority's Commissioning or the Authority's Post Completion Commissioning and reimburse Project Co its reasonable costs incurred as a result of such change in scope or time of the Authority's Commissioning. If the parties are unable to agree the Final Commissioning Programme or the change in scope or time of the Authority's Commissioning by [♦], the matter shall be referred for determination in accordance with Schedule 20 (*Dispute Resolution Procedure*).
- 17.2 The Final Commissioning Programme[s] [for each Facility] shall be in accordance with the [relevant] Outline Commissioning Programme and shall impose no greater or more onerous obligations on the Authority than those set out in the [relevant] Outline Commissioning Programme (unless otherwise agreed by the Authority in its absolute discretion). The Final Commissioning Programme shall then replace the [relevant] Outline Commissioning Programme. Without prejudice to the parties obligations in Clause 17.1, where this Agreement refers to an obligation being in accordance with, or pursuant to the [relevant] Final Commissioning Programme, such reference shall prior to the replacement of the [relevant] Outline Commissioning Programme with the [relevant] Final Commissioning Programme,

⁴⁴ The Template MIM Education PA assumes the Authority and Project Co will each undertake inspection and commissioning activities both prior to and after completion. In the case of schools projects, the approach to commissioning that is to be followed is set out in Table A, Appendix A (*Commissioning Responsibilities*) of Schedule 10 (*Outline Commissioning Programme*). The Template MIM Education PA envisages that the Final Commissioning Programme(s) will set out all requirements and obligations in relation to the development, nature, principles and performance of the completion tests to be performed to enable certification of completion to take place. Parties need to consider which commissioning activities have to occur before and which after completion (and, in each case, by whom) on a project specific basis on further education college projects in particular.

Template drafting has been provided here for Post Completion Works, to be used where relevant. Authorities will need to consider whether further project specific drafting is required, including amendments to accommodate multi-facility projects where relevant.

be deemed to be a reference to the obligation being in accordance with or pursuant to the [relevant] Outline Commissioning Programme.

- 17.3 [The][Each] Final Commissioning Programme shall describe the steps necessary, the party responsible for taking each of such steps and the timing and sequence of each of such steps to ensure insofar as relevant to the applicable Works:
- 17.3.1 that Project Co's Pre-Completion Commissioning and the Authority's Commissioning will not delay:
- (a) the Actual Completion Date occurring by the [relevant] Completion Date[; or
 - (b) [the [relevant] Actual Post Completion Works Date occurring by the [relevant] Post Completion Works Date].
- 17.3.2 that Project Co's Post Completion Commissioning and the Authority's Post Completion Commissioning in respect of the [Main] Works [for each Facility] [and Project Co's Post Completion Commissioning and the Authority's Post Completion Commissioning in respect of the Post Completion Works for [each]/[the] Facility] are [each] completed by the relevant Commissioning End Date.
- 17.4 The parties shall procure that the steps that they are responsible for carrying out and completing pursuant to the Final Commissioning Programme include, the activities described in Schedule 10 (*Outline Commissioning Programme*) [and in the case of Project Co's activities, the activities described at paragraphs [♦] of the Generic Design Requirements [and paragraphs [♦] of the Site Specific Brief]].⁴⁵
- 17.5 [In respect of each Facility,] Project Co shall notify the Independent Tester and the Authority's Representative of the date when Project Co (acting reasonably) considers that the Works will achieve the [ICT Handover Requirements][,/and] Payment Commencement Requirements [and the Post Completion Works Requirements] not less than [♦] months prior to such anticipated completion. Such notification shall trigger the completion activities of the Independent Tester under this Clause.
- 17.6 The parties each undertake to co-operate with the Independent Tester to ensure that the Independent Tester is familiar with all necessary aspects of the Project for the purposes of its role as described in this Clause.

⁴⁵ The Authority should describe any other core requirements to be complied with in relation to Project Co's commissioning activities including in respect of the decant of ICT equipment under the Authority's Construction Requirements.

Commissioning prior to Completion Date/[Post Completion Works Date]

17.7 Project Co shall:

- 17.7.1 undertake Project Co's Pre-Completion Commissioning in accordance with the [relevant] Final Commissioning Programme; and
- 17.7.2 permit the Authority to undertake the Authority's Commissioning [including permitting specialist contractors engaged by the Authority to deliver and install equipment] on such dates as agreed between the Authority and Project Co, in accordance with the [relevant] Final Commissioning Programme,⁴⁶

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

17.8 Project Co shall:

- 17.8.1 give not less than [♦] Business Days written notice to the Independent Tester, the [relevant] Facility Representative and the Authority Representative of the commencement of Project Co's Pre-Completion Commissioning in respect of the Payment Commencement Requirements [for a Facility] [and in respect of the Post Completion Works Requirements [for a Facility]] and shall ensure that the Independent Tester, the [relevant] Facility Representative, the Authority's Representative [and the ICT Installer] are invited to witness all of, and are provided with all information they may reasonably require in relation to such Project Co's Pre-Completion Commissioning and that the Independent Tester is invited to comment on Project Co's Pre-Completion Commissioning; and
- 17.8.2 be entitled to and if so requested shall attend the inspection referred to at Clause 17.10 (*Pre-Completion Inspection*).

17.9 Project Co shall (or shall procure that the Contractor shall), give the Authority access to the Facilities at such times as may be set out in the [relevant] Final Commissioning Programme to enable the Authority and Authority Parties to undertake the Authority's Commissioning in accordance with such Final Commissioning Programme for the period prior to completion of the [Main] Works [or Post Completion Works (as applicable)]. When exercising such rights the Authority shall and shall procure the Authority Parties shall comply with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.

⁴⁶ The Authority should consider what the Authority's commissioning activities, if any, will entail. Parties will need to consider when the Authority's commissioning activities (including, for example, installing of its own equipment) will be carried out.

Pre-Completion Inspections

17.10 Project Co shall give the Independent Tester, the [relevant] Facility Representative and the Authority's Representative not less than [five (5)]⁴⁷ Business Days' notice and not more than [thirty (30)] Business Days' notice of the date upon which Project Co considers that the [ICT Handover Requirements,] Payment Commencement Requirements [and Post Completion Works Requirements] [for each Facility] will be complete and the relevant tests on completion required to be performed in accordance with the [relevant] Final Commissioning Programme will be carried out. Following receipt of the notice specified in this Clause 17.10 (*Pre-Completion Inspection*) the Authority's Representative, the [relevant] Facility Representative, [a representative of the ICT Installer] and the Independent Tester shall be entitled to inspect the relevant Works on the date or dates reasonably specified by Project Co in accordance with this Clause 17.10 (*Pre-Completion Inspection*), and to attend any of the tests on completion. Project Co shall be entitled to and if so requested shall accompany the Authority's Representative, the [relevant] Facility Representative, [the representative of the ICT Installer] and the Independent Tester on any such inspection.

Pre-Completion Matters

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

Completion Certificate(s)

17.12 Pursuant to the terms of the Independent Tester Contract and subject to Clauses 17.14 to 17.18 (*Snagging Items*), the parties shall procure that the Independent Tester shall [in respect of each Facility] when he is satisfied that (i) the [ICT Handover Requirements are satisfied, issue the ICT Handover Acceptance Certificate; (ii) the] Payment Commencement Requirements are satisfied, issue a Certificate of Practical Completion; [(iii) the Post Completion Works Requirements are satisfied, issue a Certificate of Practical Completion in respect of those Post Completion Works]; and (iv) the Snagging Items in respect of the relevant Works have been completed to his satisfaction in accordance with Clauses 17.14 to 17.18

⁴⁷ Whilst this time period is in square brackets, the 5 Business Day minimum notice period is the default position and any extension to this will need to be justified on a project specific basis.

(*Snagging Items*), issue a Snagging Items Completion Certificate, each to that effect, to the Authority and Project Co.

- 17.13 Without prejudice to Clauses 17.14 and 17.19 (*Snagging Items*), the issue of [[the]/[a] ICT Handover Acceptance Certificate,] [the]/[a] Certificate of Practical Completion [and/or [the]/[a] Certificate of Practical Completion in respect of Post Completion Works] shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence (but only for the purpose of ascertaining the [relevant] [Actual ICT Handover Date,] [Payment Commencement Date]/[Payment Commencement Date 1] [and/or the Actual Post Completion Works Date] (as applicable)) that the [relevant] Works are complete in accordance with the [ICT Handover Requirements,] Payment Commencement Requirements [and/or Post Completion Works Requirements] (as the case may be) on the date stated in the [relevant] Certificate of Practical Completion [or ICT Handover Acceptance Certificate].

Snagging Items⁴⁸

- 17.14 [The Independent Tester shall on the same day as the date of issue of [the]/[an] ICT Handover Acceptance Certificate [in relation to a Facility], issue to Project Co and the Authority a list of any relevant Snagging Items (the "**Snagging List**"). Within [five (5)] Business Days after the date of receipt from the Independent Tester of the Snagging List, Project Co will provide to the Authority and the Independent Tester a reasonable programme (the "**Snagging Programme**") for making good each Snagging Item set out in the [relevant] Snagging List provided that the Snagging Programme will require that each Snagging Item will be made good within twenty (20) Business Days after the date of provision of the Snagging List or, where it is not reasonably practicable to make good within twenty (20) Business Days due to the lead times for supplies or materials, or to avoid interference with the ICT Installer, within such time as is reasonably practicable (up to a maximum of [three (3) months]). The parties will seek to agree the Snagging Programme or in default of agreement will refer the matter for determination under Clause 57 (*Dispute Resolution Procedure*).]
- 17.15 [The Independent Tester shall on the same day as the date of issue of the Certificate of Practical Completion in relation to the [Main] Works issue an update of the Snagging Items on the Snagging List prepared pursuant to Clause 17.14 (*Snagging Items*). Within [five (5)] Business Days after the date of receipt from the Independent Tester of that updated Snagging List, Project Co will provide to the Authority and the Independent Tester an updated Snagging Programme for making good each new or outstanding Snagging Item set out on the Snagging List, provided that the Snagging Programme will require that each Snagging Item included on the original Snagging List will be made good within such period as is provided under the original Snagging Programme and, in the case of new Snagging Items, within [twenty (20)] Business Days after the date of provision of the updated Snagging List or, where it is not reasonably practicable to make good within [twenty (20)] Business Days due to the lead times for supplies or materials, within such time as is reasonably practicable (up to a maximum of [three (3) months]). The parties will seek to agree the Snagging Programme or in default of agreement will refer the matter for determination under Clause 57 (*Dispute Resolution Procedure*).]
- 17.16 [The Independent Tester shall on the same day as the date of issue of a Certificate of Practical Completion in relation to the Post Completion Works issue a list of any

⁴⁸ Clauses 17.14 to 17.19 may require to be tailored for college projects, where the standard school phasing approach is not adopted.

relevant Snagging Items in respect of the [relevant] Post Completion Works (the "**PCW Snagging List**"), Within [five (5)] Business Days after the date of receipt from the Independent Tester of that PCW Snagging List, Project Co will provide to the Authority and the Independent Tester a reasonable programme (the "**PCW Snagging Programme**") for making good each Snagging Item set out on the PCW Snagging List provided that the PCW Snagging Programme will require that each Snagging Item will be made good within [twenty (20)] Business Days after the date of provision of the PCW Snagging List or, where it is not reasonably practicable to make good within [twenty (20)] Business Days due to the lead times for supplies or materials, within such time as is reasonably practicable (up to a maximum of [three (3) months]). The parties will seek to agree the PCW Snagging Programme or in default of agreement will refer the matter for determination under Clause 57 (*Dispute Resolution Procedure*).]

- 17.17 Project Co shall, in consultation with the Authority's Representative and in such a manner as to cause as little disruption as reasonably practicable to the Authority's Post Completion Commissioning and the Authority's use of the [relevant] Facilities [and so as not to interfere with the activities of the ICT Installer to be carried out pursuant to Section 2 (*Construction Phase Access Protocol*) of Schedule 34 (*Joint Operating Protocol*)] and otherwise in accordance with the requirements of Schedule 34 (*Joint Operating Protocol*), make good each Snagging Item in accordance with the [relevant] Snagging Programme [or PCW Snagging Programme (as applicable)] to the satisfaction of the Independent Tester. Upon satisfactory completion of the [relevant] Snagging List [or PCW Snagging List (as applicable)], the Independent Tester will issue the [relevant] Snagging Items Completion Certificate in accordance with the Independent Tester Contract and Schedule 22 (*Certificates*).
- 17.18 If any Snagging Item has not been rectified within the time periods permitted pursuant to Clause 17.14, 17.15 or Clause 17.16 (*Snagging Items*), as applicable, then the Authority will be entitled to effect such repairs as may be necessary to rectify the Snagging Item(s) and recover the costs of effecting such repairs from Project Co as a debt.
- 17.19 The issue of [[the]/[an] ICT Handover Acceptance Certificate and [the]/[a] Certificate of Practical Completion [in respect of the Main Works or [relevant] Post Completion Works (as applicable)] [for a Facility] shall in no way affect or diminish the obligations of Project Co under this Agreement including in respect of any Defects, or any liability for Deductions in accordance with Schedule 14 (*Payment Mechanism*).

[WiFi Completion

- 17.20 Project Co and the Authority shall procure that the Independent Tester shall, in accordance with the Independent Tester Contract and no earlier than the date that falls [♦] weeks following the Actual Completion Date [in respect of each Facility] carry out the WiFi Post-Completion Tests so that they have been completed by no later than the WiFi Tests Completion Date. The Authority and Project Co shall be entitled to attend such WiFi Post-Completion Tests. Project Co shall, if so requested, accompany the Authority's Representative and the Independent Tester in relation to the carrying out of the WiFi Post Completion Tests.
- 17.21 The parties shall procure that the Independent Tester, within [five (5)] Business Days of any inspection made pursuant to Clause 17.20 (*WiFi Completion*), notifies Project Co and the Authority of any outstanding matters (including, without limitation, the

repetition of any of the WiFi Post-Completion Tests which are required to be carried out and passed in accordance with the Final Commissioning Programme) which are required to be attended to before the WiFi Post-Completion Tests can be considered to be complete in accordance with the WiFi PC Criteria. Project Co shall attend to such matters at its own cost and shall give the Independent Tester and the Authority's Representative further notice of the date on which Project Co considers that such matters have been attended to so that the procedures in Clause 17.20 (*WiFi Completion*) and this Clause 17.21 (*WiFi Completion*) are repeated as often as may be necessary to ensure that all such outstanding matters are attended to and that the WiFi PC Criteria are satisfied.

- 17.22 Pursuant to the terms of the Independent Tester Contract, the parties shall procure the Independent Tester shall, when he is satisfied that the WiFi Post Completion Tests have been passed and the WiFi PC Criteria met, issue a Certificate of WiFi Completion to that effect. The issue of the Certificate of WiFi Completion shall in the absence of manifest error, bad faith or fraud, be conclusive evidence that the WiFi PC Criteria have been satisfied on the date stated in such certificate.
- 17.23 If the WiFi Actual Completion Date [in respect of a Facility] has not occurred on the date that falls [♦] weeks after the Actual Completion Date [in respect of that Facility] the Authority, acting reasonably, may itself take or engage others to remedy any of the outstanding matters that remain to be carried out in order to satisfy the WiFi Post Completion Tests to the same standard as would be required of Project Co under the terms of this Agreement (the "**WiFi Remedial Steps**") provided that if the Authority either takes steps itself or engages with others to remedy any of the outstanding matters that remain to be carried out it will be entitled to recover the costs of effecting such works from Project Co as a debt. For so long as and to the extent that WiFi Remedial Steps are taken by the Authority and prevents Project Co from providing any part of the Services:
- 17.23.1 Project Co shall be relieved of its obligations to provide such part of the Services; and
- 17.23.2 in respect of the period in which the Authority is taking the WiFi Remedial Steps, the Monthly Service Payments due from the Authority to Project Co shall equal the amounts Project Co would receive if it were satisfying all of its obligations and providing the Services affected by the WiFi Remedial Steps in full over that period, less an amount equal to all of the costs incurred by the Authority in taking the WiFi Remedial Steps (including, without limitation, an appropriate sum in respect of general staff costs and overheads).
- 17.24 The issue of the Certificate of WiFi Completion [in respect of a Facility] shall in no way affect or diminish the obligations of Project Co under this Agreement including in respect of any Defects, or any liability for Deductions in accordance with Schedule 14 (*Payment Mechanism*).]⁴⁹

⁴⁹ Approach to WiFi and/ or other post completion tests and certification will require consideration on a project specific basis. Such tests may be required where it is not possible to test performance at the Actual Completion Date.

As-built specification

- 17.25 Prior to issue of [the]/[a] Certificate of Practical Completion [in respect of [the Main Works] [and in respect of Post Completion Works] [for a Facility], Project Co shall provide to the Authority a hard copy and an electronic copy (in accordance with the BIM Protocol) of the "as-built" drawings, "as-built" specification and all ["final issue" construction drawings] relating to the relevant Works, together with a written statement from Project Co's Representative to the Authority's Representative certifying that all such items are true and accurate.]⁵⁰

18. POST COMPLETION COMMISSIONING

Commissioning

- 18.1 Project Co and the Authority shall, within:

18.1.1 [♦] Business Days following the Actual Completion Date [for a Facility] [; and

18.1.2 [♦] Business Days following the [relevant] Actual Post Completion Works Date [for a Facility]],

respectively undertake and complete Project Co's Post-Completion Commissioning and the Authority's Post Completion Commissioning, in accordance with the [relevant] Final Commissioning Programme. Both parties shall, at all times, and in particular in the period between the Actual Completion Date and the Actual Commissioning End Date [for a Facility] [or the [relevant] Actual Post Completion Works Date and Actual Commissioning End Date [for a Facility], as relevant], use reasonable endeavours to assist the other party to ensure compliance with the [relevant] Final Commissioning Programme.

Information

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

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

⁵⁰ Documentation to be specified on a project by project basis. Documents should, as a minimum, include "as-built" drawings and "final issue" construction drawings.

- 18.4 On the completion of Project Co's Post-Completion Commissioning and the Authority's Post Completion Commissioning [in respect of the Main Works] [for a Facility] [and the Post Completion Works [for a Facility]] the Independent Tester shall issue the Commissioning Completion Certificate [for that Facility] [and the [relevant] Post Completion Works [for that Facility], as relevant]].

Operational Manuals

- 18.5 Project Co shall make available on the [relevant] Site to the Authority's Representative:

18.5.1 at least [◆] weeks prior to the anticipated Actual Completion Date [in respect of a Facility], [◆] [paper] copies [and electronic copies (in accordance with the BIM Protocol)] of a draft operation and maintenance manual in sufficient detail to allow the Authority to plan for the safe and efficient operation of the [relevant] Facilities;

18.5.2 on or before the Actual Completion Date [in respect of a Facility] [◆] [paper] copies [and electronic copies (in accordance with the BIM Protocol)] of a final draft operation and maintenance manual [in connection with the relevant Facility] in sufficient detail to allow the Authority to operate and use such Facilities safely and efficiently; and

18.5.3 within [twenty (20) Business Days]⁵¹ following the Actual Completion Date [in respect of a Facility], [◆] [paper] copies [and electronic copies (in accordance with the BIM Protocol)] of the principal operation and maintenance manual [in connection with the relevant Facility],

in each case including all manufacturers' instructions relating to Equipment installed by Project Co and [◆].⁵²

- 18.6 Project Co shall provide to the Authority such information after the Actual Completion Date [in respect of a Facility] [and the [relevant] Actual Post Completion Works Date [in respect of a Facility]] as relates to any Snagging Items or rectification of Defects relative thereto, as is reasonably necessary to allow for the updating of any of the items listed in Clause 18.5 (*Operational Manuals*).

- 18.7 On termination of this Agreement (howsoever arising) prior to the provision by Project Co in accordance with Clause 18.5 (*Operational Manuals*) of the items listed therein, Project Co shall within ten (10) Business Days of such termination provide

⁵¹ Note that drafting for the final operation and maintenance manual in respect of a Facility should tie in with the timescale referred to in Appendix B (*Completion Criteria*) Schedule 10 (*Outline Commissioning Programme*).

⁵² To be amended on a project specific basis. For example, operational manuals may need to be made available at an earlier date depending on the timing of commissioning activities. Further, it may be possible, for Project Co to provide draft manuals to the Authority for comment prior to finalisation and suitable amendments should be made to the Clause where relevant. It is expected that substantially complete manuals will be available by the Actual Completion Date with final drafts being made available within an agreed time thereafter. The Authority should list any other manuals required.

Please note that in accordance with Welsh Language Standards certain documents may need to be translated and/or produced in bi-lingual form. Specific Authority requirements should be considered during the New Project Approval Process under the SPA.

a copy of any operating and maintenance manual not yet provided (completed as appropriate to the date of termination) to the Authority.

[Decanting, Decommissioning and Equipment Transfer

18.8 The Authority and Project Co shall, as appropriate, undertake any necessary decanting and decommissioning activities in accordance with the requirements of the [relevant] Final Commissioning Programme and Appendix A (*Commissioning Responsibilities*) of Schedule 10 (*Outline Commissioning Programme*), and any Equipment transfer in accordance with Schedule 11 (*Equipment*), such that Project Co is able to perform its obligations in respect of the Works.⁵³

19. FOSSILS AND ANTIQUITIES

Property

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

Discovery

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

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

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

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

Action

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

19.4 Project Co shall promptly and diligently comply with any instruction issued by the Authority's Representative referred to in Clause 19.3 (*Action*) above (except and to

⁵³ In the case of a schools project, the Authority will need to liaise with the School Entity/ School Entities on their decant requirements which are to be reflected in Schedule 11 (*Equipment*).

the extent that such instruction constitutes an Authority Change pursuant to Clause 19.6 (*Action*) below in which case the provisions of Schedule 16 (*Change Protocol*) shall apply), at its own cost.

- 19.5 If directed by the Authority's Representative, Project Co shall allow representatives of the Authority to enter the Site[s] for the purposes of removal or disposal of such discovery provided that such entry shall be subject to the Authority complying with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.
- 19.6 If, in relation to such discovery, the Authority requires Project Co to carry out works (being any work of alteration, addition, demolition or extension or variation in the Works) which are not works which would be necessary for the purpose of compliance with Law or any Consents, it must issue an Authority Change Notice in accordance with the provisions of Schedule 16 (*Change Protocol*).⁵⁴

⁵⁴ The discovery of fossils and antiquities is treated as a Relief Event entitling Project Co to an extension of time in accordance with Clause 30(*Delay Events and Compensation Events*) but leaving the financial risks of such discovery with Project Co. If there is a known problem on the/a Site the provisions relating to discoveries may need to be reviewed and amended on a project specific basis.

PART 4: QUALITY ASSURANCE

20. QUALITY ASSURANCE

Quality Plans and Systems

- 20.1 Project Co shall procure that all aspects of the Project Operations are the subject of quality management systems in accordance with the provisions of this Clause 20 (*Quality Assurance*).
- 20.2 The quality management systems referred to in Clause 20.1 (*Quality Plans and Systems*) above shall be reflected in appropriate quality plans, the standard of which shall be consistent with [BS EN ISO 9001] (as the case may be) or any equivalent standard which is generally recognised as having replaced them (or either of them).
- 20.3 Without limitation to the generality of Clause 20.2 (*Quality Plans and Systems*), there shall be:
- 20.3.1 a Design Quality Plan;
 - 20.3.2 a Construction Quality Plan; and
 - 20.3.3 a Services Quality Plan for each Service,
- provided that the Design Quality Plan and the Construction Quality Plan may be incorporated into one document.
- 20.4 Project Co shall procure that the Project Operations are carried out in compliance with the Quality Plans. All Quality Plans shall be submitted to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*) and Project Co shall not be entitled to implement or procure the implementation of any Quality Plan unless Project Co is entitled to proceed with such implementation pursuant to Schedule 8 (*Review Procedure*).
- 20.5 Project Co shall implement the quality management systems referred to in Clause 20.1 (*Quality Plans and Systems*) and shall procure that:
- 20.5.1 the Contractor implements the Design Quality Plan;
 - 20.5.2 the Contractor implements the Construction Quality Plan; and
 - 20.5.3 each Service Provider implements the relevant Services Quality Plan for each Service being provided by that Service Provider.

- 20.6 Where any aspect of the Project Operations is performed by more than one contractor or subcontractor, then the provisions of this Clause 20 (*Quality Assurance*) (in so far as relevant or appropriate to the activities to be performed by such contractor or subcontractor) shall apply in respect of each of such contractors or subcontractors, and references in this Clause 20 (*Quality Assurance*) to the "**Contractor**" or the "**Service Provider**" shall be construed accordingly. To avoid doubt, this Clause shall not be construed as requiring subcontractors of the Contractor or the Service Provider to have their own quality plans but only to comply with the Design Quality Plan and the Construction Quality Plan or the relevant aspects of the Services Quality Plan (as the case may be).
- 20.7 Project Co shall from time to time submit to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*) any changes to any of the Quality Plans required for such Quality Plan to continue to comply with the requirements set out in Clause 20.2 (*Quality Plans and Systems*). The Authority's Representative may raise comments on any such proposed change only on the grounds set out in paragraph 3 of Schedule 8 (*Review Procedure*).
- 20.8 If there is no objection under Schedule 8 (*Review Procedure*) to a change to any Quality Plan proposed pursuant to Clause 20.7 (*Quality Plans and Systems*), the Quality Plan shall be amended to incorporate such change.

Quality Manuals and Procedures

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

Quality Management

- 20.10 Project Co shall maintain a quality management system which shall:
- 20.10.1 ensure the effective operation of the quality systems described in this Clause 20 (*Quality Assurance*);
 - 20.10.2 cause an audit of the quality systems at regular intervals and the findings of such audit will be reported to the Authority's Representative;
 - 20.10.3 require review of all quality systems at intervals agreed with the Authority's Representative to ensure their continued suitability and effectiveness;
 - 20.10.4 require liaison with the Authority's Representative on all matters relating to quality management; and

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

Quality Monitoring

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

PART 5: INFORMATION TECHNOLOGY

21. INFORMATION TECHNOLOGY⁵⁵

- 21.1 The Authority shall, or shall procure that Authority Parties shall, carry out the works and activities identified as its responsibility in the ICT Design Requirements contained in [paragraph 4] of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*) in respect of the specification, design, construction, provision, installation, test, integration, refreshment, maintenance, management, support and upgrade of ICT Infrastructure and ICT Assets.
- 21.2 Project Co shall, or shall procure that Project Co Parties shall, carry out the works and activities identified as its responsibility in the ICT Design Requirements contained in [paragraph 4] of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*) in respect of the specification, design, construction, provision, installation, test, integration, refreshment, maintenance, management, support and upgrade of ICT Infrastructure and ICT Assets.
- 21.3 Project Co and the Authority shall each comply with their respective obligations in this Agreement in respect of the commissioning of ICT Infrastructure and ICT Assets including (without limitation) Schedule 10 (*Outline Commissioning Programme*), Schedule 11 (*Equipment*), Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*) and Section 2 (*Construction Phase Access Protocol*) of Schedule 34 (*Joint Operating Protocol*).

⁵⁵ Provisions relating to Information Technology are to be included on a project specific basis, where required.(or marked 'not used', where not required).

PART 6: SERVICES

22. THE SERVICES

General Obligations

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

22.1.1 the Service Level Specification;

22.1.2 the Method Statements;

22.1.3 the Quality Plans;

22.1.4 Good Industry Practice; and

22.1.5 the terms of this Agreement.

22.2 To avoid doubt the obligations in Clauses 22.1.1 to 22.1.5 are independent obligations and, in the case of conflict between obligations requiring different levels of performance, the default position is that the obligation requiring the highest standard of performance shall take precedence. In particular:

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

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

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

Commencement and Phase In of Services

22.3 Project Co shall procure that the provision of the Services commences on the Actual Completion Date [for a Facility] [and in respect of the Post Completion Works Areas, the [relevant] Actual Post Completion Works Date] [for a Facility].

Project Co Services Changes

- 22.4 Project Co may at any time submit to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*) proposals for amendments to or substitution for the Method Statements or any part of them. If there is no comment on such proposed amendment or substitution (on the grounds set out in paragraph 3 of Schedule 8 (*Review Procedure*)), then the Method Statements as so amended or substituted shall be the Method Statements for the purposes of this Agreement, subject to any further amendment or substitution to which there has been no comment in accordance with Schedule 8 (*Review Procedure*).
- 22.5 To avoid doubt, an amendment to or substitution for the Method Statements proposed pursuant to Clause 22.4 (*Project Co Services Changes*) shall not be a Qualifying Change entitling Project Co to any payment (or other compensation) or to any relief from the performance of its obligations under this Agreement.

No Disruption

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

23. MAINTENANCE

Programmed Maintenance Works

- 23.1 No later than [three (3)] months prior to the Completion Date [for a Facility] Project Co shall submit to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*) a Schedule of Programmed Maintenance for the period from the Completion Date to the expiry of the current Academic Year [and in respect of the Post Completion Works Areas where the Post Completion Works are scheduled to be completed prior to commencement of or in that Academic Year].
- 23.2 Not later than [three (3)] months prior to the commencement of each subsequent Academic Year Project Co shall submit to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*) a Schedule of Programmed Maintenance for the next succeeding Academic Year relevant to the [Main] Works [and in respect of the Post Completion Works Areas where Post Completion Works are complete or scheduled to be completed prior to commencement of or in that Academic Year].
- 23.3 Each Schedule of Programmed Maintenance shall contain the following information (the "**Programmed Maintenance Information**"):
- 23.3.1 details of the proposed start and end dates for each period of Programmed Maintenance, the works to be carried out, the proposed hours of work and the Areas where work is to be carried out;

- 23.3.2 details of any effect of the Programmed Maintenance on the delivery of any of the Services and/or the Authority Services; and
- 23.3.3 a proposed Lifecycle Schedule, together with a report on any differences between the Lifecycle Profile and Lifecycle Spend for the previous Academic Year and a prediction of any differences between the Lifecycle Profile and Lifecycle Spend for that Academic Year.
- 23.4 Not later than twenty (20) Business Days prior to the end of any Term, Project Co may submit to the Authority's Representative for approval in accordance with Schedule 8 (*Review Procedure*) a revision to the Schedule of Programmed Maintenance for the Academic Year in which the next Term falls showing the effect of the proposed changes to the Programmed Maintenance Information. If the Authority's Representative does not raise comments on such proposed revision in accordance with Schedule 8 (*Review Procedure*), the Schedule of Programmed Maintenance as revised shall become the Schedule of Programmed Maintenance in respect of the next Term.
- 23.5 Where the Authority's Representative raises comments in respect of any Programmed Maintenance periods and/or hours of work shown in a Schedule of Programmed Maintenance in accordance with paragraph 3 of Schedule 8 (*Review Procedure*), he shall indicate whether, and if so when, the Programmed Maintenance can be re-scheduled and Project Co shall amend the relevant Schedule of Programmed Maintenance accordingly.

Programmed and Unprogrammed Maintenance

- 23.6 Project Co shall not carry out any Programmed Maintenance or Unprogrammed Maintenance Work or Lifecycle Replacement save:
- 23.6.1 in accordance with:
- (a) a Schedule of Programmed Maintenance to which no objection has been made under Schedule 8 (*Review Procedure*) or, where comment has been raised in respect of the Programmed Maintenance or Lifecycle Replacement periods and/or time, the Schedule of Programmed Maintenance has been amended pursuant to the Service Level Specification; and
 - (b) Section 3 (*Access To Work Protocol*) of Schedule 34 (*Joint Operating Protocol*);
- 23.6.2 in accordance with:
- (a) the procedures set out in Clause 23.8 (*Programmed and Unprogrammed Maintenance*); and

(b) Section 3 (*Access To Work Protocol*) of Schedule 34 (*Joint Operating Protocol*); or

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

23.7 Notwithstanding that there has been no objection to a Schedule of Programmed Maintenance, the Authority's Representative may, at any time, require Project Co to accelerate or defer any Programmed Maintenance or Lifecycle Replacement by giving written notice to Project Co, (unless otherwise agreed) not less than [twenty (20)] Business Days prior to the scheduled date for carrying out such Programmed Maintenance or Lifecycle Replacement, which notice shall set out the time and/or periods at or during which the Authority requires the Programmed Maintenance or Lifecycle Replacement to be performed. Project Co shall notify the Authority of the amount of any additional reasonable costs which it will incur as a direct consequence of such acceleration or deferment (the "**Estimated Increased Maintenance Costs**") within [five (5)] Business Days of the receipt of the written notice advising of the requirement for an acceleration or deferment of the Programmed Maintenance. The Authority shall, within a further period of [five (5)] Business Days following receipt by the Authority of notification of the amount of the Estimated Increased Maintenance Costs, at the Authority's option, either confirm or withdraw its request to accelerate or defer the Schedule of Programmed Maintenance. If the Authority does not respond within this [five (5)] Business Day period, the request shall be deemed to have been confirmed. The Authority shall reimburse Project Co the direct and reasonable costs actually incurred by Project Co as a consequence of such acceleration or deferment up to, but not exceeding, the amount of the Estimated Increased Maintenance Costs.

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

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

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

5 Year Maintenance Plan

- 23.11 Project Co shall deliver to the Authority's Representative not less than [♦] Business Days prior to the Completion Date, and thereafter not less than [♦] Business Days prior to the commencement of each Academic Year the latest version of the 5 Year Maintenance Plan.
- 23.12 The Authority shall have a right to inspect the Facilities, the Maintenance Works and the Lifecycle Replacement to ensure that the Facilities are being maintained in accordance with the Service Level Specification and that the Facilities comply with the Authority's Construction Requirements and Project Co's Proposals throughout the Project Term. The Authority may appoint an independent third party for the purposes of carrying out any such inspection and shall make known the findings to Project Co and the Funders. The parties shall then meet to discuss any implications of such findings and any steps that are necessary to remedy any failure to comply with such obligations. Project Co shall (subject to Clause 34 (*Change Protocol*)) take into account such discussions in the next Schedule of Programmed Maintenance so that any failure to comply with such obligations shall be remedied.

Authority's Maintenance Obligations

- 23.13 The Authority shall be responsible for:
- 23.13.1 maintaining anything new that is provided by the Authority under a Derogated Low Value Change (excluding Assets which have been repaired or replaced by the Authority in accordance with Sections 2 (*Low Value Changes*) of Schedule 16 (*Change Protocol*)); and
 - 23.13.2 performing the maintenance obligations identified as its responsibility under the Interface Protocol.

Method Statements

- 23.14 Project Co shall ensure on a continuing basis that at all times its maintenance and operating procedures reflect its Method Statements and are carried out and remain sufficient to ensure that:

- 23.14.1 the Facilities are Available as required by this Agreement;
- 23.14.2 the Facilities are kept in good structural and decorative order (subject to fair wear and tear) in accordance with this Agreement (including the Service Level Specification and Method Statements);
- 23.14.3 subject to Clause 24 (*Lifecycle Replacement*), the Facilities and each of the elements of them are being maintained in accordance with the applicable design life requirements set out in paragraph [1.4.5 (*Minimum Life Expectancy and Residual Life*)] of Part 1 (*Generic Design Requirements*) of the Authority's Construction Requirements and the Minimum Residual Life Expectancy Requirements (as such term is defined in Schedule 18 (*Handback Procedure*)); and
- 23.14.4 Project Co can deliver the Services in accordance with this Agreement (including the Service Level Specification).

Surveys

- 23.15 If the Authority reasonably believes that Project Co is in breach of its obligations under Clause 23.14 (*Method Statements*) and subject always to Schedule 18 (*Handback Procedure*), then it may carry out or procure the carrying out of a survey of the Facilities to assess whether the Facilities have been and are being maintained by Project Co in accordance with its obligations under Clause 23.14 (*Method Statements*). This right may not be exercised more than once every two (2) years.
- 23.16 The Authority shall notify Project Co in writing a minimum of ten (10) Business Days in advance of the date it wishes to carry out the survey. The Authority shall consider in good faith any reasonable request by Project Co for the survey to be carried out on a different date if such request is made at least five (5) Business Days prior to the notified date and Project Co (acting reasonably) is able to demonstrate that carrying out the survey on the notified date would materially prejudice Project Co's ability to provide the Services.
- 23.17 When carrying out any survey, the Authority shall use reasonable endeavours to minimise any disruption caused to the provision of the Services by Project Co. The cost of the survey, except where Clause 23.18 (*Surveys*) applies, shall be borne by the Authority. Project Co shall give the Authority (free of charge) any reasonable assistance required by the Authority from time to time during the carrying out of any survey.
- 23.18 If a survey shows that Project Co has not complied or is not complying with its obligations under Clause 23.14 (*Method Statements*), the Authority shall:
- 23.18.1 notify Project Co of the standard that the condition of the Facilities should be in to comply with its obligations under Clause 23.14 (*Method Statements*) and this Agreement generally;

- 23.18.2 specify a reasonable period within which Project Co must carry out such rectification and/or maintenance work;
 - 23.18.3 be entitled to be reimbursed by Project Co for the cost of the survey and any administrative costs incurred by the Authority in relation to the survey other than where the costs of the rectification and/or maintenance work are less than the costs of the survey in which case the cost of the survey shall be shared equally between the Authority and Project Co; and
 - 23.18.4 Project Co shall carry out such rectification and/or maintenance work within the period specified by the Authority and any costs it incurs in carrying out such rectification and/or maintenance work shall be at its own expense.
- 23.19 In the event of any failure by Project Co to comply with Clause 23.18.4 (*Surveys*) or if the Authority is or becomes aware of a breach by Project Co of its obligations under Clause 23.18.4 (*Surveys*) then the Authority shall be entitled to exercise its right of access and remedy such breach. To the extent that the Authority performs any of the obligations of Project Co pursuant to this Clause 23.19 (*Surveys*), ("**Remedial Action**"), the Authority shall perform such Remedial Action to the same standard as would be required of Project Co under the terms of this Agreement and for so long as, and to the extent that the Remedial Action is taken, and this prevents Project Co from providing any part of the Services:
- 23.19.1 Project Co shall be relieved of its obligations to provide such part of the Services; and
 - 23.19.2 in respect of the period in which the Authority is taking the Remedial Action, the Monthly Service Payments due from the Authority to Project Co shall equal the amounts Project Co would receive if it were satisfying all of its obligations and providing the Services affected by the Remedial Action in full over that period, less an amount equal to all of the costs incurred by the Authority in taking the Remedial Action (including, without limitation, an appropriate sum in respect of general staff costs and overheads).

24. LIFECYCLE REPLACEMENT

- 24.1 Project Co shall undertake Lifecycle Replacement at the Facilities in accordance with a Lifecycle Schedule which has been approved or not commented on by the Authority under the Review Procedure.
- 24.2 No later than forty (40) Business Days before each occasion on which any part of the Facilities is due for replacement (as identified in the Lifecycle Schedule), where Project Co does not believe it is necessary to undertake such replacement, Project Co shall submit to the Authority (under the Review Procedure) a written statement detailing:
 - 24.2.1 the replacement(s) which the Lifecycle Schedule records as being due; and

- 24.2.2 why Project Co does not believe it is necessary to undertake such replacement having regard to the condition of the relevant part and Project Co's obligations under this Agreement.
- 24.3 If the Authority approves in accordance with the Review Procedure (or it is determined in accordance with the Dispute Resolution Procedure) that the replacement should be deferred, Project Co shall amend the Lifecycle Schedule to reflect such deferral.
- 24.4 Without prejudice to Clause 24.3 (*Lifecycle Replacement*) Project Co shall replace any items listed in the Lifecycle Schedule with parts of at least equivalent standard to those at the [relevant] [Actual Completion Date] [or in respect of Post Completion Works, the [relevant] Actual Post Completion Works Date] measured by reference to the standards set out in the Service Level Specification and the standards of the Equipment set out in [Project Co's Proposals and/or the Authority's Construction Requirements], measured in each case against the current standards for the relevant part so that as a minimum any replacement part should have an equivalent or greater anticipated lifespan at the same quality as the original part provided that nothing in this Clause 24.4 (*Lifecycle Replacement*) shall require the relevant elements of the Facilities to have a longer working life than required by [Appendix D] of the Service Level Specification.
- 24.5 In the event that Project Co fails to either:
- 24.5.1 replace any part of the Facilities by the date that it is due for replacement (as identified in the Lifecycle Schedule); or
- 24.5.2 comply with Clause 24.4 (*Lifecycle Replacement*),
- and such failure is not remedied within one (1) month of receipt of written notice by Project Co of such failure from the Authority, the Authority may remedy such failure itself and recover the cost from Project Co as a debt.

Lifecycle Profile and Spend

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

- 24.8 At least [sixty (60)] Business Days prior to a Lifecycle Review Date, Project Co shall submit to the Authority a report containing:
- 24.8.1 a survey of the state and condition of the Facilities and Lifecycle Assets by comparison to Project Co's maintenance and lifecycle obligations under this Agreement;
 - 24.8.2 a revised projection for any alteration to anticipated replacement or renewal of Lifecycle Assets in respect of:
 - (a) the period from the relevant Lifecycle Review Date until the next Lifecycle Review Date; and
 - (b) the period from the relevant Lifecycle Review Date until the Expiry Date;
 - 24.8.3 confirmation of any differences between the Lifecycle Profile and Lifecycle Spend, and transactions that have taken place since the previous Lifecycle Review Date;
 - 24.8.4 confirmation of the Lifecycle Profile for the period up to the next Lifecycle Review Date;
 - 24.8.5 confirmation of the Lifecycle Profile from that Lifecycle Review Date to the Expiry Date;
 - 24.8.6 a summary of how Project Co has achieved the Lifecycle Efficiencies Plan in the period since the previous Lifecycle Review Date;
 - 24.8.7 details of Equipment to be replaced and commentary on how this has been determined with particular reference to any changes to the Authority Services which the Authority has made Project Co aware of, which mean that a like for like replacement of Equipment may not be appropriate or represent best value for money for the Authority,
- (to be referred to as the "**Lifecycle Report**").
- 24.9 On the Lifecycle Review Date, the parties shall discuss the contents of the Lifecycle Report, and Project Co shall make such revisions to the Lifecycle Report as the parties agree are necessary and supply the Authority with a copy of the same within twenty (20) Business Days of the Lifecycle Review Date.

25. BIENNIAL REVIEWS AND REPORTING

25.1 Biennial Reviews

- 25.1.1 Project Co shall work with the Authority to identify opportunities for improving the performance, efficiency and effectiveness of the Facilities and the Services. This shall be termed a "**Biennial Review**".
- 25.1.2 On the date falling two (2) years after the [Actual Completion Date] and every two (2) years thereafter, during the Operational Term (each a "**Contract Review Date**"), Project Co and the Authority shall conduct a Biennial Review in order to ensure that the Services and the Facilities are providing a suitable and cost effective solution for the Authority.
- 25.1.3 The Biennial Review shall include a meeting held between the Authority and Project Co, where both parties shall present their overview of the effectiveness of the Agreement. During each Biennial Review a discussion shall take place concerning the improvements to be made, and Project Co shall record the decisions taken.
- 25.1.4 Project Co shall produce a "**Biennial Review Report**" and submit this for review by the Authority no less than thirty (30) days prior to the relevant Contract Review Date.
- 25.1.5 The Biennial Review Report shall identify any activities undertaken by Project Co to improve the effectiveness of the Services, and any further opportunities for improvement of the Agreement through prospective changes in the Services, changes in the Authority Services, and/or behaviour or usage changes by either party; and it shall include as a minimum:
- (a) a trend analysis of performance against performance and availability standards over the years to date to identify areas of performance that can be improved, and steps taken by Project Co to address performance issues. Where the performance trend analysis identifies a deteriorating trend in performance, repeat failures, or significant failures that impact on the Authority, Project Co shall produce an action plan to identify how performance is to be improved;
 - (b) [a summary of energy consumption over the period since the last Biennial Review and identification of measures that may be taken to improve energy performance and efficiency;]
 - (c) a review of Programmed Maintenance and Unprogrammed Maintenance, in the form of a risk based maintenance analysis (in line with [ISO55000] requirements or equivalent);
 - (d) Not used

- (e) any alterations to the Facility which may lead to improvements in the performance and availability of the Facility and whether or not this may require capital expenditure on the part of the Authority;
- (f) a financial summary identifying the cost impact of all the efficiency improvement opportunities identified separated into:
 - (i) improvements that can be achieved without instigating a Change under Schedule 16 (*Change Protocol*) of the Agreement including changes made by changes in user behaviour and/or changes in Authority or Project Co working which would not require an Authority Change Notice; and
 - (ii) other changes to the Services, or the Facilities that can improve efficiency but which would require an Authority Change Notice.

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

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

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

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

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

26. **MONITORING OF PERFORMANCE**

Monitoring

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

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

Grounds for Warning Notices⁵⁶

- 26.3 If at any time during the Operational Term (other than by reason of Force Majeure, a Relief Event or an Emergency):
- 26.3.1 the total Deductions for any Contract Month amount to more than [♦] per cent of the Annual Service Charge for the current Contract Year; [or]
 - 26.3.2 the total Deductions in each of any [three (3)] Contract Months in any [six (6)] consecutive Contract Months amount to more than [♦] per cent of the Annual Service Charge for the current Contract Year;
 - 26.3.3 [the Facility Warning Threshold occurs in relation to the same Facility in any [♦] consecutive Contract Months or any [♦] Contract Months during any [twelve (12)] month period; or
 - 26.3.4 in any period of [♦] Contract Months an individual Facility has been Unavailable for [twenty (20)] days or more;]

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

- (a) to serve more than one (1) Warning Notice in any Contract Month; or
- (b) to serve a Warning Notice in any two (2) consecutive Contract Months to the extent that the same event has contributed to the Authority's right to serve the Warning Notice, but provided that Project Co demonstrates to the Authority that it has taken all reasonable steps to remedy the cause of that event.

⁵⁶ The Template MIM Education PA Warning Notice triggers in respect of Deduction levels assume a single Facility.

Where the Project is a multi-facility Project, such as batched schools, it may be appropriate for the Authority to include Warning Notice triggers relevant to the level of Deductions applied in respect of an individual Facility in 26.3.3 and 26.3.4.

The warning notice regime is now triggered by the levels of Deductions being made from the Annual Service Charge. The trigger levels in this Clause need to be calibrated and to be consistent with that in Clause 40.1.9.

Warning Notices Disputes

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

Authority's Remedial Rights

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

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

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

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

- 26.6 If any of the circumstances set out in Clause 26.5 (*Authority's Remedial Rights*) arise (without prejudice to its rights under Clause 40 (*Project Co Event of Default*) or any other express rights under this Agreement) and the Authority wishes to take action (either by itself or by engaging others), the Authority shall notify Project Co in writing of the following:

26.6.1 the action it wishes to take;

26.6.2 the reason for such action;

26.6.3 the date it wishes to commence such action;

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

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

- 26.7 Following service of such notice, the Authority shall take such action as has been notified under Clause 26.6 (*Authority's Remedial Rights*) and any consequential additional action as it reasonably believes is necessary (together, the "**Required Action**") and Project Co shall give all reasonable assistance to the Authority while it is taking the Required Action. To the extent that the Authority performs any of the

obligations of Project Co hereunder or undertakes tasks that would otherwise be undertaken by Project Co pursuant to this Agreement, the Authority shall perform such obligations or undertake such tasks to the same standard as would be required of Project Co under the terms of this Agreement.

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

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

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

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

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

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

Emergencies

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

26.11 The net cost (if any) of any additional or alternative services provided by Project Co under Clause 26.10 (*Emergencies*) shall be borne by the Authority and paid in accordance with Clause 35 (*Payment*).

27. EMPLOYMENT MATTERS⁵⁷

Compliance with Law and Authority Policies

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

Project Co Indemnities

- 27.3 Project Co shall indemnify and keep indemnified in full the Authority and, at the Authority's request, each and every service provider who has or shall provide any service equivalent to any of the Services against:
- 27.3.1 claims in respect of all emoluments and all other contractual or statutory payments unpaid by Project Co or a Service Provider to any person entitled to such payments from Project Co or a Service Provider who is or has been employed or engaged by Project Co or any Service Provider in connection with the provision of any of the Services which relate to any period of employment or engagement with Project Co or any Service Provider on or after the Relevant Service Transfer Date but on or prior to the date of expiry or termination of this Agreement, and all income tax (or any tax replacing it) and pension and national insurance contributions payable thereon; and
- 27.3.2 insofar as Clause 27.3.1 does not apply, all Direct Losses incurred by the Authority as a result of any claim against the Authority in respect of any liability to any person who is or has been employed or engaged (whether as a consequence of the Transfer Regulations or of the provisions of this Clause 27 (*Employment Matters*)) by Project Co or any Service Provider in connection with the provision of any of the Services, where such claim arises as a result of any act or omission of Project Co or the Service Provider occurring after the Relevant Service Transfer Date and before the expiry or termination of this Agreement;

⁵⁷ Clause 27 (*Employment Matters*) contains drafting for projects that envisage no staff transfers. Alternative drafting for projects where staff transfers would or could occur is available from Welsh Government.

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

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

Position on expiry or earlier termination of this Agreement

- 27.5 On the expiry or earlier termination of this Agreement, the Authority and Project Co agree that it is their intention that the Transfer Regulations shall apply in respect of the provision thereafter of any service equivalent to a Service but the position shall be determined in accordance with the Law at the date of expiry or termination as the case may be and this Clause 27 (*Employment Matters*) is without prejudice to such determination.

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

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

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

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

- 27.7 If the Transfer Regulations do not apply on the expiry or earlier termination of this Agreement, the Authority shall ensure that each new provider of a service equivalent to a Service on or after the expiry or earlier termination of this Agreement (including the Authority) shall offer employment to the persons employed by Project Co or a Service Provider in the provision of the Service immediately before the expiry or earlier termination of this Agreement and shall indemnify Project Co or a Service Provider for Direct Losses any of them may suffer or incur as a result of its failure to do so, and for any costs, claims or liabilities for redundancy payments (whether statutory or contractual).

- 27.8 If an offer of employment is made in accordance with Clause 27.7 (*Position on expiry or earlier termination of this Agreement*) the employment shall be on the same terms and conditions as applied immediately before the expiry or earlier termination of this Agreement including full continuity of employment, except that the Authority or other new service provider may at its absolute discretion not offer such terms and conditions if there has been any change to the terms and conditions of the persons

concerned in breach of Clause 27.6 (*Position on expiry or earlier termination of this Agreement*).

- 27.9 Project Co shall⁵⁸:
- 27.9.1 comply with the Ethical Employment Code and any similar applicable schemes or codes of practice which apply to Project Co;
 - 27.9.2 encourage all Sub-Contractors to sign up to the Ethical Employment Code and any similar applicable schemes or codes of practice promoted by the Welsh Government; and
 - 27.9.3 ensure that the [Contractor and the Service Provider and] all Sub-Contractors who have signed up to the Ethical Employment Code comply with that code of practice and any similar applicable schemes or codes of practice which apply to that Sub-Contractor.

No Employee Transfer

- 27.10 The Authority and Project Co agree that there are no individuals presently employed by the Authority [or any other sub-contractor of the Authority]⁵⁹ whose contracts of employment will, by virtue of the transfer to Project Co of responsibility for provision of (or procuring the provision by Service Providers of) any of the Services in accordance with this Agreement and in accordance with the Transfer Regulations, have effect after the date or dates of such transfer as agreed by the parties (each a "**Relevant Service Transfer Date**") (or at any other time) as if originally made between those persons and the relevant Service Provider.
- 27.11 If it is subsequently agreed or determined that there are persons presently employed by the Authority [or any other sub-contractor of the Authority]⁶⁰ whose contracts of employment do have effect after the Relevant Service Transfer Date as if originally made between those persons and the relevant Service Provider ("**Transferring Staff**") then:
- 27.11.1 the Authority shall within ten (10) Business Days of the date on which it was so agreed or determined have the opportunity to offer or procure the offer of a position as an employee of the Authority to some or all of the Transferring Staff;
 - 27.11.2 Project Co shall procure that no person to whom the Authority has offered a position in accordance with Clause 27.11.1 shall be dismissed by reason of redundancy until the period⁶¹ for acceptance of such offer has expired and the person in question has not accepted such offer; and

⁵⁸ Where the Contractor and/or the Service Provider has signed up to the Welsh Government's Code of Practice - Ethical Employment and Supply Chains, compliance with the code shall be mandatory.

⁵⁹ Applicable where the Authority is a local authority.

⁶⁰ Applicable where the Authority is a local authority.

⁶¹ Time period to be agreed on a project by project basis.

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

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

27.12 Following the expiry or earlier termination of this Agreement, the Authority shall indemnify Project Co (for itself and for the benefit of each Service Provider) in respect of those employees employed in the provision of any Service against all Direct Losses incurred by Project Co or any Service Provider in connection with or as a result of any failure by the Authority or any new provider of a service equivalent to a Service to comply with its obligations under Regulation 13(4) of the Transfer Regulations as if such legislation applied, even if it does not in fact so apply, save to the extent that any such failure arises as a result of any act or omission of Project Co or any relevant Service Provider.

28. SITE SECURITY AND PERSONNEL ISSUES

Access

- 28.1 The Authority shall have the right to refuse admittance to, or order the removal from, the Facilities of any person employed by (or acting on behalf of) Project Co, any Project Co Party or any sub-contractor whose presence, in the reasonable opinion of the Authority, is likely to have a material adverse effect on the provision by the Authority of the relevant Authority Services at the Facilities or who is not a fit and proper person to be in the Facilities.⁶²
- 28.2 Action taken under Clause 28.1 (*Access*) shall forthwith be confirmed in writing by the Authority to Project Co and, to avoid doubt, shall not relieve Project Co of any of its obligations under this Agreement.
- 28.3 If and when so directed in writing by the Authority, Project Co shall within twenty (20) Business Days provide a list of the names and addresses of all persons it expects may require admission in connection with this Agreement, to any premises occupied by the Authority, specifying the capacities in which those persons are concerned with this Agreement and giving such other particulars as the Authority may reasonably require.

⁶² The Template MIM Education PA assumes the Project is a stand-alone development and not part of a larger site and therefore the Authority's rights here apply in relation to the Facilities only. Authorities should refer to any other relevant areas (e.g. existing premises from which the Authority operates) as necessary on a project specific basis.

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

Authority Policies⁶³

- 28.5 Project Co shall, and shall procure that all Project Co Parties shall, comply at all times with the Authority Policies (in so far as relevant to the Project Operations).
- 28.6 The Authority shall notify Project Co of any proposed change to the Authority Policies as soon as practicable (and, in any event, prior to such change taking effect) and consult with Project Co. Subject to Clause 28.7 (*Authority Policies*), such change shall take effect as a Change in accordance with Schedule 16 (*Change Protocol*).
- 28.7 The Authority may, at its sole option, notify Project Co that Project Co shall not be obliged to comply with any change to any Authority Policy and that Project Co should continue to comply with the relevant Authority Policy prior to any change in which case such change shall not take effect as a Change in accordance with Schedule 16 (*Change Protocol*).

Convictions and Disciplinary Action

- 28.8 Project Co (to the extent permitted by Law) shall subject to paragraph [1.9.3] of the Service Level Specification procure that all potential staff or persons performing any of the [Project Operations]⁶⁴ who may reasonably be expected in the course of their employment or engagement to have access to children[, the elderly] and/or vulnerable adults⁶⁵:
- 28.8.1 are questioned concerning their Convictions; and
- 28.8.2 Project Co, the Contractor and/or the Service Provider obtains a check of the most extensive available kind made with the Disclosure and Barring Service of such persons.
- 28.9 Project Co shall procure that no person who may reasonably be expected in the course of their employment or engagement to have access to children[, the elderly] and/or vulnerable adults, who discloses any Convictions, or who appears on a Barred List following the results of a Disclosure and Barring Service check, in either case of which Project Co, the Contractor or a Service Provider is aware or ought to be aware is employed or engaged in the provision of the [Project Operations] without

⁶³ The Template MIM Education PA assumes Authority Policies will include any relevant rules, regulations and requirements of the Authority relating to the conduct of staff (including those in respect of security arrangements).

⁶⁴ The following drafting should be inserted after the words "performing any of the Project Operations" where staff transfers are envisaged:

"other than transferring Authority employees (as confirmed by the Authority whose duties do not thereafter change so that they may reasonably be expected to have access to children, the elderly and/or vulnerable adults in the course of their employment or engagement)"

⁶⁵ Project specific tailoring required in this Clause 28 and the Access to Work Protocol in Schedule 34 to refer to the relevant user group.

the Authority's prior written consent (such consent not to be unreasonably withheld or delayed).

- 28.10 Subject always to having the prior written consent of the relevant individual, Project Co shall procure that the Authority is kept advised at all times of any person employed or engaged by Project Co, the Contractor or any Service Provider in the provision of any of the Project Operations who may reasonably be expected in the course of their employment or engagement to have access to children[, the elderly] and/or vulnerable adults and who, subsequent to his/her commencement of such employment or engagement, receives a Conviction of which Project Co, the Contractor or a Service Provider becomes aware or whose previous Convictions become known to Project Co, the Contractor or a Service Provider. The Authority shall have the right to refuse admittance to, or require the removal of such person(s). Project Co shall procure the immediate removal of those person(s) from the Facilities either:
- 28.10.1 at the Authority's request (where the relevant information has been provided to the Authority); and,
- 28.10.2 in all cases where the relevant information has not been provided to the Authority.
- 28.11 The Authority's Representative (acting reasonably) may instruct Project Co to procure that appropriate disciplinary action is taken against any employee of Project Co or any Sub-Contractor (in accordance with the terms and conditions of employment of the employee concerned) who misconducts himself or is incompetent or negligent in his duties or whose presence or conduct on [the]/[a] Site or at work is otherwise considered by the Authority's Representative (acting reasonably) to be undesirable. The Authority shall co-operate with any such disciplinary proceedings and shall be advised in writing by Project Co of the outcome.
- 28.12 Project Co shall procure that there are set up and maintained, by it and by all Service Providers, personnel policies and procedures covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). Project Co shall procure that the terms and the implementation of such policies and procedures comply with Law and Good Industry Practice and that they are published in written form and that copies of them (and any revisions and amendments to them) are forthwith issued to the Authority.⁶⁶
- 28.13 In the event that Project Co is notified at any time that any person employed or engaged by Project Co or a Project Co Party in carrying out the Project Operations and who may reasonably be expected in the course of their employment or engagement to have access to children[, the elderly] and/or vulnerable adults is included on a Barred List, is a barred person, is subject to verification procedures by the Disclosure and Barring Service or, is making representations to the Disclosure and Barring Service (pursuant to the Safeguarding Vulnerable Groups Act 2006), then save where the Authority's consent is obtained pursuant to Clause 28.9, it shall immediately remove or procure the removal of that person or persons from the Facilities and shall not permit their return to the Facilities in the course of

⁶⁶ Authorities should note the procedures in Clause 28.12 will be governed by Data Protection Laws. To the extent that the Authority envisages receiving information concerning Project Co employees, the Agreement will need to oblige Project Co to include a relevant clause in the contract of employment of the relevant employees.

their employment or engagement for, without prejudice to the preceding provisions of this Clause, so long as such person is no longer on a Barred List, not a barred person and where relevant, verification procedures or representations have concluded with the Disclosure and Barring Service.

Management

- 28.14 Project Co shall consult with the Authority in relation to the selection procedure for Project Co's [Facility Manager, Facility Liaison Persons and Facility Helpdesk Co-ordinators] and in the case of the Facility Manager, such person shall not be appointed (or replaced) without the prior written consent of the Authority (such consent not to be unreasonably withheld or delayed).
- 28.15 Project Co shall provide, and shall procure that all Service Providers provide, to the Authority upon request details of their respective management organisations.

Lists and Records

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

28.16.1 details of qualifications; and

28.16.2 details of training undertaken by the employee.

Resources and Training

- 28.17 Project Co shall procure that:
- 28.17.1 there shall at all times be a sufficient number of staff (including all relevant grades of supervisory staff) engaged in the provision of the Services with the requisite level of skill and experience. To avoid doubt, this obligation shall include ensuring that there are sufficient staff to cover periods of holiday, sickness, other absence, and anticipated and actual peaks in demand for each of the Services; and
- 28.17.2 all staff receive such training and supervision as is necessary to ensure the proper performance of this Agreement and compliance with all health and safety rules, procedures and requirements.⁶⁷

⁶⁷ The following proviso should be added at the end of Clause 28.17 where staff transfers are envisaged; "provided Project Co shall not be in breach of its obligations under this Clause 28.17 to the extent that such breach is caused or contributed to by the Authority failing to comply with its obligations under Clause 28.18."

The following Clause should be inserted where staff transfers are envisaged:

29. STOCKS CONSUMABLES, MATERIALS AND EQUIPMENT

Standards

- 29.1 All goods, equipment, consumables and materials which are to be used in the provision of the Services shall be of satisfactory quality.
- 29.2 Project Co shall ensure that the goods, equipment, consumables and materials used by it or any Sub-Contractor in connection with the provision of any of the Services (each as a distinct and separate obligation) are:
- 29.2.1 maintained in a safe, serviceable and clean condition in accordance with Good Industry Practice;
 - 29.2.2 of the type specified in the Service Level Specification and/or the Method Statements (where appropriate); and
 - 29.2.3 in compliance with any relevant rules, regulations, codes of practice and/or British or European Standards,
- and shall, as soon as practicable after receiving a request from the Authority's Representative, supply to the Authority's Representative evidence to demonstrate its compliance with this Clause 29.2 (*Standards*).
- 29.3 Project Co shall procure that sufficient stocks of goods, consumables, equipment and materials are held in order to comply with its obligations under this Agreement.

Hazardous Substances and Materials⁶⁸

- 29.4 Project Co shall not install, keep or use in or on the Facilities any materials, equipment or apparatus the installation, keeping or use of which is likely to cause (or in fact causes):
- 29.4.1 material damage to the Facilities;
 - 29.4.2 dust, noise or vibration constituting a nuisance to the owners and/or occupiers of any property adjoining or near to the Facilities; or

"28.18 The Authority agrees to permit and arrange for any person who in the event that he or she remains in the employment of the Authority as at the Relevant Service Transfer Date will be a transferring Authority employee to receive training and to make familiarisation visits to the Facilities (all as reasonably requested by Project Co and in such manner as to ensure that there is no material adverse effect on the operations of the Authority as a result of the same)."

⁶⁸ The drafting in Clause 29 places obligations on both parties, recognising that both parties may keep hazardous materials at the Facilities. The Authority should consider who is best placed to maintain the COSHH register[s] for the Facilities.

Where the Authority considers it appropriate, a carve-out may be provided in Clause 29.4 to cover the case of phased construction and handover for the Site[s].

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

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

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

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

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

29.6.2 use all practicable and reasonable means to:

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

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

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

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

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

29.7 The Authority shall:

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

29.7.2 use all practicable and reasonable means to:

- (a) prevent or counteract the unlawful emission of any such hazardous substance;
- (b) avoid the unlawful discharge into any conducting media serving the Facilities of any hazardous substance;
- (c) prevent the unlawful generation, accumulation or migration of any hazardous substance at or from the Facilities; and
- (d) prevent any environmental claims arising or any circumstances arising likely to result in any environmental claims,

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

29.8 [The Authority] [Project Co] shall:

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

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

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

Community Benefits

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

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

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

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

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

29.10.4 provide the Authority with quarterly monitoring information in the form required using the Dashboard Template at the end of each quarter, commencing on the Commencement Date, and ending on the Certificate of Practical Completion [for the final Facility] (each a "**Quarterly Works Monitoring Date**") then Project Co shall pay to the Authority the sum of [five thousand pounds (£5,000)] (indexed);

[provided that in each case the Authority has first served notice on Project Co notifying it of its non-compliance and (where remediable) Project Co has failed to remedy such non-compliance prior to issue of the Certificate of Practical Completion [for the final Facility]. The parties shall endeavour to agree the contents of each quarterly monitoring report within [ten (10)] Business Days of the [4th, 8th and 12th] Quarterly Works Monitoring Dates in accordance with this Clause 29.10, failing which either party may refer the matter to the Dispute Resolution Procedure.]

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

29.12 If, in relation to the Services and [during the Operational Term]/[for the period from the commencement of the Operational Term for the first Facility to the end of the Project Term], Project Co does not:

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

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

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

29.12.4 provide the Authority with [annual] monitoring information in the form required using the Dashboard Template, at the end of the Contract Year falling after the commencement of the [first] Operational Term and each anniversary of such date thereafter (the "**Annual Operations Monitoring Date**") then on the occurrence of each such failure Project Co shall pay to the Authority the sum of [five thousand pounds (£5,000)] (indexed);

[provided that in each case the Authority has first served notice on Project Co notifying it of its non-compliance and (where remediable) Project Co has failed to remedy such non-compliance within [twenty (20)] Business Days of such notice. The parties shall endeavour to agree the contents of each annual monitoring report within [ten (10)] Business Days of each Annual Operations Monitoring Date in accordance with this Clause 29.12, failing which either party may refer the matter to the Dispute Resolution Procedure.]

- 29.13 The Authority's sole and exclusive remedy in respect of a breach of Clause [29.12.1 to 29.12.3] shall be the payments provided for in Clause [29.12.1 to 29.12.3], respectively and Project Co's maximum liability in this respect shall be [*insert amount*] (indexed).
- 29.14 All payments due by Project Co to the Authority under this Clause shall become due and payable as a debt, as follows:
- 29.14.1 [in respect of the Contract Month following the [final Quarterly Works Monitoring Date], such sums as are specified as being due to the Authority under each quarterly report submitted by Project Co to the Authority pursuant to Clause 29.10.4 (or such sums as are otherwise agreed, or determined in accordance with the Disputes Resolution Procedure, as being due and payable by Project Co) and which shall be included as a negative figure in the Monthly Invoice pursuant to Clause 35.2.1(c) (*Invoicing and Payment Arrangements*) and the terms of Clause 35.2.2 (*Invoicing and Payment Arrangements*) shall apply in respect of such Monthly Invoice.
- 29.14.2 In respect of each Contract Month following an Annual Operations Monitoring Date, such sums as are specified as being due to the Authority under that [annual] report submitted by Project Co to the Authority pursuant to Clause 29.12.4 (or such sums as are otherwise agreed or determined, in accordance with the Disputes Resolution Procedure, as being due and payable by Project Co) and which shall be included as a negative figure in the Monthly Invoice pursuant to Clause 35.2.1(c) (*Invoicing and Payment Arrangements*) and the terms of Clause 35.2.2 (*Invoicing and Payment Arrangements*) shall apply in respect of such Monthly Invoice.]

Sustainable Development

- 29.15 Project Co acknowledges that the Authority is subject to the Well-being of Future Generations Act and shall assist and cooperate with the Authority to facilitate the Authority's compliance with its obligation to carry out sustainable development.
- 29.16 Project Co further acknowledges that the information contained in or supplied in connection with Clauses 29.9 to 29.14 (*Community Benefits*) and Schedule 29 (*Community Benefits*) may be published in whole or in part and/or supplied by the Authority to a Relevant Authority, as the Authority in its sole discretion considers necessary for compliance with its obligations to supply, produce and/or publish information under the Well-being of Future Generations Act.
- 29.17 Where the Authority requests information from Project Co in connection with Project Co's obligations under this Agreement (including without limitation Clauses 29.9 to 29.14 (*Community Benefits*) and Schedule 29 (*Community Benefits*)) in relation to any duty or obligation on the Authority under the Well-being of Future Generations Act, Project Co shall supply such information as soon as possible and in any event within [♦] Business Days of receiving such request.

PART 7: DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE

30. DELAY EVENTS AND COMPENSATION EVENTS ⁶⁹

- 30.1 If, at any time, Project Co becomes aware that there will be (or is likely to be) a delay in completion of the Works or that Project Co will be unable to provide the Services at the [relevant] Facility on the Completion Date [or Post Completion Works Date] [for that Facility], Project Co shall forthwith give notice to the Authority's Representative to that effect specifying the relevant delay or impediment. In relation to any such delay or impediment if the Authority's Representative is satisfied, or it is determined in accordance with Schedule 20 (*Dispute Resolution Procedure*), that such delay or impediment has arisen as a result of the occurrence of a Delay Event, then, subject to Clause 30.2 (*Delay Events and Compensation Events*) and Clause 30.15 (*Term Dates*), the Authority's Representative shall allow Project Co an extension of time equal to the delay or impediment caused by such Delay Event (taking into account reasonably foreseeable consequences of the Delay Event) and shall revise the [relevant] Completion Date, [the [relevant] ICT Handover Date] [and/or the [relevant] Post Completion Works Date (as appropriate)] accordingly but to avoid doubt, there shall be no extension to the Project Term as a result of any such delay or impediment.
- 30.2 Notwithstanding any other provision in this Agreement, if Project Co is (or claims to be) affected by a Delay Event and/ or a Compensation Event:
- 30.2.1 it shall (and shall procure that the Project Co Parties shall) take and continue to take all reasonable steps to eliminate or mitigate the consequences of such an event upon the performance of its obligations under this Agreement and, where relevant, resume performance of its obligations affected by the Delay Event and/ or Compensation Event as soon as practicable; and
- 30.2.2 it shall neither be relieved from liability under this Agreement nor entitled to any extension of time for the purpose of Clause 30 (*Delay Events and Compensation Events*) to the extent that it is delayed or impeded due to its failure (if any) to comply with its obligations under Clause 30.2.1 above.
- 30.3 For the purposes of this Agreement, a Delay Event means any of the following to the extent in each case that there will be (or is likely to be) a delay to [satisfaction of the [relevant] ICT Handover Requirements or,] completion of the relevant [Main] Works [or the [relevant] Post Completion Works (as applicable)]:
- 30.3.1 the occurrence of a Qualifying Change in relation to which it has been agreed or determined that the implementation of the Authority Change would delay the completion of the Facilities;⁷⁰

⁶⁹ Delay Events may apply after the original completion date. However, the Authority should be under no obligation to accept early completion where Project Co has completed prior to the revised completion date.

⁷⁰ The issue of an Authority Change Notice will not, in itself, give rise to a Delay Event as Project Co will be obliged to continue to carry out the Project Operations until such time as the Change is agreed. The Authority may wish to consider whether the Project Operations ought to be suspended whilst the Change process is ongoing e.g. to avoid abortive works and costs being incurred, in which case it would be appropriate to factor the time/cost implications of such suspension in Project Co's claim for a Delay Event and/ or Compensation Event.

- 30.3.2 any breach by the Authority and/or any Authority Party of any of the Authority's express obligations under this Agreement to the extent in each case that any such breach is not caused, or contributed to, by Project Co or any Project Co Party;
 - 30.3.3 the execution of works on the [relevant] Site not forming part of this Agreement by the Authority or any contractors employed by the Authority;
 - 30.3.4 opening up of the Works pursuant to Clauses 13.3 to 13.7 (*Right to Open Up*) (inclusive) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with Schedule 20 (*Dispute Resolution Procedure*) that the opening up of the Works was reasonable in the light of other Defects previously discovered by the Authority);
 - 30.3.5 Force Majeure;
 - 30.3.6 a Relief Event;
 - 30.3.7 a Relevant Change in Law referred to in Clause 33.3.1 (*Relevant Changes in Law*) and Clause 33.3.2 (*Relevant Changes in Law*);
 - 30.3.8 [the occurrence of circumstances deemed to be a Delay Event pursuant to Clause 10.4 (*[Responsibility for Ground Conditions and Contamination]*);⁷¹
 - 30.3.9 [a Further Asbestos Delay];⁷²
 - 30.3.10 [the occurrence of circumstances deemed to be a Delay Event pursuant to Clause 11.4.3 (a) (*[Judicial Proceedings]*); [or]⁷³
 - 30.3.11 the occurrence of circumstances deemed to be a Delay Event pursuant to Clause 14.10.5 (*[Unavailability of Existing Facilities]*).
- 30.4 Without prejudice to the generality of Clause 30 (*Delay Events and Compensation Events*), Project Co shall give notice in writing to the Authority's Representative as soon as it (or the Contractor) can reasonably foresee a Delay Event and/ or a Compensation Event (as applicable) occurring or, if the same is not reasonably foreseeable, as soon as it (or the Contractor) shall become aware of a Delay Event and/or a Compensation Event (as applicable). Project Co shall within ten (10)

⁷¹ Include where Clauses 10.3 and 10.4 are used.

⁷² Include where Clauses 10.5 to 10.14 are used.

⁷³ Include where Clause 11.4 is used.

Business Days after such notification, give further written details to the Authority's Representative which shall include:

- 30.4.1 a statement of which Delay Event and/or Compensation Event the claim is based upon;
 - 30.4.2 details of the circumstances from which the Delay Event and/ or Compensation Event arises;
 - 30.4.3 details of the contemporary records which Project Co will maintain to substantiate its claim;
 - 30.4.4 details of the consequences (whether direct or indirect, financial or non-financial) which such Delay Event and/ or Compensation Event may have upon completion of the [relevant] Facilities [the Main Works] [, the achievement of the ICT Handover Requirements] [and/or completion of the Post Completion Works if relevant];
 - 30.4.5 details of any measures which Project Co proposes to adopt to mitigate the consequences of such Delay Event and/ or Compensation Event; and
 - 30.4.6 details of any relief from its obligations under this Agreement that Project Co considers is reasonably required as a consequence of a Compensation Event including:
 - (a) a detailed description of the obligations from which relief is requested and the extent and duration of the requested relief;
 - (b) an explanation of why Project Co considers that the Compensation Event has or will result in a breach of Project Co's obligations would be reasonable in the circumstances; and
 - (c) the likely impact on Project Co and/or the Project in the event that Project Co is not relieved from such obligations under the this Agreement.
- 30.5 As soon as possible but in any event within five (5) Business Days of Project Co (or the Contractor) receiving, or becoming aware of, any supplemental information which may further substantiate or support Project Co's claim then, other than in respect of:
- 30.5.1 a Delay Event where the [relevant] Completion Date[, ICT Handover Date] [and/or [a/the] Post Completion Works Date if relevant] has already been revised pursuant to Clause 30.7 (*Delay Events and Compensation Events*); or

30.5.2 a Compensation Event where Project Co has already been compensated pursuant to Clause 30.14 and has (where relevant) been granted such relief from its obligations under this Agreement as is reasonable for such Compensation Event,

Project Co shall submit further particulars based on such information to the Authority's Representative.

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

30.7 Subject to the provisions of this Clause 30 (*Delay Events and Compensation Events*), the Authority's Representative shall:

30.7.1 in respect of a Delay Event, revise the [relevant] Completion Date[, ICT Handover Date] [and/or the [relevant] Post Completion Works Date (as appropriate)] in accordance with Clause 30.1 (*Delay Events and Compensation Events*); and

30.7.2 in respect of a Compensation Event give Project Co such relief from its obligations under this Agreement as is reasonable for such Compensation Event,

as soon as reasonably practicable and in any event within five (5) Business Days of the later of:

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

(b) the date of receipt by the Authority's Representative of any supplemental information supplied by Project Co in accordance with Clause 30.5 (*Delay Events and Compensation Events*) and the date of receipt of any further particulars (if such are required under Clause 30.6 (*Delay Events and Compensation Events*)), whichever is the later.

30.8 If Project Co has failed to comply with the requirements as to the giving of notice under Clause 30.4 (*Delay Events and Compensation Events*), or has failed to maintain records or afford facilities for inspection to the Authority's Representative, then:

30.8.1 in respect of a Delay Event, Project Co shall not be entitled to any extension of time (and the [relevant] Completion Date[, ICT Handover Date] [and/or the [relevant] Post Completion Works Date] shall not be revised); and

30.8.2 in respect of a Compensation Event, Project Co shall not be entitled to any compensation or relief from its obligations under this Agreement,

in respect of any period of delay by Project Co in giving notice or providing information under Clause 30.4 (*Delay Events and Compensation Events*) and/or to the extent that its failure to maintain records or afford facilities for inspection to the Authority's Representative has prevented the Authority's Representative from assessing the consequences of the Delay Event and/or Compensation Event, as applicable.

30.9 If:

30.9.1 in respect of a Delay Event, the Authority's Representative declines to fix a revised Completion Date[, ICT Handover Date] [and/or Post Completion Works Date (as relevant)]; or

30.9.2 Project Co considers that a different Completion Date[, ICT Handover Date] [and/or Post Completion Works Date] should be fixed; or

30.9.3 there is a disagreement as to whether a Delay Event has occurred; or

30.9.4 the parties cannot agree the extent of any relief from Project Co's obligations under this Agreement in respect of a Compensation Event,

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

Compensation

30.10 If a Compensation Event occurs Project Co's sole right to compensation shall be as provided for in Clauses 30.12 to 30.14 (*Compensation*) inclusive. To avoid doubt, no other Delay Event shall entitle Project Co to receive any compensation save as otherwise expressly provided in:

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

30.10.2 Clause 33 (*Changes in Law*) in the case of a Delay Event referred to in Clause 30.3.7 (*Delay Events and Compensation Events*).

- 30.11 For the purposes of Clause 30.10 (*Compensation*), a Compensation Event arises where Project Co has incurred a loss (including loss of revenue) and/ or expense as a direct result of any of the following circumstances arising prior to the Actual Completion Date for the [relevant] Facility [or in respect of the Post Completion Works (only) the Actual Post Completion Works Date]:
- 30.11.1 any breach by the Authority and/or any Authority Party of any of the Authority's express obligations under this Agreement to the extent in each case that any such breach is not caused, or contributed to, by Project Co or any Project Co Party;
 - 30.11.2 the execution of works on the [relevant] Site not forming part of this Agreement by the Authority or any contractors employed by the Authority;
 - 30.11.3 opening up of the Works pursuant to Clauses 13.3 to 13.7 (*Right to Open Up*) (inclusive) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with Schedule 20 (*Dispute Resolution Procedure*) that the opening up of the Works was reasonable in the light of other Defects previously discovered by the Authority);
 - 30.11.4 [the occurrence of circumstances deemed to be a Compensation Event pursuant to Clause 10.4 (*[Responsibility for Ground Conditions and Contamination]*);⁷⁴
 - 30.11.5 [a Further Asbestos Delay (provided that in calculating any compensation due to Project Co pursuant to Clause 30.12 (*Compensation*) there shall be no double counting with sums which are payable to Project Co pursuant to Clause 10.13 (*Asbestos*));⁷⁵
 - 30.11.6 [the occurrence of circumstances deemed to be a Compensation Event pursuant to Clause 11.4.3 (b) (*[Judicial Proceedings]*); [or]⁷⁶
 - 30.11.7 the occurrence of circumstances deemed to be a Compensation Event pursuant to Clause 14.10.5 (*[Unavailability of Existing Facilities]*).
- 30.12 Subject to Clause 30.13 (*Compensation*), if it is agreed, or determined, that there has been a Compensation Event, and Project Co has incurred loss (including loss of revenue) and/or expense as a direct result of such Compensation Event, Project Co shall be entitled to such compensation as would place Project Co in no better or worse position than it would have been in had the relevant Compensation Event not occurred and (where relevant) such relief from its obligations under this Agreement as is reasonable for such Compensation Event (taking into account the reasonably foreseeable consequences of the Compensation Event). Project Co shall promptly provide the Authority's Representative with any additional information he may

⁷⁴ Include where Clauses 10.3 and 10.4 are used.

⁷⁵ Include where Clauses 10.5 to 10.14 are used.

⁷⁶ Include where Clause 11.4 is used.

require in order to determine the amount of such compensation and where applicable, the extent of relief from Project Co's obligations under this Agreement.

30.13 Notwithstanding any other provision in this Agreement, Project Co shall take all reasonable steps so as to minimise the loss and/or expense referred to in Clause 30.12 (*Compensation*) in relation to any Compensation Event and any compensation payable shall:

30.13.1 exclude any amounts incurred or to be incurred as a result of any failure of Project Co (or any Project Co Party) to comply with this Clause 30.13 (*Compensation*); and

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

30.14 The amount of any compensation due to Project Co under Clause 30.12 (*Compensation*) shall be agreed between the parties or, failing agreement, determined pursuant to Schedule 20 (*Dispute Resolution Procedure*) and such compensation shall be payable:

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

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

[Term Dates

30.15 The Authority agrees that when assessing the effect of any Delay Event for the purpose of Clause 30.7 (*Delay Events and Compensation Events*) and assessing the effect of any Compensation Event for the purpose of Clause 30.12 (*Compensation*), any delay to the achievement of a revised Completion Date[, ICT Handover Date] [and/or [a/the] Post Completion Works Date] [for a Facility] and/or any loss of revenue that may arise as a result of the operation of Clause 14.8 (*Handover Dates*) shall be taken into account provided that: the ICT Handover Date shall only ever move to the [twenty fifth (25th)] Business Day, and the Completion Date shall only ever move to the [fifth (5th)] Business Day, before the first day of a Term or half term (other than the summer half term).]⁷⁷

⁷⁷ See note at Clauses 14.6 to 14.8.

31. RELIEF EVENTS

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

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

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

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

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

31.1.5 blockade or embargo falling short of Force Majeure;

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

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

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

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

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

Compensation Events) by Delay Events in accordance with Clause 30 (*Delay Events and Compensation Events*).

Mitigation

- 31.4 Where a party is (or claims to be) affected by a Relief Event:
- 31.4.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the Relief Event as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
- 31.4.2 it shall not be entitled to rely upon the relief afforded to it pursuant to Clause 31.2 (*Relief Events*) of this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 31.4.1 above.
- 31.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant Relief Event. Such initial notice shall give sufficient details to identify the particular event claimed to be a Relief Event.
- 31.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days of the notice referred to in Clause 31.5 (*Mitigation*) which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Relief Event on the ability of the party to perform, the action being taken in accordance with Clause 31.4 (*Mitigation*), the date of the occurrence of the Relief Event and an estimate of the period of time required to overcome it (and/or its effects).
- 31.7 The party claiming relief shall notify the other as soon as the consequences of the Relief Event have ceased and of when performance of its affected obligations can be resumed.
- 31.8 If, following the issue of any notice referred to in Clause 31.6 (*Mitigation*), the party claiming relief receives or becomes aware of any further information relating to the Relief Event (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.
- 31.9 To avoid doubt, and subject to any other express provision of this Agreement, the occurrence of a Relief Event shall not entitle Project Co to any compensation.

32. FORCE MAJEURE

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

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

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

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

32.1.4 pressure waves caused by devices travelling at supersonic speeds,

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

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

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

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

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

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

- 32.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- 32.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the party to perform, the action being taken in accordance with Clause 32.3 (*Force Majeure*), the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects).
- 32.7 The party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.
- 32.8 If, following the issue of any notice referred to in Clause 32.6 (*Force Majeure*), the party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.
- 32.9 Nothing in this Clause 32 (*Force Majeure*) shall affect the Authority's entitlement to make Deductions in the period during which any event of Force Majeure is subsisting.
- 32.10 The parties shall endeavour to agree any modifications to this Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Schedule 20 (*Dispute Resolution Procedure*) shall not apply to a failure of the Authority and Project Co to reach agreement pursuant to this Clause 32.10 (*Force Majeure*).

Disaster Plan

- 32.11 The parties shall comply with the provisions of the Disaster Plan.
- 32.12 The parties shall liaise with each other periodically to review and update the Disaster Plan.

PART 8: CHANGES IN LAW & CHANGES

33. CHANGES IN LAW

General

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

Relevant Changes in Law

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

33.3 Relevant Change in Law means any of the following:

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

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

33.3.3 the occurrence, after the relevant date, of any Change in Law which requires any work of alteration, addition, demolition or extension or variation in the quality or function of the Facilities which is not Maintenance Work or Lifecycle Replacement or work which Project Co would otherwise be required to undertake to comply with its obligations under this Agreement. For the purposes of this Clause 33.3.3, the relevant date shall be:

(a) in respect of the [Main] Works the later to occur of the Completion Date and the Actual Completion Date [for a Facility], save where the Actual Completion Date is delayed by a Delay Event referred to in Clause 30.3.1 to Clause 30.3.4 or by a Delay Event referred to in Clause 30.3.7 to Clause 30.3.11, in which case the relevant date shall be the later to occur of the Completion Date and the date on which the Works would have been completed in accordance with this Agreement had the relevant Delay Event not occurred; and

(b) in respect of the Post Completion Works be the later to occur of the [relevant] Post Completion Works Date and the Actual Post Completion Works Date, save where the [relevant] Actual Post

Completion Works Date is delayed by a Delay Event referred to in Clause 30.3.1 to Clause 30.3.4 or by a Delay Event referred to in Clause 30.3.7 to Clause 30.3.11, in which case the relevant date shall be the later to occur of the [relevant] Post Completion Works Date and the date on which the [relevant] Post Completion Works would have been completed in accordance with this Agreement had the relevant Delay Event not occurred].

provided that in either case:

- (i) such Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Project Operations, on the basis of draft bills published in Government green or white papers or other Government departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Union, in each case published:
 - (aa) prior to the date of this Agreement; and
 - (bb) in substantially the same form or having substantially the same effect as the Relevant Change in Law; and
- (ii) a Change in Law relating to the application for, coming into effect, terms, implementation, repeal, revocation or otherwise of any Planning Permission shall not constitute a Relevant Change in Law.

33.4 On the occurrence of a Relevant Change in Law:

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

Authority Change Notice and the relevant provisions of Schedule 16 (*Change Protocol*) shall apply except that:

- (a) Project Co may give notice to the Authority's Representative that it objects to such an Authority Change Notice only on the grounds that the implementation of the Change would not give effect to or comply with the Relevant Change in Law;
- (b) the Authority shall (i) agree the implementation of the Low Value Change, or (ii) confirm the estimate for the Medium Value Change, or (iii) approve the High Value Change Stage 2 Submission, (as appropriate) in respect of the Change in accordance with the relevant provisions of Schedule 16 (*Change Protocol*);
- (c) the provisions of Clause 11 (*Consents and Planning Approval*) shall apply;
- (d) the Authority shall not be entitled to withdraw any Authority Change Notice or its agreement as to the implementation of the Low Value Change, confirmation of an estimate for the Medium Value Change or approval of a High Value Change Stage 2 Submission (as appropriate), issued in accordance with this Clause 33.4 (*Relevant Changes in Law*);
- (e) Project Co shall, without prejudice to its general obligation to comply with the terms of this Agreement:
 - (i) use all reasonable endeavours to mitigate the adverse effects of any Relevant Change in Law and take all reasonable steps to minimise any increase in costs arising from such Relevant Change in Law; and
 - (ii) use all reasonable endeavours to take advantage of any positive or beneficial effects of any Relevant Change in Law and take all reasonable steps to maximise any reduction in costs arising from such Relevant Change in Law; and
- (f) any compensation payable, or reduction to the Annual Service Charges, shall be calculated in accordance with the relevant provisions of Schedule 16 (*Change Protocol*) provided that:
 - (i) the amount of any compensation payable; or

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

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

General Change in Law

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

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

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

- (a) Project Co may give notice to the Authority's Representative that it objects to such an Authority Change Notice only on the grounds that the implementation of the Change would not give effect to or comply with the Change in Law;
- (b) the Authority shall (i) agree the implementation of the Low Value Change; or (ii) confirm the estimate for the Medium Value Change; or (iii) approve the High Value Change Stage 2 Submission, (as appropriate) in respect of the Change in accordance with the relevant provisions of Schedule 16 (*Change Protocol*);
- (c) the provisions of Clause 11 (*Consents and Planning Approval*) shall apply;
- (d) the Authority shall not be entitled to withdraw any Authority Change Notice or its (i) agreement as to the implementation of the Low Value Change; or (ii) confirmation of an estimate for the Medium Value Change; or (iii) approval of a High Value Change Stage 2 Submission (as appropriate), issued in accordance with this Clause 33.5 (*General Change in Law*); and

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

34. CHANGE PROTOCOL

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

PART 9: FINANCIAL

35. PAYMENT⁷⁸

Service Payments

- 35.1 Project Co shall not be entitled to receive any Monthly Service Payments until [the Payment Commencement Date] [Payment Commencement Date 1]. Subject to the provisions of this Agreement, the Authority shall pay Project Co the Monthly Service Payments in respect of each Contract Month from [the Payment Commencement Date]/[Payment Commencement Date 1] in accordance with this Clause 35.1 (*Service Payments*) and the provisions of Schedule 14 (*Payment Mechanism*).

Invoicing and Payment Arrangements

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

⁷⁸ Authorities are referred to Theme 14 (*Financing arrangements*) at Chapter 3 of EPEC/EUROSTAT's Guide.

Government financing (e.g. capital contributions, loans, equity, grants or financing guarantees) must not exceed 49% of the capital expenditure to be incurred for the construction of the MIM asset. However, **all** Authority/government financing must be considered in light of statistical treatment under EPEC/EUROSTAT's Guide.

Authorities must seek consent from the Welsh Government to any and all public financing proposals, at each stage of the New Project Approval Process under the SPA.

Where, for example, the Authority is considering a capital contribution to a project, this should be considered as part of the outline business case in both the affordability and value for money assessments. This will be relevant to statistical classification of the financing of the Project and will be considered in conjunction with, for example, equity in Project Co/Hold Co.

Other factors to be considered include:

- ensuring capital is reflected in value already delivered in the project (e.g. following the achievement of Actual Completion Date);
- under the "no-retendering procedure" adjustment should be made in respect of any outstanding capital contribution that has been committed by the Authority but is unpaid at that date;
- VAT status (especially if the capital contribution is funded by grant monies from a third party source); and/or
- if there is any re-scheduling of Senior Debt drawdown, Authority capital contributions should be withheld until the Authority is satisfied no drawdown of Senior Debt or equity is retired behind those of the Authority and that the ratio of private capital to Authority capital is not adversely affected.

If the Authority intends to make a capital contribution, it should use the drafting set out below.

"Capital Contributions

- 35.8 Subject to Clause 35.9 to 35.11, the Authority hereby agrees to make a capital contribution in the sum of [[♦] (£♦)] (the "Contribution") to Project Co in respect of [capital construction costs to be incurred by Project Co in relation to the Works (but excluding professional and administrative fees and other similar overheads)].
- 35.9 [The Contribution shall become due and payable by the Authority to Project Co on the later of (a) fifteen (15) Business Days after the Actual Completion Date, or (b) fifteen (15) Business Days after the Authority receives a valid invoice for the Contribution from Project Co.]
- 35.10 The ratio of private sector funding (including Senior Debt, [Junior Debt] and share capital) drawn down as compared with the Contribution made shall at all times be that determined from the [Base Case].
- 35.11 For the avoidance of doubt, the Contribution is exclusive of VAT and shall not be Indexed."

- 35.2.1 [On or before the fifth Business Day of each Contract Month Project Co shall submit to the Authority an invoice in the Agreed Form ("**Monthly Invoice**") aggregating the following:
- (a) the Monthly Service Payment for that Contract Month, calculated in accordance with Section 2 (*Calculation Of Service Payments*) of Schedule 14 (*Payment Mechanism*);
 - (b) adjustments to reflect previous over-payments and/or under-payments (each adjustment stated separately);
 - (c) any other amounts due by one party to the other (and where owed by Project Co showing as a negative figure);
 - (d) any VAT payable in respect of the above amounts;
 - (e) as a negative figure, in respect of the Monthly Invoice issued during the final Contract Month only, an amount equivalent to twice the monthly average of the Deductions incurred in the previous six (6) Contract Months ("**Estimated Deductions**"),⁷⁹

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

- 35.2.2 Subject to Clauses 35.2.3 (*Invoicing and Payment Arrangements*) and 35.3 (*Manner of Payment*) and the submission of the supporting information referred to in Clause 35.2.1, where a Monthly Invoice shows a net amount owed by the Authority to Project Co, the Authority shall pay the amount of the Monthly Invoice on the later of the final Business Day of the Contract Month or the date falling fifteen (15) Business Days after receipt of the Monthly Invoice, together with delivery of a valid VAT invoice in respect thereof. Where a Monthly Invoice shows a net amount owed by Project Co to the Authority, Project Co shall pay that amount to the Authority on the later of the final Business Day of the Contract Month or the date falling fifteen (15) Business Days after the Monthly Invoice or, at the option of the Authority and subject to Section 3 of Schedule 14 (*Payment Mechanism*), carry forward that amount to the next Monthly Invoice to reduce amounts which would otherwise be owed by the Authority to Project Co.

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

⁷⁹ Add a new limb (e) as follows, where staff transfers are envisaged:

"(e) any amounts owed to Project Co to take account of an Equal Pay Adjustment in accordance with Clause 27.26;"
And re-order the existing limb (e) as limb (f).

of receipt of an invoice therefor. If the Estimated Deductions exceed the Deductions incurred in the final two (2) Contract Months the Authority shall pay to Project Co an amount equal to the excess within fifteen (15) Business Days of receipt of an invoice therefor.

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

- (a) details of each and the aggregate amount of all Deductions incurred in relation to Performance Failures;
- (b) details of each and the aggregate amount of all Deductions incurred in relation to Availability Failures;
- (c) other information detailed in paragraph 2 of Section 4 of Schedule 14 (*Payment Mechanism*).

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

Manner of Payment⁸⁰

35.3 All invoices under this Agreement shall be raised in Pounds Sterling and the money of account and money of payment in respect of all payments, liabilities and claims (including any accrued rights) under this Agreement at any time shall remain denominated in Pounds Sterling. All payments under this Agreement shall be made in Pounds Sterling by [electronic transfer of funds for value on the day in question] to the bank account of the recipient (located in the United Kingdom) specified in the relevant invoice, quoting the invoice number against which payment is made.

Disputes

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

⁸⁰ Project Co to specify the manner of payment.

Late Payments

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

Set-Off

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

36. VAT AND CONSTRUCTION INDUSTRY TAX DEDUCTION SCHEME

VAT

- 36.1 All amounts stated to be payable by either party under this Agreement shall be exclusive of any VAT properly chargeable on any amount.
- 36.2 Each party shall pay to the other party any VAT properly chargeable on any supply made to it under this Agreement provided that it shall first have received from the other party a valid tax invoice in respect of that supply which complies with the requirements of Part III Value Added Tax Regulations 1995.
- 36.3 If either party (referred to in this Clause 36 as the "**First Party**") shall consider that any VAT which the other party (referred to in this Clause 36 as the "**Second Party**") claims to be properly chargeable to the First Party in connection with this Agreement is not in fact properly so chargeable, the First Party shall be entitled to require the Second Party to obtain clearance from HM Revenue and Customs (or, if relevant, such other body as is charged at the time with the collection and management of VAT) as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request HM Revenue and Customs for such clearance.

- 36.4 The following further provisions shall apply in respect of the application for clearance in accordance with Clause 36.3 (VAT):
- 36.4.1 prior to submitting its request for such clearance and any further communication to HM Revenue and Customs in connection with the obtaining of the clearance, the Second Party shall first obtain the agreement of the First Party to the contents of such request and any such further communication, such agreement not to be unreasonably withheld or delayed;
 - 36.4.2 the Second Party shall provide to the First Party copies of all communications received from HM Revenue and Customs in connection with the application for clearance as soon as practicable after receipt; and
 - 36.4.3 the Second Party shall use all reasonable endeavours (including without limitation the provision of such additional information as HM Revenue and Customs may require) to obtain such clearance as soon as reasonably practicable following the initial request.
- 36.5 If clearance is required by the First Party under Clause 36.3 (VAT), the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until clearance is received from HM Revenue and Customs which states that a sum of VAT (the "**VAT Sum**") is properly so chargeable or HM Revenue and Customs state that they are not prepared to give any clearance on the matter. In this case, then subject to Clauses 36.6 (VAT) and 36.7 (VAT) and provided that the First Party shall first have received a valid tax invoice which complies with the requirements of Part III Value Added Tax Regulations 1995 and which states the VAT Sum to be the amount of VAT chargeable to the First Party, the First Party shall pay the VAT Sum (and any interest or penalties attributable to the VAT Sum) to the Second Party.
- 36.6 If the First Party disagrees with any clearance obtained pursuant to Clause 36.3 (VAT) by the Second Party from HM Revenue and Customs, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs and expenses including interest and penalties which it may incur in relation thereto) shall take such action and give such information and assistance to the First Party as the First Party may require to challenge such clearance or otherwise to resist or avoid the imposition of VAT on the relevant supply.
- 36.7 The following further provisions shall apply if the First Party shall exercise its rights under Clause 36.6 (VAT):
- 36.7.1 the action which the First Party shall be entitled to require the Second Party to take shall include (without limitation) contesting any assessment to VAT or other relevant determination of HM Revenue and Customs before any tax tribunal or court of competent jurisdiction and appealing any judgement or decision of any such tribunal or court;

- 36.7.2 if the Second Party shall be required to pay to or deposit with HM Revenue and Customs a sum equal to the VAT assessed as a condition precedent to its pursuing any appeal, the First Party shall, at its election, either pay such sum to HM Revenue and Customs on behalf of the Second Party or on receipt of proof in a form reasonably satisfactory to the First Party that the Second Party has paid such sum to or deposited such sum with HM Revenue and Customs the First Party shall pay such sum to the Second Party;
- 36.7.3 save as specifically provided in Clause 36.5 (VAT), the First Party shall not be obliged to pay to the Second Party any sum in respect of the VAT in dispute to the Second Party or in respect of VAT on any further supplies made by the Second Party to the First Party which are of the same type and raise the same issues as the supplies which are the subject of the relevant dispute unless and until the final outcome of the relevant dispute is that it is either determined or agreed that VAT is properly chargeable on the relevant supply or supplies; and
- 36.7.4 the Second Party shall account to the First Party for any costs awarded to the Second Party on any appeal, for any sum paid to or deposited with HM Revenue and Customs in accordance with Clause 36.7.2 which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

Changes in Recoverability of VAT

- 36.8 Subject to Clause 36.9 (*Changes in Recoverability of VAT*), if, following a Change in Law, Project Co becomes unable to recover VAT attributable to supplies to be made to the Authority by Project Co pursuant to this Agreement, the Authority shall ensure that Project Co is left in no better and no worse position than it would have been had such Change in Law not occurred (including but not limited to making such amendments to this Agreement as Project Co and the Authority shall agree acting reasonably), provided that Project Co shall use all reasonable endeavours to mitigate the adverse effects of any such Change in Law.
- 36.9 The provisions of Clause 36.8 (*Changes in Recoverability of VAT*) shall apply only if (and to the extent that) the Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Works on the basis of draft bills published in Government green or white papers or other Government departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Union, in each case published:
- 36.9.1 prior to the date of this Agreement; and
- 36.9.2 in substantially the same form as the Change in Law.

Construction Industry Tax Deduction Scheme

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

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

- (a) "**the Act**" means the Finance Act 2004;
- (b) "**the Regulations**" means the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045);
- (c) "**the Legislation**" means Chapter 3 Part 3 of the Act and the Regulations, taken together;
- (d) "**Contractor**" means a person who is a contractor for the purposes of Chapter 3 Part 3 of the Act; and
- (e) "**sub-contractor**" means a person who is a sub-contractor for the purposes of Chapter 3 Part 3 of the Act.

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

36.10.3 If any payment due from the Authority to Project Co under this Agreement is a contract payment under section 60(1) of the Act, then the Authority, as Contractor, shall (not later than fifteen (15) Business Days before the first such payment is due to be made) verify, in accordance with Regulation 6 of the Regulations, whether the sub-contractor is registered for gross payment or for payment under deduction or is not registered under Chapter 3 Part 3 of the Act.

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

- (a) if Project Co is registered for gross payment under section 63(2) of the Act, the Authority shall make a payment to Project Co without any deduction;
- (b) if Project Co is not registered for gross payments under section 63(2) of the Act, the Authority shall make a payment to Project Co, subject to the deduction of the relevant percentage in accordance with section 61(1) of the Act, and thereupon Clause 36.10.6 below shall apply.

- 36.10.5 If any dispute arises between the Authority and Project Co as to whether any payment due by the Authority to Project Co under this Agreement is or is not a contract payment by virtue of the exemption in Regulation 23 of the Regulations, the parties will jointly apply to HM Revenue and Customs for a written clearance and until such clearance is received it shall be assumed that such payment is a contract payment and the provisions of Clause 36.10 (*Construction Industry Tax Deduction Scheme*) shall apply accordingly.
- 36.10.6 The Authority shall be entitled to make a deduction at the rate specified in section 61(1) of the Act or at such other rate as may be in force from time to time from the whole of any payment to Project Co (and not just that part of such payment which does not represent the direct cost to Project Co or any other person of materials used or to be used in carrying out the construction operations to which the relevant payment relates) unless prior to making such payment the Authority shall have received written confirmation from HM Revenue and Customs (obtained by and at the expense of Project Co) in a form which is reasonably satisfactory to the Authority directing the Authority to make the deduction against only a specified amount or proportion of any such payment to Project Co.
- 36.10.7 Where any error or omission has occurred in calculating or making any payment under this Clause 36.10 (*Construction Industry Tax Deduction Scheme*) then:
- (a) in the case of an over deduction, the Authority shall correct that error by repayment of the sum over deducted to Project Co; and
 - (b) in the case of an under deduction, Project Co shall correct that error or omission by repayment of the sum under deducted to the Authority.
- 36.10.8 The Authority shall send promptly to HM Revenue & Customs any returns required by the Legislation, and shall provide to Project Co a payment statement (where appropriate) and/or such other information as may be required by the Legislation in relation to any contract payment.
- 36.10.9 If compliance with this Clause 36.10 (*Construction Industry Tax Deduction Scheme*) involves the Authority or Project Co in not complying with any other of the terms of this Agreement, then the provisions of this Clause shall prevail.

37. FINANCIAL MODEL⁸¹

- 37.1 Unless otherwise agreed between the parties, any amendments to the Financial Model shall reflect, be consistent with and be made only in accordance with the provisions of this Agreement, and shall in all cases be subject to the prior written

⁸¹ The Welsh Government considers that parties ought to be able to safeguard their own copies of the base case financial model and any amended versions during the life of the Project. The Authority should ensure that it has suitable contract management arrangements in place for obtaining updates of the financial model, as well as arrangements for safeguarding these. The Authority will be required to supply the Welsh Government with a copy of the financial model at Financial Close and whenever it is amended.

approval of the Authority (such approval not to be unreasonably withheld or delayed). In the event that the parties fail to agree any proposed amendments to the Financial Model, the matter shall be referred for resolution in accordance with Schedule 20 (*Dispute Resolution Procedure*).

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

38. RECORDS AND OPEN BOOK ACCOUNTING

Records and Reports

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

PART 10: TERMINATION

39. AUTHORITY EVENTS OF DEFAULT

- 39.1 For the purposes of this Agreement, Authority Events of Default means any of the following events or circumstances:
- 39.1.1 a breach by the Authority of its obligations under this Agreement which substantially frustrates or renders it impossible for Project Co to perform its material obligations under this Agreement for a continuous period of not less than sixty (60) days; or
 - 39.1.2 the Authority fails to pay any sum or sums due to Project Co under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) the amount of the Monthly Service Payment from time to time and such failure continues for thirty (30) Business Days from receipt by the Authority of a notice of non-payment from Project Co;
 - 39.1.3 the Authority is in breach of its obligations under Clause 58.11 (*Assignment*); or
 - 39.1.4 an expropriation, sequestration or requisition of a material part of the Assets and/or shares of Project Co or Hold Co by the Authority or any Relevant Authority.

Project Co's Options

- 39.2 On the occurrence of an Authority Event of Default, or within a reasonable time after Project Co becomes aware of the same, and while the same is still subsisting, Project Co may, at its option:
- 39.2.1 in respect of execution of the Works, suspend performance by it of its obligations under this Agreement until such time as the Authority shall have demonstrated to the reasonable satisfaction of Project Co that it is capable of performing, and will perform, its obligations under this Agreement; or
 - 39.2.2 ⁸²serve notice on the Authority (or such other party as may be notified in advance in writing by the Authority to Project Co) of the occurrence (and specifying details) of such Authority Event of Default. If the relevant matter or circumstance has not been rectified or remedied by the Authority (or otherwise) in respect of Clause 39.1.1, Clause 39.1.3 or Clause 39.1.4 within sixty (60) Business Days of such notice, and in respect of Clause 39.1.2 within thirty (30) Business Days of such notice, Project Co may serve a further notice on the Authority (or its substitute notified in

⁸² Certain notices of importance (including a notice of an Authority Default) require to be issued to Welsh Government (as well as the Authority) pursuant to the notice provisions in Clause 65.6.

accordance with this Clause 39.2.2) terminating this Agreement with immediate effect.

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

40. PROJECT CO EVENT OF DEFAULT

Project Co Event of Default

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

Insolvency

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

- (a) any arrangement or composition with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act 1986) being entered into by or in relation to Project Co;
- (b) a receiver, administrator, administrative receiver, liquidator or other encumbrancer or other similar officer taking possession of or being appointed over, or any distress, execution or other process being levied or enforced (and not being discharged within ten (10) Business Days) upon, the whole or any material part of the assets of Project Co;
- (c) Project Co ceasing to carry on business;
- (d) a petition being presented (and not being discharged within twenty (20) Business Days), or a resolution being passed or an order being made for the administration or the winding up, bankruptcy or dissolution of Project Co; or
- (e) if Project Co shall suffer any event analogous to the events set out in Clauses 40.1.1(a) to 40.1.1(d) in any jurisdiction in which it is incorporated or resident;⁸³

⁸³ Delete limb (e) if all relevant parties are incorporated and resident in the jurisdiction of England and Wales.

Long Stop

- 40.1.2 Project Co failing to achieve the Actual Completion Date [for each Facility] within a period of [nine (9)] months after the [final] Completion Date ("**Longstop Date**")], provided that where [in respect of any Facility], but for the terms of Clause 14.8 (*Handover Dates*), the Actual Completion Date could have occurred, the Longstop Date shall be extended to the next date on which such Actual Completion Date may occur pursuant to Clause 14.8 (*Handover Dates*).];⁸⁴

Default

40.1.3

- (a) Project Co committing a material breach of its obligations under this Agreement which has a material and adverse effect on the delivery of the Authority Services (other than as a consequence of a breach by the Authority of its obligations under this Agreement);
- (b) Project Co wilfully breaches Schedule 23 (*Refinancing*);

- 40.1.4 Project Co Abandons the Works;

Health and Safety

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

⁸⁴ Where phasing is adopted a project specific approach will need to be considered.

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

- (a) act in a reasonable and proportionate manner having regard to such matters as the gravity of any offence and the identity of the person committing it; and
- (b) give all due consideration, where appropriate, to action other than termination of this Agreement;

Change in Control

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

Assignment

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

Deductions

40.1.8 ⁸⁵

- (a) the total Deductions in each of any [three (3)] Contract Months in any [six (6)] consecutive Contract Months is equal to or greater than [♦] percent of the Annual Service Charge for the current Contract Year;
- (b) [the Facility Unavailability Threshold occurs in relation to the same Facility in any [three (3)] consecutive Contract Months or any [four (4)] Contract Months during any [twelve (12)] Contract Month period; or
- (c) in any period of [three (3)] Contract Months, an individual Facility has been Unavailable for [twenty (20)] days or more;]

⁸⁵Where the project is a multi-facility project, such as batched schools, it will, in most cases, be appropriate for the Authority to include termination triggers relevant to the level of Deductions applied in respect of a particular Facility.

*Warning Notices*⁸⁶

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

Payment

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

Insurance

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

40.1.12 Not used

Corrupt Gifts

40.1.13

- (a) Project Co has committed a Prohibited Act, in relation to which Clause 45.3.1 (*Remedies*) applies; or
- (b) Project Co has committed a Prohibited Act, in relation to which Clause 45.3.2, 45.3.3, 45.3.4 or 45.3.5 (*Remedies*) applies; or

Tax Compliance

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

Notification

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

⁸⁶ This Clause and the triggers in Clause 26.3 (*Grounds for Warning Notices*) need to be calibrated and related to the performance measures in Schedule 12 (*Service Requirements*) and the requirements of Schedule 14 (*Payment Mechanism*).

Authority's Options

- 40.3 On the occurrence of a Project Co Event of Default, or within a reasonable time after the Authority becomes aware of the same, and while the same is subsisting, the Authority may:
- 40.3.1 in the case of the Project Co Events of Default referred to in Clauses 40.1.1 (*Insolvency*), 40.1.2 (*Long Stop*), 40.1.3(b) (*Default*), 40.1.5 (*Health and Safety*), 40.1.6 (*Change in Control*), 40.1.7 (*Assignment*), 40.1.8 (*Deductions*) 40.1.9 (*Warning Notices*), 40.1.10 (*Payment*), or 40.1.13(a) (*Corrupt Gifts*), terminate this Agreement in its entirety by notice in writing having immediate effect;
 - 40.3.2 in the case of any Project Co Event of Default referred to in Clause 40.1.3(a) and 40.1.4, serve notice of default on Project Co requiring Project Co at Project Co's option either:
 - (a) to remedy the Project Co Event of Default referred to in such notice of default (if the same is continuing) within twenty (20) Business Days of such notice of default; or
 - (b) to put forward within twenty (20) Business Days of such notice of default a reasonable programme (set out, if appropriate, in stages) for remedying the Project Co Event of Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Project Co Event of Default is proposed to be remedied (Project Co shall only have the option of putting forward a programme in accordance with this Clause 40.3.2(b) if it first notifies the Authority within ten (10) Business Days of such notice of default that it proposes to do so);
 - 40.3.3 in the case of any Project Co Event of Default referred to in Clause 40.1.11 (*Insurance*) serve notice of default on Project Co requiring Project Co to remedy the Project Co Event of Default (if the same is continuing) within twenty (20) Business Days of such notice of default;
 - 40.3.4 in the case of any Project Co Event of Default referred to in Clause 40.1.14 (*Tax Compliance*), serve notice of default on Project Co requiring Project Co to remedy the Project Co Event of Default (if the same is continuing) within thirty (30) Business Days of such notice of default; and
 - 40.3.5 in the case of any Project Co Event of Default referred to in Clause 40.1.13(b) (*Corrupt Gifts and Payments*), serve notice of default on Project Co requiring Project Co to remedy the Project Co Event of Default (if the same is continuing) within twenty (20) Business Days of such notice of default, on the terms required pursuant to Clause 45.3.2, 45.3.3, 45.3.4 or 45.3.5, as appropriate.

Remedy Provisions

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

40.5 If:

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

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

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

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

Authority's Costs

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

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

41. TERMINATION RESULTING FROM FORCE MAJEURE

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

42. AUTHORITY VOLUNTARY TERMINATION

The Authority shall be entitled to terminate this Agreement at any time on [six (6)] months' written notice to Project Co, including, for the avoidance of doubt, in circumstances described at regulation 73(1)(c) of The Public Contracts Regulations 2015 (S.I.2015/102). In the event of notice being given by the Authority in accordance with this Clause, the Authority shall, at any time before the expiration of such notice, be entitled to direct Project Co, where the Works (or any part or parts of the Works) or any Service (or any elements of any Service) have not been commenced, to refrain from commencing any such Works or Services (or to procure the same).

43. TERMINATION FOR PERSISTENT BREACH BY PROJECT CO

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

43.1.1 specifying that it is a formal warning notice;

43.1.2 giving reasonable details of the breach; and

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

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

43.2.1 specifying that it is a final warning notice;

- 43.2.2 stating that the breach specified has been the subject of a warning notice served within the twelve (12) month period prior to the date of service of the final warning notice; and
- 43.2.3 stating that if such breach continues for more than fourteen (14) days or recurs in three (3) or more months within the six (6) month period after the date of service of the final warning notice, the Agreement may be terminated.
- 43.3 A warning notice may not be served in respect of any breach which has previously been counted in the making of a separate warning notice.
- 43.4 Once a termination notice is served for a Persistent Breach, Project Co should not be entitled to any further rectification period, although the provisions of the Funders' Direct Agreement will still apply.

44. EXPIRY

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

45. CORRUPT GIFTS AND PAYMENTS

Prohibition on Corruption

- 45.1 The term "**Prohibited Act**" means:
- 45.1.1 offering, giving or agreeing to give to the Authority or any other public body or to any person employed by or on behalf of the Authority or any other public body any gift or consideration of any kind as an inducement or reward:
- (a) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other agreement with the Authority or any other public body; or
 - (b) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with the Authority or any other public body;
- 45.1.2 entering into this Agreement or any other agreement with the Authority or any other public body in connection with which commission has been paid or has been agreed to be paid by Project Co or on its behalf, or to its knowledge, unless before the relevant agreement is entered into

particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Authority;

- 45.1.3 committing any offence:
 - (a) under the Bribery Act 2010;
 - (b) under any Law creating offences in respect of fraudulent acts; or
 - (c) at common law, in respect of fraudulent acts in relation to this Agreement or any other agreement with the Authority or any other public body;
- 45.1.4 defrauding or attempting to defraud or conspiring to defraud the Authority or any other public body;
- 45.1.5 committing any breach of the Employment Relations Act 1999 (Blacklists Regulations) 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992;
- 45.1.6 committing any breach of the Data Protection Laws by unlawfully processing Personal Data in connection with any blacklisting activities; or
- 45.1.7 committing any offence under the Modern Slavery Act 2015.

Warranty

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

Remedies

- 45.3 If Project Co or any Project Co Party (or anyone employed by or acting on behalf of them) commits any Prohibited Act, then the Authority shall be entitled to act in accordance with Clauses 45.3.1 to 45.3.6 below:
 - 45.3.1 if a Prohibited Act is committed by Project Co or by an employee of Project Co not acting independently of Project Co, then the Authority may terminate this Agreement with immediate effect by giving written notice to Project Co;
 - 45.3.2 if the Prohibited Act is committed by an employee of Project Co acting independently of Project Co, then the Authority may give written notice to Project Co of termination and this Agreement will terminate, unless within

twenty (20) Business Days of receipt of such notice Project Co terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Works and/or Services by another person;

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

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

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

45.3.6 any notice of termination under this Clause shall specify:

(a) the nature of the Prohibited Act;

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

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

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

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

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

Permitted Payments

- 45.5 Nothing contained in this Clause 45 (*Corrupt Gifts and Payments*) shall prevent Project Co from paying any proper commission or bonus to its employees within the agreed terms of their employment.

Notification

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

Interim Management

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

46. COMPENSATION ON TERMINATION

- 46.1 If this Agreement is terminated pursuant to Clause 41 (*Termination Resulting from Force Majeure*), then the Authority shall pay compensation to Project Co in accordance with Section 3 (*Consequence of Termination for Force Majeure*) of Schedule 17 (*Compensation on Termination*).
- 46.2 If this Agreement is terminated pursuant to Clause 40 (*Project Co Event of Default*) or Clause 43 (*Termination for Persistent Breach by Project Co*) then the Authority shall pay compensation to Project Co in accordance with Section 2 (*Compensation on Project Co Default*) of Schedule 17 (*Compensation on Termination*).
- 46.3 If this Agreement is terminated pursuant to Clause 39 (*Authority Events of Default*), then the Authority shall pay compensation to Project Co in accordance with Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of Schedule 17 (*Compensation on Termination*).
- 46.4 If this Agreement is terminated pursuant to Clause 42 (*Authority Voluntary Termination*), then the Authority shall pay compensation to Project Co in accordance with Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of Schedule 17 (*Compensation on Termination*).

Tax Equalisation

- 46.5 Where a payment is to be made to Project Co pursuant to Clause 46.1, Clause 46.3 or Clause 46.4 (*Compensation on Termination*) (a "**Compensation Payment**") and Project Co has a Relevant Tax Liability in respect of such payment, then the amount of the Compensation Payment to be made by the Authority to Project Co shall be increased so as to ensure that Project Co is in the same position (after account is

taken of the Relevant Tax Liability) as it would have been in had it not been for such Relevant Tax Liability.

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

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

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

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

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

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

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

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

- 46.9 Any increase in the amount of a Compensation Payment which is payable under Clause 46.5 (*Tax Equalisation*) shall be paid on the later of five (5) Business Days after a demand therefore (together with evidence in sufficient detail for the Authority to satisfy itself of the Relevant Tax Liability and its calculation) is made by Project Co and:
- 46.9.1 in the case of an Actual Liability, five (5) Business Days before the date on which the relevant tax must be paid to the tax authority in order to avoid incurring interest and penalties; and
- 46.9.2 in the case of a Deemed Liability, five (5) Business Days before the date on which tax which would have been payable but for the utilisation of the relevant Relief must be paid in order to avoid incurring interest or penalties (whether by Project Co or otherwise) and, for the purposes of determining when the Relief would otherwise have been utilised, Reliefs shall be regarded as utilised in the order in which they arise.
- 46.10 The Authority shall have the right to pay the amount payable under Clause 46.5 (*Tax Equalisation*) direct to HM Revenue and Customs in satisfaction of the relevant tax due by Project Co.

Rights of Set-Off

- 46.11 To avoid doubt, the Authority's obligations to make any payment of compensation to Project Co pursuant to this Clause are subject to the Authority's rights under Clause 35.6 (*Set-Off*), save that the Authority agrees not to set-off any amount agreed or determined as due and payable by Project Co to the Authority against any payment of termination compensation (whether payable as a lump sum or in instalments) under Clauses 46.1, 46.3 or 46.4 (*Compensation on Termination*), except to the extent that such termination payment exceeds the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as the case may be) at that time.

Full and Final Settlement

- 46.12 Subject to the provisions of paragraph 2.1.1 of Section 4 (*General*) of Schedule 17 (*Compensation on Termination*):
- 46.12.1 any compensation paid pursuant to this Clause shall be in full and final settlement of any claim, demand and/or proceedings of Project Co in relation to any termination of this Agreement and/or any Project Document (and the circumstances leading to such termination) and Project Co shall be excluded from all other rights and remedies in respect of any such termination; and
- 46.12.2 the compensation payable (if any) pursuant to this Clause 46 (*Compensation on Termination*) above shall be the sole remedy of Project Co and Project Co shall not have any other right or remedy in respect of such termination.

47. CONSEQUENCES OF TERMINATION

Continued Performance

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

Transfer to Authority of Assets, Contracts etc.⁸⁷

- 47.2 On the service of a notice of termination in accordance with this Agreement for any reason or otherwise at the Expiry Date, subject to the provisions of the Funders' Direct Agreement:

47.2.1 if prior to [the latest to occur of] the [final] Actual Completion Date and the [final] Actual Post-Completion Works Date], in so far as any transfer shall be necessary fully and effectively to transfer property to the Authority, Project Co shall transfer to, and there shall vest in, the Authority, such part of the Works and/or the Facilities as shall have been constructed and such items of the Plant [and ♦]⁸⁸ as shall have been procured by Project Co if the Authority so elects;

47.2.2 all goods and all materials on or near to the Site[s] not yet incorporated in the Works shall remain available to the Authority for the purposes of completing the Works and if the cost of such goods and materials has not been reflected in the payment of any compensation pursuant to Schedule 17 (*Compensation on Termination*), subject to the payment by the Authority to Project Co in respect of such goods and materials (determined as between a willing vendor and willing purchaser with any disputes determined pursuant to Clause 57 (*Dispute Resolution Procedure*));

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

47.2.4 Project Co shall hand over to, and there shall vest in, the Authority, free from any Encumbrances (other than any created on or by or against the Authority), the Facilities⁸⁹;

47.2.5 if the Authority so elects, Project Co shall procure that any of the Construction Contract, the Service Contracts and/or the Independent

⁸⁷ The Authority should include project specific provisions (e.g. relating to equipment, IT, planning, land and Authority assets or information etc). The Authority should consider what protection is required to ensure compliance with the handover provisions on a project specific basis (taking into account the nature, importance and value of the assets that the handover provisions will apply to).

⁸⁸ The Authority should add other project specific items.

⁸⁹ The Authority should insert any project specific provisions regarding, for example, IT and Equipment.

Tester Contract shall be novated or assigned to the Authority, provided that where termination occurs under Clause 39 (*Authority Events of Default*) the consent of the Contractor, the Service Provider or the Independent Tester (as the case may be) shall be required;

- 47.2.6 Project Co shall, or shall procure that any Contracting Associate shall (as the case may be), offer to sell to the Authority at a fair value (determined as between a willing vendor and willing purchaser, with any disputes as to such fair value being determined pursuant to Schedule 20 (*Dispute Resolution Procedure*), free from any Encumbrance all or any part of the stocks of material and other assets, road vehicles, spare parts and other moveable property owned by Project Co or any of its Contracting Associates and reasonably required by the Authority in connection with the operation of the Facilities or the provision of the Services;
- 47.2.7 Project Co shall deliver to the Authority (as far as not already delivered to the Authority) one (1) complete set of:
- (a) "as built drawings" showing all alterations made to the Facilities since the commencement of operation of the Facilities; and
 - (b) maintenance, operation and training manuals for the Facilities;
- 47.2.8 Project Co shall use all reasonable endeavours to procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical plant and equipment used or made available by Project Co under this Agreement and included in the Facilities are assigned, or otherwise transferred, to the Authority with full title guarantee; and
- 47.2.9 Project Co shall deliver to the Authority the records referred to in Clause 38 (*Records and Open Book Accounting*) except where such documents are required by Law to be retained by Project Co or its Contracting Associates (in which case complete copies shall be delivered to the Authority⁹⁰).

- 47.3 Project Co shall ensure that provision is made in all contracts of any description whatsoever to ensure that the Authority will be in a position to exercise its rights, and Project Co will be in a position to comply with its obligations, under Clause 47.2 (*Transfer to Authority of Assets, Contracts etc.*), Clause 47.4 (*Transitional Arrangements*) and Clause 48 (*Handback Procedure*)

Transitional Arrangements

- 47.4 Save as otherwise provided for in paragraph 20 and 21 of 18 (*Handback Procedure*) on the termination or expiry of this Agreement for any reason, for a reasonable

⁹⁰ The following drafting should be added after the words "delivered to the Authority", where staff transfers are envisaged:

"information equivalent to the information it is required to provide in accordance with Clause 27 (*Employment Matters*) in relation to the employees employed by Project Co and/or Service Providers and"

period both before and after any such termination, Project Co shall have the following duties:

- 47.4.1 Project Co shall co-operate fully with the Authority and any successor providing to the Authority services in the nature of any of the Services or any part of the Services in order to achieve a smooth transfer of the manner in which the Authority obtains services in the nature of the Services and to avoid or mitigate in so far as reasonably practicable any inconvenience or any risk to the health and safety of the employees of the Authority and members of the public;
- 47.4.2 Project Co shall as soon as practicable remove from the Site[s] all property not acquired by the Authority pursuant to Clause 47.2 (*Transfer to Authority of Assets, Contracts etc.*) (or not belonging to the Authority or any Authority Party) and if it has not done so within forty (40) Business Days after any notice from the Authority requiring it to do so the Authority may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred to the credit of Project Co;
- 47.4.3 Project Co shall forthwith deliver to the Authority's Representative:
- (a) any security passwords, access codes and other keys to the Facilities and the equipment; and
 - (b) without prejudice to Clause 56 (*Intellectual Property*), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facilities (but excluding computer programmes, which have been developed or acquired by a Service Provider for its own use and not solely for the purposes of provision of any of the Services at the Facilities or the assignment or transfer of which is otherwise restricted); and
- 47.4.4 Project Co shall as soon as practicable vacate the Site[s] and shall leave the Site[s] and the Facilities in a safe, clean and orderly condition.
- 47.5 If the Authority wishes to conduct a competition prior to the Expiry Date with a view to entering into an agreement for the provision of services (which may or may not be the same as, or similar to, the Services or any of them) following the expiry of this Agreement, Project Co shall co-operate with the Authority fully in such competition process including (without limitation) by:
- 47.5.1 providing any information which the Authority may reasonably require to conduct such competition but, to avoid doubt, information which is commercially sensitive to Project Co shall not be provided (and, for the purpose of this Clause 47.5.1 commercially sensitive shall mean information which would if disclosed to a competitor of Project Co give that competitor a competitive advantage over Project Co and thereby prejudice the business of Project Co but shall, to avoid doubt, exclude any

information to be disclosed in terms of Clause 27 (*Employment Matters*));
and

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

Continuing Obligations

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

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

- 47.6.2 termination of this Agreement shall not affect the continuing rights and obligations of Project Co and the Authority under Clauses 10 (*The Site[s]*), 27 (*Employment Matters*), 32 (*Force Majeure*), 35 (*Payment*), 36 (*VAT and Construction Industry Tax Deduction Scheme*), 37 (*Financial Model*), 38 (*Records and Open Book Accounting*), 41 (*Termination Resulting from Force Majeure*), 42 (*Authority Voluntary Termination*), 45 (*Corrupt Gifts and Payments*), 46 (*Compensation on Termination*), 47 (*Consequences of Termination*), 49 (*Indemnities*), 54 (*Insurance*), 55 (*Exclusions and Limitations on Liability*), 56 (*Intellectual Property*), 57 (*Dispute Resolution Procedure*), 60 (*Mitigation*), 62 (*Confidentiality*), 65 (*Notices*) and Clause 77 (*Governing Law and Jurisdiction*) or under any other provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

48. HANDBACK PROCEDURE

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

PART 11: INDEMNITIES, RELIEF, WARRANTIES & INSURANCE

49. INDEMNITIES

Project Co Indemnities to Authority

- 49.1 Project Co shall indemnify and keep the Authority indemnified at all times from and against all Direct Losses sustained by the Authority in consequence of:
- 49.1.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, Project Co or any Project Co Party notwithstanding any act or omission of the Authority or any Authority Party;⁹¹
 - 49.1.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 49.2.1) arising out of, or in the course of, the Project Operations, save to the extent caused (or contributed to) by any Unreasonable Act by the Authority or any Authority Party, breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate⁹² or negligent act or omission of the Authority or any Authority Party;
 - 49.1.3 any physical loss of or damage to Authority Assets arising by reason of any act or omission of Project Co or any Project Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate or negligent act or omission of the Authority or any Authority Party; and
 - 49.1.4 any loss of or damage to property or assets of any third party arising by reason of any act or omission of Project Co or any Project Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate or negligent act or omission of the Authority or any Authority Party.

⁹¹ This mirrors the indemnity given by the Authority in relation to its employees in Clause 49.2.1. Project Co should manage the risks covered by the indemnity (and the fact that there is no carve out for causation) by putting appropriate insurance cover in place (which it is required by law to do), which contains satisfactory non-vitiation provisions (see Clause 54.6 (*Subrogation and Vitiatio*)).

⁹² Deliberate acts or omissions do not include acts or omissions which are within the contemplation of the parties or provided for in this Agreement (see paragraph 11 of Section 2 of Schedule 1 (*Definitions and Interpretation*)).

Authority Indemnities to Project Co

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

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

49.2.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 49.1.1) (*Project Co Indemnities to Authority*) arising by reason of any act or omission of the Authority or any Authority Party in the course of provision of the Authority Services, any Unreasonable Act by the Authority or any Authority Party, breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate act or omission of the Authority or any Authority Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party;

49.2.3 any physical damage to any part of the Facilities or any assets or other property of Project Co or any Project Co Party arising by reason of any breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate act or omission of the Authority or any Authority Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party; and

49.2.4 any loss of or damage to property or assets of any third party arising by reason of any breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate act or omission of the Authority or any Authority Party, save to the extent caused (or contributed to) by any act or omission of Project Co or any Project Co Party;

provided that in the case of Clauses 49.2.3 and 49.2.4 there shall be excluded from the indemnity given by the Authority any liability:

- (a) for the occurrence of risks against which and to the extent to which Project Co is obliged to insure under this Agreement (but for the avoidance of doubt, not such liability to the extent within any applicable excess or deductible or over the maximum amount insured or to be insured under such insurance); or
- (b) in respect of a matter which is a Compensation Event; or
- (c) in respect of Malicious Damage.

Conduct of Claims

49.3 This Clause 49.3 (*Conduct of Claims*) shall apply to the conduct, by a party from whom an indemnity is sought under this Agreement, of claims made by a third person against a party having (or claiming to have) the benefit of the indemnity. The party having, or claiming to have, the benefit of the indemnity is referred to as the "**Beneficiary**" and the party giving the indemnity is referred to as the "**Indemnifier**". Accordingly:

49.3.1 if the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become, entitled to indemnification under this Agreement, the Beneficiary shall give notice in writing to the Indemnifier as soon as reasonably practicable and in any event within twenty (20) Business Days of receipt of the same;

49.3.2 subject to Clauses 49.3.3, 49.3.4 and 49.3.5 below, on the giving of a notice by the Beneficiary pursuant to Clause 49.3.1 above, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all (but not part only) of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with an indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim;

49.3.3 with respect to any claim conducted by the Indemnifier pursuant to Clause 49.3.2 above:

(a) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;

(b) the Indemnifier shall not bring the name of the Beneficiary into disrepute; and

(c) the Indemnifier shall not pay or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;

49.3.4 the Beneficiary shall be free to pay or settle any claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if:

(a) the Indemnifier is not entitled to take conduct of the claim in accordance with Clause 49.3.2 above; or

- (b) the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Beneficiary under Clause 49.3.1 above or notifies the Beneficiary that it does not intend to take conduct of the claim; or
 - (c) the Indemnifier fails to comply in any material respect with the provisions of Clause 49.3.3 above;
- 49.3.5 the Beneficiary shall be free at any time to give notice to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any claim (or of any incidental negotiations) to which Clause 49.3.2 above applies. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Clause 49.3.5, then the Indemnifier shall be released from any liability under its indemnity under Clause 49.1 (*Project Co Indemnities to Authority*) or Clause 49.2 (*Authority Indemnities to Project Co*) (as the case may be) and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to Clause 49.3.2 in respect of such claim;
- 49.3.6 if the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:
 - (a) an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out of pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and
 - (b) the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity,
- 49.3.7 provided that there shall be no obligation on the Beneficiary to pursue such recovery and that the Indemnifier is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Indemnifier exceeds any loss sustained by the Beneficiary (including for this purpose indirect or consequential losses or claims for loss of profits which are excluded by this Agreement from being recovered from the Indemnifier); and
- 49.3.8 any person taking any of the steps contemplated by Clauses 49.3.1 to 49.3.5 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

Mitigation – Indemnity Claims

- 49.4 To avoid doubt the provisions of Clause 60 (*Mitigation*) apply to any indemnity given under this Agreement and any such indemnity shall not apply to the extent that such part or parts of Direct Losses could have been reduced or avoided by the Beneficiary complying with the provisions of such Clause 60 (*Mitigation*).

50. MALICIOUS DAMAGE

50.1 Remit of Clause

This Clause 50 (*Malicious Damage*) specifies the respective obligations of the parties in relation to Malicious Damage to the Facilities during the Operational Term.

50.2 Notification

50.2.1 As soon as possible after a Service Event has been notified to the Helpdesk by an Authorised Caller or after Project Co has itself or by a Service Provider become aware of a Service Event, if it considers that the Service Event was caused by Malicious Damage by a person other than a Project Co Party, Project Co must verbally inform the Helpdesk, the [relevant] Facility Representative and the [Authority's Representative] (a "**Malicious Damage Report**"). Where it is reasonably practicable for it to do so without prejudicing its ability to achieve Rectification of the Service Event within the Rectification Period and subject to any immediate steps that it requires to take to make the Facilities safe, it must allow the [Authority's Representative and] the [relevant] Facility Representative an opportunity to inspect the evidence it relies on to support its claim that Malicious Damage caused the Service Event concerned before carrying out Rectification and, where this is not reasonably practicable, Project Co must take reasonable steps to preserve or record in a suitable manner any such evidence and forthwith make that record available to the Authority and the [relevant] Facility Representative.

50.2.2 Provided Project Co has complied with the requirements of Clause 50.2.1, unless within [[♦] hours] of receipt of a Malicious Damage Report or within [[♦] hours] of the start of the next Core Session where the Malicious Damage Report is made outside Core Sessions, or, if applicable, within [one (1)] Business Day of receipt of the evidence or record of the alleged Malicious Damage concerned the [Authority's Representative] notifies Project Co that he agrees that the Service Event referred to in the relevant Malicious Damage Report was caused by Malicious Damage by a person other than a Project Co Party, the [Authority's Representative] will be deemed to have disagreed that the Service Event concerned was caused by Malicious Damage by a person other than a Project Co Party.

50.3 **Rectification of Malicious Damage**

- 50.3.1 In relation to any Service Event referred to in a Malicious Damage Report, Project Co shall always take such steps as are necessary in accordance with its obligations under this Agreement to make the Facilities safe.
- 50.3.2 If the [Authority's Representative] agrees in accordance with Clause 50.2 (*Notification*) that a Service Event was caused by Malicious Damage by a person other than a Project Co Party:
- (a) except when Clause 50.3.2(b) (*Rectification of Malicious Damage*) applies, Project Co shall not Rectify the Service Event beyond what is required by Clause 50.3.1 unless instructed by the Authority to do so as an Authority Change under Schedule 16 (*Change Protocol*); or
 - (b) if, in the reasonable opinion of Project Co, the Service Event referred to in a Malicious Damage Report, if not Rectified, will or is likely to result in the costs of performing the Services and in particular the costs of Maintenance Works and Lifecycle Replacement being materially increased, it may notify the [Authority's Representative] to that effect and shall be entitled to proceed with Rectification in accordance with its obligations under this Agreement.
- 50.3.3 If the [Authority's Representative] does not agree in accordance with Clause 50.2 (*Notification*) that the Service Event referred to in a Malicious Damage Report was caused by Malicious Damage by a person other than a Project Co Party, Project Co shall proceed with Rectification as soon as reasonably practical after the Authority has issued a notice to that effect or is deemed to have disagreed with the Malicious Damage Report pursuant to Clause 50.2.2 (*Malicious Damage*) and in any event, in accordance with its obligations under this Agreement.
- 50.3.4 Where Clause 50.3.2(a) applies the Authority may, at its option, issue a Derogated Low Value Change Notice and/or other Authority Change Notice pursuant to Schedule 16 (*Change Protocol*).

50.4 **Costs of Rectifying Malicious Damage**

Project Co will be entitled to include all reasonable costs incurred with any Service Provider or third party:

- 50.4.1 to make the Facilities safe pursuant to Clause 50.3.1 and 50.3.2(a) (*Rectification of Malicious Damage*) if it is agreed by the Authority or subsequently determined under the Dispute Resolution Procedure that the Service Event was caused by Malicious Damage by a person other than a Project Co Party; or

50.4.2 to carry out Rectification pursuant to Clause 50.3.2(b) (*Rectification of Malicious Damage*); or

50.4.3 to carry out Rectification pursuant to Clause 50.3.3 (*Rectification of Malicious Damage*) if it is subsequently determined under the Dispute Resolution Procedure that the Service Event was caused by Malicious Damage by a person other than a Project Co Party,

in a Monthly Invoice in accordance with Clause 35.2.1(c) (*Invoicing and Payment Arrangements*). In deciding what a reasonable cost is, regard may be had to prices and rates in the Catalogue (as defined in Schedule 16 (*Change Protocol*)).

50.5 **Project Co to Provide Information**

Project Co must provide:

50.5.1 the Authority with such information as the Authority reasonably requests for the purpose of making claims for losses due to Malicious Damage, under the Operational Insurances; and

50.5.2 the [relevant] Facility Representative with such information and assistance as may reasonably be required to facilitate the [relevant] Facility Representative's inspection of Rectification carried out by Project Co pursuant to this Clause 50 (*Malicious Damage*).

50.6 **Disputes**

Any dispute under this Clause 50.6 (*Disputes*) shall be determined under the Dispute Resolution Procedure.

51. **TAX ON INDEMNITY PAYMENTS**

If any payment by one party under an indemnity in this Agreement is subject to income tax or corporation tax (or any tax replacing them) in the hands of the recipient, the recipient may demand in writing to the party making the payment that the payment shall be increased by such amount as would ensure that, after taking into account any such tax payable in respect of such additional amount, the recipient receives and retains a net sum equal to the amount it would have otherwise received had the payment not been subject to such tax. In relation to any such additional amount payable to Project Co, Project Co and the Authority shall have the same rights and obligations as would apply to a Relevant Tax Liability under Clause 46.6.3 and Clauses 46.5 to 46.10 (*Tax Equalisation*) (inclusive) shall apply mutatis mutandis to the payment of the additional amount. The party making the payment shall pay such additional amount within ten (10) Business Days of receipt of such demand.

52. EXCUSING CAUSES

52.1 If an Excusing Cause interferes adversely with, or causes or contributes to a failure of, the performance of the Project Operations by Project Co and/or causes or contributes to the occurrence of an Availability Failure and/or a Performance Failure and provided that the effect of such Excusing Cause is claimed within ten (10) Business Days of the date on which Project Co became aware (or ought reasonably to have become so aware) of the occurrence of the Excusing Cause, then (subject to Clauses 52.3 (*Insured Exposure*) and 52.4 (*Mitigation of Excusing Cause*)) to the extent such failure or interference or occurrence of an Availability Failure and/or a Performance Failure arises as a result of such Excusing Cause:

52.1.1 such failure by Project Co to perform or interference or occurrence, and any poor performance of, any affected Service shall not constitute a breach of the provisions of this Agreement by Project Co;

52.1.2 such failure by Project Co to perform or interference or occurrence shall not be taken account of in measuring the performance of any affected Service in accordance with the Service Level Specification, which shall be operated as though the relevant Service had been performed free from such adverse interference; and

52.1.3 any such Availability Failure and/or Performance Failure shall be deemed not to have occurred,

so that Project Co shall be entitled to payment under this Agreement as if there had been no such interference with, or failure in the performance of, the Project Operations and no such occurrence of an Availability Failure and/or Performance Failure.

52.2 For the purpose of Clause 52 (*Excusing Causes*), an Excusing Cause means:

52.2.1 any Authority Event of Default or breach of any express provision of this Agreement by the Authority or any Authority Party (unless, and to the extent, caused or contributed to by Project Co or any Project Co Party);

52.2.2 any (i) deliberate act or omission of the Authority, of any Authority Party or of any Authority Invitee; or, (ii) any failure by the Authority, an Authority Party or an Authority Invitee (having regard always to the interactive nature of the activities of the Authority, Authority Parties and Authority Invitees and of Project Co) to take reasonable steps to carry out its activities in a manner which minimises undue interference with Project Co's performance of the Project Operations, save where (and to the extent):

(a) caused or contributed to by Project Co or any Project Co Party;

(b) the Authority, Authority Party or Authority Invitee is acting in accordance with a recommendation or instruction of Project Co or any Project Co Party;

- (c) any such act or omission giving rise to such failure was within the contemplation of the parties or was otherwise provided for in this Agreement;
 - (d) the consequences of any such deliberate act or omission or other acts or omissions giving rise to such failure would have been prevented by the proper performance of Project Co's obligations under this Agreement; or
 - (e) the same arises from an act of the Authority, an Authority Party or Authority Invitee compliant with the Contractor's Site Rules and other requirements of the Contractor as referred to in Clause 13.1 (*Access to the Site[s]*) or 17.9 (*Commissioning prior to Completion Date[/Post Completion Works Date]*);
- 52.2.3 the implementation of any action taken by the Authority or any Authority Party, or any suspension of Project Co's obligation to deliver any or any part of the Services or the compliance by Project Co with instructions given by the Authority, in each case in the circumstances referred to in Clauses 26.6 to 26.9 (*Authority's Remedial Rights*) (inclusive);
- 52.2.4 the carrying out of any Low Value Change in accordance with the terms of this Agreement during the period of time agreed between the Authority and Project Co;
- 52.2.5 the carrying out of planned preventative maintenance in accordance with the Schedule of Programmed Maintenance;
- 52.2.6 the occurrence of a Service Event that the [Authority's Representative] has agreed pursuant to Clause 50.3.2 or that it has been determined pursuant to the Dispute Resolution Procedure has been caused by Malicious Damage by a person other than a Project Co Party, but only until such time as either (i) the Authority has instructed Project Co to Rectify the Service Event as an Authority Change and the time period for implementation of such Authority Change has expired or (ii) Project Co has Rectified the Service Event pursuant to Clause 50.3.2(b);
- 52.2.7 Project Co complying with an instruction of the Authority pursuant to Clause 26.10 (*Emergencies*); [or]
- 52.2.8 [the occurrence of a matter referred to in Clause 10.4 (*Responsibility for Ground Conditions and Contamination*) during the Operational Term;]⁹³

⁹³ This Excusing Cause shall be included where the drafting at Clause 10.4 (*Responsibility for Ground Conditions and Contamination*) applies.

52.2.9 the Authority's Representative, the Facility Representative or a Facility Liaison Person [from the relevant Facility]:

(a) making a specific request of Project Co; or

(b) giving specific instructions to Project Co,

in either case, against the reasonable advice of Project Co and provided that Project Co has advised the Authority's Representative or [relevant] Facility Representative (as appropriate) of the impact of such request or instruction will have on the ability of Project Co to perform its obligations under this Agreement and that where such advice is provided verbally it is confirmed in writing as soon as reasonably practicable thereafter;

52.2.10 [a Flooding Event [in excess of that anticipated by [♦] of the Authority's Construction Requirements];⁹⁴

52.2.11 if and to the extent the Authority is using Alternative Accommodation in accordance with paragraphs 4.7 of Section 3 of Schedule 14 (*Payment Mechanism*);

52.2.12 [an External Utility Failure;]

52.2.13 the introduction of Equipment by the Authority beyond the design parameters stated in the Authority's Construction Requirements;

52.2.14 a failure on the part of the Authority or an Authority Party to grant access to Project Co to the Facility pursuant to paragraphs [4.1.4 or 4.3] of Section 3 of Schedule 34 (*Joint Operating Protocol*);

52.2.15 a failure by the Authority to stop using or to remove Authority Maintenance Equipment following issue of a valid notification to do so by Project Co under paragraph 2.5 (*Authority Maintenance Equipment*) of Section 1 (*General*) of Schedule 11 (*Equipment*); or

52.2.16 the occurrence of the circumstances referred to in Clause 10.16.2 (*Off Site Contamination*).

Insured Exposure

52.3 Without prejudice to Clause 54 (*Insurance*), Project Co shall not be entitled to any payment which would not have been due under this Agreement but for Clause 52 (*Excusing Causes*) to the extent that Project Co is or should be able to recover under any policy of insurance required to be maintained by Project Co or any Project Co

⁹⁴ This additional Excusing Cause may be added on a project specific basis. Please refer to footnote at definition of "Flooding Event" in Schedule 1.

Party in accordance with this Agreement (whether or not such insurance has in fact been effected or, if effected, has been vitiated as a result of any act or omission of Project Co (or any Project Co Party), including but not limited to non-disclosure or under insurance) or any other policy of insurance which Project Co has taken out and maintained.

Mitigation of Excusing Cause

- 52.4 Project Co shall take all reasonable steps to mitigate the consequences of an Excusing Cause on Project Co's ability to perform its obligations under this Agreement. To the extent that Project Co does not take such steps, Project Co shall not be entitled to, and shall not receive, the relief specified in Clause 52.1 (*Excusing Causes*).
- 52.5 To avoid doubt, Clause 52.2.2 (*Excusing Causes*) shall not impose a general obligation on the Authority to take (or to procure that any Authority Party or Authority Invitee takes) such steps and shall apply (and be construed) solely for the purpose of establishing whether an Excusing Cause has occurred.

53. WARRANTIES

53.1 Tax Compliance

- 53.1.1 Project Co represents and warrants to the Authority that at the date of this Agreement, it has notified the Authority in writing of any Occasions of Tax Non-Compliance and any litigation in connection with any Occasions of Tax Non-Compliance that it or, so far as it is aware having made reasonable enquiries, any of the Shareholders (other than [♦]⁹⁵) is involved in.
- 53.1.2 If at any time an Occasion of Tax Non-Compliance occurs in relation to it or any Shareholder other than [♦]⁹⁶ (a "**Non-Compliant Shareholder**"), Project Co shall:
- (a) notify the Authority in writing of such fact within five (5) Business Days of it becoming aware of that occurrence; and
 - (b) provide to the Authority:
 - (i) promptly, and in any event within twenty (20) Business Days of its becoming aware of that occurrence, details of the steps which it, or as the case may be, the Non-Compliant Shareholder is taking to address the Occasion of Tax Non-Compliance and to prevent the same from recurring, together with any mitigating

⁹⁵ Reference to be made to the Welsh Government shareholder entity, under the Shareholders' Agreement.

⁹⁶ Reference to be made to the Welsh Government shareholder entity, under the Shareholders' Agreement.

factors that it considers relevant (together '**Proposed Mitigating Measures**'); and

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

53.1.3 The Authority will notify Project Co in writing if the Proposed Mitigating Measures are acceptable to it, in its reasonable opinion, within fifteen (15) Business Days of receipt of all information required to be provided in accordance with Clause 53.1.2.

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

53.1.5 If:

- (a) the warranty by Project Co contained in Clause 53.1.1 is untrue and Proposed Mitigating Measures are not agreed in accordance with Clauses 53.1.2 to 53.1.4 (inclusive); and/or
- (b) Project Co commits a material breach of its obligation to notify the Authority of any Occasion of Tax Non-Compliance and / or Project Co fails to provide details of Proposed Mitigating Measures each as required by Clause 53.1.2; and/or
- (c) the Authority otherwise becomes aware that an Occasion of Tax Non-Compliance has occurred in relation to Project Co or a Shareholder (other than [♦]⁹⁷) and Project Co fails to provide details of Proposed Mitigating Measures within twenty (20) Business Days of its being required by the Authority to do so; and/or
- (d) the Authority notifies Project Co under Clause 53.1.4 that the Proposed Mitigating Measures are not acceptable and, if Project Co is requested to provide details of further measures pursuant

⁹⁷ Reference to be made to the Welsh Government shareholder entity, under the Shareholders' Agreement.

to Clause 53.1.4 the further measures (if any) are not acceptable to the Authority, in its reasonable opinion and the Authority notifies Project Co to that effect; and / or

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

then the Authority shall be entitled to give to Project Co:

- (i) where the Occasion of Tax Non-Compliance has occurred in relation to Project Co, a notice under Clause 40.3.4 (*Authority's Options*); and
- (ii) where the Occasion of Tax Non-Compliance has occurred in relation to a Shareholder, a notice under Clause 53.1.6.

53.1.6 Where the Occasion of Tax Non-Compliance applies to a Non-Compliant Shareholder, the Authority may by written notice (a "**Shareholder Tax Non-compliance Notice**") require that the Non-Compliant Shareholder transfers all its shares and Shareholder loan notes in Project Co or Hold Co to a person who is not a Restricted Person within one hundred and eighty (180) days commencing on the date the Shareholder Tax Non-compliance Notice is served. If the Non-Compliant Shareholder does not effect such transfer of shares and Shareholder loan notes in Project Co or Hold Co to a person who is not a Restricted Person within such one hundred and eighty (180) day period (or such longer period as may be agreed by the Authority in its absolute discretion) then the Authority will be entitled to give a notice to Project Co under Clause 40.3.4 (*Authority's Options*).

If Project Co fails to implement, or procure the implementation by a Non-Compliant Shareholder of, any Proposed Mitigating Measures agreed to by the Authority in any material respect (including as to timetable) following an Occasion of Tax Non-Compliance which applies to a Non-Compliant Shareholder, the Authority may by written notice (a "**Shareholder Tax Mitigation Measures Non-Compliance Notice**") require that the Non-Compliant Shareholder transfers all its shares and Shareholder loan notes in Project Co or Hold Co to a person who is not a Restricted Person within ninety (90) days commencing on the date the Shareholder Tax Mitigation Measures Non-Compliance Notice is served. If the Non-Compliant Shareholder does not effect such transfer of shares and Shareholder loan notes to a person who is not an Restricted Person within such ninety (90) day period (or such longer period as may be agreed by the Authority in its absolute discretion) then the Authority will be entitled to give a notice to Project Co under Clause 40.3.4 (*Authority's Options*).

54. INSURANCE⁹⁸

Project Co Insurances

- 54.1 Project Co shall procure that the Insurances, details of which are set out in Section 1 (*Policies To Be Taken Out By Project Co And Maintained During The Design And Construction Phase*) of Schedule 15 (*Insurance Requirements*), are taken out prior to the commencement of the Works and are maintained for the periods specified in Section 1 (*Policies To Be Taken Out By Project Co And Maintained During The Design And Construction Phase*) of Schedule 15 (*Insurance Requirements*).
- 54.2 Project Co shall procure that the Insurances, details of which are set out in Section 2 (*Policies to be taken out by Project Co and maintained from the [relevant] Actual Completion Date*) of Schedule 15 (*Insurance Requirements*), are taken out from the [relevant] Actual Completion Date and are maintained for the periods specified in Section 2 (*Policies to be taken out by Project Co and maintained from the [relevant] Actual Completion Date*) of Schedule 15 (*Insurance Requirements*).
- 54.3 Without prejudice to the other provisions of this Clause 54 (*Insurance*), Project Co shall, at all relevant times, at its own cost, effect and maintain in full force those insurances which it is required to effect by any applicable Law. In addition, Project Co shall discharge all its obligations under the Insurance Act 2015 when placing, renewing, maintaining or amending any of the Insurances referred to in Clauses 54.1, 54.2 and 54.3 including complying with the duty of fair presentation to insurers, and taking the actions needed to protect the Authority's separate interests where appropriate.
- 54.4 All Insurances referred to in Clauses 54.1 and 54.2 (*Project Co Insurances*) shall:
- 54.4.1 be maintained in the names of the parties specified in Schedule 15 (*Insurance Requirements*) and shall be composite policies of insurance (and not joint) unless stated otherwise in Schedule 15 (*Insurance Requirements*);
 - 54.4.2 be placed with insurers who are acceptable to the Authority (such acceptance not to be unreasonably withheld or delayed);
 - 54.4.3 in so far as they relate to damage to assets (including the Facilities), cover the same for the full reinstatement value;
 - 54.4.4 comply with the relevant provisions of Section 1 (*Policies To Be Taken Out By Project Co And Maintained During The Design And Construction Phase*) and Section 2 (*Policies To Be Taken Out By Project Co And Maintained From The [Relevant] Actual Completion Date*) of Schedule 15 (*Insurance Requirements*);

⁹⁸ The Authority should seek professional insurance advice on the insurance requirements in Clause 54 and Schedule 15 (*Insurance Requirements*), on a project specific basis.

- 54.4.5 provide for thirty (30) days prior written notice of their cancellation, non-renewal or amendment to be given to the Authority in accordance with Endorsement 1 in Section 3 (*Endorsements*) of Schedule 15 (*Insurance Requirements*);
- 54.4.6 in respect of the Physical Damage Policies provide for payment of any proceeds received by Project Co to be applied in accordance with Clause 54.22 (*Reinstatement*);
- 54.4.7 in the case of the Operational Insurances only, be reviewed and renewed in accordance with Section 4 (*Insurance Arrangements*) of Schedule 15 (*Insurance Requirements*);
- 54.4.8 the limit of indemnity and maximum deductible for each of the Operational Insurances shall, where such values are specified as being indexed under Section 2 (*Policies To Be Taken Out By Project Co And Maintained From The [Relevant] Actual Completion Date*) of Schedule 15 (*Insurance Requirements*) be indexed provided that the limit of indemnity or maximum deductible (as appropriate) shall only be increased where the indexed sum is equal to or exceeds the next whole insurable amount or deductible (as the case may be) available in the insurance market.
- 54.5 Project Co shall ensure that its brokers give the Authority a letter of undertaking substantially in the form set out in Section 5 (*Broker's Letter Of Undertaking*) of Schedule 15 (*Insurance Requirements*) at Financial Close and subsequently on the renewal of each of the Insurances.

Subrogation and Vitiation

- 54.6 Project Co shall in respect of the Insurances referred to in Clauses 54.1 and 54.2 (*Project Co Insurances*):
- 54.6.1 [procure that all policies of insurance to be effected by it pursuant to this Clause shall contain a provision to the effect that the insurers have agreed to waive all rights of subrogation against the Authority (and all Authority Parties other than Contractors and Sub-Contractors) in accordance with Endorsement 2 in Section 3 (*Endorsements*) of Schedule 15 (*Insurance Requirements*)]⁹⁹; and

⁹⁹ Waivers of subrogation are available in the prevailing UK insurance market and should be sought to protect the Authority's interests, particularly in relation to the insurances where the Authority is to be a co-insured party for its separate rights and interests. Drafting of the required endorsement is set out in Section 3 (*Endorsements*) of Schedule 15 (*Insurance Requirements*) (Endorsement 2).

54.6.2 [provide for non-vitiation protection in respect of any claim made by the Authority as co-insured in accordance with Endorsement 2 in Section 3 (*Endorsements*) of Schedule 15 (*Insurance Requirements*)]¹⁰⁰;

provided that, to avoid doubt, this Clause 54.6 (*Subrogation and Vitiating*) shall not by itself prevent Project Co from claiming against the Authority (or any Authority Party) under an express provision of this Agreement for any loss or damage not covered because of the level of deductibles under such insurance permitted by this Agreement or to the extent such loss or damage exceeds the maximum of such insurance required by this Agreement.

54.7 Neither party shall take any action or fail to take any reasonable action or (in so far as it is reasonably within its power) permit or allow others to take or fail to take any action (including failure to disclose any fact) as a result of which any of the Insurances may be rendered void, voidable, unenforceable or suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

Evidence of Project Co Insurance

54.8 Not less than twenty (20) Business Days prior to the amendment or expiry of any relevant insurance policy (other than the expiry of any of the Operational Insurances in respect of which Project Co must comply with the provisions of Section 4 (*Insurance Arrangements*) of Schedule 15 (*Insurance Requirements*)), Project Co shall submit to the Authority a request for approval from the Authority of the insurer and the principal terms and conditions of such insurance policy (and any revision to such terms and conditions or change in identity of such insurer), such approval not to be unreasonably withheld or delayed.

54.9 Project Co shall provide to the Authority:

54.9.1 copies on request of all insurance policies referred to in Clauses 54.1 to 54.3 (*Project Co Insurances*) (together with any other information reasonably requested by the Authority relating to such insurance policies) and the Authority shall be entitled to inspect them during ordinary business hours; and

54.9.2 evidence that the premiums payable under all insurance policies have been paid and that the Insurances are in full force and effect in accordance with the requirements of this Clause 54 (*Insurance*) and Schedule 15 (*Insurance Requirements*).

54.10 Renewal certificates or other such evidence of renewal in relation to the Insurances shall be obtained as and when necessary and copies (certified in a manner

¹⁰⁰ Non vitiation protection will be required under every policy where the Authority requires that it be a co-insured party for its separate rights and interests. Drafting of the required endorsement is set out in Section 3 (*Endorsements*) of Schedule 15 (*Insurance Requirements*) (Endorsement 2).

acceptable to the Authority) shall be forwarded to the Authority as soon as possible but in any event within twenty (20) Business Days of the Renewal Date.

- 54.11 If Project Co defaults in insuring or continuing to maintain the Insurances, the Authority may insure against any risk in respect of which such default has occurred and recover any premiums from Project Co as a debt provided that if the default occurs during the Operational Term the amount recoverable from Project Co shall be the difference between the premiums had Project Co continued to maintain the Insurances and the premiums paid by the Authority to take out and maintain the Insurances.

Acceptance and Compliance

- 54.12 The supply to the Authority of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause 54 (*Insurance*) shall not imply acceptance by the Authority (or the Authority's Representative) that:

54.12.1 the extent of insurance cover is sufficient and its terms are satisfactory; or

54.12.2 in respect of any risks not insured against, that the same were Uninsurable.

- 54.13 Neither failure to comply, nor full compliance, with the insurance provisions of this Agreement shall relieve Project Co of its liabilities and obligations under this Agreement.

54.14 Uninsurable Risks

54.14.1 If a risk usually covered by [contractors' 'all risks' insurance, property damage insurance, third party liability insurance, delay in start up and business interruption insurance (but not loss of profits) or statutory insurances] in each case required under this Agreement becomes Uninsurable then:

(a) Project Co shall notify the Authority of any risk becoming Uninsurable within five (5) Business Days of becoming aware of the same and in any event at least five (5) Business Days before expiry or cancellation of any existing insurance in respect of that risk; and

(b) if both parties agree, or it is determined in accordance with the Dispute Resolution Procedure that the risk is Uninsurable and that:

(i) the risk being Uninsurable is not caused by the actions of Project Co or any sub-contractor of Project Co (of any tier); and

- (ii) Project Co has demonstrated to the Authority that Project Co and a prudent board of directors of a company operating the same or substantially similar businesses in the United Kingdom to that operated by Project Co would in similar circumstances (in the absence of the type of relief envisaged by this Clause) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking into account inter alia (and without limitation) the likelihood of the Uninsurable risk occurring (if it has not already occurred), the financial consequences for such company if such Uninsurable risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company,

the parties shall meet to discuss the means by which the risk should be managed or shared (including considering the issue of self-insurance by either party).

54.14.2 If the requirements of Clause 54.14.1 are satisfied, but the parties cannot agree as to how to manage or share the risk, then:

- (a) where such requirements are satisfied in respect of such third party liability insurance the Authority shall (at the Authority's option) either pay to Project Co an amount equal to the amount calculated in accordance with Section 3 (*Compensation On Termination For Force Majeure*) of Schedule 17 (*Compensation on Termination*) and this Agreement will terminate, or elect to allow this Agreement to continue and Clause 54.14.2(b) below shall thereafter apply in respect of such risk; and
- (b) where such requirements are satisfied in respect of [contractors' 'all risks' insurance, property damage insurance, third party liability insurance (if the Authority elects to allow this Agreement to continue in accordance with Clause 54.14.2(a)), delay in start up and business interruption insurance (but not loss of profits) or statutory insurances] this Agreement shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Authority shall (at the Authority's option) either pay to Project Co an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and this Agreement will continue, or an amount equal to the amount calculated in accordance with Section 3 (*Compensation On Termination For Force Majeure*) of Schedule 17 (*Compensation on Termination*) plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable whereupon this Agreement will terminate; and
- (c) where pursuant to Clauses 54.14.2(a) and/or 54.14.2(b) this Agreement continues then the Annual Service Charge shall be reduced in each year for which the relevant insurance is not maintained by an amount equal to the premium paid (or which

would have been paid) by Project Co in respect of the relevant risk in the year prior to it becoming Uninsurable (index linked from the date that the risk becomes Uninsurable) save to the extent that such reduction is otherwise reflected in a reduction in the payments claimed by Project Co pursuant to paragraph 1.1 of Section 6 (*Other Costs*) of Schedule 14 (*Payment Mechanism*). Where the risk is Uninsurable for part of a year only the reduction in the Annual Service Charge shall be pro rated to the number of months for which the risk is Uninsurable;

- (d) where pursuant to Clauses 54.14.2(a) and/or 54.14.2(b) this Agreement continues Project Co shall approach the insurance market at least every four (4) months to establish whether the risk remains Uninsurable. As soon as Project Co is aware (and, the parties agree or it is determined pursuant to the Dispute Resolution Procedure) that the risk is no longer Uninsurable, Project Co shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) for such risk in accordance with this Agreement;
- (e) in respect of any period between the Authority receiving notification in accordance with Clause 54.14.1(a) that a TPL Risk has become Uninsurable and the Authority's notification to the Project Co in accordance with Clause 54.14.2(a) in respect of such risk then, provided it is ultimately agreed or determined that the requirements of Clause 54.14.1(b) are satisfied in respect of the Uninsurable TPL Risk and subject to Clause 54.14.2(f) below, Clause 54.14.2(b) shall apply in respect of occurrences of the Uninsurable TPL Risk during such period unless the parties otherwise agree how to manage the risk during this period; and
- (f) Clause 54.14.2(e) shall only apply provided the Project Co does not unreasonably materially delay (a) agreement and/or determination in accordance with the Dispute Resolution Procedure as to whether the requirements of Clause 54.14.1(b) are satisfied in respect of the Uninsurable TPL Risk and/or (b) meeting with the Authority to discuss the means by which the risk should be managed.

Where this Clause 54.14.2 applies and this Agreement continues, Project Co shall, subject to Clause 54.14.2(c), be relieved of its obligations to maintain insurance in respect of the relevant Uninsurable Risk.

54.14.3 If, pursuant to Clause 54.14.1(b), the Authority elects to make payment of compensation to Project Co (such that this Agreement will terminate) (the "**Relevant Payment**"), Project Co shall have the option (exercisable in writing within twenty (20) Business Days of the date of such election by the Authority (the "**Option Period**") to pay to the Authority on or before the end of the Option Period, an amount equal to the insurance proceeds that would have been payable had the relevant risk not become Uninsurable, in which case this Agreement will continue (and the Relevant Payment will not be made by the Authority), and Project Co's payment shall be applied

for the same purpose and in the same manner as insurance proceeds would have been applied had the relevant risk not become Uninsurable.

54.14.4 During the Operational Term, the Authority shall be entitled to notify Project Co that a risk has become Uninsurable under paragraph (b) of the definition of "Uninsurable". Following such notification Clauses 54.14.1(b) to 54.14.3 (except Clause 54.14.1(b)(ii)) shall apply as if Project Co has issued a notice under Clause 54.14.1(a).

54.15 **Unavailability of Terms**

54.15.1 If, upon the renewal of any of the Insurances:

- (a) any Insurance Term is not available to Project Co in the worldwide insurance market with reputable insurers of good standing; and/or
- (b) the insurance premium payable for Insurance incorporating such Insurance Term is such that the Insurance Term is not generally being incorporated in insurance procured in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom,

other than, in each case by reason of one or more actions of Project Co and/or any sub-contractor of Project Co (of any tier) then Clause 54.15.2, shall apply.

54.15.2 If it is agreed or determined that Clause 54.15.1 applies then the Authority shall waive Project Co's obligations in Clauses 54.1 to 54.3 (*Project Co Insurances*) and/or Schedule 15 (*Insurance Requirements*) in respect of that particular Insurance Term and Project Co shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Agreement as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in Clause 54.15.1 continue to apply to such Insurance Term.

54.15.3 To the extent that the parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedure, that an alternative or replacement term and /or condition of insurance is available to Project Co in the worldwide insurance market with reputable insurers of good standing which if included in the relevant insurance policy would fully or partially address Project Co's inability to maintain or procure the maintenance of insurance with the relevant Insurance Term, at a cost which contractors in the UK are (at such time) generally prepared to pay, Project Co shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition.

54.15.4 Project Co shall notify the Authority as soon as reasonably practicable and in any event within five (5) days of becoming aware that Clause 54.15.1(a)

and/or Clause 54.15.1(b) are likely to apply or (on expiry of the relevant insurance then in place) do apply in respect of an Insurance Term (irrespective of the reason for the same). During the Operational Term the Authority shall be entitled to notify Project Co that Clause 54.15.1(b) is likely to apply or (on expiry of the relevant insurance then in place) does apply in respect of an Insurance Term (irrespective of the reason for the same). Project Co shall provide the Authority with such information as the Authority reasonably requests regarding the unavailability of the Insurance Term and the parties shall meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.¹⁰¹

54.15.5 In the event that Clause 54.15.1(a) and/or Clause 54.15.1(b) apply in respect of an Insurance Term, (irrespective of the reasons for the same) Project Co shall approach the insurance market at least every four (4) months to establish whether Clause 54.15.1(a) and/or Clause 54.15.1(b) remain applicable to the Insurance Term. As soon as Project Co is aware that Clause 54.15.1(a) and/or Clause 54.15.1(b) has ceased to apply to the Insurance Term and the parties agree or it is determined pursuant to the Dispute Resolution Procedure, Project Co shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Agreement.

Risk Management

54.16 With effect from the date of this Agreement, the Authority and Project Co shall each designate or appoint an insurance and risk manager and notify details of the same to the other party. Such person shall:

54.16.1 be responsible for dealing with all risk management matters on behalf of its appointing or designating party including (without limitation) ensuring compliance by that party with this Clause 54.16 (*Risk Management*);

54.16.2 advise and report to that party on such matters; and

54.16.3 ensure that any report or survey conducted by any insurer of any relevant procedures in relation to the Project (or where such report or survey cannot be made available, any recommendation or requirement following that survey) is disclosed to the parties.

54.17 Without prejudice to the provisions of Clause 54.16 (*Risk Management*), the parties shall notify one another, and in Project Co's case the relevant insurer, of any circumstances which may give rise to a claim of a value equal to or in excess of [♦] pounds (£[♦]) (index linked)¹⁰² under the Insurances within [♦] Business Days of becoming aware of the same (or earlier, if so requested by the terms of the relevant insurance policy). If any insurer disputes any such claim, Project Co shall provide

¹⁰¹ Given insurance premiums are a pass-through cost to the Authority during the Operational Term, it is appropriate for the Authority to have the right to trigger the Unavailability provisions if it considers the premium for insuring with a particular term or condition has reached such a level that the term or condition is not generally being incorporated in insurance.

¹⁰² The insurance claims notification threshold should normally represent a significant or material value claim in connection with the requirement or represent an amount that would provide comfort to the Authority that it has knowledge of claims that might impact on the Authority.

the Authority with full details of any disputed claim and the parties shall liaise with one another to ensure that the relevant claim is preserved or pursued.

Application of Proceeds

- 54.18 All insurance proceeds received by Project Co under the Physical Damage Policies shall be paid into the Insurance Proceeds Account and shall be applied in accordance with this Agreement and in accordance with the Insurance Proceeds Account Agreement¹⁰³.
- 54.19 Subject to the provisions of the Funders' Direct Agreement and Clause 54.22 (*Reinstatement*), Project Co shall apply any proceeds of any policies of Insurance:
- 54.19.1 in the case of third party legal liability or employers' liability insurance, in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable; and
- 54.19.2 in the case of any other insurance other than delay in start up or business interruption insurance, so as to ensure the performance by Project Co of its obligations under this Agreement, including where necessary the reinstatement, restoration or replacement of the Facilities, assets, materials or goods affected by the event giving rise to the insurance claim and consequent payment of proceeds.
- 54.20 Where reinstatement monies are required to be released from the Insurance Proceeds Account Project Co shall obtain the Authority's consent in accordance with the Insurance Proceeds Account Agreement. The Authority shall give its consent (or confirm that it is withholding its consent) to the release of monies from the Insurance Proceeds Account within one (1) Business Day of a request from Project Co (provided that such consent must not be unreasonably withheld).
- 54.21 If the proceeds of any insurance claim are insufficient to cover the settlement of such claims, Project Co will make good any deficiency forthwith.
- 54.22 **Reinstatement**
- 54.22.1 All insurance proceeds received under any Physical Damage Policy¹⁰⁴ shall be applied to repair, reinstate and replace each part or parts of the Facilities in respect of which the proceeds were received.
- 54.22.2 Where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event

¹⁰³ This Clause must refer to only such insurances, the proceeds of which are to be paid into the Insurance Proceeds Account i.e. Physical Damage insurance policies

¹⁰⁴ This will not include, for example, third party liability, employers' liability, business interruption or advance loss of profits insurance.

(or a series of related events) (the ("**Relevant Incident**") in an amount in excess of [♦] pounds (£[♦]) (index-linked)¹⁰⁵:

- (a) Project Co shall deliver as soon as practicable and in any event within twenty-eight (28) days after the making of the claim a plan prepared by Project Co for the carrying out of the works necessary (the "**Reinstatement Works**") to repair, reinstate or replace (the "**Reinstatement Plan**") the assets which are the subject of the relevant claim or claims in accordance with Clause 54.22.2(b)(iv) below. The Reinstatement Plan shall set out:
 - (i) if not the Contractor, the identity of the person proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the Authority; and
 - (ii) the proposed terms and timetable or, if not then established, the reasonably anticipated terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Authority, which approval shall not be unreasonably delayed;

- (b) provided that the Authority is satisfied that the Reinstatement Plan will enable Project Co to comply with Clause 54.22.2(b)(iv) below within a reasonable timescale:
 - (i) the Reinstatement Plan will be adopted and carried out by Project Co;
 - (ii) Project Co shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the Reinstatement Plan approved by the Authority;
 - (iii) prior to the earlier to occur of the Termination Date or the Expiry Date, any amounts standing to the credit of the Insurance Proceeds Account (the "**Relevant Proceeds**") (together with any interest accrued) may be withdrawn by Project Co from the Insurance Proceeds Account as required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in Clause 54.22.2(b)(ii) above, and to meet any other reasonable costs and expenses of Project Co for the sole purposes of funding the Reinstatement Works and the parties shall operate the signatory requirements of

¹⁰⁵ The insurance claims notification threshold should normally represent a significant or material value claim in connection with the requirement or represent an amount that would provide comfort to the Authority that it has knowledge of and can influence the Reinstatement Plan.

the Insurance Proceeds Account in order to give effect to such payments. Following the earlier to occur of the Termination Date and the Expiry Date, the Authority may withdraw amounts standing to the credit of the Insurance Proceeds Account for the purposes of funding any Reinstatement Works;

- (iv) the Authority agrees and undertakes that, subject to compliance by Project Co with its obligations under this Clause, and provided that Project Co procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in Clause 54.22.2(b)(ii), it shall not exercise any right which it might otherwise have to terminate this Agreement by virtue of the event which gave rise to the claim for the Relevant Proceeds;
- (v) the Authority undertakes to use reasonable endeavours to assist Project Co in the carrying out of the Reinstatement Plan;
- (vi) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Authority and in accordance with Clause 54.22.3 below the Authority shall permit withdrawal by Project Co of any Relevant Proceeds then held in the Insurance Proceeds Account that have not been paid under Clause 54.22.2(b)(iii) above, in respect of the Relevant Incident, together with any interest accrued; and
- (vii) subject to the provisions of Clause 49.1 (*Project Co Indemnities to Authority*) Project Co shall be solely responsible for the payment of any deficiency.

54.22.3 Where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate or replace any Facility, Project Co shall carry out the work in accordance with the Authority's Construction Requirements so that on completion of the work, the provisions of this Agreement are complied with.

54.22.4 If and to the extent that a breach by Project Co of its obligations under Clause 54.22.2(b) leads to a delay in the completion of the Reinstatement Works, any entitlement that Project Co has to relief under Clause 31 (*Relief Events*) shall be suspended.

55. EXCLUSIONS AND LIMITATIONS ON LIABILITY

Exclusions

- 55.1 The indemnities under this Agreement shall not apply and (without prejudice to the Authority's rights under the Payment Mechanism) there shall be no right to claim damages for breach of this Agreement, in tort or on any other basis whatsoever to the extent that any loss claimed by either party is for loss of profits, loss of use (subject to Clause 55.3), loss of production, loss of business or loss of business opportunity or is a claim for consequential loss or for indirect loss of any nature ("**Indirect Losses**") suffered or allegedly suffered by either party. The Authority agrees that, notwithstanding the foregoing, any losses of Project Co arising under the Construction Contract and the Service Contracts¹⁰⁶ as originally executed (or as amended in accordance with and subject to Clause 4.1 (*Ancillary Documents*)) which are not Indirect Losses shall not be excluded from such a claim solely by reason of this Clause 55.1 (*Exclusions*).
- 55.2 The Authority shall not be liable in tort to Project Co or any Project Co Party in respect of any negligent act or omission of the Authority or any Authority Party relating to or in connection with this Agreement and Project Co shall procure that no Project Co Party shall bring such a claim against the Authority. Project Co has accepted this on the basis that it and each Project Co Party will cover the risk of negligent acts or omissions by insurance or in such other manner as it (or they) may think fit.
- 55.3 The indemnity under Clause 10.16.3 (b) (*Off Site Contamination*) shall include the direct costs of the use of alternative facilities to the extent covered by Insurance.

No Double Recovery

- 55.4 Subject to:
- 55.4.1 any other express right of the Authority pursuant to this Agreement; and
- 55.4.2 the Authority's right to claim, on or after termination of this Agreement, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Agreement by Project Co save to the extent that the same has already been recovered by the Authority pursuant to this Agreement or has been taken into account to reduce any compensation payable by the Authority pursuant to Clause 46 (*Compensation on Termination*),

the sole remedy of the Authority in respect of a failure to provide the Services in accordance with this Agreement shall be the operation of the Payment Mechanism.

¹⁰⁶ As a matter of good practice, the Authority should review the relevant Sub-contracts prior to Financial Close to ensure that they contain mirror provisions excluding the right to claim Indirect Losses. Assurances on the contents of the sub-contracts will be required to be provided to the Welsh Government, whether or not equity is being invested by the public sector.

- 55.5 Subject to Clause 39 (*Authority Events of Default*) and any other express right of Project Co pursuant to this Agreement, Project Co's sole remedy in respect of any breach of this Agreement which is a Compensation Event shall be pursuant to Clause 30 (*Delay Events and Compensation Events*).
- 55.6 Nothing in Clause 55.4 (*No Double Recovery*) shall prevent or restrict the right of the Authority to seek an injunction or an order for specific performance or other discretionary remedies of the court.
- 55.7 Notwithstanding any other provision of this Agreement, neither party shall be entitled to recover compensation or make a claim under this Agreement or any other agreement in relation to the Project in respect of any loss that it has incurred (or any failure of the other party) to the extent that it has already been compensated in respect of that loss or failure pursuant to this Agreement or otherwise.
- 55.8 Neither party shall have the right to terminate this Agreement for breach of contract save as expressly set out in this Agreement.

No Loss

- 55.9 Where the Authority would otherwise be expressly liable to make payment to Project Co of sums which include amounts payable in turn by Project Co to any Sub Contractor, the Authority shall not be entitled to withhold, reduce or avoid any such payment to Project Co in reliance only on the fact that the amount which is due from Project Co to the Sub Contractor or the entitlement of the Sub Contractor to payment of such amount as a result of the circumstances giving rise to the Authority's obligation to pay, is conditional on the entitlement of, or receipt of payment by Project Co from the Authority.
- 55.10 [Where Project Co would otherwise be expressly liable to make payment to the Authority of sums which include amounts payable in turn by the Authority to any School Entity, Project Co shall not be entitled to withhold, reduce or avoid any such payment to the Authority in reliance only on the fact that the amount which is due from the Authority to the School Entity or the entitlement of the School Entity to payment of such amount as a result of the circumstances giving rise to Project Co's obligation to pay, is conditional on the entitlement of, or receipt of payment by the Authority from Project Co.]

PART 12: MISCELLANEOUS

56. INTELLECTUAL PROPERTY

Project Data

56.1 Project Co shall make available to the Authority free of charge (and hereby irrevocably licences the Authority to use) all Project Data that might reasonably be required by the Authority and Project Co shall ensure that it can make the Project Data available to the Authority on these terms, for the purposes of:

56.1.1 the Authority carrying out the Authority Services (and its operations relating to the performance of the Authority Services), its duties under this Agreement and/or any statutory duties that the Authority may have; and

56.1.2 following termination of this Agreement, the design or construction of the Facilities, the operation, maintenance or improvement of the Facilities and/or the carrying out of operations the same as, or similar to, the Project Operations,

(together the "**Approved Purposes**") and in this Clause "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly.

Intellectual Property Rights

56.2 Project Co:

56.2.1 hereby grants to the Authority, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub-licences) to use the Intellectual Property Rights which are or become vested in Project Co; and

56.2.2 shall, where any Intellectual Property Rights are or become vested in a third party, use all reasonable endeavours to procure the grant of a like licence to that referred to in Clause 56.2.1 above to the Authority,

in both cases, solely for the Approved Purposes.

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

Maintenance of Data¹⁰⁷

- 56.3 To the extent that any of the data, materials and documents referred to in this Clause are generated by or maintained on a computer or similar system, Project Co shall use all reasonable endeavours to procure for the benefit of the Authority, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable the Authority or its nominee to access and otherwise use (subject to the payment by the Authority of the relevant fee, if any) such data for such purposes as the Authority may at its sole discretion require. As an alternative, Project Co may provide such data, materials or documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format.
- 56.4 Project Co shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Clause 56.3 (*Maintenance of Data*) in accordance with Good Industry Practice. Without prejudice to this obligation, Project Co shall submit to the Authority's Representative for approval its proposals for the back-up and storage in safe custody of such data, materials and documents and the Authority shall be entitled to object if the same is not in accordance with Good Industry Practice. Project Co shall comply, and shall cause all Project Co Parties to comply, with all procedures to which the Authority's Representative has given its approval. Project Co may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Authority's Representative, who shall be entitled to object on the basis set out above.

Claims

- 56.5 Where a claim or proceeding is made or brought against the Authority which arises out of the infringement of any rights in or to any Intellectual Property (other than any Disclosed Data) or because the use of any materials, Plant, machinery or equipment in connection with the Project Operations infringes any rights in or to any Intellectual Property of a third party then, unless such infringement has arisen out of the use of any Intellectual Property by or on behalf of the Authority otherwise than in accordance with the terms of this Agreement, Project Co shall indemnify the Authority at all times from and against all such claims and proceedings and the provisions of Clause 49.3 (*Conduct of Claims*) shall apply.

¹⁰⁷ If either party is to be given access to any of the other party's computer systems, as a matter of good practice and also to clarify potential liability for unauthorised access to those systems under the Computer Misuse Act 1990, the scope of each party's authorisation to access each other's computer systems will need to be defined clearly. The terms of such authorisation will be project specific.

57. DISPUTE RESOLUTION PROCEDURE

Except where expressly provided otherwise in this Agreement, any dispute arising out of or in connection with this Agreement shall be resolved in accordance with the procedure set out in Schedule 20 (*Dispute Resolution Procedure*).

58. SUB-CONTRACTING AND ASSIGNMENT

Sub-Contractors

58.1 Project Co shall, without prejudice to Clause 58.8 (*Assignment*), procure that none of the persons listed below shall sub-contract all (or substantially all) of their obligations under or in the agreement set out next to its name:

Person	Contract
Contractor	Construction Contract
Service Provider	Service Contract

without, in each case, the prior written consent of the Authority (such consent not to be unreasonably withheld or delayed). To avoid doubt, (i) any failure to comply with Clause 58.3 (*Sub-Contractors*) shall be a reasonable ground for withholding consent and (ii) consent shall, without prejudice to the other provisions of Clause 58 (*Sub-Contractors*), not be required in respect of the appointment of any party currently approved by the Authority as a suitable replacement.

58.2 If the contract set out next to the name of any person referred to in Clause 58.1 (*Sub-Contractors*) shall at any time lapse, terminate or otherwise cease to be in full force and effect (whether by reason of expiry or otherwise), with the effect that such person shall cease to act in relation to the Project, Project Co shall forthwith appoint a replacement (subject to compliance with Clause 58.1 (*Sub-Contractors*)).

58.3 Project Co shall:

58.3.1 deliver the Contractor Collateral Agreement, the Service Provider's Collateral Agreement and the Key Sub-Contractor Collateral Agreements on the date of this Agreement, other than in respect of any Key Sub-Contractors who are not appointed at that time;

58.3.2 procure that any replacement for any person referred to in Clause 58.1 (*Sub-Contractors*) [or any Key Sub-Contractor]: shall enter into a contract upon the same or substantially similar terms as the person so replaced; shall enter into a collateral agreement on the same or substantially the same terms as the Collateral Agreement entered into by the person so replaced, and, shall deliver a certified copy of that appointment and the Collateral Agreement duly executed by each party to that collateral

agreement other than the Authority no later than the date that such appointment is to take effect;

58.3.3 where any new Key Sub-Contractor is to be engaged in connection with the Project, procure that: a certified true copy of their appointment; and, a collateral agreement substantially in the form of in the form set out in Section 3 (*Key Sub-Contractor Collateral Agreement*) of Schedule 9 (*Collateral Agreements*) Collateral Agreement duly executed by each party to that Collateral Agreement other than the Authority, is delivered to the Authority no later than the date on which such appointment is to take effect.

58.4 Where Project Co enters into a contract with a Sub-Contractor for the purposes of carrying out the Project Operations or any part of the Project Operations under this Agreement, Project Co shall cause a term to be included in such contract:

58.4.1 which requires payment to be made to the Sub-Contractor within a specified period not exceeding thirty (30) days from receipt of a valid invoice as defined by the contract requirements and in the case of the provision of Services provides that, for the purpose of payment alone, where the Authority has made payment to Project Co and the Sub-Contractor's invoice includes Project Operations in relation to which payment has been made by the Authority then, to the extent that it relates to such Project Operations, the invoice shall be treated as valid and payment shall be made to the Sub-Contractor without deduction (but without prejudice to any right to deduct or set off validly arising under the terms of the contract with the Sub-Contractor); and

58.4.2 which notifies the Sub-Contractor that the contract forms part of a larger contract for the benefit of the Authority and that should the Sub-Contractor have any difficulty in securing the timely payment of an invoice that matter may be referred by the Sub-Contractor to the Authority's Representative; and

58.4.3 which requires any sub contracts to be entered into in relation to the Project Operations to be on the same terms as this Clause 58.4 (*Sub-Contractors*) (including for the avoidance of doubt this Clause 58.4.3) subject only to modification to refer to the correct designation of the equivalent party as the supplier and recipient of the relevant Project Operations as the case may be.

Replacement of a Non-Performing Sub-Contractor

58.5 On the substitution or replacement of a Service Provider due to a breach or default under a Service Contract, Project Co may elect, subject to Clause 58.7 (*Replacement of a Non-Performing Sub-Contractor*) and provided that at the time of making such election no notice of termination has been served under this Agreement, that for the purposes of Clause 40.1.8 (*Deductions*) and Clause 40.1.9 (*Warning Notices*) only, all Deductions incurred and Warning Notices served prior to the date of such substitution or replacement shall be disregarded by virtue of Clause 58.6 (*Replacement of a Non-Performing Sub-Contractor*) below.

- 58.6 If Project Co makes an election pursuant to Clause 58.5 (*Replacement of a Non-Performing Sub-Contractor*) above then, with effect from the date of substitution or replacement of the Service Provider, all Deductions incurred and Warning Notices served prior to that date shall be disregarded for the purposes of Clause 40.1.8 (*Deductions*) and Clause 40.1.9 (*Warning Notices*). For the avoidance of doubt, the Authority shall retain the right to make Deductions in accordance with Schedule 14 (*Payment Mechanism*) in respect of the Availability Failures and/or Performance Failures to which the Deductions and/or Warning Notices are attributable.
- 58.7 Project Co shall be entitled to make an election pursuant to Clause 58.5 (*Replacement of a Non-Performing Sub-Contractor*) on a maximum of two (2) occasions during the Project Term.

Assignment

- 58.8 This Agreement and any other agreement in connection with the Project to which both the Authority and Project Co are a party shall be binding on, and shall enure to the benefit of, Project Co and the Authority and their respective statutory successors and permitted transferees and assignees. [In the case of the Authority, its successors shall include any person to whom the Welsh Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Authority upon the Authority ceasing to exist, transfers the property, rights and obligations of the Authority under this Agreement and such other agreements in connection with the Project to which the Authority and Project Co are both a party.]¹⁰⁸
- 58.9 Subject to Clause 58.10 (*Assignment*), Project Co shall not, without the prior written consent of the Authority, assign, novate, transfer, sub-contract or otherwise dispose of any interest in this Agreement, [the Independent Tester Contract,] the Construction Contract, the Service Contract and [any other contract] entered into by Project Co for the purposes of performing its obligations under this Agreement.
- 58.10 The provisions of Clause 58.9 (*Assignment*) do not apply to the grant of any security, in a form approved by the Authority prior to its grant (such approval not to be unreasonably withheld or delayed), or to the enforcement of any such security and substitution rights in accordance with the Funders' Direct Agreement for any loan made to Project Co under the Initial Funding Agreements provided that any assignee shall enter into the Funders' Direct Agreement in relation to the exercise of its rights, if the Authority so requires.
- 58.11 The rights and obligations of the Authority under this Agreement shall not be assigned, novated or otherwise transferred (whether by virtue of any Law or any scheme pursuant to any Law or otherwise) to any person other than to any [public] body (being a single entity) acquiring the whole of the Agreement and having the legal capacity, power and authority to become a party to and to perform the obligations of the Authority under this Agreement being:
- 58.11.1 the Welsh Ministers or a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975; or

¹⁰⁸ The inclusion of the words in square brackets should be considered on a project specific basis.

58.11.2 [in the case of any Further Education Corporation or Designated Institution (as defined in the Further and Higher Education Act 1992) any other Further Education Corporation or Designated Institution where a Deed of Reliance in the form set out in Schedule 35 ([Deed of Reliance]) is entered into by the Welsh Ministers in respect of the Collateral Obligation of that organisation; or]

58.11.3 any other public body whose obligations under this Agreement and the Funders' Direct Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to Project Co) by the Authority, the Welsh Ministers or a Minister of the Crown having the legal capacity, power and authority to perform the obligations under the guarantee and the obligations of the Authority under this Agreement,

without the consent of Project Co. The prior written consent of Project Co (not to be unreasonably withheld or delayed) shall be required for any other assignment, transfer or disposal by the Authority of the whole or any part of this Agreement.

59. OWNERSHIP INFORMATION AND CHANGES IN CONTROL

59.1 Project Co represents and warrants to the Authority that at the date of this Agreement the legal and beneficial ownership of Project Co and Hold Co is as set out in Schedule 21 (*Project Co Information*) and that, other than any security granted to the Senior Funders under the Senior Funding Agreements [and other than any Shareholder pre-emption rights,] no arrangements are in place that have or may have or result in any sale, transfer or disposal of any legal, beneficial, equitable or other interest in any or all of the shares in Project Co or Hold Co.

59.2 Project Co shall inform the Authority of any proposed Change in Control in Project Co and/or Hold Co prior to its occurrence, or, if it does not have any prior information, as soon as reasonably practicable (and in any event, within thirty (30) days) of any Change in Control occurring in respect of Project Co and/or Hold Co.

59.3 The Authority may, not more than [twice] in any Contract Year, or at any time when a Project Co Event of Default is outstanding, require Project Co to inform it, as soon as reasonably practicable and in any event within thirty (30) days of receipt of the Authority's request for details, of any Change in Control in respect of Project Co and/or Hold Co.

59.4 Project Co's obligations under Clauses 59.1 and 59.2 (*Ownership Information and Changes in Control*) above shall, except where a legal transfer of shares has occurred be limited to the extent of Project Co's awareness having made all reasonable enquiry.

- 59.5 Subject to Clause 59.6 (*Ownership Information and Changes in Control*), prior to the expiry of a period of twelve (12) months commencing on the [last to occur of the:] [final] [Actual Completion Date;][and the [final] Actual Post Completion Works Date]¹⁰⁹, no Change in Control in any or all of the shares in Project Co and/or Hold Co shall be permitted without the prior written approval of the Authority. Any Change in Control arising as a consequence of either:
- 59.5.1 the grant or enforcement of security in favour of the Senior Funders over or in relation to any of the shares of Project Co, provided that any document conferring security over any shares has been approved by the Authority (such approval not to be unreasonably withheld or delayed);
 - 59.5.2 any transfer by a Shareholder to an [Associate] of such transferor;
 - 59.5.3 any change in beneficial or legal ownership of any shares that are listed on a recognised investment exchange (as defined in section 285 of the Financial Services and Markets Act 2000); or
 - 59.5.4 where the Change of Control arises as a consequence of any change in legal or beneficial ownership of any interest in shares owned at the date of this Agreement by the [♦]¹¹⁰,

shall be disregarded for the purpose of this Clause 59.5 (*Ownership Information and Changes in Control*) above.

Where Clause 59.5.2 applies and subsequent to any such transfer (the "**Original Transfer**") the transferee ceases to be an [Associate] of the original transferor, it shall be a breach of this Clause 59.5 (*Ownership Information and Changes in Control*) if the shares or interests which were the subject of the Original Transfer are not [within twenty (20) Business Days] of the transferee ceasing to be an Associate of the original transferor, transferred to the original transferor or any Associate of such transferor.

- 59.6 No Change in Control (at any time) in any or all of the shares in Project Co or Hold Co (or any company (other than a public quoted company whose equity securities are listed on a recognised investment exchange, as defined in section 285 of the Financial Services and Markets Act 2000) holding shares in Hold Co, Project Co or in any company (or its shareholders) holding shares in such a company (or its shareholders)) shall be permitted without the prior written approval of the Authority where the person acquiring control is a Restricted Person.

60. MITIGATION

Each of the Authority and Project Co shall at all times take all reasonable steps to minimise and mitigate any loss for which the relevant party is entitled to bring a claim against the other party pursuant to this Agreement.

¹⁰⁹ The 12 month period should not commence until all works (including Post Completion Works) are complete.

¹¹⁰ Reference to be made to the Welsh Government shareholder entity, under the Shareholders' Agreement.

61. DATA PROTECTION

Data Protection

- 61.1 For the purpose of the following Clauses, the terms "Controller", "Data Subject", "Personal Data Breach" and "Process/Processing" shall have the meanings given to them in the Data Protection Laws.
- 61.2 Project Co undertakes to the Authority that it shall comply with the obligations of a "Controller" under the provisions of the Data Protection Laws in respect of the Personal Data processed by it. In addition, Project Co:
- 61.2.1 warrants that it has, or will have at all material times, (and it shall procure that all Sub-Contractors (and their agents and sub-contractors of any tier have or will have at all material times) Protective Measures in place to protect against unauthorised or unlawful Processing or any Data Loss Event and that it has taken, or will take at all material times, all reasonable steps to ensure the reliability of any of its staff which will have access to Personal Data Processed as part of the Project Operations;
 - 61.2.2 undertakes that it will only obtain, hold, Process, use, store and disclose Personal Data as is necessary to perform its obligations or exercise its rights under this Agreement and (without prejudice to Clause 5.2 (*General Standards*)) that such data will be held, Processed, used, stored and disclosed only in accordance with the Data Protection Laws and any other applicable Law;
 - 61.2.3 undertakes that it will notify the Authority without undue delay upon becoming aware of any Data Loss Event in respect of the Personal Data;
 - 61.2.4 will co-operate with the Authority, to the extent reasonably requested, in relation to any notifications to the Information Commissioner or to Data Subjects which either party is required to make following a Personal Data Breach;
 - 61.2.5 will co-operate with the Authority, to the extent reasonably requested in relation to:
 - (a) a request to the Authority from a Data Subject to exercise any right under the Data Protection Laws;
 - (b) any other communication from a Data Subject to the Authority concerning the Processing of their Personal Data; and
 - (c) any communication from the Information Commissioner concerning the Processing of Personal Data, or compliance with the Data Protection Laws; and

61.2.6 undertakes to allow the Authority access to any relevant premises on reasonable notice to inspect its procedures described at Clause 61.2.1 above.

62. CONFIDENTIALITY¹¹¹

62.1 The Authority shall, subject to Clause 62.2 (*Confidentiality*) be entitled to make the documents and information listed in this Clause 62.1 (*Confidentiality*) freely available to the public (which may include, without limitation, publication on the Authority's website):

62.1.1 this Agreement;

62.1.2 the Independent Tester Contract;

62.1.3 the Collateral Agreements;

62.1.4 the Monthly Service Report¹¹²; and

62.1.5 the Financial Model (as updated from time to time in accordance with this Agreement),

62.1.6 [♦]¹¹³

and Project Co acknowledges and agrees that, subject to the exclusion of information referred to in Clause 62.2.2, the provision or publication of the documents and information listed in this Clause 62.1 (*Confidentiality*) shall not give rise to any liability under the terms of this Agreement or otherwise. The Authority shall notify Project Co in writing not less than ten (10) Business Days prior to any intended provision or publication of information pursuant to this Clause 62.1 (*Confidentiality*).

62.2

62.2.1 The parties agree that the provisions of this Agreement, the Financial Model and each Ancillary Document shall, subject to Clause 62.2.2 below,

¹¹¹ In line with the general approach taken by the Welsh Audit Commission, these Clauses support a general openness in regard to the project contracts and associated documentation. The Welsh Government considers there is a limited amount of the Project Data that can be properly regarded as falling under any of the exemptions in the freedom of information regime. These have been identified in Schedule 26 (*Commercially Sensitive Information*) with what are thought to be reasonable periods when the protection of confidentiality may be claimed. The Authority should be wary of attempts to widen the scope or extend the duration of the limited contractual confidentiality arrangements in these Clauses and should consider these Clauses in light of any other guidance with which it is required to comply.

¹¹² This should be the Monthly Service Report or some other form of report that Project Co is required to produce on a regular basis, detailing (a) the Monthly Service Payment Amounts (gross and net of Deductions), (b) a breakdown of Deductions incurred, (c) Warning Notices issued and (d) other payments included within the Monthly Invoices for the quarter (e.g. in respect of changes, compensation, indemnities etc).

¹¹³ Any other information is to be listed on a project specific basis.

not be treated as Confidential Information and may be disclosed without restriction and Project Co acknowledges that the Authority shall, subject to Clause 62.2.2 below, be entitled to make this Agreement and each Ancillary Document available in the public domain.

- 62.2.2 Clause 62.2.1 above shall not apply to provisions of this Agreement, the Financial Model or an Ancillary Document designated as Commercially Sensitive Information and listed in Schedule 26 (*Commercially Sensitive Information*) to this Agreement which shall, subject to Clause 62.3 (*Permitted Disclosure*) be kept confidential for the periods specified in that Schedule 26 (*Commercially Sensitive Information*).
- 62.2.3 The parties shall keep confidential all Confidential Information received by one party from the other party relating to this Agreement and Ancillary Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

Permitted Disclosure

62.3 Clauses 62.2.2 and 62.2.3 shall not apply to:

- 62.3.1 any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under this Agreement for the performance of those obligations;
- 62.3.2 any matter which a party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause;
- 62.3.3 any disclosure to enable a determination to be made under Schedule 20 (*Dispute Resolution Procedure*) or in connection with a dispute between Project Co and any of its subcontractors;
- 62.3.4 any disclosure which is required pursuant to any Law or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or, if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- 62.3.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 62.3.6 any provision of information to the parties' own professional advisers or insurance advisers or to the Senior Funders or the Senior Funders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to Project Co to enable

it to carry out its obligations under this Agreement, or may wish to acquire shares in Project Co [and/or Hold Co] in accordance with the provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;

- 62.3.7 any disclosure by the Authority of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed new contractor, its advisers and lenders, should the Authority decide to retender this Agreement;
- 62.3.8 any registration or recording of the Consents and property registration required;
- 62.3.9 any disclosure of information by the Authority to any other department, office or agency of the Government or their respective advisers or to any person engaged in providing services to the Authority for any purpose related to or ancillary to this Agreement or the School Entities;
- 62.3.10 any disclosure for the purpose of:
 - (a) the examination and certification of the Authority's or Project Co's accounts;
 - (b) any examination pursuant to the Public Audit (Wales) Act 2004 of the economy, efficiency and effectiveness with which the Authority has used its resources;
 - (c) any disclosure required to be made to the Auditor General or the Wales Audit Office;
 - (d) complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies; or
 - (e) (without prejudice to the generality of Clause 62.3.4) compliance with the FOIA and/or the Environmental Information Regulations;
- 62.3.11 [disclosure pursuant to Clause 62.1 (*Confidentiality*); or]
- 62.3.12 disclosure to the extent required pursuant to Clause 64.2 (*Information and Audit Access*);
- 62.3.13 disclosures by Project Co or the Shareholders to WEPCo that is reasonably required to enable WEPCo to comply with its obligations under the SPA; [or

62.3.14 [*identify here disclosure requirements to other public bodies where Facilities are joint facilities;*]

provided that, to avoid doubt, neither Clause 62.3.10(e) nor Clause 62.3.4 above shall permit disclosure of Confidential Information otherwise prohibited by Clause 62.2.3 where that information is exempt from disclosure under section 41 of the FOIA.

- 62.4 Where disclosure is permitted under Clause 62.3 (*Permitted Disclosure*), other than under Clauses 62.3.2, 62.3.4, 62.3.5, 62.3.8 and 62.3.10, the party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.
- 62.5 Project Co shall not make use of this Agreement or any information issued or provided by or on behalf of the Authority in connection with this Agreement otherwise than for the purpose of this Agreement, except with the written consent of the Authority.
- 62.6 Where Project Co, in carrying out its obligations under this Agreement, is provided with information relating to any Authority Party, Project Co shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless Project Co has obtained the prior written consent of that person and has obtained the prior written consent of the Authority.
- 62.7 On or before the Expiry Date, Project Co shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any Authority Party including any documents in the possession, custody or control of a Sub-Contractor, are delivered up to the Authority.
- 62.8 The parties acknowledge that [Welsh Audit Commission] has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament and/or National Assembly of Wales.
- 62.9 The provisions of this Clause 62 (*Confidentiality*) are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

Announcements

- 62.10 Unless otherwise required by any Law or any regulatory or governmental authority or otherwise as is expressly permitted by this agreement, (but only to that extent), neither party shall make or permit or procure to be made any public announcement or disclosure (whether for publication in the press, the radio, television screen or any other medium) of any Confidential Information or in the case of Project Co of its (or any Project Co Party's) interest in the Project or, in any such case, any matters relating thereto, without the prior written consent of the other party (which shall not be unreasonably withheld or delayed).

63. FREEDOM OF INFORMATION

- 63.1 Project Co acknowledges that the Authority is subject to the requirements of the FOIA and the Environmental Information Regulations and shall assist and cooperate with the Authority to facilitate the Authority's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in Clauses 63.2 to 63.8 (*Freedom of Information*).
- 63.2 Where the Authority receives a Request for Information in relation to Information that Project Co is holding on its behalf and which the Authority does not hold itself the Authority shall refer to Project Co such Request for Information as soon as practicable and in any event within five (5) Business Days of receiving such Request for Information and Project Co shall:
- 63.2.1 provide the Authority with a copy of all such Information in the form that the Authority requires as soon as practicable and in any event within five (5) Business Days (or such other period as the Authority acting reasonably may specify) of the Authority's request; and
 - 63.2.2 provide all necessary assistance as reasonably requested by the Authority in connection with any such Information, to enable the Authority to respond to the Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.
- 63.3 Following notification under Clause 63.2 (*Freedom of Information*), and up until such time as Project Co has provided the Authority with all the Information specified in Clause 63.2.1, Project Co may make representations to the Authority as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Authority shall be responsible for determining at its absolute discretion:
- 63.3.1 whether Information is exempt from disclosure under the FOIA and the Environmental Information Regulations; and
 - 63.3.2 whether Information is to be disclosed in response to a Request for Information, and
- in no event shall Project Co respond directly, or allow its Sub-Contractors to respond directly, to a Request for Information unless expressly authorised to do so by the Authority.

- 63.4 Project Co shall ensure that all Information held on behalf of the Authority is retained for disclosure for at least the number of years (from the date it is acquired) [specified in the Authority Policy relating to records retention]¹¹⁴ and shall permit the Authority to inspect such Information as requested from time to time.
- 63.5 Project Co shall transfer to the Authority any Request for Information received by Project Co as soon as practicable and in any event within two (2) Business Days of receiving it.
- 63.6 Project Co acknowledges that any lists provided by it listing or outlining Confidential Information are of indicative value only and that the Authority may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of FOIA and the Environmental Information Regulations.
- 63.7 In the event of a request from the Authority pursuant to Clause 63.2 (*Freedom of Information*) Project Co shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Authority of Project Co's estimated costs of complying with the request to the extent these would be recoverable, if incurred by the Authority, under section 13(1) of the FOIA and the Fees Regulations. Where such costs (either on their own or in conjunction with the Authority's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in section 12(1) of the FOIA and as set out in the Fees Regulations (the "**Appropriate Limit**") the Authority shall inform Project Co in writing whether or not it still requires Project Co to comply with the request and where it does require Project Co to comply with the request the five (5) Business Days period for compliance shall be extended by such number of additional days for compliance as the Authority is entitled to under section 10 of the FOIA. In such case, the Authority shall notify Project Co of such additional days as soon as practicable after becoming aware of them and shall reimburse Project Co for such costs as Project Co incurs in complying with the request to the extent it is itself entitled to reimbursement of such costs in accordance with its own FOIA policy from time to time.¹¹⁵
- 63.8 Project Co acknowledges that (notwithstanding the provisions of Clause 62 (*Confidentiality*) the Authority may, acting in accordance with the Secretary of State's Code of Practice on the Discharge of Functions of Public Authorities under Part 1 of the Freedom of Information Act 2000 (the "**Code**"), and/or having full regard to any guidance or briefings issued by the Information Commissioner or the Welsh Government, be obliged under the FOIA, or the Environmental Information Regulations to disclose Information concerning Project Co or the Project:
- 63.8.1 in certain circumstances without consulting with Project Co; or

¹¹⁴ The Authority should ensure the appropriate policy is in place.

¹¹⁵ It is up to the parties to decide whether costs associated with any future change in the Authority's FOIA cost recovery policy should go through Schedule 16 (*Change Protocol*).

If the Environmental Information Regulations are relevant to the project, the parties may include broadly equivalent provisions in the Agreement dealing with costs and based upon the Authority's policy towards reimbursement of such costs under section 10 of the Environmental Information Regulations.

63.8.2 following consultation with Project Co and having taken their views into account,

provided always that where Clause 63.8.1 above applies the Authority shall, in accordance with the recommendations of the Code, draw this to the attention of Project Co prior to any disclosure.

63.9 In the event that the Project Co is or becomes subject to the Environmental Information Regulations or the FOIA it shall comply with its obligations under the Environmental Information Regulations and the FOIA. In doing so, it will use reasonable endeavours to consult the Authority before disclosing Information about them or any agreement entered into between the Authority and Project Co.

64. INFORMATION AND AUDIT ACCESS

64.1 Project Co shall provide to the Authority's Representative all information, documents, records and the like in the possession of, or available to, Project Co (and to this end Project Co shall use all reasonable endeavours to procure that all such items in the possession of the Contractor or any Service Providers shall be available to it and Project Co has included, or shall include, relevant terms in all contracts with the Contractor or any Service Providers to this effect) as may be reasonably requested by the Authority's Representative for any purpose in connection with this Agreement.

64.2 For the purpose of:

64.2.1 the audit, examination and certification of the Authority's accounts; or

64.2.2 any examination pursuant to the Public Audit (Wales) Act 2004 of the economy, efficiency and effectiveness with which the Authority has used its resources,

the Wales Audit Office may examine such documents as it may reasonably require which are owned, held or otherwise within the control of Project Co (and Project Co shall procure that any person acting on its behalf who has such documents and/or other information shall also provide access) and may require Project Co to produce such oral or written explanations as he considers necessary.

64.3 Project Co shall provide and shall procure that its Sub-Contractors shall provide such information as the Authority may reasonably require from time to time to enable it to meet its obligations to provide reports and returns pursuant to regulations, directions or guidance applicable to the Authority including, without limitation, reports and returns regarding the physical condition of buildings occupied by the Authority, health and safety, under the firecode, relating to environmental health and to comply with [requirements for the provision of information relating to achievement of customer service targets].

- 64.4 Project Co shall:
- 64.4.1 take appropriate and proportionate technical and organisational measures to manage the risks posed to the security of network and information systems used in the provision of the Services;
 - 64.4.2 assist the Authority in taking appropriate measures to minimise the impact of any incidents affecting the Authority's network and information systems;
 - 64.4.3 cooperate with any audit by a Relevant Authority of its own or the Authority's security and network and information systems (at no cost to the Authority) and make any changes to the Services which the Relevant Authority requires in relation to the network and information systems used in the provision of the Services (at no additional cost to the Authority);
 - 64.4.4 notify the Authority without undue delay upon becoming aware of a Reportable Incident and in any event within no more than 24 hours, such notification to set out all information that the Authority may reasonably require in connection with that incident (including the time, duration, nature and impact of the Reportable Incident); and
 - 64.4.5 on request, provide reasonable assistance to the Authority in connection with a Reportable Incident, including in respect of the assessment of that incident, the provision of further information on the Reportable Incident and in respect of the actions to be taken as a consequence of the Reportable Incident.
- 64.5 Project Co shall indemnify the Authority at all times against all administrative fines arising from any claim by a third party (including, without limitation, by data subjects, whether individually or in groups) or any action by the Information Commissioner or other Relevant Authority arising from:
- 64.5.1 a breach by Project Co of Clause 61 (*Data Protection*) or Clause 64 (*Information and Audit Access*); and/or
 - 64.5.2 any act or omission of Project Co or a Project Co Party that results in a breach by the Authority of the Data Protection Laws and/or Laws applicable to a Reportable Incident,
- and the provisions of Clause 49.3 (*Conduct of Claims*) shall apply.
- 64.6 Project Co shall indemnify the Authority at all times against all losses, costs and expenses (including, without limitation, reasonable legal, investigatory and consultancy fees and expenses) arising from: any claim by a third party (including,

without limitation, by data subjects, whether individually or in groups) or any action by the Information Commissioner or other Relevant Authority arising from:

64.6.1 a breach by Project Co of Clause 61 (*Data Protection*) or Clause 64 (*Information and Audit Access*); and/or,

64.6.2 any act or omission of Project Co or a Project Co Party that results in a breach by the Authority of the Data Protection Laws and/ or Laws applicable to a Reportable Incident,

and the provisions of Clause 49.3 (*Conduct of Claims*) shall apply.

65. NOTICES

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

If to Project Co:

Address: [◆]

Email: [◆]

If to the Authority:

Address: [◆]

Email: [◆]

65.2 Where any information or documentation is to be provided or submitted to the Authority's Representative or the Project Co Representative it shall be provided or submitted by sending the same by first class recorded post, by hand or by email leaving the same at:

If to Project Co's Representative:-

Address: [◆]

Email: [◆]

If to the Authority's Representative:-

Address: [◆]

Email: [◆]

(copied in each case to the Authority)

65.3 Either party to this Agreement (and either Representative) may change its nominated address (including email address) by prior notice to the other party.

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

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

65.6 Notices given by email shall be deemed to have been received:

65.6.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the email address specified in Clause 65.1 or 65.2 (*Notices*), or notified from time to time under Clause 65.3 (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

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

and provided no error message indicating failure has been received by the sender and provided that in the case of notices required by or issued pursuant to [Clause 26.3 (*Grounds for Warning Notices*), Clause 26.4 (*Warning Notices Disputes*), Clauses 39 to 45 (*Corrupt Gifts and Payments*), Schedule 16 (*Change Protocol*) and/or, as the case may be Schedule 17 (*Compensation on Termination*)] that within 24 hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by hand to the intended recipient in accordance with the provisions of Clauses 65.1 and 65.2 (*Notices*) and where such notice is addressed to the Authority, or the Authority's Representative, copied to [◆¹¹⁶].

¹¹⁶ Insert Welsh Government details

66. NO WAIVER

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

Continued effect – no waiver

66.2 Notwithstanding any breach of this Agreement by either party, and without prejudice to any other rights which the other party may have in relation to it, the other party may elect to continue to treat this Agreement as being in full force and effect and to enforce its rights under this Agreement. The failure of either party to exercise any right under this Agreement, including any right to terminate this Agreement and any right to claim damages, shall not be deemed a waiver of such right for any continuing or subsequent breach.

67. NO AGENCY

67.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Authority and Project Co.

67.2 Save as expressly provided otherwise in this Agreement, Project Co shall not be, or be deemed to be, an agent of the Authority and Project Co shall not hold itself out as having authority or power to bind the Authority in any way.

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

68. ENTIRE AGREEMENT

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

68.2 Each of the parties acknowledges that:

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

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

69. THIRD PARTY RIGHTS

Save in respect of Welsh Government's and WEPCo's rights pursuant to paragraph 12 of Section 1 of Schedule 19 (*Record Provisions*), it is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provision contained in this Agreement save to the extent expressly provided in this Agreement and, to avoid doubt, without prejudice to the terms of the Funders' Direct Agreement or the rights of any permitted successor to the rights of Project Co or of any permitted assignee.

70. SEVERABILITY

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

71. CONFLICTS OF AGREEMENTS

In the event of any conflict between this Agreement and the Project Documents, the provisions of this Agreement shall prevail.

72. COSTS AND EXPENSES

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

73. AMENDMENTS

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

74. [LOCAL GOVERNMENT (CONTRACTS) ACT 1997¹¹⁷

74.1 Project Co hereby consents to the issue by the Authority of certificates under section 3 of the Local Government (Contracts) Act 1997 in respect of this Agreement and the Funders' Direct Agreement.

¹¹⁷ Where the Authority is a local authority this Clause containing the consent to certification of the Project Agreement and incorporation of relevant discharge terms set out below should be included at

74.2 The relevant discharge terms within the meaning of section 6 of the Local Government (Contracts) Act 1997 are set out in Schedule 32 (*[Relevant Discharge Terms]*).

75. COUNTERPARTS

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

76. FURTHER ASSURANCE

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

77. GOVERNING LAW AND JURISDICTION

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

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

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

Clause 74 (and subsequent Clauses renumbered), subject to checking all current, applicable legislation.

SCHEDULES

SCHEDULE 1:

DEFINITIONS AND INTERPRETATION

SECTION 1

In this Agreement unless the context otherwise requires:

"5 Year Maintenance Plan"	means the plan, to be prepared by or on behalf of Project Co, for any works for the maintenance or repair of the Facilities, including the renewal or replacement of plant or equipment as necessary, during each rolling five (5) year period for the duration of the Project Term;
"Abandons"	means a failure to carry out the Works at [the/ a] Site in accordance with the Programme for any consecutive period of [♦] Business Days in any Contract Year or for [♦] Business Days (whether consecutive or not);
"ACBR Enhancements"	means Project Co's enhanced commitments on the ACBRs, distinct from the Authority's Community Benefit Requirement KPIs, described in the table set out in Part 1 of Section 2 of Schedule 29 (<i>Project Co's Community Benefit Method Statements</i>);
"Academic Year"	means [in respect of each Facility] ¹¹⁸ the period from [1 September] to [31 August] and comprising the Terms published from time to time prior to the commencement of each Academic Year in accordance with Clause 5.4 or 5.5 (<i>Notification of Terms and Examination Periods</i>), such period not to include more than [195] ¹¹⁹ Core Days [and [60] Additional Periods]; ¹²⁰
"Access to Work Permit"	means a permit issued pursuant to paragraph 4 of Section 3 of Schedule 34 (<i>Joint Operating Protocol</i>);
"Access to Work Protocol"	means the protocol set out in Section 3 (<i>Access to Work Protocol</i>) of Schedule 34 (<i>Joint Operating Protocol</i>);

¹¹⁸ Authorities to review/amend on a project specific basis.

¹¹⁹ An Authority should confirm/verify the number of Core Days per Facility against their curriculum requirements.

¹²⁰ Definition to be adjusted as appropriate for Schools/ Colleges.

"Active ICT Infrastructure"	has the meaning given in Part 1 (<i>Generic Design Requirements</i>) of Section 3 (<i>Authority's Construction Requirements</i>) of Schedule 6 (<i>Construction Matters</i>);
"Actual Commissioning End Date"	means the date specified in the Commissioning Completion Certificate for [the Main Works or the Post Completion Works, as applicable] issued by the Independent Tester pursuant to Clause 18.4 (<i>Information</i>);
"Actual Completion Date"	means [in respect of each Facility] the later of: <ul style="list-style-type: none"> (a) the date stated in the Certificate of Practical Completion [in respect of the Payment Commencement Requirements] [for the relevant Facility] issued by the Independent Tester pursuant to Clause 17.12 (<i>Completion Certificate(s)</i>); and (b) subject to Clause 14.6 (<i>Early Completion</i>), the Completion Date [for the relevant Facility] ¹²¹;
"Actual ICT Handover Date"	means [in relation to a Facility] the date determined in accordance with Clause 14.8 (<i>Handover Dates</i>);
"Actual Liability"	has the meaning given in Clause 46.6.3 (<i>Tax Equalisation</i>);
"Actual Post Completion Works Date[s]"	means[, in respect of each Facility,] the later of: <ul style="list-style-type: none"> (a) the date stated in the Certificate of Practical Completion in respect of the [relevant] Post Completion Works Requirements [at [each/the] Facility] issued by the Independent Tester pursuant to Clause 17.12 (<i>Completion Certificate(s)</i>); and (b) subject to Clause 14.6 (<i>Early Completion</i>), the Post Completion Works Date[s] for [each/the] Facility;¹²²
["Additional Asbestos"	means Asbestos that is included in the updated Asbestos Survey in accordance with Clause 10.10.2 (<i>Asbestos</i>), as having been discovered at a Demolition Site and disposed

¹²¹ Drafting in square brackets to be used as appropriate in projects involving multiple Schools or College Facilities.

¹²² Project specific amendment to the Post Completion drafting should be considered by an Authority and its advisers where different phases of Post Completion Works (including Soft Landscaping Works) are required/a single phase of Post Completion Works.

of as part of the Asbestos Works but only to the extent that such Asbestos differs in nature and/or extent and/or location from the Asbestos identified in the version of the Asbestos Schedule that has been used to determine the Asbestos Tendered Sum for the Licensed Contractor pursuant to Clauses 10.8 to 10.9 (*Asbestos*);]¹²³

"Additional Community Benefit Project Co Proposals" means Project Co's additional community benefit commitments and key performance indicators, distinct from the Authority's Community Benefit Requirement KPIs, described in the table set out in Part 1 of Section 2 of Schedule 29 (*Community Benefits*);

"Additional Period" has the meaning given to that term in Section 1 of Schedule 14 (*Payment Mechanism*);]

"Additional Permitted Borrowing" means on any date, the amount equal to any amount of principal outstanding under the Senior Funding Agreements (as the same may from time to time be amended, whether or not with the approval of the Authority) in excess of the amount of principal scheduled under the Senior Funding Agreements at Financial Close to be outstanding at that date,

but only to the extent that:

- (a) this amount is less than or equal to the Additional Permitted Borrowings Limit; and
- (b) in respect of any Additional Permitted Borrowing the Agent is not in material breach of its obligations under clause 9.4.3 of the Funders' Direct Agreement as it applies to such Additional Permitted Borrowing,

and provided further that any such excess amount of principal which is:

- (i) invested as part of any Qualifying Change; or
- (ii) outstanding from time to time as a result of any drawing under the Senior Funding Agreements as entered into at the date of this Agreement,

¹²³ The Asbestos Schedule prepared following the Asbestos Management Survey should be inserted in the Schedule Part referred to.

disregarding any subsequent amendment; or

- (iii) outstanding from time to time as a result of any amendment to the Senior Funding Agreements in respect of which the Authority has agreed that its liabilities on a termination may be increased pursuant to Clause 4.3 (*Changes to Funding Agreements and Refinancing*)

shall not be counted as Additional Permitted Borrowing;

"Additional Permitted Borrowings Limit" means an amount equal to:

- (a) 10% of the Original Senior Commitment, for any Additional Permitted Borrowing subsisting in the period from the date of Financial Close to the date on which the amount outstanding under the Senior Funding Agreements is reduced to 50% or less of the Original Senior Commitment; and thereafter
- (b) the higher of:
 - (i) 5% of the Original Senior Commitment; and
 - (ii) the amount of any Additional Permitted Borrowing outstanding on the last day of the period referred to in paragraph (a);

"Affiliate" means, in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company, and "**holding company**" and "**subsidiary**" shall have the meaning given to them in section 1159 of the Companies Act 2006;

"Agent" has the meaning given in the Funders' Direct Agreement;

"Agreement" means this project agreement, including the Schedules;

"Alternative Accommodation" has the meaning given in Section 1 of Schedule 14 (*Payment Mechanism*);

"Ancillary Documents"	means the Construction Contract, the Service Contract, the [Management Services Agreement], the Performance Guarantees [and [to be inserted]], all as the same may be amended or replaced from time to time; ¹²⁴
"Ancillary Rights"	means such rights as set out in Section 3 (<i>Ancillary Rights</i>) of Schedule 5 (<i>Land Matters</i>);
"Annual Operations Monitoring Date"	has the meaning given in Clause 29.12.4 (<i>Community Benefits</i>);
"Annual Service Charge"	has the meaning given in Section 1 of Schedule 14 (<i>Payment Mechanism</i>);
"Annual Service Report"	means the report to be delivered by Project Co to the Authority pursuant to paragraph 2.2 of Section 4 of Schedule 14 (<i>Payment Mechanism</i>);
"Anti-social Behaviour Orders"	means the following which have been ordered, granted or issued (as appropriate): <ul style="list-style-type: none"> (a) an anti-social behaviour order as defined in the Crime and Disorder Act 1998; (b) a civil injunction as defined in Part 1 of the Anti-social Behaviour, Crime and Policing Act 2014; (c) a criminal behaviour order as defined in Part 2 of the Anti-social Behaviour, Crime and Policing Act 2014; (d) a direction excluding a person from an area as defined in Part 3 of the Anti-social Behaviour, Crime and Policing Act 2014; (e) a community protection notice as defined in Chapter 1 of Part 4 of the Anti-social Behaviour, Crime and Policing Act 2014; or

¹²⁴ The Authority should consider if there are any other project documents to be listed here. The Authority must carry out due diligence on the key sub-contracts and the management services agreement prior to Financial Close, to satisfy itself of deliverability and pass through of risk. Where risks are not passed through to sub-contractors, the Authority should be satisfied as to how these risks are being managed at Project Co level.

- (f) a public spaces protection order as defined in Chapter 2 of Part 4 of the Anti-social Behaviour, Crime and Policing Act 2014;

"Appropriate Limit"	has the meaning given to it in Clause 63.7 (<i>Freedom of Information</i>);
"Approved Purposes"	has the meaning given to it in Clause 56.1 (<i>Project Data</i>);
"Approved RDD Item"	means an item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed either "Level A – no comment" or "Level B – proceed subject to amendment as noted" by the Authority's Representative pursuant to the provisions of Clause 12 (<i>The Design Construction and Commissioning Process</i>) and Schedule 8 (<i>Review Procedure</i>) (provided that in the case of any item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed "Level B – proceed subject to amendment as noted" Project Co has taken account of the Authority's Representative's comments), as such item of Reviewable Design Data may be varied or amended from time to time in accordance with Schedule 16 (<i>Change Protocol</i>);
"Area"	has the meaning given to that term in Section 1 of Schedule 14 (<i>Payment Mechanism</i>);
"Area Data Sheet" or "ADS"	means the Area Data Sheets set out in Section 6 of Schedule 6 (<i>Construction Matters</i>);
"Articles of Association"	means Project Co's articles of association and/or Hold Co's articles of association as the context may require, and the term " Articles " shall be construed accordingly;
["Asbestos"]	has the meaning given to it in the Control of Asbestos Regulations 2012;]
["Asbestos Management Survey"]	means the asbestos management survey set out in [♦] (<i>Asbestos Surveys and Schedule</i>);]
["Asbestos Schedule"]	means the initial asbestos schedule set out in [♦] of Schedule [♦] (<i>Asbestos Surveys and Schedule</i>) as updated in accordance with Clauses 10.7.2 to 10.7.5 and 10.10 (<i>[Asbestos]</i>);] ¹²⁵

¹²⁵ Insert reference to Asbestos Schedule contained in the Asbestos Management Survey carried out under the SPA.

["Asbestos Survey"]	means a Refurbishment/Demolition Survey as described in Guidance Note HSG264 (Asbestos: The Survey Guide) published by the Health & Safety Executive;]
["Asbestos Survey Report"]	means a detailed report prepared by the Asbestos Surveyor on the results of an Asbestos Survey, which report shall include the Asbestos Surveyor's detailed recommendations as to the nature and scope of the Asbestos Works required at the relevant Demolition Site and the Asbestos Schedule, as updated in accordance with Clauses 10.7.2 to 10.7.5 and 10.10 ([Asbestos]);]
["Asbestos Surveyor"]	means [a licensed asbestos surveyor appointed in accordance with Clauses 10.7 and 10.9 ([Asbestos]);]
[Asbestos Tendered Sum	has the meaning given in Clause 10.8 ([Asbestos]);]
["Asbestos Works"]	means the works required for the removal of all Asbestos at the relevant Demolition Site to be carried out in accordance with Clauses 10.5 to 10.11 of this Agreement;]
["Asbestos Works Period"]	means, in relation to a Demolition Site, the period of time programmed for the carrying out of Asbestos Works as identified in the Asbestos Management Survey contained in [♦] (<i>Asbestos Surveys and Schedule</i>); ¹²⁶
"Assets"	means all assets and rights to enable the Authority or a successor contractor to own, operate and maintain the Facilities in accordance with this Agreement including: <ul style="list-style-type: none"> (a) any land or buildings; (b) any furniture and equipment; (c) any books and records (including operating and maintenance manuals, health and safety manuals and other know how); (d) any spare parts, tools and other assets (together with any warranties in respect of assets being transferred);

¹²⁶ Reference should be made to the section of the Asbestos Management Survey that includes the Asbestos Provisional Sum and Programme.

(e) any revenues and any other contractual rights;
and

(f) any intellectual property rights,

but excluding any assets and rights in respect of which the Authority is full legal and beneficial owner;

"Associated Companies"

means [(a)], in respect of a relevant company, a company which is a Subsidiary, a Holding Company or a company that is a Subsidiary of the ultimate Holding Company of that relevant company, and in the case of Project Co shall include [Hold Co] and each of the Shareholders and in the case of Hold Co shall include each of the Shareholders; [or (b) in respect of one of the initial shareholders [♦] Limited or any person which is a member of that [Investment Group], and the term "**Associate**" shall be interpreted accordingly; ¹²⁷

"Authorised Caller"

means the following persons:

(a) the Authority's Representative;

(b) Facility Representative [(in respect of the relevant Facility)];

(c) any Facility Liaison Person or Facility Helpdesk Co-ordinator [(in respect of the relevant Facility)];

(d) any Authority [or School Entity] employee in the event of an Emergency [(in respect of the relevant Facility)];

(e) Project Co; and

(f) the Service Provider;

"Authority Assets"

means the [Authority Maintenance Equipment, the ICT Assets] and [insert details of other Authority existing premises/sites etc] and any other assets and equipment or

¹²⁷ Insert details of investment funds on a project specific basis, if appropriate. If a fund or limited partnership or "50:50" owned vehicle (which is not a "subsidiary") or similar is in the relevant ownership chain of Project Co, this definition will need to be expanded to cover this instance. If any of the holders of equity in Project Co are limited partnerships or other funds, particular attention will need to be given to Clause 59 (*Ownership Information and Changes in Control*) during any lock-in period.

other property used by, or on behalf of, the Authority or any Authority Party, other than the Facilities;¹²⁸

"Authority Change"	has the meaning given in Schedule 16 (<i>Change Protocol</i>);
"Authority Change Notice"	has the meaning given in Schedule 16 (<i>Change Protocol</i>);
"Authority Control Period"	has the meaning given in paragraph 4.1 of Section 2 (<i>Construction Phase Access Protocol</i>) of Schedule 34 (<i>Joint Operating Protocol</i>);
"Authority Equipment"	means the equipment set out in paragraph 2.1 (<i>Authority Equipment Classification</i>) of Section 1 (<i>General</i>) of Schedule 11 (<i>Equipment</i>) [in respect of the relevant Facility];
"Authority Invitee"	means any Student or any person visiting the [relevant] Facility at the invitation (whether express or implied) of the Authority [or the School Entity];
"Authority Events of Default"	has the meaning given in Clause 39.1 (<i>Authority Events of Default</i>);
"Authority Maintenance Equipment"	means [the Group 2.1 Equipment, the Group 2.2 Equipment, the Group 3.1 Equipment, the Group 3.2 Equipment and the Group 4 Equipment];
"Authority Party"	means: (a) any of the Authority's agents, contractors and sub-contractors of any tier and its or their directors, officers and employees at the Facilities; [and (b) in relation to any School Entity, any governor or member of that School Entity acting as such, or any teacher employed by that School Entity acting in the course of their employment] [in each case] with the authority of the Authority but excluding Project Co, any Project Co Party and statutory undertakers and utilities and

¹²⁸ This definition (which is only used in the indemnity to the Authority in Clause 49.1.3) is intended to cover those parts of the Authority site that are not the subject of the sole remedy payment mechanism. In practice that means those parts of the Site(s) to which Project Co does not provide any Service or, where Project Co does provide Services to a Facility, in respect of those parts of the Site(s) which Project Co does not take any element of availability risk. The Authority should also consider how equipment is treated – if Project Co is not responsible for maintenance and lifecycle of any items of equipment then such items should be included within the definition.

"Authority Parties" shall be construed accordingly;

"Authority Policies" means, subject to Clause 28.7 (*Authority Policies*), the policies of the Authority set out in the document annexed to this Agreement as Attachment [♦] as amended from time to time in accordance with the provisions of Clause 33 (*Changes in Law*) and Schedule 16 (*Change Protocol*);¹²⁹

"Authority Services" means all of

- (a) the Educational Services, [♦]¹³⁰; and
- (b) services incidental thereto,

and such other services as may be notified to Project Co by the Authority from time to time;

Authority's Annual Reports and Accounts [♦]¹³¹

"Authority's Commissioning" means the Authority's pre-completion commissioning activities to be carried out by the Authority in accordance with Clause 17 (*Pre-Completion Commissioning and Completion*);

"Authority's Community Benefit Requirement KPIs" or "ACBRs" means the Authority's minimum community benefit requirements and key performance indicators, described in Part 2 of Section 1 of Schedule 29 (*Authority's Community Benefit Requirement KPIs*);

"Authority's Community Benefits Requirements" means those requirements set out in Schedule 29 (*Community Benefits*);

"Authority's Construction Requirements" means the requirements of the Authority set out or identified in Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*) as amended from time to time in accordance with the terms of this Agreement;

¹²⁹ The relevant policies will vary on a project specific basis.

¹³⁰ To be completed on a project specific basis to capture any additional activities to be undertaken at the Facilities by the Authority/ School Entity which are not captured in the definition of Educational Services, including the soft FM services which will remain the responsibility of the Authority/ School Entity, the maintenance and lifecycle of Authority Maintenance Equipment and ICT Assets.

¹³¹ To be completed on a project specific basis.

"Authority's Post Completion Commissioning"	means the Authority's post-completion commissioning activities to be carried out by the Authority in accordance with Clause 18.1 (<i>Post Completion Commissioning</i>);
"Authority's Representative"	means the person so appointed by the Authority pursuant to Clause 8 (<i>Representatives</i>);
"Available"	has the meaning given in Section 1 of Schedule 14 (<i>Payment Mechanism</i>);
"Availability Failure"	has the meaning given in Section 1 of Schedule 14 (<i>Payment Mechanism</i>);
"Availability Standards"	has the meaning given in Section 1 of Schedule 14 (<i>Payment Mechanism</i>);
"Barred List"	the barred lists provided for under the Safeguarding Vulnerable Groups Act 2006 as amended by the Protection of Freedoms Act 2012;
"Base Case"	means the base case for the purpose of the Financial Model at Financial Close as the same may be amended from time to time in accordance with Section 6 (<i>Changing the Financial Model</i>) of Schedule 16 (<i>Change Protocol</i>);
["Base Case Equity IRR"	means [INSERT NUMBER] per cent;] ¹³²
"Base Date"	has the meaning given in paragraph 16 of Section 2 (<i>Interpretation</i>) of Schedule 1 (<i>Definitions and Interpretation</i>);
"Base Senior Debt Termination Amount"	has the meaning given in Section 5 (<i>Definitions</i>) of Schedule 17 (<i>Compensation on Termination</i>);
"Beneficial Access"	means a non-exclusive right to access and use the [relevant] Facilities;
"Beneficiary"	has the meaning given in Clause 49.3 (<i>Conduct of Claims</i>);
"Biennial Review"	means the biennial review referred to in Clause 25.1.1 (<i>Biennial Reviews</i>);

¹³² For use with Section 7 of Schedule 16, as applicable (batched facilities optional partial termination provisions).

"Biennial Review Report"	has the meaning given in Clause 25.1.4 (<i>Biennial Reviews</i>);
"BIM Protocol"	means the protocol attached at Schedule 30 (<i>BIM Protocol</i>);
"Building Management System" or "BMS"	means [♦];
"Building User Guide"	has the meaning given to that term in the Authority's Construction Requirements;
"Business Day"	means a day other than a Saturday, Sunday or a bank holiday in England and Wales;
"Capital Expenditure"	means capital expenditure (as such term is interpreted in accordance with generally accepted accounting principles in the United Kingdom from time to time);
"Catalogue of Small Works and Services"	has the meaning given in Schedule 16 (<i>Change Protocol</i>);
"CDM Regulations"	has the meaning given in Section 2 (<i>Safety During Construction</i>) of Schedule 6 (<i>Construction Matters</i>);
"Certificate of Practical Completion"	means a certificate in the relevant form set out in Schedule 22 (<i>Certificates</i>);
["Certificate of WiFi Completion"	means the certificate to be issued by the Independent Tester in accordance with Clause 17.22 (<i>[WiFi Completion]</i>) in the form set out in Schedule 22 (<i>Certificates</i>);
"Change"	has the meaning given in Schedule 16 (<i>Change Protocol</i>);
"Change in Control"	means: <ul style="list-style-type: none"> (a) any sale or other disposal of any legal, beneficial or equitable interest in any or all of the equity share capital of a corporation (including the control over the exercise of voting rights conferred on that equity share capital, control over the right to appoint or remove directors or the rights to dividends); and/or

- (b) any other arrangements that have or may have or which result in the same effect as paragraph (a) above;

"Change in Law" means the coming into effect or repeal (without re-enactment or consolidation) in England and Wales or in Wales alone of any Law, or any amendment or variation to any Law, or any judgement of a relevant court of law which changes binding precedent in England and Wales or in Wales alone in each case after the date of this Agreement;

"Collateral Agreements" means the Contractor's Collateral Agreement, the Service Provider's Collateral Agreement and the Key Sub-Contractor Collateral Agreements;

["Collateral Obligation" has the meaning given to it in the Deed of Reliance];

"Commencement Date" means [the date of this Agreement];

"Commercially Sensitive Information" means the sub set of Confidential Information listed in [column 1 of Schedule 26 (*Commercially Sensitive Information*) in each case for the period specified in column 2 of Schedule 26 (*Commercially Sensitive Information*)];

"Commissioning Completion Certificate" means a certificate in the relevant form set out in Schedule 22 (*Certificates*);

"Commissioning End Date" means the date [in respect of the Main Works and in respect of the Post Completion Works] by which the parties' commissioning activities are programmed to be completed in accordance with the Final Commissioning Programme [for the relevant Facility] ;

["Committed Standby Facility" means [♦];

"Compensation Event" has the meaning given in Clause 30.11 (*Compensation*);

"Compensation Payment" has the meaning given in Clause 46.5 (*Tax Equalisation*);

["Completion Date" means in respect of the Payment Commencement Requirements [for each Facility], the date described as such in Section 2 (*Phasing*) of Schedule 7 (*The Programme*),¹³³ or such revised date as may be specified

¹³³ Insert agreed date(s) on which completion is scheduled to occur. For multi-facility projects the completion date in respect of each Facility should be set out.

by the Authority's Representative pursuant to Clause 30 (*Delay Events and Compensation Events*) or such other date as may be agreed by the parties;]

"Completion Criteria"

means the completion criteria required to meet the Actual Completion Date[, ICT Handover Date] [and/or [relevant] Actual Post Completion Works Date] [for each Facility], set out in Appendix B of Schedule 10 (*Outline Commissioning Programme*);

"Confidential Information"

means:

(a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either party and all Personal Data and Sensitive Personal Data within the meaning of the Data Protection Laws and

(b) Commercially Sensitive Information,

provided that information to be supplied by Project Co to the Authority pursuant to Clauses 29.15 to 29.17 (*Sustainable Development*) shall not be Confidential Information¹³⁴;

"Consents"

means all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorisations required by Law, and all necessary consents and agreements from any third parties (including, without limitation, any Planning Permission), needed to carry out the Project Operations in accordance with this Agreement;

"Construction Contract"

means the design and build contract dated on or around the date of this Agreement between Project Co and the Contractor (which, as at the date of this Agreement, is in the Agreed Form) as amended or replaced from time to time in accordance with this Agreement;

"Construction Phase"

means [in respect of each Facility] the period from and including the date of execution of this Agreement to and including[:

¹³⁴ Any information or classes of information the parties agree should be treated as Commercially Sensitive Information should be included in Schedule 26 (*Commercially Sensitive Information*). Standard provisions are included in Schedule 26 (*Commercially Sensitive Information*).

(a) in respect of the Main Works,] the Actual Completion Date [; and

(b) [in respect of the Post Completion Works, the [final] Actual Post Completion Works Date];

"Construction Quality Plan" means the document at Section 8 (*Quality Plans (Design and Construction)*) of Schedule 6 (*Construction Matters*);

"Construction Skills Certification Scheme" means the scheme operated by Construction Skills Certification Scheme Limited (registered number 03024675) to evidence the skills and competence of persons employed on construction sites;

"Contamination" means all or any pollutants or contaminants, including any chemical or industrial, radioactive, dangerous, toxic or hazardous substance, waste or residue (whether in solid, semi-solid or liquid form or a gas or vapour) and including without limitation genetically modified organisms [but for the purpose of Clauses 10.3, 10.4 (*Responsibility for Ground Conditions and Contamination*) and 10.16 (*Off Site Contamination*) does not include Asbestos];

"Contingent Funding Liabilities" has the meaning given to it in Section 5 (*Definitions*) of Schedule 17 (*Compensation on Termination*);

"Contract Month" means a calendar month provided that:

(a) the first Contract Month shall be the period from and including the [first] Payment Commencement Date to and including the last day of the calendar month in which such Payment Commencement Date falls; and

(b) the last Contract Month shall be the period from and including the first day of the calendar month in which the Expiry Date or Termination Date (as the case may be) falls to and including the Expiry Date or the Termination Date (as the case may be);

"Contract Review Date" means each review date referred to in Clause 25.1.2 (*Biennial Reviews*);

"Contract Year" means each period of twelve (12) calendar months during the Project Term, starting on [1 April], and each subsequent period of twelve (12) calendar months, save for the first Contract Year which shall be the period commencing on the

date of this Agreement and ending on the next 31 March and the final Contract Year which shall be the period commencing on the preceding 1 April and ending on the date of expiry or earlier termination of this Agreement (as the case may be);

- "Contracting Associate"** means the Contractor, any Service Provider and [any other entity which performs on behalf of Project Co any material function in connection with this Agreement or the Project Operations];¹³⁵
- "Contractor"** means [♦]¹³⁶ engaged by Project Co to carry out the Works and any substitute design and/or building contractor engaged by Project Co as may be permitted by this Agreement;
- "Contractor's Collateral Agreement"** means a collateral agreement among the Authority, Project Co and the Contractor in the form set out in Section 1 (*Contractor's Collateral Agreement*) of Schedule 9 (*Collateral Agreements*);
- "Contractor's Site Manager"** means the manager to be appointed by the Contractor for purposes of supervision of all day-to-day activities on the [relevant] Site;
- "Contractor's Site Rules"** means the Contractor's rules, applicable on the [relevant] Site to the Authority, Project Co, the Contractor and their respective sub-contractors and suppliers of every tier during the construction of the Facilities;
- "Convictions"** means, other than in relation to any minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding orders (including any spent convictions as contemplated by section 1(1) of the Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of Schedule 1 of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023) or any replacement or amendment to that Order) and including any Anti-Social Behaviour Orders;
- "Core Day"** has the meaning given to it in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*);
- "Core Sessions"** has the meaning given to it in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*);

¹³⁵ This provision should be drafted on a project specific basis to encompass any principal sub-contractors to Project Co.

¹³⁶ Insert description of construction contractor.

"COSHH"	means The Control of Substances Hazardous to Health Regulations 2002;
"Dashboard Template"	means the form attached at Part 3 of Section 1 of Schedule 29 (<i>Community Benefits</i>);
"Data Loss Event"	means any event that results, or may result, in unauthorised access to Personal Data held by the Project Co under this Agreement, and/or actual or potential loss and/or destruction of Personal Data in breach of this Agreement, including any Personal Data Breach;
"Data Protection Laws"	means Law protecting personal data of natural persons (including the Data Protection Act 2018, GDPR and codes of practice issued from time to time by relevant supervisory authorities);
"Decant"	means the completion by Project Co of the removal of all equipment, items and materials to be removed by Project Co from the Existing Facilities to the Facilities in accordance with the terms of the Decant Protocol;
"Decant Completion Certificate"	means the certificate in the relevant form set out in Schedule 22 (<i>Certificates</i>);
"Decant Protocol"	means the Protocol set out in in Section 2 (<i>Decant Protocol</i>) to Schedule 11 (<i>Equipment</i>) identifying the obligations and responsibilities of the parties in relation to the removal of items from the Existing Facilities and their relocation and installation in the Facilities;
"Decant Timetable"	means the decant timetable set out at paragraph 20 of Section 2 (<i>Decant Protocol</i>) of Schedule 11 (<i>Equipment</i>);
"Deduction"	means a deduction to be made in calculating a Monthly Service Payment, calculated in accordance with Section 3 (<i>Deductions from Monthly Service Payments</i>) of Schedule 14 (<i>Payment Mechanism</i>);
["Deed of Reliance"	means the agreement to be entered into between the Welsh Ministers, the Authority, Project Co and [the Security Trustee] in the form set out in Schedule 35 ([Deed of Reliance]);
"Deemed Liability"	has the meaning given in Clause 46.6.3 (<i>Tax Equalisation</i>);

"Default Interest"	means any increased margin that is payable to the Senior Funders or which accrues as a result of any payment due to the Senior Funders not being made on the date on which it is due;
"Default Interest Rate"	means 2% over [◆];
"Defects"	means any defect or fault in the Works and/or the Facilities which occurs due to a failure by Project Co to meet the Authority's Construction Requirements and/or Project Co's Proposals or otherwise to comply with its obligations under this Agreement;
"Delay Event"	has the meaning given in Clause 30.3 (<i>Delay Events and Compensation Events</i>);
["Demolition Site"	means [◆];
"Derogated Low Value Change"	has the meaning given in Schedule 16 (<i>Change Protocol</i>);
"Derogated Low Value Change Notice"	has the meaning given in Schedule 16 (<i>Change Protocol</i>);
"Design Data"	means all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing and/or operation of the Facilities;
"Design Quality Plan"	means the document at Section 8 (<i>Quality Plans (Design And Construction)</i>) of Schedule 6 (<i>Construction Matters</i>);
"Direct Losses"	means, subject to the provisions of Clause 55.1 (<i>Exclusions and Limitations on Liability</i>), all damage, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an agent/client, client paying basis), proceedings, demands and charges whether arising under statute, contract or at common law but, to avoid doubt, excluding Indirect Losses;
"Disaster Plan"	means the plan set out in Schedule 28 (<i>Disaster Plan</i>);
"Disclosed Data"	means any Design Data and any other written information, survey reports, data and documents ¹³⁷ made available or

¹³⁷ The following drafting should be inserted after the words "data and documents" where staff transfers are envisaged:

"(excluding for the avoidance of doubt information contained in the First Employee List or any subsequently updated version of that list)"

issued to Project Co or any Project Co Party in connection with the Project by or on behalf of the Authority (or any Authority Party) whether on, before or after the execution of this Agreement;

"Disclosure and Barring Service"

the non-departmental public body established pursuant to the Protection of Freedoms Act 2012;

"Discriminatory Change in Law"

means any Change in Law the effect of which is to discriminate directly against¹³⁸:

- (a) [facilities] whose design, construction, financing and operation are procured under the private finance initiative (or any successor initiative applying principles similar to those of the private finance initiative, including the Mutual Investment Model) in relation to other similar projects; or
- (b) companies undertaking projects procured by contracts under the private finance initiative (or any successor initiative applying principles similar to those of the private finance initiative, including the Mutual Investment Model) in relation to other companies undertaking similar projects; or
- (c) the [insert name of the Facilities] in relation to other similar facilities; or
- (d) Project Co in relation to other companies,

save:

- (i) where such Change in Law is in response to any act or omission on the part of Project Co which is illegal (other than an act or omission rendered illegal by virtue of the Change in Law itself);
- (ii) that such action shall not be deemed to be discriminatory solely on the basis that its effect on Project Co is greater than its effect on other companies; and
- (iii) that a change in taxes or the introduction of a tax affecting companies generally or a change in VAT shall be deemed not to be

¹³⁸ The definition must be completed on a project specific basis and will vary depending on the nature of the Facilities.

discriminatory in any circumstances (to avoid doubt, such changes being given effect in accordance with Clause 36 (*VAT and Construction Industry Tax Deduction Scheme*));

"Dispute Resolution Procedure" means the procedure set out in Schedule 20 (*Dispute Resolution Procedure*);

["Disruption Event" means a failure by Project Co to carry out the Works in accordance with this Agreement the result of which is that an Existing Facility [or Facility] (or part thereof) cannot reasonably continue to be used for the provision of Educational Services;]

"DOTAS" means the Disclosure of Tax Avoidance Schemes rules which require a promoter of tax schemes to tell HM Revenue & Customs of any specified notifiable arrangements or proposals and to provide prescribed information on those arrangements or proposals within set time limits as contained in Part 7 of the Finance Act 2004 and in secondary legislation made under vires contained in Part 7 of the Finance Act 2004 and as extended to National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868 made under s.132A of the Social Security Administration Act 1992;

"Educational Services" means [the provision of teaching and pastoral support for school age children, the provision of careers advice, liaison with parents and guardians of Students and the carrying on of extra-curricular activities for Students and the use of school accommodation by the local community;]^{139/}

[the provision of teaching, vocational training, careers advice, mentoring and associated support services for Students and the carrying on of extra-curricular activities for Students and the use of the Facilities by the local community];

"Emergency" means an event causing or, in the reasonable opinion of a party, threatening to cause death or injury to any individual, or serious disruption to the lives of a number of people or extensive damage to property, or contamination of the environment, in each case on a scale beyond the capacity of the emergency services or preventing the Services operating under normal circumstances and requiring the mobilisation and organisation of the emergency services;

¹³⁹ The first definition is the proposed starting point for a Schools Project, and the second, for a College Project. Each will require to be reviewed on a project specific basis and adjusted to reflect the educational/ community activities to be undertaken at the relevant School or College including pre-school education where relevant.

"Encumbrance"		means any option, right of pre-emption, pledge, security, interest, lien, charge, mortgage, lease, licence, claim, condition, retention or other encumbrance or restriction whether imposed by agreement, by law or otherwise;
"Environmental Regulations"	Information	means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such regulations;
"Equipment"		means [♦] ¹⁴⁰ ;
"Estimated Deductions"		has the meaning given in Clause 35.2.1 (<i>Invoicing and Payment Arrangements</i>);
"Estimated Increased Maintenance Costs"		has the meaning given in Clause 23.7 (<i>Programmed and Unprogrammed Maintenance</i>);
"Ethical Employment Code"		means the Code of Practice - Ethical Employment in Supply Chains issued by the Welsh Government on [♦];
"Examination Period"		means the [external examination periods for Students at the Facility published by the Authority or the [relevant] School Entity for each Academic Year and notified by the Authority to Project Co in accordance with Clause 5.8 and 5.9 (<i>Notification of Terms and Examination Periods</i>) of this Agreement] / [examination periods for Students at the Facility for each Academic Year notified by the Authority to Project Co in accordance with Clause 5.8 and 5.9 (<i>Notification of Terms and Examination Periods</i>) of this Agreement];
"Excusing Cause"		has the meaning given in Clause 52.2 (<i>Excusing Causes</i>);
["Existing Facility"		means [♦];]
"Expiry Date"		means [midnight] on [date];

¹⁴⁰ To be drafted on a project specific basis linked as appropriate to Clause 16 (*Equipment*), Schedule 11 (*Equipment*) and the Service Level Specification as appropriate by reference to all equipment groupings.

["External Areas"	means [◆]; ¹⁴¹
["External Utility Failure"	means a failure in: <ul style="list-style-type: none"> (a) the supply of gas, electricity, water, telephone or telecommunications services to the [relevant] Site; (b) the service and facility of discharging water and sewerage from the [relevant] Site, <p>where such failure originates on the side of the relevant [Utility Point] that is owned or controlled by the relevant utility provider and provided that such failure has not arisen as a result of an act or omission of Project Co or a Project Co Party;]</p>
"Facility"	means [the buildings and other facilities, together with all supporting infrastructure (including the Plant and [the Group 1 Equipment]), external hard-standings, specialist surfaces and other amenities located on the [relevant] Site (including as a minimum all aspects detailed within [Annex 2] to Section 1 (<i>Service Level Specification</i>) of Schedule 12 (<i>Service Requirements</i>)), as required to enable Project Co to comply with its obligations under this Agreement, all as the same may be varied, amended or supplemented from time to time in accordance with this Agreement (and " Facilities " shall be taken to refer to all of the Facilities on each Site, or, as the context requires, any number of them);]
"Facility Helpdesk Co-ordinator"	has the meaning given to it in Section 3 of Schedule 34 (<i>Joint Operating Protocol</i>);
"Facility Liaison Person"	has the meaning given to it in Section 3 of Schedule 34 (<i>Joint Operating Protocol</i>);
"Facility Manager"	means [◆];
["Facility Representative"	has the meaning given in Clause 8.11.1 (<i>Facility Representative</i>);
["Facility Unavailability Threshold"	[means in any Contract Month, the Total Availability Deductions relating to a Facility [exceed 25% in the case of a secondary school][, or] [exceed [30% in the case of a

¹⁴¹ To be completed/used on a project specific basis.

primary school], [exceed [♦]%]¹⁴² of the Monthly Service Charge attributable to such Facility in accordance with paragraph 2 of Section 2 of Schedule 14 (*Payment Mechanism*) provided that for the purpose of making such a calculation where a Contract Month has between six (6) and twenty (20) (inclusive) Core Days such Monthly Service Charge shall be multiplied by the number of Core Days in that month divided by twenty (20);^{143]}

["Facility Warning Threshold"

means in any Contract Month, the Deductions relating to [the/a] Facility [exceed [♦]% in the case of a secondary school], or [exceed [[♦]% in the case of a primary school], [exceed [♦]%]¹⁴⁴ of the Monthly Service Charge attributable to such Facility in accordance with paragraph 2 of Section 2 of Schedule 14 (*Payment Mechanism*), provided that for the purpose of making such a calculation where a Contract Month has between six (6) and twenty (20) (inclusive) Core Days such Monthly Service Charge shall be multiplied by the number of Core Days in that month divided by twenty (20)¹⁴⁵;

"Fees Regulations"

means the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004;

"Final Baseline Energy Model"

has the meaning given in [Part 1 (*Generic Design Requirements*) of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*)];

"Final Commissioning Programme"

means the programme jointly developed and agreed by the Authority and Project Co in accordance with the provisions of Clause 17.1 (*Pre-Completion Commissioning and Completion*);

"Financial Close"

means the date of this Agreement;

"Financial Model"

means the computer spreadsheet model for the Project incorporating statements of Project Co's cashflows including all expenditure, revenues, financing and taxation of the Project Operations together with the profit and loss accounts and balance sheets for Project Co throughout the Project Term accompanied by details of all assumptions, calculations and methodology used in their compilation and any other documentation necessary or desirable to operate the model, as amended from time to time in accordance with the terms of Clause 37 (*Financial Model*), a copy of

¹⁴² To be populated for college projects, if bundling applicable.

¹⁴³ This definition relates to drafting in Clause 40.1.8(b) that is to be used on multi-facility projects. To be adjusted as appropriate to the type of Facility.

¹⁴⁴ To be populated for college projects, if bundling applicable.

¹⁴⁵ This definition relates to drafting in Clause 26.3.3 that is to be used on multi-facility projects. To be adjusted as appropriate to the type of Facility.

which is attached to this Agreement on disk as Attachment [◆];

"Finishes"	means those finishes listed in the table set out in paragraph 1.2.3 of Schedule 8 (<i>Review Procedure</i>);
"Finishes Proposal Date"	means, in relation to a Finish, the relevant date identified in the table set out in paragraph 1.2.3 of Schedule 8 (<i>Review Procedure</i>);
"Finishes Selection Date"	means, in relation to a Finish, the relevant date identified in the table set out in paragraph 1.2.3 of Schedule 8 (<i>Review Procedure</i>);
"First Party"	has the meaning given in Clause 36.3 (<i>VAT</i>);
["Flooding Event"	means flooding due to adverse weather at [◆]/[the] Site[s]; ¹⁴⁶
"FOIA"	means the Freedom of Information Act 2000 and any subordinate legislation (as defined in section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such Act;
"Force Majeure"	has the meaning given in Clause 32 (<i>Force Majeure</i>);
"Funders"	means all or any of the persons who provide financing or funding in respect of the Project Operations under the

¹⁴⁶ This project specific definition is to be used where a project specific flood risk has been identified in respect of a particular Site and the Authority accepts that technical mitigation measures (alone) do not sufficiently address this risk.

Entire flood risk will not be accepted by the Authority in any circumstances.

On multi-facility projects the name of the relevant Site should be included in place of the second set of square brackets.

When going through the New Projects Approval Process under the Strategic Partnering Agreement and before accepting inclusion of this project specific drafting, Authorities should be mindful of ensuring that they are satisfied that:

- a. Project Co/ WEPCo has demonstrated that there is a flood risk on the Site with a technical report identifying the risk on the Site and annexing the relevant data that they are relying upon (e.g. map showing how a 1 in 100 annual probability of river flooding would affect the Site);
- b. Project Co/ WEPCo has demonstrated in their detailed flood risk assessment how the flood risk to the site can be managed as part of the development proposal (e.g. through placing the building on a particular part of the Site) and what measures are being put in place to minimise the effects of any flooding (e.g. design measures with electrical sockets higher up the wall/ground); and
- c. if having considered the flood mitigation measures that are being put in place it is demonstrated as being reasonable to put further contractual protection in the Project Agreement, then any protection will need to be drafted specifically by reference to the risk on the Site (e.g. by referring to a 1 in 100 annual probability event, as the measures on Site are supposed to protect against flooding up to that point and therefore should be a private sector risk until that threshold has been breached).

Funding Agreements including [◆] and, where the context so permits, prospective financiers or funders;

"Funders' Direct Agreement"

means the agreement to be entered into between the Authority, the Senior Funders and Project Co in the form set out in Schedule 4 (*Funders' Direct Agreement*);

"Funding Agreements"

means all or any of the agreements or instruments to be entered into by Project Co or any of its Associates relating to the financing of the Project Operations (including the Initial Funding Agreements and any agreements or instruments to be entered into by Project Co or any of its Associates relating to the rescheduling of their indebtedness or the refinancing of the Project Operations);

"Funding Default"

means an [Event of Default] as defined in the [Senior Loan Agreement]¹⁴⁷;

["Further Asbestos"

means Asbestos discovered at a Demolition Site and set out in the Asbestos Schedule (as updated) that has been agreed pursuant to Clauses 10.10.1 and/or 10.10.2 (*Asbestos*) to the extent only that it differs in nature and/or extent and/or location from the Asbestos identified in the asbestos schedule contained in [◆] of Schedule [◆] (*Asbestos Surveys and Schedule*);]

["Further Asbestos Delay"

has the meaning given to it in Clause 10.12 (*Asbestos*);]

"GDPR"

means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to processing of Personal Data and on the free movement of such data;

"General Anti-Abuse Rule"

means:

- (a) the legislation in Part 5 of the Finance Act 2013; and
- (b) any future legislation introduced into parliament to counteract tax advantages arising from abusive arrangements to avoid national insurance contributions;

"Generic Design Requirements"

Part 1 (*Generic Design Requirements*) of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*);

¹⁴⁷ See note on Clause 4.7.

"Good Industry Practice"	means using standards, practices, methods and procedures conforming to the Law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under the same or similar circumstances;
"Government"	means the government of the United Kingdom or the Welsh Ministers;
"Gross Area"	has the meaning given in Part 1 (<i>Generic Design Requirements</i>) of Section 3 (<i>Authority's Construction Requirements</i>) of Schedule 6 (<i>Construction Matters</i>);
"Ground Physical and Geophysical Investigation[s]"	means the investigation of all the ground, physical and geophysical conditions of and surrounding the Site[s] and of any extraneous materials in, on or under the Site[s] (including its surface and subsoil) to enable the Facilities to be designed and constructed and the Works to be carried out with due regard for those conditions and the seismic activity (if any) in the region of the Site[s];
"Group 1 Equipment"	means each item of equipment identified as Group 1 ¹⁴⁸ Equipment in column [♦] of the tables set out on each of the Loaded Room Layout Drawings [for the relevant Facility];
"Group 2.1 Equipment"	means each item of equipment identified as Group 2.1 Equipment in column [♦] of the tables set out on each of the Loaded Room Layout Drawings [for the relevant Facility];
["Group 2.2 Equipment"	means each item of equipment identified as Group 2.2 Equipment in column [♦] of the tables set out on each of the Loaded Room Layout Drawings [for the relevant Facility];
"Group 3.1 Equipment"	means each item of equipment identified as Group 3.1 Equipment in column [♦] of the tables set out on each of the Loaded Room Layout Drawings [for the relevant Facility];
"Group 3.2 Equipment"	means each item of equipment identified as Group 3.2 Equipment in column [♦] of the tables set out on each of the Loaded Room Layout Drawings [for the relevant Facility];

¹⁴⁸ The Project Agreement drafting assumes that there will not be any legacy Group 1 Equipment. Where there is legacy Group 1 Equipment moving to the Facilities, Group 1 Equipment may need to be subdivided and project specific drafting amendments required.

"Group 4 Equipment"	means each item of equipment identified as Group 4 Equipment in column [♦] of the tables set out on each of the Loaded Room Layout Drawings;
"H&S Conviction"	has the meaning given in Clause 40.1.5 (<i>Health and Safety</i>);
"Halifax Abuse Principle"	means the principle explained in the CJEU Case C-255/02 Halifax and others;
"Handback Amount"	has the meaning given in Schedule 18 (<i>Handback Procedure</i>);
"Handback Bond"	has the meaning given in Schedule 18 (<i>Handback Procedure</i>);
"Handback Certificate"	means the certificate of confirmation that the Facilities comply with the Handback Requirements in the relevant form set out in Schedule 22 (<i>Certificates</i>);
"Handback Programme"	has the meaning given in Schedule 18 (<i>Handback Procedure</i>);
"Handback Requirements"	has the meaning given in Schedule 18 (<i>Handback Procedure</i>);
"Handback Survey"	has the meaning given in Schedule 18 (<i>Handback Procedure</i>);
"Handback Works"	has the meaning given in Schedule 18 (<i>Handback Procedure</i>);
"Health and Safety Regime"	means the Food Safety Act 1990 (and associated regulations), the Health & Safety at Work etc Act 1974 (and associated regulations), the Regulatory Reform (Fire Safety) Order 2005, the Environmental Protection Act 1990, the Water Industry Act 1991, the Water Resources Act 1991 and any similar or analogous health, safety or environmental legislation in force from time to time;
"Helpdesk"	has the meaning given in Section 1 of Schedule 14 (<i>Payment Mechanism</i>);
"High Value Change"	has the meaning given in Schedule 16 (<i>Change Protocol</i>);

"High Value Change Stage 2 Submission"	has the meaning given in Schedule 16 (<i>Change Protocol</i>);
"Hold Co"	means [◆];
"Holding Company"	has the meaning given to it in section 1159 of the Companies Act 2006;
["ICT Assets"]	means: <ul style="list-style-type: none"> (a) hardware, software, networking equipment, telecommunications equipment, telephone systems, projectors, screens, digital signage, interactive whiteboards, video playback equipment, stage lighting control systems, audio systems, assisted hearing systems, technological sports equipment, cashless catering equipment, registration systems, internal CCTV equipment, peripherals, manuals, documentation and related ICT products and materials [but excluding [◆]]¹⁴⁹; and (b) the Active ICT Infrastructure;]
["ICT Handover"]	means, in relation to [a/ the] Facility satisfaction of the ICT Handover Requirements;]
["ICT Handover Acceptance Certificate"]	means a certificate in the relevant form set out in Schedule 22 (<i>Certificates</i>);]
["ICT Handover Date"]	means subject to Clause 30 (<i>Delay Events and Compensation Events</i>), the date described as such in Section 2 (<i>Phasing</i>) of Schedule 7 (<i>The Programme</i>) or such other date as the parties may agree ¹⁵⁰ ;]
["ICT Handover Period"]	has the meaning given to it in paragraph 6.1 of Appendix B of Schedule 10 (<i>Outline Commissioning Programme</i>);]
["ICT Handover Requirements"]	means the requirements set out in paragraph 2.1.4(a) of Appendix B of Schedule 10 (<i>Outline Commissioning Programme</i>);]

¹⁴⁹ To exclude ICT assets that Project Co has responsibility for maintaining.

¹⁵⁰ The date programmed for ICT Handover should be set out here in respect of each relevant Facility.

["ICT Infrastructure"	has the meaning given to it in Section 3 (<i>Authority's Construction Requirements</i>) of Schedule 6 (<i>Construction Matters</i>);]
["ICT Infrastructure Tests"	means the tests set out in Annex 2 (<i>ICT Infrastructure Tests</i>) in Part 1 (<i>Generic Design Requirements</i>) Section 3 (<i>Authority's Construction Requirements</i>) of Schedule 6 (<i>Construction Matters</i>);]
["ICT Installer"	has the meaning given to that term in paragraph 2 of Section 2 (<i>Construction Phase Access Protocol</i>) of Schedule 34 (<i>Joint Operating Protocol</i>);]
"ICT Responsibilities Matrix"	means the matrix set out at paragraph [4.13 (<i>ICT Responsibilities Matrix</i>)] of Part 1 (<i>Generic Design Requirements</i>) of Section 3 (<i>Authority's Construction Requirements</i>) of Schedule 6 (<i>Construction Matters</i>);
["ICT Service Contract"	means the agreement(s) dated [♦]/ [on or around the date of this Agreement] between the [School Entity/ Authority] and the ICT Installer related to the provision of ICT at the Facility;]
["Identified Asbestos"	means Asbestos identified on the Asbestos Schedule at the time it is issued for the purpose of the tender for a Licensed Contractor pursuant to Clause 10.8 (<i>[Asbestos]</i>);]
"In Use Energy Model"	has the meaning given in [Part 1 (<i>Generic Design Requirements</i>) of Section 3 (<i>Authority's Construction Requirements</i>) of Schedule 6 (<i>Construction Matters</i>);]
"Indemnifier"	has the meaning given in Clause 49.3 (<i>Conduct of Claims</i>);
"Independent Surveyor"	has the meaning given to in Schedule 18 (<i>Handback Procedure</i>);
"Independent Tester"	means the [insert name of Independent Tester] or such substitute independent tester as may be permitted pursuant to this Agreement;
"Independent Tester Contract"	means the contract dated on or around the same date as this Agreement in the form set out in Schedule 13 (<i>Independent Tester Contract</i>) or any replacement thereof among Project Co, the Authority, the Contractor and the Independent Tester;

"Indirect Losses"	has the meaning given in Clause 55.1 (<i>Exclusions and Limitations on Liability</i>);
"Information"	has the meaning given under section 84 of the Freedom of Information Act 2000;
"Information Breach"	means a breach of any provisions of Schedule 19 (<i>Record Provisions</i>), or Section 4 (<i>Insurance Arrangements</i>) of Schedule 15 (<i>Insurance Requirements</i>);
"Information Commissioner"	has the meaning given in the Data Protection Laws;
"Information System"	means a system for generating, sending, receiving, storing or otherwise processing electronic communications;
"Initial Funding Agreements"	means [♦] ¹⁵¹ in the Agreed Form;
"Initial ICT Equipment"	Part 1 (<i>Generic Design Requirements</i>) of Section 3 (<i>Authority's Construction Requirements</i>) of Schedule 6 (<i>Construction Matters</i>);
"Insurance Proceeds Account"	means the account numbered [♦] in the joint names of Project Co and the Authority with the [Account Bank (as defined in the Funding Agreements)];
"Insurance Proceeds Account Agreement"	means the agreement in the form set out in Schedule 25 (<i>Insurance Proceeds Account Agreement</i>);
"Insurance Term"	means any term and/or condition required to be included in a policy of insurance by Clause 54 (<i>Insurance</i>) and/or Schedule 15 (<i>Insurance Requirements</i>) but excluding any risk;
"Insurances"	means, as the context requires, all or any of the insurances required to be maintained by Project Co pursuant to this Agreement;
"Intellectual Property"	means all registered or unregistered trademarks, service marks, patents, registered designs, utility models, applications for any of the foregoing, copyrights, unregistered designs, the sui generis rights of extraction relating to databases, trade secrets and other confidential information or know-how;

¹⁵¹ List those Funding Agreements which are to be put in place at Financial Close.

"Intellectual Property Rights"	means the Intellectual Property which (or the subject matter of which) is created, brought into existence, acquired, used or intended to be used by Project Co, any Project Co Party or by other third parties (for the use by or on behalf of or for the benefit of Project Co) for the purposes of the design or construction of the Facilities, the operation, maintenance, improvement and/or testing of the Facilities or the conduct of any other Project Operation or otherwise for the purposes of this Agreement;
"Interface Protocol"	means the interface protocol agreed between Project Co and the Authority pursuant to paragraph 3 of Section 4 (<i>Interface Protocol</i>) of Schedule 12 (<i>Service Requirements</i>) and set out at Appendix B of the Service Level Specification;
"Interim Project Report"	means a report prepared by Project Co, incorporating (as a minimum) the details set out at Schedule 33 (<i>Interim Project Report</i>) ¹⁵² ;
["Investment Group"]	[♦];
"IT"	means information technology systems, hardware and software;
"Joint Insurance Cost Report"	has the meaning given to it in paragraph 1 of Section 4 of Schedule 15 (<i>Insurance Requirements</i>);
"Joint Operating Protocol"	means the joint operating protocol set out in Schedule 34 (<i>Joint Operating Protocol</i>);
["Judicial Proceedings"	means the grant of permission for an application of judicial review within six (6) weeks of the date of a Planning Approval (and any subsequent application or related process) under Part 54 of the Civil Procedure Rules in respect of a Planning Approval;] ¹⁵³
["Judicial Proceedings Action"	means any court order or declaration made by a relevant court (including without limitation the granting of an injunction) arising out of or in connection with any Judicial Proceedings that renders unlawful and/or prevents the performance of all or part of Project Co's obligations under this Agreement;] ¹⁵⁴

¹⁵² See footnote at Clause 4.8

¹⁵³ Definition required where drafting in Clause 11.4 (*Judicial Proceedings*) is used.

¹⁵⁴ Definition required where drafting in Clause 11.4 (*Judicial Proceedings*) is used.

"Key Construction Process" ¹⁵⁵	means [◆];
"Key Personnel"	has the meaning given to it in Clause 2.3 (<i>Appointment</i>);
"Key Sub-Contractor"	means the architects, structural engineers, mechanical and electrical engineers, acoustic engineers, 'Principal Designer' under the CDM Regulations and [◆] ¹⁵⁶ employed by the Contractor in connection with the Works and any employer's agent employed by Project Co;
"Key Sub-Contractor Collateral Agreements"	means the collateral agreement among the Authority, Project Co[, the Contractor] and the Key Sub-Contractors in the form set out in Section 3 (<i>Key Sub-Contractor Collateral Agreement</i>) of Schedule 9 (<i>Collateral Agreements</i>);
"Law"	means: <ul style="list-style-type: none"> (a) any applicable statute or proclamation or any delegated or subordinate legislation; (b) any enforceable community right within the meaning of section 2(1) of the European Communities Act 1972; (c) any applicable guidance, direction or determination with which the Authority and/or Project Co is bound to comply (including the Welsh Language Standards) to the extent that the same are published and publicly available or the existence or contents of them have been notified to Project Co by the Authority; and (d) any applicable judgement of a relevant court of law which is a binding precedent in England and Wales, <p>in each case in force in England and Wales or Wales alone;</p>
["Leased Equipment"	means any Project Co Equipment which is subject to an operating lease with any third party and shall be deemed to include any replacement;]

¹⁵⁵ Please refer to comments at Clause 5 of the Independent Tester Contract.

¹⁵⁶ This list should be reviewed and supplemented on a project specific basis.

"Legacy Equipment"	means Group 2.1 Equipment, Group 3.1 Equipment and Group 4 Equipment;
"Liaison Committee"	has the meaning given to it in Schedule 24 (<i>Liaison Procedure</i>);
["Licensed Contractor"	means a contractor licensed by the Health and Safety Executive to work with Asbestos;]
"Lifecycle Assets"	each item of building fabric, Plant, Equipment or any other asset or part of the [relevant] Facilities to be renewed or replaced during the Project Term as identified in the [relevant] Lifecycle Schedule or as may be identified by the parties applying Good Industry Practice; ¹⁵⁷
"Lifecycle Efficiencies Plan"	the plan for "Lifecycle Efficiencies" set out in Project Co's Proposals;
"Lifecycle Profile"	the amounts profiled to be spent by Project Co on the replacement or renewal of Lifecycle Assets as shown in the Financial Model [in row [♦]] as at the Commencement Date;
"Lifecycle Replacement"	means any works for the renewal of any Lifecycle Assets that are necessary to ensure that the [relevant] Facilities are maintained in accordance with the Service Level Specification and Method Statements and that [the]/[such] Facilities comply with the Authority's Construction Requirements and Project Co's Proposals throughout the Project Term;
"Lifecycle Report"	the report prepared by Project Co pursuant to Clause 24.8 (<i>Lifecycle Replacement</i>);
"Lifecycle Review Date"	the 5th, 10th, 15th and 20th anniversaries of the Commencement Date and not less than [♦] prior to the Expiry Date;
"Lifecycle Schedule"	the detailed annual Lifecycle Replacement schedule showing when the Lifecycle Assets will be renewed or replaced, and forming part of the Schedule of Programmed Maintenance;

¹⁵⁷ Project Co's Proposals will include a table detailing key Lifecycle Assets and anticipated replacement dates. It must be clear that Project Co will not be required to replace those assets at the scheduled time (or include them in the Lifecycle Report that they would otherwise be scheduled to appear in) where deferring such maintenance does not have a negative impact on the condition of the Facilities, the Services or the use of the Facilities and Project Co's Proposals.

"Lifecycle Spend"	the actual amount spent by Project Co on the replacement or renewal of Lifecycle Assets;
"Liquid Market"	has the meaning given in Section 4 (<i>General</i>) of Schedule 17 (<i>Compensation on Termination</i>);
"Loaded Room Layout Drawings"	has the meaning given in the Authority's Construction Requirements;
"Longstop Date"	has the meaning given to it in Clause 40.1.2 (<i>Longstop</i>);
"Loose Equipment"	means any items identified by the Authority (using labels provided by Project Co) which cannot be packed into crates;
"Loose Equipment Purchase Protocol"	has the meaning given to that term in the Authority's Construction Requirements;
"Low Value Change"	has the meaning given in Schedule 16 (<i>Change Protocol</i>);
["Main Works"	means the Works with the exception of the Post Completion Works;]
"Maintenance Works"	means any works for maintenance or repair of the Facilities that are necessary to ensure that the Facilities are maintained in accordance with Service Level Specification and Method Statements and that the Facilities comply with the Authority's Construction Requirements and Project Co's Proposals (including, without limitation, the renewal or replacement of any Plant or Equipment) throughout the Project Term but excluding for the avoidance of doubt Lifecycle Replacement;
"Malicious Damage"	means wilful or reckless damage to any Facility that is not caused by Project Co or a Project Co Party, provided that the following shall always be excluded: <ul style="list-style-type: none"> (a) accidental damage; (b) normal wear and tear; and (c) damage that arises from an item being used for its reasonable and proper purpose and/or area being used for its reasonable and proper purpose;

"Malicious Damage Report"	has the meaning given in Clause 50.2.1;
"Management Service Provider"	means [♦] ¹⁵⁸ or any other person engaged by Project Co from time to time as may be permitted by this Agreement to procure the provision of the Services (or any part of them);
"Management Services Agreement"	means the contract dated on or around the date of this Agreement between Project Co and the Management Service Provider (which as at the date of this Agreement is in the Agreed Form), as amended or replaced from time to time in accordance with this Agreement;
"Medium Value Change"	has the meaning given in Schedule 16 (<i>Change Protocol</i>);
"Method Statements"	means the method of providing a Service as set out or identified in Section 2 (<i>Method Statements</i>) of Schedule 12 (<i>Service Requirements</i>) as amended from time to time in accordance with Clause 34 (<i>Change Protocol</i>) and Clause 22 (<i>The Services</i>);
"Migration Manager"	has the meaning given to that term in [♦] of Section 2 (<i>Decant Protocol</i>) of Schedule 11 (<i>Equipment</i>);
"Minimum Residual Life Expectancy Requirement"	has the meaning given in Schedule 18 (<i>Handback Procedure</i>);
"Monthly Invoice"	has the meaning given in Clause 35.2.1 (<i>Invoicing and Payment Arrangements</i>);
"Monthly Service Charge"	has the meaning given in Section 1 of Schedule 14 (<i>Payment Mechanism</i>);
"Monthly Service Payment"	has the meaning given in Section 1 of Schedule 14 (<i>Payment Mechanism</i>);
"Monthly Service Report"	means a monthly report in the Agreed Form, to be prepared by Project Co and provided to the Authority in accordance with the relevant provisions in Clause 35.2.3 (<i>Invoicing and Payment Arrangements</i>) and Sections 4 and 5 of Schedule 14 (<i>Payment Mechanism</i>);
"Net Present Value"	has the meaning given in Schedule 23 (<i>Refinancing</i>);

¹⁵⁸ Insert description of Management Service Provider(s)

"New Replacement ICT Equipment"	Part 1 (<i>Generic Design Requirements</i>) of Section 3 (<i>Authority's Construction Requirements</i>) of Schedule 6 (<i>Construction Matters</i>);
"Non-Compliant Shareholder"	has the meaning given to it in Clause 53.1.2 (<i>Tax Compliance</i>);
"Notice Date"	means [◆];
"Occasion of Tax Non-Compliance"	means: <ul style="list-style-type: none"> (a) any tax return of Project Co or a Shareholder submitted to a Relevant Tax Authority on or after 1 October 2012 is found to be incorrect as a result of: <ul style="list-style-type: none"> (i) a Relevant Tax Authority successfully challenging Project Co or the relevant Shareholder under the General Anti-Abuse Rule or the Halifax Abuse Principle or under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax Abuse Principle; the failure of an avoidance scheme which Project Co or the relevant Shareholder was involved in, and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime; and/or (ii) Project Co's or the relevant Shareholder's tax affairs giving rise on or after 1 April 2013 to a criminal conviction in any jurisdiction for tax-related offences which is not spent at the date of this Agreement or to a penalty for civil fraud or evasion;
"Operational Insurances"	means the insurances required by Clause 54.2 (<i>Insurance</i>) and "Operational Insurance" means any one of such insurances;
"Operational Term"	means [in respect of [the Main Works relating to] each Facility] [(a)] the period from the [relevant] Actual Completion Date until the end of the Project Term[; and (b) in respect of the Post Completion Works the period from

the [relevant] Actual Post Completion Works Date until the end of the Project Term];

"Option Period" has the meaning given in Clause 54.14.3 (*Uninsurable Risks*);

"Original Senior Commitment" [means the amount committed under the Senior Funding Agreements as at Financial Close (as adjusted to take into account any Qualifying Change)];¹⁵⁹

"Other Costs" means costs payable to Project Co pursuant to Section 6 (*Other Costs*) of Schedule 14 (*Payment Mechanism*);

"Outline Commissioning Programme" means the programme setting out the standards, specifications, procedures and other requirements for the carrying out and completion of the commissioning activities of the parties set out in outline in Schedule 10 (*Outline Commissioning Programme*);

["Partial Termination Authority Notice of Change" has the meaning given to that term in paragraph 1 of Section 7 ([**Partial Termination**) of Schedule 16 (*Change Protocol*);]¹⁶⁰

["Partial Termination Event" means any of the following:

(a) the affected Facility is to transfer from its current Site to a new site and a [School Entity/ Authority] will no longer operate from the current Site; or

(b) the affected Facility is to be discontinued and a [School Entity/ Authority] will no longer operate from the current Site;]¹⁶¹

["Payment Commencement Date" means the Actual Completion Date;]

["Payment Commencement Date 1" means the date the first Facility achieves the Actual Completion Date;]

["Payment Commencement Date 2" means the date the second Facility achieves the Actual Completion Date;]

¹⁵⁹ Definition assumes traditional bank debt finance.

¹⁶⁰ For use with Section 7 of Schedule 16, as applicable (batched school facilities optional partial termination provisions).

¹⁶¹ For use with Section 7 of Schedule 16, as applicable (batched school facilities optional partial termination provisions).

"Payment Requirements"	Commencement	has the meaning given to it in paragraph 2.1.4(b) of Appendix B of Schedule 10 (<i>Outline Commissioning Programme</i>);
"Payment Mechanism"		means Schedule 14 (<i>Payment Mechanism</i>);
["PCW Snagging List"		means the list to be prepared by the Independent Tester in accordance with Clause 17.16 (<i>Snagging Items</i>) in respect of the Post Completion Works containing Snagging Items;]
["PCW Snagging Programme"		has the meaning given to it in Clauses 17.16 (<i>Snagging Items</i>);]
"Performance Failure"		has the meaning given in Section 1 (<i>Interpretation</i>) of Schedule 14 (<i>Payment Mechanism</i>);
"Performance Guarantees"		means the guarantees to Project Co in respect of the Construction Contract and the Service Contract which, as at the date of this Agreement are in the Agreed Form ¹⁶² ;
"Permitted Borrowing"		means without double-counting, any: <ul style="list-style-type: none"> (a) advance to Project Co under the Senior Funding Agreements, provided that such advance is not made under any Committed Standby Facility; (b) Additional Permitted Borrowing; (c) advance to Project Co under any Committed Standby Facility¹⁶³ which is made solely for the purpose of funding any cost overruns, increased expenses or loss of revenue which Project Co incurs, provided that such funds are not used in substitution for other sources of committed funding designated for those purposes; and (d) interest and, in respect of the original Senior Funding Agreements only (as entered into at the date of this Agreement, prior to any subsequent amendment), other amounts accrued or payable

¹⁶² Insert details of any other guarantees to be given.

¹⁶³ The "Committed Standby Facility", if used, will be any standby facility that is committed by the Senior Funders at Financial Close for the purposes of funding any unforeseen cost overruns, increased expenses or loss of revenues incurred by Project Co. If there is no such facility limb (c) of the definition of "Permitted Borrowing" will not be required.

under the terms of such original Senior Funding Agreements,

except where the amount referred to in paragraphs (a) to (d) above is or is being used to fund a payment of Default Interest on any Additional Permitted Borrowing;

- "Persistent Breach"** means a breach for which a final warning notice (referred to in Clause 43.2 (*Termination for Persistent Breach by Project Co*) has been issued, which has continued for more than fourteen (14) days or recurred in three (3) or more months within the six (6) month period after the date on which such final warning notice is served on Project Co;
- "Personal Data"** means personal data (as that term is defined in the Data Protection Laws) processed by either Party in connection with their respective rights and obligations in this Agreement;
- ["Phase Plans"** means the plans attached at Appendix 3 of Schedule 5 (*Land Matters*);]¹⁶⁴
- "Physical Damage Policies"** means the policies of insurance referred to in paragraph 1 (*Contractors' 'All Risks' Insurance (CAR)*) of Section 1 (*Policies to be taken out by Project Co and maintained during the design and construction phase*) and paragraph 1 (*Property Damage Insurance*) of Section 2 (*Policies to be taken out by Project Co and maintained from the [relevant] Actual Completion Date*) of Schedule 15 (*Insurance Requirements*);
- "Planned Decant Completion Date"** means the date upon which the Decant is set to complete as detailed in paragraph [17] (*Information*) of Section 2 (*Decant Protocol*) of Schedule 11 (*Equipment*);
- "Planned Decant Start Date"** means the date upon which the Decant is set to start as detailed in paragraph [3] (*Post Decant Activities*) of Section 2 (*Decant Protocol*) of Schedule 11 (*Equipment*);
- "Planning Approval"** means detailed planning consent for the Project dated [insert date of Planning Approval] and annexed as Attachment [◆];
- "Planning Permission"** means any planning permission, approval of reserved matters, listed building consent, conservation areas consent and/or other consent or approval reasonably required from time to time for construction and/or operation

¹⁶⁴ Cross-refer to description of Phases, if relevant, or delete.

of the Facilities (including without limitation for any Authority Change and the Planning Approval);

"Plant"	means the infrastructure systems, building systems, fixed, and immovable equipment systems, installed as part of the Works or pursuant to an Authority Change as replaced from time to time;
"Porters"	has the meaning given in paragraph 9 of Section 2 (<i>Decant Protocol</i>) of Schedule 11 (<i>Equipment</i>);
"Post Completion Commissioning"	means, as appropriate, Project Co's Post Completion Commissioning and/or the Authority's Post Completion Commissioning [in respect of the Main Works and/or the Post Completion Works as applicable];
["Post Completion Works"	means, [in relation to each Facility,] those parts of the Works [described as such in the Authority's Construction Requirements and Project Co's Proposals/ highlighted as such on the Programme] ¹⁶⁵ to be completed after the [relevant] Actual Completion Date in accordance with the Programme;]
["Post Completion Works Areas"	means [♦];]
["Post Completion Works Date"	means in respect of the Post Completion Works [for each Facility] the date shown as the corresponding Post Completion Works Date in Section 2 of Schedule 7 (<i>The Programme</i>), or such revised date as may be specified by the Authority's Representative pursuant to Clause 30 (<i>Delay Events and Compensation Events</i>), or such other date as may be agreed by the parties;] ¹⁶⁶
["Post Completion Works Requirements"	has the meaning given to it in paragraph 2.1.4(c) of Appendix B of Schedule 10 (<i>Outline Commissioning Programme</i>);]
"Pounds Sterling"	means the currency issued by the Bank of England from time to time;
"Programme"	means the programme set out in Schedule 7 (<i>The Programme</i>) as revised and issued by Project Co (or on its behalf) from time to time pursuant to Clause 14 (<i>Programme and Dates for Completion</i>);

¹⁶⁵ Where there are Post Completion Works on a Project, these must be clearly identified and distinguished from the Main Works.

¹⁶⁶ Where there are different phases of Post Completion Works at a Facility project specific tailoring will be required to clearly demarcate the different scope and target completion date for those works.

"Programmed Maintenance"		means the Maintenance Work which Project Co is to carry out in accordance with Schedule of Programmed Maintenance;
"Programmed Information"	Maintenance	has the meaning given in Clause 23.3 (<i>Programmed Maintenance Works</i>);
"Prohibited Act"		has the meaning given in Clause 45 (<i>Corrupt Gifts and Payments</i>);
"Project"		has the meaning given to it in Recital A;
"Project Co Equipment"		means the equipment set out in paragraph 1.1 (<i>Project Co Equipment Classification</i>) of Schedule 11 (<i>Equipment</i>) [in respect of the relevant Facility;]
"Project Co Event of Default"		has the meaning given in Clause 40 (<i>Project Co Event of Default</i>);
"Project Co Factors"		has the meaning given to it in paragraph 1 of Section 4 of Schedule 15 (<i>Insurance Requirements</i>);
"Project Co Party"		means Project Co's agents and contractors (including without limitation the Contractor and the Service Provider[s]) and its or their sub-contractors of any tier and its or their directors, officers, employees and workmen in relation to the Project and "Project Co Parties" shall be construed accordingly;
"Project Co Suspension Notice"		has the meaning given to it in Clause 11.4.2(b) (<i>Judicial Proceedings</i>);
"Project Co's Community Benefit Method Statements"		means the method statements set out in Part 2 of Section 2 of Schedule 29 (<i>Community Benefits</i>);
"Project Co's Key Personnel"		means the personnel identified in Schedule 3 (<i>Key Personnel</i>);
"Project Co's Commissioning"	Post-Completion	means Project Co's commissioning activities carried out in accordance with Clause 18.1 (<i>Post Completion Commissioning</i>);
"Project Co's Commissioning"	Pre-Completion	means Project Co's commissioning activities to be carried out in accordance with Clause 17 (<i>Pre-Completion Commissioning and Completion</i>);

"Project Co's Proposals"	means the document at Section 4 (<i>Project Co Proposals</i>) of Schedule 6 (<i>Construction Matters</i>) as amended from time to time in accordance with Clause 34 (<i>Change Protocol</i>);
"Project Co's Representative"	means the person appointed by Project Co pursuant to Clause 8 (<i>Representatives</i>);
"Project Data"	means: <ul style="list-style-type: none"> (a) all Design Data; (b) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the provision of the Services; and (c) any other materials, documents and or data acquired, brought into existence or used in relation to the Project Operations or this Agreement;
"Project Documents"	means the Ancillary Documents and the Funding Agreements;
"Project Operations"	means the carrying out of the Works, the carrying out of Project Co's Pre-Completion Commissioning and Project Co's Post-Completion Commissioning, the management and provision of the Services and the performance of all other obligations of Project Co under this Agreement from time to time;
"Project Term"	means the period commencing at [midnight] on the date of this Agreement and ending on the earlier of the Expiry Date and the Termination Date;
"Proposed Mitigating Measures"	has the meaning given in Clause 53.1.2(b)(i) (<i>Tax Compliance</i>);
"Protective Measures"	means appropriate technical and organisational measures which may include: pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of such measures;

"Qualifying Change"

means (unless expressly stated otherwise):

- (a) a Low Value Change in respect of which the parties have agreed the method of implementation; or
- (b) a Medium Value Change in respect of which the Authority has issued a confirmation notice pursuant to paragraph 7.1.1 of Section 3 (*Medium Value Changes*) of Schedule 16 (*Change Protocol*); or
- (c) a High Value Change which has received Stage 2 Approval pursuant to paragraph 8.2.1 of Section 4 (*High Value Changes*) of Schedule 16 (*Change Protocol*),

in each case provided that any necessary changes required to be made to any Project Document and/or Ancillary Document pursuant to Schedule 16 (*Change Protocol*) have been given effect to and become unconditional;

"Quality Plans"

means the Design Quality Plan and Construction Quality Plan, prepared in accordance with Section 8 (*Quality Plans (Design And Construction)*) of Schedule 6 (*Construction Matters*), and the Services Quality Plan, prepared in accordance with Section 3 (*Services Quality Plan*) of Schedule 12 (*Service Requirements*), as required to be implemented by Project Co in accordance with Clause 20 (*Quality Assurance*);

"Quarterly Works Monitoring Date"

has the meaning given in Clause 29.10.4 (*Community Benefits*);

"Range of Finishes"

has the meaning given in paragraph 1.2.3(a) of Schedule 8 (*Review Procedure*);

"RDD Meeting Protocol"

means the protocol set out in [♦] of the Method Statements;

"Rectification"

has the meaning given in Section 1 of Schedule 14 (*Payment Mechanism*) and "Rectify" and "Rectified" should be construed accordingly;

"Rectification Period"

has the meaning given in Section 1 of Schedule 14 (*Payment Mechanism*);

"Referral"	has the meaning given in Schedule 20 (<i>Dispute Resolution Procedure</i>);
"Refinancing"	has the meaning given in Schedule 23 (<i>Refinancing</i>);
"Reinstatement Plan"	has the meaning given in Clause 54.22 (<i>Reinstatement</i>);
"Reinstatement Works"	has the meaning given in Clause 54.22.2 (<i>Reinstatement</i>);
"Relevant Authority"	means any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom, or of the European Union, (or of the Welsh Ministers or the National Assembly for Wales);
"Relevant Change in Law"	has the meaning given in Clause 33.3 (<i>Changes in Law</i>);
"Relevant Event"	has the meaning given in Schedule 16 (<i>Change Protocol</i>);
"Relevant Incident"	has the meaning given in Clause 54.22.2 (<i>Reinstatement</i>);
"Relevant Payment"	has the meaning given in Clause 54.14.3 (<i>Uninsurable Risks</i>);
"Relevant Proceeds"	has the meaning given in Clause 54.22.2 (<i>Reinstatement</i>);
"Relevant Service Transfer Date"	has the meaning given in Clause 27.10 (<i>No Employee Transfer</i>); ¹⁶⁷
"Relevant Tax Authority"	means HM Revenue & Customs, or, if applicable, a tax authority in the jurisdiction in which Project Co or, as the case may be, the relevant person is established;
"Relevant Tax Liability"	has the meaning given in Clause 46.6.3 (<i>Tax Equalisation</i>);
"Relief"	has the meaning given in Clause 46.6.1 (<i>Tax Equalisation</i>);
"Relief Events"	has the meaning given in Clause 31 (<i>Relief Events</i>);

¹⁶⁷ Refer to Clause 27.10 (*Compliance with Law and Authority Policies*) where Staff Transfer drafting is adopted.

"Renewal Date" has the meaning given in Schedule 15 (*Insurance Requirements*);

"Reportable Incident" means any incident or event having an actual adverse effect on:

- (a) an electronic communications network within the meaning of Section 32(1) of the Communications Act 2003;
- (b) any device or group of interconnected or related devices, one or more of which, pursuant to a program, perform automatic processing of digital data; or
- (c) digital data stored, processed, retrieved or transmitted by elements covered under paragraph (a) or (b) for the purposes of their operation, use, protection and maintenance,

and which has a significant impact on the continuity of Educational Services and/ or the Authority [or School Entity] discharging its statutory duties or functions that affect the [Facility];

"Request for Information" has the meaning set out in the FOIA or the Environmental Information Regulations as relevant (where the meaning set out for the term "request" shall apply);

"Required Action" has the meaning given in Clause 26.7 (*Authority's Remedial Rights*);

"Reserved Rights" means the matters referred to in Section 2 (*Reserved Rights*) at Schedule 5 (*Land Matters*);

"Restricted Person" means either:

- (a) a person providing or proposing to provide [♦] services of a similar nature to those provided or contemplated by the Authority at the time in question; or
- (b) any person who has a material interest in the manufacture, production, sale or distribution of [pornography,] or [arms and weapons] or [the

production of tobacco products and/or alcoholic beverages];

- (c) a person who poses, or could pose (in the reasonable opinion of the Authority) a threat to national security;
- (d) [any person whose tax returns submitted on or after 1 October 2012 have been found to be incorrect as a result of:
 - (i) HM Revenue and Customs successfully challenging it under the General Anti-Abuse Rule ("**GAAR**") or the Halifax Abuse Principle;
 - (ii) the Relevant Tax Authority challenging it under any tax rules or legislation that have an effect equivalent or similar to the GAAR or the Halifax Abuse Principle; and/or
 - (iii) the failure of an avoidance scheme which the person was involved in and which was, or should have been, notified under the DOTAS or any equivalent or similar regime in a jurisdiction in which the person is established;]

"Retail Prices Index" or "RPIX"

means the Retail Prices Index (All Items Excl Mortgage Interest) as published by the Office for National Statistics from time to time (the "**Index**"), or, failing such publication or in the event of a fundamental change to the Index, such other index as the parties may agree, or such adjustments to the Index as the parties may agree (in each case with the intention of putting the parties in no better nor worse position than they would have been in had the Index not ceased to be published or the relevant fundamental change not been made) or, in the event that no such agreement is reached, as may be determined in accordance with the Dispute Resolution Procedure;

"Revenue"

means the projected Unavoidable Fixed Costs and Senior Debt Service Costs of Project Co;

"Reviewable Design Data"

means the Design Data listed at Section 5 (*Reviewable Design Data*) of Schedule 6 (*Construction Matters*);

["Reviewable Programme"]	Design Data	means the programme for submission and review of the Submitted Items as set out in Appendix 1 of Schedule 8 (<i>Review Procedure</i>);]
"Room Guide"		has the meaning given to that term in the Authority's Construction Requirements;
"Revised Senior Debt Termination Amount"		has the meaning given in Section 5 (<i>Definitions</i>) of Schedule 17 (<i>Compensation on Termination</i>);
"Schedule of Maintenance"	Programmed	means the programme referred to in Clause 23.1 (<i>Programmed Maintenance Works</i>) to be submitted to the Authority's Representative by Project Co in accordance with Schedule 8 (<i>Review Procedure</i>);
"Schedule of Accommodation"		has the meaning given to it in the Authority's Construction Requirements;
"Schedules"		means Schedules 1 to [♦] attached to this Agreement;
["School Entity"]		means [a governing body constituted in accordance with Section 19 of the Education Act 2002];]
"Second Party"		has the meaning given in Clause 36.3 (<i>VAT</i>);
"Security Trustee"		means [♦];
"Senior Debt"		has the meaning given in Section 5 (<i>Definitions</i>) of Schedule 17 (<i>Compensation on Termination</i>);
"Senior Debt Service Costs"		means interest and debt service costs incurred in respect of the [Senior Funding Agreements] less: <ul style="list-style-type: none"> (a) sums which are in arrears; and (b) all sums reserved by Project Co and which Project Co is entitled to use to make such payments, without breaching the [Senior Funding Agreements];
"Senior Funders"		means [specify relevant funders];

"Senior Funding Agreements"	means [♦] as at the date of this Agreement and as amended as permitted under Clause 4 (<i>Project Documents</i>);
"Senior Loan Agreement"	means [♦];
"Service Contract"	means the contract dated on or around the date of this Agreement between Project Co and the Service Provider (which as at the date of this Agreement is in the Agreed Form), by which Project Co will procure the performance of the Services (as amended or replaced from time to time in accordance with this Agreement);
"Service Event"	has the meaning given in Section 1 of Schedule 14 (<i>Payment Mechanism</i>);
"Service Level Specification"	means the requirements of the Authority set out in Section 1 (<i>Service Level Specification</i>) of Schedule 12 (<i>Service Requirements</i>) as amended from time to time in accordance with Clause 34 (<i>Change Protocol</i>);
"Service Provider"	means [♦] ¹⁶⁸ or any other person engaged by Project Co from time to time as may be permitted by this Agreement to procure the provision of the Services (or any part of them);
"Service Provider's Collateral Agreement"	means the collateral agreement among the Authority, Project Co and the Service Provider in the form set out in Section 2 (<i>Service Provider's Collateral Agreement</i>) of Schedule 9 (<i>Collateral Agreements</i>);
"Services"	means the services to be provided, managed and/or procured by Project Co for the Authority in accordance with Schedule 12 (<i>Service Requirements</i>) as subsequently amended or adjusted in accordance with this Agreement;
"Services Quality Plan"	means the document set out in Section 3 (<i>Services Quality Plan</i>) of Schedule 12 (<i>Service Requirements</i>);
"Shareholder(s)"	means any person(s) who from time to time, as permitted by this Agreement, holds share capital in Project Co or Hold Co which persons are, as at the date of this Agreement, listed as such in Schedule 21 (<i>Project Co Information</i>);
"Shareholder Tax Mitigation Measures Non-Compliance Notice"	has the meaning given to it in Clause 53.1.6 (<i>Tax Compliance</i>);

¹⁶⁸ Insert description of Service Provider(s)

"Shareholder Tax Non-Compliance Notice"	has the meaning given to it in Clause 53.1.6 (<i>Tax Compliance</i>);
"Shareholders' Agreement"	means the agreement between the Shareholders relating to Project Co, including any agreement relating to the subscription of equity (or other shareholder funding) by the Shareholders in Project Co or Hold Co;
"Site[s]"	means the land made available to Project Co for the Project outlined in red on [♦] ¹⁶⁹ ;
"Site Conditions"	means the condition of the [relevant] Site including (but not limited to) climatic, hydrological, hydrogeological, ecological, environmental, geotechnical, topographical and archaeological conditions;
"Site Plans"	means the site plan[s] attached at Appendix 2 of Schedule 5 (<i>Land Matters</i>) ¹⁷⁰ ;
"Site Specific Brief"	means Part 2 (<i>Site Specific Brief</i>) of Section 3 (<i>Authority's Construction Requirements</i>) of Schedule 6 (<i>Construction Matters</i>);
"Small Works and Services Rates"	has the meaning given in Schedule 16 (<i>Change Protocol</i>);
"Snagging Completion Date"	means the date of the relevant Snagging Items Completion Certificate issued by the Independent Tester in respect of the [Main] Works [or the [relevant] Post Completion Works (as applicable)] [for a Facility] pursuant to Clause 17.17 (<i>Snagging Items</i>);
"Snagging Items"	means minor defects, deficiencies or omissions of a snagging nature whose remediation cannot reasonably be expected to affect the provision of the Services, disrupt the use of the Facilities, prejudice the safe use of the Facilities or prevent the Independent Tester from issuing a Certificate of Practical Completion for the [Main] Works [or [relevant] Post Completion Works (as applicable)] [or the ICT Handover Acceptance Certificate] [for a Facility] and the remediation of which cannot reasonably be expected to exceed in aggregate twenty (20) Business Days from the [relevant] Certificate of Practical Completion [or ICT Handover Acceptance Certificate (as applicable)], or such longer period (up to a maximum of [three (3) months]) as may be reasonable taking into account the lead time for

¹⁶⁹ Insert details of relevant plan.

¹⁷⁰ Plan to be developed on a project specific basis.

supplies or materials [or to avoid interference with the ICT Installer];

"Snagging Certificate" **Items** **Completion** means the certificate(s) issued by the Independent Tester in accordance with Clause 17.17 (*Snagging Items*) and in accordance with the terms of the Independent Tester Contract;

"Snagging List" means the list to be prepared by the Independent Tester in accordance with Clause 17.14 (*Snagging Items*) [in respect of the Main Works] containing Snagging Items, as updated pursuant to Clause 17.15 (*Snagging Items*);

"Snagging Programme" has the meaning given to it in Clauses 17.14 (*Snagging Items*), as updated pursuant to Clause 17.15 (*Snagging Items*);

"Soft Services" has the meaning given in the Service Level Specification;

["Soft Landscaping Works" means, [in relation to each Facility,] those parts of the Post Completion Works [described as such in the Authority's Construction Requirements and Project Co's Proposals/ highlighted as such on the Programme]¹⁷¹ to be completed after the [relevant] Actual Completion Date in accordance with the Programme;]

["Soft Landscaping Completion Date" means in respect of the Soft Landscaping Works [for each Facility] the Post Completion Works Date shown as the corresponding Soft Landscaping Completion Date in Section 2 of Schedule 7 (*The Programme*), or such revised date as may be specified by the Authority's Representative pursuant to Clause 30 (*Delay Events and Compensation Events*), or such other date as may be agreed by the parties;]

"Specific Change in Law" means any Change in Law which specifically refers to:

- (a) the provision of works or services the same as or similar to the Works or the Services in premises for the provision of any Educational Service; or
- (b) the holding of shares in companies whose main business is providing works or services the same as or similar to the Works or the Services in premises for the provision of any Educational Service;

¹⁷¹ Where there are Soft Landscaping Works these will form a distinct sub-type of Post Completion Works on a Project, these must be clearly identified and distinguished from other Post Completion Works.

"Student"		means a student of the [relevant] Facility;
"Sub-Contractor"		means any third party (including the Contractor and a Service Provider) who enters into any Sub-Contract;
"Sub-Contracts"		means the contracts entered into by or between Project Co, the Contractor and/or a Service Provider and other third parties in relation to any aspect of the Project Operations;
"Submitted Item"		has the meaning given to it in Paragraph 1.2 of Schedule 8 (<i>Review Procedure</i>);
"Subordinated Debt"		has the meaning given in Section 5 (<i>Definitions</i>) of Schedule 17 (<i>Compensation on Termination</i>);
"Subordinated Funder"		means a person providing finance under a Subordinated Funding Agreement;
"Subordinated Agreements"	Funding	means [♦] as at the date of this Agreement or as amended with the prior written agreement of the Authority;
"Subsidiary"		has the meaning given to it in section 1159 of the Companies Act 2006;
"Suitable Substitute Contractor"		has the meaning given in Section 5 (<i>Definitions</i>) of Schedule 17 (<i>Compensation on Termination</i>);
"Suspension Notice"		has the meaning given to it in Clause 11.4.2 (<i>Judicial Proceedings</i>);
"Term"		the terms published by the Authority for each Academic Year and notified to Project Co in accordance with Clauses 5.4 and 5.5 (<i>Notification of Terms and Examination Periods</i>) (and "half term" references shall be construed accordingly);
"Termination Date"		means the date on which termination of this Agreement takes effect in accordance with its terms;
"Title Conditions"		means title conditions set out in Section 1 (<i>Title Conditions</i>) of Schedule 5 (<i>Land Matters</i>);

"Total Availability Deduction"	has the meaning given to that term in Section 1 (<i>Deductions from Monthly Service Payments</i>) of Schedule 14 (<i>Payment Mechanism</i>);
"TPL Risk"	means a risk which is required to be insured under the third party liability insurance policy;
"Transfer Regulations"	means the Transfer of Undertaking (Protection of Employment) Regulations 2006 (SI No. 246);
"Transferring Staff"	has the meaning given to it in Clause 27.11 (<i>No Employee Transfer</i>);
"Unavailable"	has the meaning given to it in Section 1 of Schedule 14 (<i>Payment Mechanism</i>);
"Unavoidable Fixed Costs"	<p>means the fixed costs incurred by Project Co which first fall due for payment by Project Co during the period of indemnity but excluding:</p> <ul style="list-style-type: none"> (a) costs which could have reasonably been mitigated or avoided by Project Co; (b) payments to Project Co's Associated Companies; (c) payments which are not entirely at arm's length; (d) payments to holders of equity in Project Co, providers of Subordinated Debt and any other financing costs other than Senior Debt Service Costs; (e) indirect losses suffered or allegedly suffered by any person; (f) fines, penalties or damages for unlawful acts, breaches of contract or other legal obligations; (g) payments Project Co can recover under contract or in respect of which Project Co has a remedy against another person in respect of the same liability;

- (h) payments to the extent that Project Co has such funds available to it including:
 - (i) reserves which Project Co can draw upon without breaching the Senior Funding Agreements;
 - (ii) standby or contingent facilities or funds of Senior Debt or equity which Project Co is entitled to have available;
 - (iii) payments representing any profits of the Project (to the extent not already excluded in (d) above);

"Uninsurable"

means, in relation to a risk, either that:

- (a) insurance is not available to Project Co in respect of the Project in the worldwide insurance market with reputable insurers of good standing in respect of that risk; or
- (b) the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom;

"Unprogrammed Work"

Maintenance

has the meaning given in Clause 23.8 (*Programmed and Unprogrammed Maintenance*);

"Unreasonable Act"

means any act or omission which is contrary to any reasonable instruction, guidance or rules for the operation or management of the Facilities;

"Utilities"

means [◆];

"Utilities Agreement"

- (a) those agreements listed in Schedule [◆] (*Utilities Agreements*); and
- (b) any other agreements with, or consents, releases, notices or variations properly required for the purposes of carrying out the Works to be obtained from and/or served on, any public or private utility, drainage, sewage, water, electricity, gas or telecommunications undertaker, authority or company or any service

provider or company, body or authority for the requisitioning, design, commissioning, installation, laying, relaying, construction, repair, maintenance, use or diversion or disconnection and/or connection to any services and/or services media of any kind including without prejudice to the generality thereof gas, water, electricity, signals and pulses, telecommunications, drainage, sewers, wires, cables, conduits and apparatus;

"Utilities Third Party"	a third party on whom a Utilities Agreement is to be served or from whom a Utilities Agreement is required to be given or executed;
"VAT"	means value added tax at the rate prevailing at the time of the relevant supply charged in accordance with the provisions of the Value Added Tax Act 1994;
"VAT Sum"	has the meaning given in Clause 36 (<i>VAT and Construction Industry Tax Deduction Scheme</i>);
"Vitiating Act"	has the meaning given in Endorsement 2, Section 3 (<i>Endorsements</i>) of Schedule 15 (<i>Insurance Requirements</i>);
"Warning Notice"	means a notice validly served by the Authority's Representative on Project Co under Clause 26.3 (<i>Grounds for Warning Notices</i>), specifying that it is a Warning Notice and setting out the circumstances that have given rise to the issue thereof;
"Well-being of Future Generations Act"	means the Well-being of Future Generations (Wales) Act 2015;
"Welsh Language Standards"	means the Welsh Language Standards (No.1) Regulations 2015;
"WEPCo"	means [♦] ¹⁷²
["WiFi"	means [♦];]
["WiFi Actual Completion Date"	means such date stated in the Certificate of WiFi Completion or, in the event of dispute, as such date may be determined in accordance with Schedule 20 (<i>Dispute Resolution Procedure</i>);]

¹⁷² Insert description of WEP entity.

["WiFi PC Criteria"]	means the WiFi Post Completion Tests have been passed;]
["WiFi Post-Completion Tests"]	means the tests described at paragraph [3] of Appendix B of Schedule 10 (<i>Outline Commissioning Programme</i>);]
["WiFi Tests Completion Date"]	means the date that falls [♦] weeks after the Actual Completion Date [in respect of each Facility]; and]
"Works"	means the design (including the preparation of all Design Data), construction, installation, testing, commissioning and completion of the Facilities (including any temporary works) and the Group 2 Equipment, Group 3 Equipment (to the extent provided for in [♦] and [♦] of the Authority's Construction Requirements) to be performed by Project Co in accordance with this Agreement (as varied, amended or supplemented from time to time in accordance with this Agreement) [including the Post Completion Works].

SECTION 2

INTERPRETATION

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

1. The headings and marginal notes and references to them in this Agreement shall be deemed not to be part of this Agreement and shall not be taken into consideration in the interpretation of this Agreement.
2. Except where the context expressly requires otherwise, references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedules are references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedules to this Agreement and references to Sections, Appendices and Attachments (if any) are references to Sections, Appendices and Attachments to or contained in this Agreement.
3. The Schedules (including Sections, Parts, Appendices and Attachments thereto, if any) to this Agreement are integral parts of this Agreement and a reference to this Agreement includes a reference to the Schedules (including Sections, Parts Appendices and Attachments thereto, if any).
4. Words importing persons shall, where the context so requires or admits, include individuals, firms, partnerships, trusts, corporations, governments, governmental bodies, authorities, agencies, unincorporated bodies of persons or associations and any organisations having legal capacity.
5. Where the context so requires words importing the singular only also include the plural and vice versa and words importing the masculine shall be construed as including the feminine or the neuter or vice versa.
6. The language of this Agreement is English. All correspondence, notices, drawings, Design Data, test reports, certificates, specifications and information shall be in English.¹⁷³ All name plates, identification labels, instructions and notices to the public and staff and all other written, printed or electronically readable matter required in accordance with, or for purposes envisaged by, this Agreement shall comply with Welsh Language Standards (including any amending, supplemental or replacement Law from time to time) and shall be bilingual (in English and Welsh), where required by the Authority provided that all operating and maintenance instructions (and any other complex technical documents) are permitted in English only.
7. Save where stated to the contrary, references to any agreement or document include (subject to all relevant approvals and any other provisions of this Agreement concerning amendments

¹⁷³ Whilst the Project Agreement will be in English, Authorities should stipulate their language of preference for instructions, notices etc and any Welsh language requirements ought to be priced as part of the Annual Service Charge for the Project.

to agreements or documents) a reference to that agreement or document as amended, supplemented, substituted, novated or assigned.

8. References to any Law are to be construed as references to that Law as from time to time amended or to any Law from time to time replacing, extending, consolidating or amending the same provided that the provisions of this paragraph shall be without prejudice to the operation of Clause 33 (*Changes in Law*) and Schedule 16 (*Change Protocol*) which shall operate in relation to a Change in Law on the basis set out in this Agreement.
9. Without prejudice to Clause 58.8 (*Assignment*), references to a public organisation [(other than the Authority)]¹⁷⁴ shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the relevant functions and relevant responsibilities of such public organisation.
10. Without prejudice to Clause 58.8 (*Assignment*), references to other persons (other than the Authority and Project Co) shall include their successors and assignees.
11. References to a deliberate act or omission of the Authority or any Authority Party shall be construed having regard to the interactive nature of the activities of the Authority and of Project Co and the expression shall exclude acts or omissions which were within the contemplation of the parties or which were otherwise provided for in this Agreement.
12. The words in this Agreement shall bear their natural meaning. The parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore, be construed contra proferentem.
13. Reference to "parties" means the parties to this Agreement and references to "a party" mean one of the parties to this Agreement.
14. In construing this Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word "other" or "including" or "in particular" shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
15. All of Project Co's obligations, duties and responsibilities shall be construed as separate obligations, duties and responsibilities owed to the Authority and to be performed at Project Co's own cost and expense.
16. Unless expressly stated otherwise, references to amounts or sums expressed to be "indexed" or "index linked" are references to amounts or sums in [♦]¹⁷⁵ ("**Base Date**") prices which require to be adjusted whenever the provision containing the amount or sum is given effect in accordance with this Agreement to reflect the effects of inflation after that date. The

¹⁷⁴ Square brackets to be removed in Schools projects. Text in square brackets to be deleted in College projects.

¹⁷⁵ Insert full base date

adjustment shall be measured by changes in the relevant index published for that Contract Year as calculated in accordance with the following formula:

$$\text{Amount or sum in } [\diamond]^{176} \text{ prices} \times (\text{RPIX}_d / \text{RPIX}_o) \frac{\text{RPI}_d}{\text{RPI}_o}$$

Where RPIX_d is the value of the Retail Prices Index (All Items Excluding Mortgage Interest) published or determined with respect to the month most recently preceding the date when the provision in question is to be given effect and RPIX_o (All Items Excluding Mortgage Interest) is the value of the Retail Prices Index in respect of the Base Date. If any error or mistake shall occur in the publication of RPIX (the "**Incorrect Figure**") that has been used at any time in any calculation in Schedule 14 (*Payment Mechanism*) or any amount required to be indexed in accordance with this Agreement which is subsequently duly acknowledged and corrected (the "**Correct Figure**") by the Office of National Statistics or the relevant government department with responsibility for the publication of the Index then the Authority and Project Co agree that any calculations which used the Incorrect Figure for the adjustment of any part or parts of the Annual Service Charge shall be re-calculated based upon the Correct Figure. Any overpayment or underpayment by either party to the other which has occurred as a result of the Incorrect Figures shall be paid or repaid by the party benefiting from any overpayment or underpayment as determined in accordance with this paragraph to the other within ten (10) Business Days of the recalculation using the Correct Figure being agreed or determined. Any dispute in relation to this clause may be referred at the request of either party to the Dispute Resolution Procedure.

17. Reference to a document being in the Agreed Form is a reference to the form of the relevant document [(or where appropriate, the form of the relevant document on disk)] agreed between the parties and for the purpose of identification either (i) initialled or signed by each of them or on their behalf or (ii) entered into on or around the Commencement Date.
18. The operation of the Housing Grants, Construction and Regeneration Act 1996 upon any Project Document shall not affect the rights or obligations of the parties under this Agreement.
19. Words in parenthesis and italics appearing after a Clause reference or a reference to a Schedule are inserted for ease of reference only. If there is any discrepancy between the Clause reference and the words appearing in parenthesis and italics after the Clause reference, the Clause reference shall prevail.
20. Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a prescribed number of Business Days after a stipulated date or event, or "no later than" or "by" a stipulated date or event which is a prescribed number of Business Days after a stipulated date or event, the latest time for performance shall be [5pm] on the last Business Day for performance of the obligations concerned.
21. Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a prescribed number of Business Days before a stipulated date or event, or "no later than" or "by" a stipulated date or event which is a prescribed number of Business Days before a stipulated date or event, the latest time for performance shall be [5pm] on the last Business Day for performance of the obligations concerned.

¹⁷⁶ Insert base month/year

SCHEDULE 2:
COMPLETION DOCUMENTS

SECTION 1

DOCUMENTS TO BE DELIVERED BY PROJECT CO

Unless an original document is specifically requested, a copy (certified by an officer of Project Co as being a true copy) of each of the following documents is to be delivered by Project Co to the Authority in accordance with Clause 2.1 (*Execution and Delivery of Documents*) of this Agreement:

1. The Consents and other authorisations, licences, permits, and approvals listed below:

[♦]¹⁷⁷

2. The Shareholders' Agreement and certification from Project Co that the Shareholders' Agreement has become (or will become, simultaneously with delivery of the other documents referred to in this Schedule 2 (*Completion Documents*)) unconditional in accordance with its terms, accompanied by evidence of the same.
3. The Initial Funding Agreements and certification from Project Co that (1) the Initial Funding Agreements have become unconditional (other than any condition relating to the conditionality of this Agreement) and (2) that all conditions to the availability of funds to Project Co under the Initial Funding Agreements have been satisfied or waived, accompanied by evidence of the same.
4. The Construction Contract, the Service Contract and the Performance Guarantees, executed by the parties to such agreements.
5. An original of the Funders' Direct Agreement, the Independent Tester Contract, the Insurance Proceeds Account Agreement, the Collateral Agreements¹⁷⁸ [the Deed of Reliance] and the brokers letters of undertaking relating to the Insurances referred to in paragraph 11 below in the Agreed Form, executed by the parties to such agreements (other than the Authority [and in the case of the Deed of Reliance the Welsh Ministers]).
6. Extracts from the minutes of the meeting of the board of directors (certified as true and accurate by a director of the relevant company) of each of Project Co, each Shareholder [, Hold Co] and each of the other parties to the documents listed in Section 1 (*Documents to be Delivered by Project Co*) of Schedule 2 (*Completion Documents*), at which resolutions were passed approving the execution, delivery and performance of each relevant document to which such person is expressed to be a party and in each case authorising a named person or persons to execute and deliver each such document and any other documents to be

¹⁷⁷ Project specific items to be listed.

¹⁷⁸ In the event that any Key Sub-Contractors have not been appointed at completion the relevant Key Sub-Contractor Collateral Agreements should be carved out from this drafting.

delivered by it pursuant to it. For the avoidance of doubt, this requirement shall not extend to the Senior Funders.

7. A certificate of a director of each of the companies referred to in paragraph 6 above setting out the names and specimen signatures of the person or persons named in the relevant certified extract.
8. Evidence of the share subscriptions required under the Shareholders' Agreement and other shareholder funding commitments having been made by the Shareholders in Project Co [and Hold Co].
9. Project Co's [and Hold Co's] Certificate of Incorporation and of any Certificate of Incorporation on Change of Name.
10. The Articles of Association of Project Co [and Hold Co].
11. The insurance broker's letter of undertaking, evidence of the insurances required in accordance with Clause 54 (*Insurance*) having been taken out by Project Co and that the policies comply with the requirements of this Agreement, [and an estimate by the insurance broker of the premiums for the Operational Insurances for the first year of the Operational Term.]
12. Two computer disk copies of the Financial Model audited by [♦]¹⁷⁹.
13. Evidence that Project Co has agreed to be treated as the only "client" for the Project for the purposes of the CDM Regulations.
14. Evidence that the Insurance Proceeds Account has been opened.
15. [♦]¹⁸⁰
16. An original duly executed copy of this Agreement.

¹⁷⁹ Insert name of financial adviser

¹⁸⁰ Authority to indicate other project specific documents, including any other project document, planning and property related agreements and any subordinated debt or other financing arrangement, where appropriate.

SECTION 2

DOCUMENTS TO BE DELIVERED BY THE AUTHORITY

The Authority shall deliver to Project Co the following documents:

1. An original copy of the Funders' Direct Agreement, the Collateral Agreements, the Independent Tester Contract, [the Deed of Reliance] the Insurance Proceeds Account Agreement and this Agreement, duly executed by the Authority [and, in the case of the Deed of Reliance the Welsh Ministers].
2. A certified copy of the resolution of the Authority approving the execution, delivery and performance of the documents referred to in paragraph 1 above and in each case authorising a named person or persons to execute and deliver each such document and any documents to be delivered by it pursuant thereto.
3. A certificate of the relevant officer of the Authority setting out the names and specimen signatures of the person or persons named in the resolution of the Authority referred to in paragraph 2 above.
4. [♦]¹⁸¹

¹⁸¹ Authority to list other project specific documents to be included.

SCHEDULE 3: ¹⁸²

KEY PERSONNEL

¹⁸² Include details required in accordance with Clause 8.9.

SCHEDULE 4:
FUNDERS' DIRECT AGREEMENT

THIS AGREEMENT IS MADE ON

AMONG:

- (1) [♦] (the "**Authority**")
- (2) [♦] (the "**Agent**" for the Senior Funders) on behalf of itself and the Senior Funders; and
- (3) [♦] company no [♦]) whose registered office is at [♦] ("**Project Co**")

IT IS AGREED AS FOLLOWS:

1. INTERPRETATIONS

1.1 Definitions

In this Agreement, unless the context otherwise requires:

"Appointed Representative"	means a Representative that has been notified to the Authority pursuant to a Step-In Notice;
"Authority Direct Agreements"	means [♦];
"Authority Project Documents"	means the MIM Project Agreement and all other documents to which the Authority and Project Co are parties pursuant to the MIM Project Agreement;
"Collateral Agreements"	means [♦];
"Collateral Counterparty"	Agreement means one of the parties to the Collateral Agreements (other than the Authority or Project Co);

"Enforcement Event"	means [♦] ¹⁸³ ;
"Event of Default"	shall have the meaning given to it in the [Credit Agreement];
"Event of Insolvency"	means [incorporate appropriate cross references from MIM Project Agreement] (inclusive) of a Project Co Event of Default;
"Final Payment Date"	means [♦];
"MIM Project Agreement"	means an agreement dated [♦] between Project Co and the Authority relating to the [♦];
"Project Co Event of Default"	shall have the meaning given to it in the MIM Project Agreement;
"Representative"	means: <ul style="list-style-type: none"> (a) the Agent, any Senior Funder and/or any of their Affiliates; (b) an administrator, administrative receiver, receiver or receiver and manager of Project Co appointed under the Security Documents; (c) a person directly or indirectly owned or controlled by the Agent and/or any Senior Funders; or (d) any other person approved by the Authority (such approval not to be unreasonably withheld or delayed);
"Required Period"	means subject to Clause 4 (<i>No Liquid Market</i>) the period starting on the date of a Termination Notice and: <ul style="list-style-type: none"> (a) prior to the Payment Commencement Date, ending

¹⁸³ Definition to include not only the occurrence of an event of default under the credit agreement but also the taking of action to enforce repayment.

eighty (80) Business Days later;
and

- (b) on or following the Payment Commencement Date, ending sixty (60) Business Days later;¹⁸⁴

"Security Documents" [list the security documents forming part of the Senior Funding Agreements];

"Senior Debt Discharge Date" means the date on which all amounts owing by Project Co to the Senior Funders under the Senior Funding Agreements have been irrevocably paid in full;

"Senior Funders" means [insert details if not included in MIM Project Agreement];

"Step-In Date" means the date on which the Agent gives the Authority a Step-In Notice;

"Step-In Notice" means the notice given by the Agent to the Authority pursuant to Clause 5 (*Representative*) stating that the Agent is exercising the step-in rights under this Agreement and identifying the Appointed Representative;

"Step-In Period" means the period from the Step-In Date up to and including the earlier of:

- (a) the Step-Out Date;
- (b) the date of any transfer under Clause 8 (*Novation*);
- (c) the date of any termination for breach under Clause 6 (*Step-In Period*); and
- (d) the date of expiry of the MIM Project Agreement;

¹⁸⁴ In schemes where there is phased completion, the move from eighty (80) to sixty (60) Business Days should occur at the payment commencement date for the first phase.

"Step-Out Date"	means the date falling twenty (20) Business Days after the date of a Step-Out Notice;
"Step-Out Notice"	means a notice from the Agent or Appointed Representative to the Authority pursuant to Clause 7 (<i>Step-Out</i>);
"Suitable Substitute Contractor"	means a person approved by the Authority (such approval not to be unreasonably withheld or delayed) as: <ul style="list-style-type: none"> (a) having the legal capacity, power and authority to become a party to and perform the obligations of Project Co under the Authority Project Documents; and (b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub-contracts) which are sufficient to enable it to perform the obligations of Project Co under the Authority Project Documents;
"Termination Notice"	means a notice given by the Authority to the Agent under Clause 3.2 (<i>No Termination Without Notice</i>);
"Unrestricted Assets"	means those [Assets], excluding any revenues or cash balances or claims outstanding at the date of transfer under any Sub-Contract, which are required by the Authority or its nominee or any replacement of Project Co for the purposes of the construction, operation or maintenance of the Facilities following termination, assuming such construction, operation or maintenance is carried out on terms substantially the same as the terms of the MIM Project Agreement.

1.2 Interpretation

- 1.2.1 Capitalised terms defined in the MIM Project Agreement shall have the same meaning in this Agreement.

- 1.2.2 The clause and paragraph headings in this Agreement are for ease of reference only and are not to be taken into account in the construction or interpretation of any provision to which they refer.
- 1.2.3 Unless the context otherwise requires:
- (a) a reference in this Agreement to any clause, sub-clause, paragraph, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, paragraph, schedule or annex of this Agreement;
 - (b) references to this Agreement or to any other such document shall include any permitted variation, amendment or supplements to such document;
 - (c) references to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended or re-enacted;
 - (d) references to a person includes firms and corporations and their successors and permitted assignees or transferees;
 - (e) words in this Agreement importing any one gender include both other genders and may be used interchangeably; and
 - (f) words in this Agreement importing the singular meaning, include the plural meaning and vice versa.

2. **CONSENT TO SECURITY**

- 2.1 The Authority acknowledges notice of, and consents to, the security interest granted over Project Co's rights under the Authority Project Documents effected by Project Co in favour of the Senior Funders under the Security Documents.
- 2.2 The Authority confirms that it has not received notice of any other security interest granted over Project Co's rights under the Authority Project Documents.
- 2.3 Except as specifically provided for in this Agreement the Authority has no obligations (whether express, implied, collateral or otherwise) to the Agent and/or the Senior Funders in connection with this Agreement or the Authority Project Documents or the Project.

- 2.4 The Authority acknowledges notice of and consents to the security interest granted by [Hold Co] in favour of the Agent over the entire issued share capital of Project Co.¹⁸⁵
- 2.5 [For the purposes of Clause 35.3 (*Manner of Payment*) of the MIM Project Agreement, Project Co and the Agent hereby authorise and instruct the Authority (and the Authority agrees) to pay all sums payable to Project Co under the Authority Project Documents to the [account] and Project Co and the Authority agree that upon the occurrence of an Enforcement Event, if so directed in writing by the Agent upon giving reasonable notice¹⁸⁶, the Authority shall pay any sum which it is obliged to pay to Project Co under the Authority Project Documents to a bank account specified by the Agent.]
- 2.6 The Authority shall not be obliged to make any enquiry as to the authority of the Agent in doing any act or entering into any document or making any agreement under or in connection with this Agreement and the Authority shall be entitled to assume that the Agent is duly authorised by each of the Senior Funders to assume the obligations expressed to be assumed by it under this Agreement and to undertake on behalf of each Senior Funder in the terms of this Agreement so as to bind each Senior Funder as if it were a party hereto.
- 2.7 The rights of the Agent under this Agreement shall be extinguished upon the Final Payment Date.

3. NO TERMINATION WITHOUT NOTICE

- 3.1 Subject only to Clause 3.2 (*No Termination Without Notice*), the Authority may serve notice terminating the MIM Project Agreement at any time if it is entitled to do so under the terms of the MIM Project Agreement.
- 3.2 The Authority shall not terminate or serve notice terminating the MIM Project Agreement in respect of a Project Co Event of Default or a Persistent Breach without giving to the Agent:
- 3.2.1 at least the Required Period of prior written notice (a "**Termination Notice**") stating:
- (a) that a Project Co Event of Default or a Persistent Breach has occurred and the proposed Termination Date; and
- (b) the grounds for termination in reasonable detail, and
- 3.2.2 not later than the date falling twenty (20) Business Days after the date of a Termination Notice a notice containing details of any amount owed by Project Co to the Authority, and any other liabilities or obligations of Project

¹⁸⁵ This clause is not mandatory and will only be relevant in cases where a holding company structure is adopted by the sponsors.

¹⁸⁶ The Authority should not be exposed to the possibility that it may be too late to revoke a payment to Project Co which has already been set up, such that the Authority is at risk of having to pay twice.

Co of which the Authority is aware (having made proper enquiry) which are:

- (a) accrued and outstanding at the time of the Termination Notice; and/or
- (b) which will fall due on or prior to the end of the Required Period, under the MIM Project Agreement.

3.3 On becoming aware of an Enforcement Event the Agent shall give notice thereof to the Authority stating that an Enforcement Event has occurred and giving reasonable details thereof (an "**Enforcement Event Notice**") whereupon, subject to payment by the Agent of the Authority's reasonable costs and expenses in respect thereof (being such costs and expenses as would not have been incurred in respect of the provision of such information had an Enforcement Event Notice not been served) the provisions of Clause 3.2.2 shall apply as if references therein to a Termination Notice were to an Enforcement Event Notice.

3.4 The Authority will copy to the Agent any non-payment notice which the Authority serves on Project Co pursuant to Clause 40.1.10 (*Payment*) of the MIM Project Agreement.

4. **NO LIQUID MARKET**

4.1 At any time during the Required Period the Agent may issue a written notice (the "**No Liquid Market Notice**") to the Authority setting out the reasons why the Agent does not believe that a Liquid Market exists.

4.2 On or before the date falling fourteen (14) Business Days after the date on which a No Liquid Market Notice is received by the Authority, the Authority shall notify the Agent of its opinion as to whether or not a Liquid Market exists. Where the Authority believes that a Liquid Market does exist, such notice shall set out the reasons for the Authority's belief. If the parties do not agree whether or not a Liquid Market exists, then either party may refer the dispute to be determined in accordance with Clause 17 (*Disputes*) below.

4.3 If the parties agree or it is determined in accordance with Clause 17 (*Disputes*) below that no Liquid Market exists, the MIM Project Agreement shall automatically terminate and the provisions of Clause 4 (*No Retendering Procedure*) of Section 2 (*Compensation For Project Co Default*) of Schedule 17 (*Compensation on Termination*) to the MIM Project Agreement shall apply.

4.4 If any dispute relating to this Clause 4 (*No Liquid Market*) is determined pursuant to Clause 17 (*Disputes*), the Required Period shall be extended by the period of time spent determining such dispute pursuant to Clause 17 (*Disputes*).

5. **REPRESENTATIVE**

- 5.1 Subject to Clause 5.2 (*Representative*) and without prejudice to the Agent's rights under the Security Documents, the Agent may give the Authority a Step-In Notice at any time:
- 5.1.1 during which a Project Co Event of Default or an Enforcement Event¹⁸⁷ is subsisting (whether or not a Termination Notice has been served); or
 - 5.1.2 during the Required Period.
- 5.2 The Agent shall give the Authority not less than five (5) Business Days prior notice of:
- 5.2.1 its intention to issue a Step-In Notice; and
 - 5.2.2 the identity of the proposed Appointed Representative.
- 5.3 On the issue of the Step-In Notice, the Appointed Representative shall assume jointly with Project Co the rights of Project Co under the Authority Project Documents and thereafter, until the end of the Step-In Period the Authority shall deal with the Appointed Representative and not Project Co.

6. **STEP-IN PERIOD**

- 6.1 Notwithstanding Clause 3 (*No Termination Without Notice*) above, the Authority may terminate the MIM Project Agreement if:
- 6.1.1 any amount referred to in Clause 3.2.2(a) above has not been paid to the Authority on or before the Step-In Date; or
 - 6.1.2 any amount referred to in Clause 3.2.2(b) above has not been paid on or before the last day of the Required Period; or
 - 6.1.3 amounts, of which the Authority was not aware (having made proper enquiry) at the time of the Termination Notice, subsequently become payable and are not discharged on or before the date falling twenty (20) Business Days after the date on which the liability of Project Co for these amounts is notified to the Agent or if later the Step-In Date; or
 - 6.1.4 grounds arise after the Step-In Date in accordance with the terms of the MIM Project Agreement provided that Deductions and/or Warning Notices

¹⁸⁷ If Senior Funders are taking enforcement action, then there is no objection to there being a right of step-in, although in practice funders may not wish to step in if there is no Project Co Event of Default (and therefore no threat of termination of the Template MIM Education PA).

that arose pursuant to Schedule 14 (*Payment Mechanism*) to the MIM Project Agreement prior to the Step-In Date shall not be taken into account during the Step-In Period but such Deductions and/or Warning Notices (to the extent applicable under the terms of the MIM Project Agreement) shall be taken into account after the Step-Out Date.

6.2 The Authority shall not terminate the MIM Project Agreement during the Step-In Period on grounds:

6.2.1 that the Agent has served a Step-In Notice or enforced any Security Document; or

6.2.2 arising prior to the Step-In Date of which the Authority was aware (having made proper enquiry) and whether or not continuing at the Step-In Date unless:

(a) the grounds arose prior to the Actual Completion Date, and the Actual Completion Date does not occur on or before the date twelve (12) months after the date on which the Authority would have been entitled to terminate the MIM Project Agreement for non-completion of the Works under Clause 40.1.2 (*Long Stop*) of the MIM Project Agreement; or

(b) the grounds arose after the Actual Completion Date, and neither the Appointed Representative nor Project Co is using all reasonable endeavours (including implementation of any remedial programme) to remedy any breach of the MIM Project Agreement which:

(i) arose prior to the Step-In Date; and

(ii) is continuing (and capable of remedy); and

(iii) would have entitled the Authority to terminate the MIM Project Agreement; or

(c) the grounds (whenever they first arose) did not give rise to any right to terminate until after the Step-In Notice; or

6.2.3 arising solely in relation to Project Co.

7. STEP-OUT

- 7.1 The Appointed Representative may at any time during the Step-In Period deliver to the Authority a Step-Out Notice which shall specify the Step-Out Date.
- 7.2 On expiry of the Step-In Period:
- 7.2.1 the Appointed Representative will be released from all of its obligations and liabilities to the Authority under the Authority Project Documents arising prior to the end of the Step-In Period and rights of the Appointed Representative against the Authority will be cancelled;¹⁸⁸ and
- 7.2.2 the Authority shall no longer deal with the Appointed Representative and shall deal with Project Co in connection with the Authority Project Documents.
- 7.3 Project Co shall continue to be bound by the terms of the MIM Project Agreement, notwithstanding the occurrence of a Step-In Notice, a Step-In Period, a Step-Out Notice, Step-Out Date, any action by the Agent or Appointed Representative or the Senior Funders and/or any provision of this Agreement.

8. NOVATION

- 8.1 Subject to Clause 8.2 (*Novation*), at any time:
- 8.1.1 after an Enforcement Event has occurred; or
- 8.1.2 during the Step-In Period,
- the Agent may, subject to Clause 8.2 (*Novation*), on not less than twenty (20) Business Days' prior notice to the Authority and any Appointed Representative, procure the transfer of Project Co's rights and liabilities under the Authority Project Documents to a Suitable Substitute Contractor in accordance with the provisions of Clause 8.4 (*Novation*).
- 8.2 The Authority shall notify the Agent as to whether any person to whom the Agent proposes to transfer Project Co's rights and liabilities under the Authority Project Documents is a Suitable Substitute Contractor, on or before the date falling twenty (20) Business Days after the date of receipt from the Agent of all information reasonably required by the Authority to decide whether the proposed transferee is a Suitable Substitute Contractor.

¹⁸⁸ The effect of this provision is that rights and obligations which are outstanding from the Step-in Period are preserved and will be reflected in the amount of compensation payable by the Authority on early termination of the Template MIM Education PA. It is not therefore necessary for the Authority to retain rights of action against the Appointed Representative after the end of the Step-in Period.

- 8.3 The Authority shall not unreasonably withhold or delay its decision on whether the proposed transferee is a Suitable Substitute Contractor and it shall, without limitation, be reasonable for the Authority to withhold its consent if there are unremedied breaches under the Authority Project Documents and there is no rectification plan reasonably acceptable to the Authority in respect of the breaches.
- 8.4 Upon the transfer referred to in Clause 8.1 (*Novation*) becoming effective:
- 8.4.1 Project Co, the Appointed Representative and the Authority will be released from their obligations under the Authority Project Documents to each other (the "**discharged obligations**");
 - 8.4.2 the Suitable Substitute Contractor and the Authority will assume obligations towards each other which differ from the discharged obligations only insofar as they are owed to or assumed by the Suitable Substitute Contractor instead of Project Co or the Appointed Representative;
 - 8.4.3 the rights of Project Co and the Appointed Representative against the Authority under the Authority Project Documents and vice versa (the "**discharged rights**") will be cancelled;
 - 8.4.4 the Suitable Substitute Contractor and the Authority will acquire rights against each other which differ from the discharged rights only insofar as they are exercisable by or against the Suitable Substitute Contractor instead of Project Co or the Appointed Representative;
 - 8.4.5 any then subsisting ground for termination of the MIM Project Agreement by the Authority shall be deemed to have no effect and any subsisting Termination Notice shall be automatically revoked;
 - 8.4.6 the Authority shall enter into a direct agreement with the Suitable Substitute Contractor and a representative of Senior Funders lending to the Suitable Substitute Contractor on substantially the same terms as this Agreement; and
 - 8.4.7 any Deductions and/or Warning Notices that arose pursuant to Schedule 14 (*Payment Mechanism*) [or due to [unavailability]] prior to that time shall, without prejudice to the rights of the Authority to make financial deductions, not be taken into account in determining whether a Project Co Event of Default has occurred.

9. MISCELLANEOUS

- 9.1 The Authority shall at Project Co's expense, take whatever action the Agent, an Appointed Representative or a Suitable Substitute Contractor taking a transfer in accordance with Clause 8.1 (*Novation*) may require for perfecting any transfer or release under Clause 5 (*Representative*) above, Clause 7 (*Step-Out*) above and Clause 8 (*Novation*) above including the execution of any transfer or assignment,

and the giving of any notice, order or direction and the making of any registration which, in each case, the Agent or Appointed Representative or Suitable Substitute Contractor reasonably requires.

- 9.2 The Authority shall not take any action to wind up, dissolve, appoint an administrator, seek an interim order appointee under paragraph 13(1)(d) of Schedule B1 of the Insolvency Act 1986 (as amended) or sanction a voluntary arrangement (or similar) or take any other similar or analogous step in relation to Project Co.
- 9.3 Subject to Clause 16 (*Survivorship*), this Agreement shall remain in effect until the earlier of:
- 9.3.1 the Final Payment Date;
- 9.3.2 the date of termination of the MIM Project Agreement; or
- 9.3.3 the date of transfer of Project Co's rights and liabilities under the Authority Project Documents to a Suitable Substitute Contractor pursuant to Clause 8.1 (*Miscellaneous*) above.
- 9.4 The Agent, in respect of Clauses 9.4.1, 9.4.2 and 9.4.3, and Project Co, in respect of Clause 9.4.4 shall promptly notify the Authority of:
- 9.4.1 any Enforcement Event and any action taken in connection with such Enforcement Event, any decisions to accelerate the maturity of any amounts owing by Project Co to the Senior Funders under the Senior Funding Agreements and/or any decisions to demand repayment;
- 9.4.2 the date referred to in Clause 9.3.1 above on or before the date falling twenty (20) Business Days after its occurrence;
- 9.4.3 the details and amount of any proposed Additional Permitted Borrowing including:
- (a) the circumstances giving rise to it and reasons for it; and
- (b) the terms on which it will be borrowed;
- 9.4.4 on the first Business Day of each calendar month during which any Additional Permitted Borrowing is, or may be, subsisting, the amount outstanding under the Senior Funding Agreements (as the same may be amended (whether or not with the approval of the Authority)) and, to the extent it is aware (having made reasonable and proper enquiry):
- (a) the amount of any [Distribution] made by Project Co; and

(b) the amount of any credit balance on any account of Project Co.¹⁸⁹

9.5 Project Co joins in this Agreement to acknowledge and consent to the arrangements set out and agrees not knowingly to do or omit to do anything that may prevent any party from enforcing its rights under this Agreement.

9.6 For the avoidance of doubt, if there is any conflict or inconsistency between the provisions of this Agreement and the MIM Project Agreement, the provisions of this Agreement shall prevail.

9.7 Notwithstanding any provision in the Collateral Agreements to the contrary, the Authority agrees that, subject to Clauses 9.8 and 9.9 (*Miscellaneous*), it will not, in respect of any particular Collateral Agreement, exercise or seek to exercise any of its step-in rights or other rights (other than design, Intellectual Property or similar rights) under such Collateral Agreement until the earliest of:

9.7.1 the Senior Debt Discharge Date; or

9.7.2 the date on which the Agent has given its written consent to such exercise; or

9.7.3 the time when in respect of any such Collateral Agreement either:

(a) the Senior Funders have failed to exercise any corresponding right to such Collateral Agreement under their own Security Documents and the time for exercising such right has ended in accordance with the terms thereof; or

(b) the Agent has confirmed in writing to the Authority (following any request from the Authority for such confirmation, to which the Agent shall be obliged to respond promptly) that it does not intend to exercise any of its rights under the relevant Security Document or that it has no further claim thereunder; or

(c) the Senior Funders have stepped in to or otherwise directly or indirectly taken control over the rights of Project Co under the relevant Sub-Contract (in accordance with their rights under their Security Documents) and then stepped out from, or otherwise relinquished control of such rights under or in connection with such Sub-Contract; or

9.7.4 the date falling [♦] months after the date on which the MIM Project Agreement has been terminated in accordance with its terms and the terms of this Agreement.

¹⁸⁹Drafting assumes traditional bank debt.

- 9.8 In addition to its rights under Clause 9.7 (*Miscellaneous*), where the MIM Project Agreement has not been terminated but a counterparty has a right to terminate its Sub-Contract for breach by Project Co of the terms of such Sub-Contract the Authority may pay directly, or undertake to make a payment directly to the counterparty concerned, amounts properly due and payable pursuant to the Sub-Contract and may set off any such sums against any payments payable by the Authority to Project Co under the MIM Project Agreement so as to satisfy them pro tanto, provided always that the Authority shall not exercise its rights under this Clause 9.8 (*Miscellaneous*) in respect of any particular Sub-Contract in circumstances where the Senior Funders have stepped in to or otherwise directly or indirectly taken control over the relevant Sub-Contract and have not stepped out of it or otherwise relinquished such control unless the Authority reasonably believes that the Senior Funders are not seeking to preserve continuity of service or build obligation (as relevant) under the relevant Sub-Contract with reasonable diligence (or under any equivalent service or build obligation under the Sub-Contract).
- 9.9 In addition to its rights under Clause 9.7 (*Miscellaneous*), where the MIM Project Agreement has been terminated, the Authority shall from the Termination Date be able to exercise any of its step-in rights or other rights under or in respect of any of the Collateral Agreements; however notwithstanding the terms of the Collateral Agreements or any other provisions of this Clause 9.9 (*Miscellaneous*), each of the relevant Sub-Contractors (and any guarantors thereof as relevant) shall remain responsible, and be liable, to Project Co in respect of all costs, claims, damages, losses and liabilities which shall have arisen out of or in connection with the relevant Sub-Contracts in respect of the period prior to the Termination Date in relation to which the Agent acting on behalf of Project Co and the Senior Funders shall retain the benefit of all and any rights to all such costs, claims, damages, losses and liabilities.
- 9.10 Except in accordance with the provisions of Clauses 9.7 to 9.9 (*Miscellaneous*) (inclusive) the Authority shall not, prior to the Senior Debt Discharge Date:
- 9.10.1 claim, recover, retain or receive (or seek to claim, recover, retain or receive) any amount under the Collateral Agreements;
- 9.10.2 take any action to wind-up, dissolve, appoint an administrator, seek an interim order appointee (under paragraph 13(1)(d) of Schedule B1 of the Insolvency Act 1986 (as amended)) or sanction a voluntary arrangement (or similar) or take any other similar analogous step in relation to any Sub-Contractors; or
- 9.10.3 save with the prior written consent of the Agent, compete on grounds (whether in whole or in part) relating to the Project (by virtue of a claim under any of the Collateral Agreements, the MIM Project Agreement or any other Project Document or otherwise) with the rights of the Senior Funders on any formal insolvency of any Sub-Contractor or Project Co, nor claim to be subrogated to the rights of any Senior Funders.
- 9.11 The Authority agrees and undertakes that if it receives any amount in contravention of the provisions of Clause 9.10 (*Miscellaneous*) above it will promptly turn the same over to the Agent and pending such payment hold the same on trust for the Agent and the Senior Funders.

9.12 Notwithstanding the terms of the MIM Project Agreement and Security Documents, the Agent agrees that the Authority may exercise its rights to have transferred to it or its nominee any Unrestricted Assets following the Termination Date and the Agent will not exercise or seek to exercise any enforcement rights and shall on or before the date any Unrestricted Assets are transferred to the Authority or its nominee, as the case may be, release its security over them.

9.13 Notwithstanding the terms of any Senior Funding Agreements, the parties agree and shall, to the extent it is within their power, direct that all insurance proceeds receivable or received by Project Co under the insurances referred to in Clause 54 (*Insurance*) of the MIM Project Agreement shall be paid directly into the Insurance Proceeds Account and applied in accordance with the MIM Project Agreement.

10. **ASSIGNMENT**

10.1 No party to this Agreement may assign or transfer any part of its rights or obligations under this Agreement save as provided in this Clause 10.1 (*Assignment*).

10.2 The Agent may assign, novate or transfer its rights and obligations under this Agreement and in respect of the Security Documents to a successor Agent in accordance with the Senior Funding Agreements without the consent of the Authority and any such assignment novation or transfer shall not constitute a Change of Control for the purposes of Clause 59.6 (*Ownership Information and Changes in Control*) of the MIM Project Agreement. The Authority also agrees that any enforcement by the Agent of the security referred to in Clause 2.4 (*Consent To Security*) above (and any subsequent transfer of share capital in Project Co) following an Enforcement Event shall not constitute a Project Co Event of Default under Clause 40.1.6 (*Change in Control*) of the MIM Project Agreement.

10.3 Any Senior Funder may assign or transfer its rights under the [Senior Funding Agreements] in accordance with the terms of the [Senior Funding Agreements].

10.4 The Authority shall transfer its rights and obligations under this Agreement to any permitted assignee of its interest in the MIM Project Agreement and the Agent and the Senior Funders shall co-operate with the Authority in completing the formalities of any transfer or assignment including by executing any additional documents as may be required by the Authority.

10.5 If Clause 10.2 (*Assignment*) applies in relation to the Agent, the Authority shall enter into a new direct Agreement with the new Agent on substantially the same terms as this Agreement.

11. **ENTIRE AGREEMENT**

Unless otherwise stated in this Agreement, this Agreement and the Authority Project Documents constitutes the entire agreement between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement. No party has relied on any representation except as expressly set out in this Agreement.

12. **WAIVER**

12.1 The failure of any party to exercise any contractual right or remedy shall not constitute a waiver thereof until communication in writing under Clause 12.2 (*Waiver*).

12.2 No waiver shall be effective unless it is communicated in writing to the other party.

12.3 A waiver of any right or remedy arising from a breach of contract shall not constitute a waiver of any right or remedy arising from any other breach of this Agreement.

13. **SEVERABILITY**

If any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality or enforceability of the remaining parts of this Agreement.

14. **CONFIDENTIALITY**

The Agent shall be bound to comply with the obligations on the part of Project Co contained in Clause 62 (*Confidentiality*) of the MIM Project Agreement in relation to all information and matters obtained from any other party under or in connection with the Project.

15. **NOTICES CONSENTS AND APPROVALS**

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

15.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

15.2.1 if delivered by hand at the time of delivery; or

15.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting

provided that, in either case, a notice or other communication received on a non-Business Day or after 5pm in the place of receipt shall be deemed to be received at 9am on the next following Business Day in such place; or

15.2.3 notices given by email shall be deemed to have been received:

- (a) at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the email address specified in Clauses 15.3 to 15.5 (*Notices Consents And Approvals*)), if sent on a Business Day between the hours of 9am and 4pm; or
- (b) by 11am on the next following Business Day, if the email enters the intended recipient's relevant Information System after 4pm, on a Business Day but before 9am on that next following Business Day,

and provided no error message indicating failure has been received by the sender and provided that within twenty-four (24) hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by hand to the intended recipient in accordance with the provisions of this Clause 15 (*Notices Consents And Approvals*) and where such notice is addressed to the Authority, copied to [♦¹⁹⁰].

15.3 Any notice to be given to the Authority should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing by the Authority.

15.4 Any notice to be given to the Agent should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing by the Agent.

15.5 Any notice to be given to Project Co should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing by Project Co.

15.6 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.

16. SURVIVORSHIP

Notwithstanding the provisions of Clause 9.3.2, Clauses 9.7 to 9.13 (inclusive) (*Miscellaneous*), 11, 13, 14, 15, 17, 18 and 19 shall survive termination of this Agreement.

¹⁹⁰ Insert Welsh Government details.

17. DISPUTES

- 17.1 Any dispute arising in relation to any aspect of this Agreement shall be resolved in accordance with this Clause 17 (*Disputes*).
- 17.2 If a dispute arises in relation to any aspect of this Agreement, the Parties shall consult in good faith in an attempt to come to an agreement in relation to the disputed matter.
- 17.3 Without prejudice to Clause 17.2, either of the Authority or the Agent may give the other notice of its intention to refer the dispute to an Expert for determination ("**Notice of Expert Determination**"). The Notice of Expert Determination shall include a brief statement of the issue to be referred and the redress sought.
- 17.4 The Authority and the Agent shall attempt to agree the identity of the Expert within five (5) Business Days of the date of issue of the Notice of Expert Determination. In the event that the Authority and the Agent cannot agree the identity of the Expert within such period, either of them may request the President for the time being of the Chartered Institute of Arbitrators to nominate a suitable individual, and such individual shall be the Expert for the purposes of this Clause 17 (*Dispute Resolution*). The Expert shall (unless otherwise agreed) be an independent individual with knowledge of and experience in project financed projects in the education sector. The Party giving the Notice of Expert Determination ("**Referring Party**") shall send a copy of the Notice of Expert Determination to the Expert as soon as he has been appointed.
- 17.5 Within five (5) Business Days of the service of the Notice of Expert Determination, or as soon thereafter as the Expert is appointed, the Referring Party shall serve its statement of case ("**Referral Notice**") on the Expert and the other Party ("**Responding Party**"). The Referral Notice shall include a copy of this Agreement, details of the circumstances giving rise to the dispute as set out in the Notice of Expert Determination, the reasons why the Referring Party is entitled to the redress sought, and the evidence upon which it relies.
- 17.6 The Responding Party shall serve its statement of case ("**Response**") on the Expert and the Referring Party within a period of time to be directed by the Expert. The Response shall include any arguments in response to the Referral Notice and any additional evidence on which the Responding Party relies.
- 17.7 The Expert shall have absolute discretion as to how to conduct resolution of the dispute, including whether a meeting is necessary. He shall establish the procedure and timetable subject to any limitation within this Agreement. He shall act fairly and impartially and may take the initiative in ascertaining the facts and the law. The Parties shall comply with any request or direction of the Expert in relation to resolution of the dispute.
- 17.8 The Expert shall provide to the Authority and the Agent his written decision on the dispute within ten (10) Business Days after the date of receipt of the Referral Notice (or such other period as the Parties may agree). The Expert shall state the reasons for his decision. Unless and until revised, cancelled or varied by the courts of

England and Wales, the Expert's decision shall be binding on all Parties who shall forthwith give effect to the decision.

- 17.9 The Expert's costs shall be borne as the Expert shall specify or, in default, equally by the Authority and the Agent. Each Party shall bear its own costs arising out of the referral, including legal costs and the costs and expenses of any witnesses.
- 17.10 All information, data or documentation disclosed or delivered by a Party to the Expert in consequence of or in connection with his appointment as Expert shall be treated as confidential. The Expert shall not disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the Party disclosing or delivering the same and all copies shall be returned to such Party on completion of the Expert's work.
- 17.11 Either of the Authority or the Agent may within ninety (90) days of receipt of the Expert's decision give notice to the other of its intention to refer the dispute to the courts of England and Wales for final determination.
- 17.12 The Parties shall continue to comply with, observe and perform all their obligations hereunder regardless of the nature of the dispute and notwithstanding the referral of the dispute for resolution under this Clause 17 (*Dispute Resolution*) and shall give effect forthwith to every decision of the Expert and the courts delivered under this Clause 17 (*Dispute Resolution*).

18. COUNTERPARTS

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

19. GOVERNING LAW

- 19.1 Subject to Clause 17 (*Disputes*) above, this Agreement is governed by the laws of England and Wales.
- 19.2 The parties agree that the courts of England and Wales shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of those courts.

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

SCHEDULE 5:

LAND MATTERS

SECTION 1¹⁹¹

TITLE CONDITIONS

1. [All title conditions, rights, real burdens, covenants and other rights identified in Appendix 1 of this Schedule 5 (*Land Matters*).
2. All third party rights and rights of way in respect of the Site[s] which were or should have been apparent from a visual inspection of the Site[s] or which were or should have been apparent from the Site investigations pursuant to Clause 7.3 (*Project Co Investigation*) and Clause 10 (*The Site[s]*).
3. All conditions contained in any agreements entered into pursuant to [Clause 9.6 (*Extent of Rights*) and Clause 10.15 (*Utilities*)].¹⁹²

¹⁹¹ This should include any restrictions on the use of any part of the Site(s) following title due diligence and must be completed in advance of the Authority issuing a New Project Request under the SPA.

Un-disclosed title issues will constitute an Excusing Cause, and may constitute a Delay Event and/or a Compensation Event so the Authority must ensure adequate title diligence and appropriate disclosure through Section 1 of Schedule 5, on a value for money basis. The Authority will also need to be clear that, for any title compensation event proposed during the Project Approval Process that, (i) the rights subsist (ii) the rights would, if enforced, affect the Works (iii) Project Co could not reasonably have taken account of the problems in designing its solution and (iv) that insurance cover was not appropriate or available.

¹⁹² To be reviewed on a project specific basis.

SECTION 2

RESERVED RIGHTS¹⁹³

In relation to the [*describe Site[s]*], there are excepted and reserved the following rights to the Authority[, Authority Parties] and/or the Authority's Representative:

1. [◆],¹⁹⁴
2. [◆],

and such rights as set out under paragraphs [◆] are subject always to the terms of the Joint Operating Protocol.

¹⁹³ This should include any rights over any part of the Site(s) which have been or are being reserved for the Authority and/or any third party e.g. rights of access, wayleaves and must be completed in advance of the Authority issuing a New Project Request under the SPA.

Un-disclosed reserved rights will constitute an Excusing Cause and may constitute, a Delay Event and/or a Compensation Event so the Authority must ensure adequate title diligence and appropriate disclosure through Section 2 of Schedule 5, on a value for money basis. The Authority will also need to be clear that, for any title compensation event proposed by Project Co/ WEPCo, (i) the rights subsist (ii) the rights would, if enforced, affect the Works (iii) Project Co/ WEPCo could not reasonably have taken account of the problems in designing its solution and (iv) insurance cover was not appropriate or available.

¹⁹⁴ To be completed on a project specific basis.

SECTION 3

ANCILLARY RIGHTS¹⁹⁵

Ancillary Rights means:

- (a) a non-exclusive licence to enter and remain upon those parts of the Site[s] that Project Co and/or any Project Co Party requires access to in order to carry out the Works or provide the Services;
- (b) such rights of access to and egress from the Site[s] including those highlighted [◆] on the Site Plans, as are necessary for Project Co and any Project Co Party to perform their obligations and exercise their rights under this Agreement and in particular for the purposes of implementing the Works and providing the Services, provided that such rights may be varied by the Authority and such variation will be deemed to be a Medium Value Change;
- (c) rights of free and uninterrupted passage and running of water, soil, gas, electricity, telephone and other services within the Site[s], including those highlighted [◆] on the Site Plans, provided that such rights of passage may be varied by the Authority to such alternative routes as the Authority may reasonably specify from time to time; and
- (d) the right where necessary to inspect, repair, maintain or renew the Utilities within the Site[s] and the right (at the cost of Project Co) to connect into the Utilities within the Site[s] [or the [Utility Work Areas]] and to construct such new Utilities as may from time to time be necessary in connection with the Project Operations, provided that the prior written consent of the Authority is obtained (such consent not to be unreasonably withheld or delayed),

provided that:

- (i) such rights are subject to the Title Conditions, Reserved Rights and the Authority's rights under this Agreement; and
- (ii) without prejudice to paragraph (i) above, the rights shall not in any circumstances entitle Project Co or any Project Co Party to exclusive occupancy or exclusive possession of any part of the Site[s], save as may be required to the areas shaded [◆] on the Site Plans, for the periods shown on such plans (which, for the avoidance of doubt, shall not in any case extend beyond the [relevant] Actual Completion Date [or, in respect of the Post Completion Works (only) the [relevant] Actual Post Completion Works Date]),

and such rights as set out under paragraphs [◆] above are subject always to the terms of the Joint Operating Protocol.

¹⁹⁵ Development of plans will be project specific, albeit the default position should be that Project Co/the Contractor is entitled to exclusive access to construction areas up to the point where the Authority starts its commissioning activity in line with the Final Commissioning Programme.

**APPENDIX 1:
TITLE CONDITIONS**

1. [♦]; ¹⁹⁶

¹⁹⁶ To be completed on a project specific basis.

**APPENDIX 2:
SITE PLAN[S]¹⁹⁷**

¹⁹⁷ To be completed on a project specific basis.

APPENDIX 3:
[PHASE PLANS]¹⁹⁸

¹⁹⁸ To be completed on a project specific basis.

SCHEDULE 6: ¹⁹⁹
CONSTRUCTION MATTERS

SECTION 1

PLANNING/CONSENTS

¹⁹⁹ Refer to comments on Clause 11

SECTION 2

SAFETY DURING CONSTRUCTION

1. In this Section 2 (*Safety During Construction*) of Schedule 6 (*Construction Matters*) and wherever used elsewhere in this Agreement:
 - 1.1 "**CDM Regulations**" means the Construction (Design and Management) Regulations 2015 (and "**CDM Regulation**" shall be construed accordingly); and
 - 1.2 "**the client**", "**the Principal Designer**" and "**the Executive**" shall have the same meanings as are ascribed to them in the CDM Regulations.
2. In so far as not already done, within five (5) Business Days of the date of execution of this Agreement, Project Co shall make and serve on the Authority a notice in writing pursuant to and in the form (if any) required by CDM Regulation 4(8) that Project Co agrees to be treated as the only client in relation to the Works for the purposes of the CDM Regulations. Notwithstanding Project Co agreeing in writing to be treated as the only client pursuant to CDM Regulation 4(8), the Authority will comply with its remaining duties as set out in CDM Regulation 4(8). During the Project Term, Project Co shall not, and shall not seek to, withdraw, terminate or in any manner derogate from its declaration that it will act as, and its acceptance of its responsibilities as, the client in relation to the Works for all the purposes of the CDM Regulations. The Authority will endorse its consent, in writing, to such election on the said notice and return it to Project Co within five (5) Business Days of receipt.
3. Project Co warrants that it has the skills, knowledge, organisational capability and experience to, and shall, observe, perform and discharge or shall procure the observance, performance and discharge of:
 - 3.1 all the obligations, requirements and duties of the client arising under the CDM Regulations in connection with the Works and, where necessary, the provision of the Services; and
 - 3.2 all obligations incumbent on the client under any code of practice or guidance for the time being approved by the Health and Safety Commission pursuant to the Health and Safety at Work etc Act 1974 issued in connection with the CDM Regulations.
4. Project Co shall provide to the Authority's Representative:
 - 4.1 in a substantially complete form on the Actual Completion Date [for each Facility]; and
 - 4.2 in final form within [◆] of the Actual Completion Date [for each Facility],

one (1) electronic copy (on computer disk, tape or other format) of the revised and updated health and safety file and construction phase plan (current at that date) prepared by the

Principal Designer pursuant to the CDM Regulations in relation to the Works and the Services and electronic or paper copies of every amendment or update made to such file during the Project Term.

SECTION 3

AUTHORITY'S CONSTRUCTION REQUIREMENTS

SECTION 4

PROJECT CO'S PROPOSALS

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SECTION 5

REVIEWABLE DESIGN DATA²⁰⁰

RDD Item	Definition
General Arrangements / Elevations	
Visitor, Student & Pastoral Reception Area Details (to the extent they are part of Project Co's Proposals)	1:20 scale drawing reception desk layout - plan and elevations. Confirm location of any power, data and services on desk.
Drawing	Review of (but not selection of) external render / cladding panels colour prior to submission to planners
Ironmongery	
Schedule	Ironmongery sets defined, including a full ironmongery breakdown, security control measures and door references identified.
Lock Suiting	Confirm locking strategy for all keyed locks; master, sub-master, slaves and pass keys.
Window Ironmongery	Provide samples only of proposed Ironmongery
Signage	
Signage Schedule	Way finding and room signage schedule. Confirmation of front type size, font type, signage size, room name and number.
Signage Selection	Samples of sign finishes. External building sign material/colour.

²⁰⁰ The RDD list has been prepared particularly with school facilities in mind. The Authority should consider where project specific tailoring may be necessary.

RDD Item	Definition
Manifestation	Dots, squares, piano bars only for Building Regulations compliance. [Authority]/ [School Entity] specific logos can be included to a single location within the school (logo artwork provided by school).
Graphics/Artwork (particularly in primary schools)	Type, extent and location to be agreed. Vinyl transfers.
Equipment	
Equipment	Group 1 – Colours only where applicable Bleacher Seating from standard range only
Schedule of Group 2 and 3 Legacy Equipment	Group 2 – Confirmation of whether Group 2.1 Equipment . or 2.2 Equipment and Group 3.1 Equipment or Group 3.2 Equipment only post validation survey.
Toilet Cubicles	Sample of lock type only
M&E	
CCTV Strategy /Cashless catering	Location of legacy camera's and cashless catering pay points only
Fire Strategy	Review of agreed strategy only following input from Building Control.
Building Access/Egress Control & Strategy	Review of agreed strategy only following input from Building Control.
External Lighting	Layout only
External access control to entrance gates	Proposals for access/security to main gate for deliveries only to the extent required by Project Co's Proposals
Water Fountains - Drawing	Location only

RDD Item	Definition
Finishes	
Wall Finishes (including Stairs /Landing)	<p>Samples for Paint types.</p> <p>Colours only.</p> <p>But including any tiling for splash backs etc</p> <p>Laminate panelling in kitchen</p>
WC toilet cubicles, doors and back panels	Colours only
Floor Finishes	<p>Samples for all floor finishes (including mat wells and barrier carpet/matting)</p> <p>Colours. only</p>
Acoustic Treatment	Colours only
Roller Blinds	<p>Sample to be provided</p> <p>Colours only 1 per Facility (where no impact on daylight requirements)</p>
Landscaping	
External finishes	Schedule of external materials (to the extent they are not dictated by planning authorities)
External Planting	Schedule of plants
Cycle Storage	Specification / product details

SECTION 6

AREA DATA SHEETS

SECTION 7

THERMAL AND ENERGY EFFICIENCY TESTING PROCEDURE

SECTION 8

QUALITY PLANS (DESIGN AND CONSTRUCTION)

**SCHEDULE 7:
THE PROGRAMME**

[SECTION 1
PROGRAMME]

[SECTION 2

Phasing]

[Programme Dates]²⁰¹

Facility Name	[ICT Handover Date]	Completion Date	[Post Completion Works Date]

²⁰¹ Sample style. Adjustment will be required to reflect any further phasing.

**SCHEDULE 8:
REVIEW PROCEDURE**

1. Review

1.1 The provisions of this Schedule 8 (*Review Procedure*) shall apply whenever any item, document or course of action is required to be reviewed, approved or otherwise processed in accordance with Schedule 8 (*Review Procedure*).

1.2 Subject to [Clause 12.5.1 (*Authority Design Review*) and]²⁰² any express provision of this Agreement, the manner, form and timing of any submission to be made by Project Co to the Authority's Representative for review under this Schedule 8 (*Review Procedure*) shall be a matter for Project Co to determine. Each submission under this Schedule 8 (*Review Procedure*) shall be accompanied by a copy of the proposed document to be reviewed (including, where applicable, any Reviewable Design Data) or a statement of the proposed course of action (the entire contents of a submission being referred to in this Schedule 8 (*Review Procedure*) as a "**Submitted Item**"). In relation to each Submitted Item, the following procedure shall apply:

1.2.1 as soon as possible and, if the Submitted Item comprises²⁰³:

- (a) an item of Reviewable Design Data;
- (b) a revised Programme submitted pursuant to Clause 14 (*Programme and Dates for Completion*); or
- (c) a document or proposed course of action submitted in the case of (an emergency),

within [♦] Business Days of the date of receipt of a submission (or re-submission, as the case may be) of the Submitted Item to the Authority's Representative (or such other period as the parties may agree), the Authority's Representative shall return one (1) copy of the relevant Submitted Item to Project Co endorsed "no comment" or (subject to and in accordance with paragraph 3 (*Grounds of Objection*)) "comments" as appropriate; and

1.2.2 subject to paragraph 1.4, if the Authority's Representative fails to return a copy of any Submitted Item (including any re-submitted Submitted Item) duly endorsed in accordance with paragraph 1.2.1, within [♦] Business Days (or within such other period as the parties may agree in writing) of the date of its submission to the Authority's Representative, then the Authority's Representative shall be deemed to have returned the

²⁰² Please refer to comment at Clause 12.5.1

²⁰³ The Authority should include any other items which are relevant on a project specific basis.

Submitted Item to Project Co endorsed "no comment" (and, in the case of Reviewable Design Data, endorsed "Level A - no comment"); and

1.2.3 in relation to the aspects of each Finish identified in the table below:

- (a) Project Co shall submit to the Authority a range or selection of finishes ("**Range of Finishes**") no later than the relevant Finishes Proposal Date;
- (b) the Authority's Representative shall by the relevant Finishes Selection Date notify Project Co of its selection for the relevant Finish; and
- (c) if no selection of a Finish has been made by the Authority's Representative and notified to Project Co in accordance with paragraph 1.2.3(b) by the relevant Finish Selection Date, Project Co shall be entitled to make a selection from the Range of Finishes submitted in accordance with paragraph 1.2.3(a). After the relevant Finish Selection Date, should the Authority wish to vary any selection previously made by Project Co or by the Authority, such variation shall be effected as an Authority Change in accordance with Schedule 16 (*Change Protocol*).

Table of Finishes²⁰⁴

Finishes	Aspects	Finishes Proposal Date	Finishes Selection Date
External finishes (roof, windows and external elevations)	colour and material		
wall finishes	colour		
floor finishes	colour and type		
ironmongery	style and colour		
tapware	style and content		
main public light fittings	specification and style		
external signage	size, style, colour and location		
internal signage	size, style, colour and location		
light switches and sockets	style and colour		

²⁰⁴ This is project specific. This table is intended to be for guidance only.

Finishes	Aspects	Finishes Proposal Date	Finishes Selection Date
light fittings	style and colour		
hard landscaping	colour and material		
[others to be inserted on a project specific basis by the Authority]			

- 1.3 If the Authority's Representative raises comments on any Submitted Item in accordance with paragraph 3 (*Grounds of Objection*) he shall state the ground upon which such comments are based and the evidence or other information necessary to substantiate that ground. To the extent that the Authority's Representative comments on a Submitted Item other than on the basis set out in this Schedule 8 (*Review Procedure*), or fails to comply with the provisions of this paragraph, Project Co may, in its discretion, either:
- 1.3.1 request written clarification of the basis for such comments and, if clarification is not received within [♦] Business Days of such request by Project Co, refer the matter for determination in accordance with Schedule 20 (*Dispute Resolution Procedure*); or
 - 1.3.2 in the case of a Submitted Item comprising Reviewable Design Data only, at its own risk, and without prejudice to Clause 12 (*The Design Construction and Commissioning Process*), proceed with further design or construction disregarding such comments pending the outcome of any reference to the Dispute Resolution Procedure that may be made by either party.
- 1.4 In the case of any Submitted Item of the type referred to in paragraph 3.10, a failure by the Authority's Representative to endorse and return such Submitted Item within the period specified in paragraph 1.2.2 shall be deemed to constitute an objection by the Authority's Representative to such Submitted Item. If the parties fail to agree the form and content of such Submitted Item, within [♦] Business Days following the expiry of the period specified in paragraph 1.2.2, the matter shall be determined in accordance with Schedule 20 (*Dispute Resolution Procedure*)²⁰⁵.
- 1.5 The parties shall comply with the RDD Meeting Protocol²⁰⁶.

²⁰⁵ The Authority should refer to any other items which are relevant on a project specific basis.

²⁰⁶ The RDD Meeting Protocol is to be prepared on a project specific basis to tie in the with procedure for Reviewable Design Data under this Schedule 8. A two stage meeting process should be included which includes submission by Project Co of different levels of information. On schools projects it is envisaged that School Entities (as well as the relevant local authority) are involved in some of the meetings. After the final meeting in respect of an item of Reviewable Design Data Project Co will complete a proforma form, setting out the details of the item together with relevant information and deliverables for approval on behalf of the relevant Authority.

2. **Further Information**

Project Co shall submit any further or other information, data and documents that the Authority's Representative reasonably requires in order to determine whether he has a basis for raising comments or making objections to any Submitted Item in accordance with this Schedule 8 (*Review Procedure*). If Project Co does not submit any such information, data and documents, the Authority's Representative shall be entitled to:

- 2.1 comment on the Submitted Item on the basis of the information, data and documents which have been provided; or
- 2.2 object to the Submitted Item on the grounds that insufficient information, data and documents have been provided to enable the Authority's Representative to determine whether he has a legitimate basis for commenting or objecting in accordance with this Schedule 8 (*Review Procedure*).

3. **Grounds of Objection²⁰⁷**

The expression "raise comments" in this paragraph shall be construed to mean "raise comments or make objections" unless the contrary appears from the context. The Authority's Representative may raise comments in relation to any Submitted Item on the grounds set out in paragraph 2 (*Further Information*) above or on the ground that the Submitted Item would (on the balance of probabilities) breach any Law but otherwise may raise comments in relation to a Submitted Item only as follows:

- 3.1 in relation to any Submitted Item if:
 - 3.1.1 Project Co's ability to perform its obligations under this Agreement would (on the balance of probabilities) be adversely affected by the implementation of the Submitted Item; or
 - 3.1.2 the implementation of the Submitted Item would (on the balance of probabilities) adversely affect any right of the Authority under this Agreement or its ability to enforce any such right;
- 3.2 in relation to any Submitted Item submitted pursuant to Clause 4.1 (*Ancillary Documents*) if:
 - 3.2.1 the Authority's ability to perform its obligations under this Agreement would be adversely affected by the proposed course of action;

²⁰⁷ This drafting has been included as a framework for guidance and should be amended as appropriate on a project specific basis, including, in particular, to take account of how commissioning of the Facilities is to be carried out (where relevant) and any other matters that are to be left to be agreed pursuant to the Review Procedure (such as proposals for self-monitoring systems etc).

- 3.2.2 the Authority's ability to provide the relevant Authority Services or to carry out any of its statutory functions would (on the balance of probabilities) be adversely affected by the proposed course of action;
 - 3.2.3 the proposed course of action would be likely to result in an increase to the Authority's liabilities or potential or contingent liabilities under this Agreement;
 - 3.2.4 the proposed course of action would adversely affect any right of the Authority under this Agreement or its ability to enforce any such right; or
 - 3.2.5 Project Co's ability to perform its obligations under this Agreement would be materially adversely affected by the proposed course of action;
- 3.3 in relation to Reviewable Design Data submitted pursuant to Clause 12.5 (*Authority Design Review*):
- 3.3.1 which does not comprise 1:50 scale room layout drawings the Authority's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*) on the ground that the Submitted Item :
 - (a) is not in accordance with the Authority's Construction Requirements;
 - (b) is not in accordance with Project Co's Proposals; and/or
 - (c) it would require the Authority [or a School Entity] to make changes to the ICT Services Contract;
 - 3.3.2 which comprises a 1:50 scale [Room Layout Drawing] in respect of which there is a corresponding generic 1:50 scale [Room Layout Drawing] for the relevant room type (which has previously been reviewed and commented upon by the Authority's Representative in accordance with this Schedule 8 (*Review Procedure*)), the Authority's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*), on the ground that the Submitted Item does not conform to the generic 1:50 scale Room Layout Drawing; and
 - 3.3.3 which comprises a 1:50 scale [Room Layout Drawing] in respect of which there is no corresponding generic 1:50 scale Room [Layout Drawing] for the relevant room type (which has previously been reviewed and commented upon by the Authority's Representative in accordance with this Schedule 8 (*Review Procedure*)), the Authority's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*), on the grounds that the Submitted Item is not in accordance with the Authority's Construction Requirements, Project Co's Proposals [and/ or it would require the Authority [or a School Entity] to make changes to the ICT Services Contract];

- 3.4 in relation to a proposal to amend Project Co's Proposals and rectify (part of) the Works submitted pursuant to Clause 12.7 (*Rectification of Project Co's Proposals*), on the grounds that, following the amendment and rectification proposed:
- 3.4.1 Project Co's Proposals would not satisfy the Authority's Construction Requirements;
 - 3.4.2 the structural, mechanical and/or electrical performance of the Facilities would not be of an equivalent standard of performance to that set out in Project Co's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made); [and/or
 - 3.4.3 the Authority [or a School Entity] would require to make a changes to the ICT Services Contract;]
- 3.5 in relation to Finishes:
- 3.5.1 which have the effect of making a selection from the Range of Finishes (or any alternative range or selection of Finishes submitted by Project Co to the Authority's Representative) pursuant to Clause 12.5.1; or
 - 3.5.2 where the Submitted Item does not comply with the relevant provisions of the Authority's Construction Requirements and/or Project Co's Proposals;
- 3.6 in relation to the submission of any revised Programme pursuant to Clause 14 (*Programme and Dates for Completion*) on the ground that the revised Programme:
- 3.6.1 would not (on the balance of probabilities) enable:
 - (a) the [Main] Works [in respect of a Facility] to be completed by the [relevant] Completion Date;
 - (b) the [relevant] Post Completion Works to be completed by the [relevant] Post Completion Works Date; [and/or
 - (c) the ICT Handover Requirements [in respect of a Facility] to be achieved by the ICT Handover Date;]
 - 3.6.2 would render the Authority unable to comply with the Decant Protocol without material additional expense or disruption;
 - 3.6.3 would materially increase the disruption to the provision of Educational Services by the Authority;

- 3.6.4 would materially increase the cost or disruption to the Authority [or a School Entity] of any decanting from or within an Existing Facility; [or
- 3.6.5 would adversely affect the delivery of services under the relevant ICT Services Contract.]
- 3.7 in relation to the submission of any Quality Plan or part of a Quality Plan or any changes to any Quality Plan pursuant to Clause 20.4 (*Quality Plans and Systems*) or Clause 20.7 (*Quality Plans and Systems*) or any quality manual or procedure in accordance with Clause 20.9 (*Quality Management*), on the grounds that such Quality Plans, or parts of or changes to such Quality Plans, quality manuals or procedures, or the quality management systems which they reflect, would not comply with:
 - 3.7.1 in the case of the Design Quality Plan and the Construction Quality Plan referred to in Clause 20.8 (*Quality Plans and Systems*), the requirements referred to in Section 8 (*Quality Plans (Design And Construction)*) of Schedule 6 (*Construction Matters*); and
 - 3.7.2 in the case of the Services Quality Plan referred to in Clause 20 (*Quality Assurance*), the requirements referred to in Section 3 (*Services Quality Plan*) of Schedule 12 (*Service Requirements*);
- 3.8 in relation to the submission of any proposed revision or substitution for the Method Statements or any part of any Method Statement (as the case may be) pursuant to Clause 22.4 (*Project Co Services Changes*), on the grounds that:
 - 3.8.1 the proposed revision or substitution is not in accordance with Good Industry Practice;
 - 3.8.2 the performance of the Services in accordance with the proposed revision or substitution would (on the balance of probabilities):
 - (a) be materially different from the performance of the Services in accordance with the Method Statement prior to such proposed revision or substitution; or
 - (b) be less likely to achieve compliance with the Service Level Specification; or
 - (c) have an adverse effect on the provision by the Authority of the relevant Authority Services at, or on the safety or enjoyment of any users of, the Facilities; or
 - (d) cause the Authority to incur material additional expense; or

- 3.8.3 the proposed revision or substitution would (on the balance of probabilities) result in an inferior standard of performance of the Services to the standard of performance in accordance with the Method Statement prior to such proposed revision or substitution and/or, as relevant, result in a probable failure to meet the Handback Requirements; and
- 3.9 in relation to the submission of any Schedule of Programmed Maintenance pursuant to Clause 23.1 (*Programmed Maintenance Works*), any revision to any Schedule of Programmed Maintenance pursuant to Clause 23.4 (*Programmed Maintenance Works*), any submission of Unprogrammed Maintenance Work pursuant to Clause 23.8 (*Programmed and Unprogrammed Maintenance*), or any written statement regarding deferral of Lifecycle Replacement and revision of the Lifecycle Schedule (forming part of the Schedule of Programmed Maintenance) pursuant to Clause 24.2 (*Lifecycle Replacement*), on the grounds that:
- 3.9.1 carrying out the Programmed Maintenance, Lifecycle Replacement or the Unprogrammed Maintenance Work in the period or at the times suggested would (on the balance of probabilities) interfere with the operations of the Authority [or the School Entity] and such interference could be avoided or mitigated by Project Co rescheduling the Programmed Maintenance, Lifecycle Replacement or the Unprogrammed Maintenance Work; or
- 3.9.2 in relation to the Schedule of Programmed Maintenance, the proposed hours for carrying out the Programmed Maintenance, Lifecycle Replacement are not consistent with the principles set out in Section 3 (*Access To Work Protocol*) of Schedule 34 (*Joint Operating Protocol*); or
- 3.9.3 the proposed method of performance of the Programmed Maintenance, Lifecycle Replacement or the Unprogrammed Maintenance Work would not be in accordance with the Service Level Specification; or
- 3.9.4 the enjoyment and/or safety of users of the Facilities would (on the balance of probabilities) be adversely affected; or
- 3.9.5 the period for carrying out the Programmed Maintenance, Lifecycle Replacement or the Unprogrammed Maintenance Work would (on the balance of probabilities) exceed the period reasonably required for the relevant works.
- 3.10 In relation to the submission of Project Co's proposals for the Handback Works (and without prejudice to the Joint Operating Protocol), the Handback Programme and the Handback Amount pursuant to Schedule 18 (*Handback Procedure*), on the grounds, in addition to those set out in paragraph 3.9 above, that:
- 3.10.1 in the case of the Handback Works, Project Co's proposals will not (on the balance of probabilities) ensure that the Handback Requirements are achieved by the Expiry Date;
- 3.10.2 in the case of the Handback Programme, performance of the Handback Works in accordance with the programme is not (on the balance of

probabilities) capable of achieving satisfaction of the Handback Requirements by the Expiry Date;

3.10.3 in the case of the Handback Amount, it does not represent the cost of carrying out the Handback Works according to the Handback Programme and the provisions of Schedule 18 (*Handback Procedure*).

4. Effect of Review

- 4.1 Any Submitted Item which is returned or deemed to have been returned by the Authority's Representative endorsed "no comment" (and in the case of Reviewable Design Data, endorsed "Level A - no comment") shall be complied with or implemented (as the case may be) by Project Co, provided that where the Submitted Item is a revised Programme this paragraph 4.1 (*Effect of Review*) of Schedule 8 (*Review Procedure*) shall not be construed as imposing any additional obligations above those which apply otherwise to such Programme under the other terms of this Agreement, including but not limited to Clause 14 (*Programme and Dates for Completion*).
- 4.2 In the case of any Submitted Item other than Reviewable Design Data, if the Authority's Representative returns the Submitted Item to Project Co endorsed "comments", Project Co shall comply with such Submitted Item after amendment in accordance with the comments unless Project Co disputes that any such comment is on grounds permitted by this Agreement, in which case Project Co or the Authority's Representative may refer the matter for determination in accordance with Schedule 20 (*Dispute Resolution Procedure*) and Project Co shall not act on the Submitted Item until such matter is so determined or otherwise agreed.
- 4.3 In the case of a Submitted Item comprising Reviewable Design Data, if the Authority's Representative returns the Submitted Item endorsed other than "Level A - no comment", Project Co shall:
- 4.3.1 where the Authority's Representative has endorsed the Submitted Item "Level B - proceed subject to amendment as noted", either proceed to construct or proceed to the next level of design of the part of the Works to which the Submitted Item relates but take into account any amendments required by the Authority's Representative in his comments;
 - 4.3.2 where the Authority's Representative has endorsed the Submitted Item "Level C - subject to amendment as noted" not act upon the Submitted Item, amend the Submitted Item in accordance with the Authority's Representative's comments and re-submit the same to the Authority's Representative in accordance with paragraph 4.4; or
 - 4.3.3 where the Authority's Representative has endorsed the Submitted Item "Level D - rejected" not act upon the Submitted Item, amend the Submitted Item and re-submit the Submitted Item to the Authority's Representative in accordance with paragraph 4.4,

unless Project Co disputes that any such comment or proposed amendment is on grounds permitted by this Agreement, in which case Project Co or the Authority's Representative may refer the matter for determination in accordance with Schedule 20 (*Dispute Resolution Procedure*) and Project Co shall not act on the Submitted Item until such matter is so determined or otherwise agreed except at its own risk in accordance with paragraph 1.3.2 (*Review*).

- 4.4 Within ten (10) Business Days of receiving the comments of the Authority's Representative on any Submitted Item comprising Reviewable Design Data, Project Co shall (except in the case contemplated in paragraph 4.3.1) send a copy of the Submitted Item as amended to the Authority's Representative pursuant to paragraph 4.3 and the provisions of paragraphs 1.2.1 (*Review*), 4.1 and 4.3 shall apply (changed according to context) to such re-submission.
- 4.5 The return or deemed return of any Submitted Item endorsed "no comment" (or in the case of Reviewable Design Data endorsed "Level A - no comment" or otherwise endorsed in accordance with paragraph 4.3.1 or 4.3.2) shall mean that the relevant Submitted Item may be used or implemented for the purposes for which it is intended but, save to the extent expressly stated in this Agreement, such return or deemed return of any Submitted Item shall not otherwise relieve Project Co of its obligations under this Agreement nor is it an acknowledgement by the Authority that Project Co has complied with such obligations.

5. **Documentation Management**²⁰⁸

- 5.1 Project Co shall issue [one (1)] paper copy and [one (1)] electronic copy of all Submitted Items to the Authority and compile and maintain a register of the date and contents of the submission of all Submitted Items.
- 5.2 Project Co shall compile and maintain a register of the date of receipt and content of all Submitted Items that are returned or deemed to be returned by the Authority's Representative.
- 5.3 Save to the extent set out in this Schedule 8 (*Review Procedure*), no review, comment or approval by the Authority shall operate to exclude or limit Project Co's obligations or liabilities under this Agreement (or the Authority's rights under this Agreement).

6. **Changes**

- 6.1 No approval or comment or any failure to give or make an approval or comment under this Schedule 8 (*Review Procedure*) shall constitute a Change save to the extent provided in this Schedule 8 (*Review Procedure*).
- 6.2 If, having received comments from the Authority's Representative, Project Co considers that compliance with those comments would amount to a Change, Project Co shall, before complying with the comments, notify the Authority of the same and, if it is agreed by the parties or determined pursuant to Schedule 20 (*Dispute*

²⁰⁸ This paragraph is intended as a framework basis only and should be developed in a project specific basis.

Resolution Procedure) that a Change would arise if the comments were complied with, the Authority may, if it wishes, implement the Change and it shall be dealt with in accordance with Schedule 16 (*Change Protocol*). Any failure by Project Co to notify the Authority that it considers compliance with any comments of the Authority's Representative would amount to a Change shall constitute an irrevocable acceptance by Project Co that any compliance with the Authority's comments shall be without cost to the Authority and without any extension of time.

- 6.3 No alteration or modification to the design, quality and quantity of the Works arising from the development of detailed design or from the co-ordination of the design shall be construed or regarded as a Change.

APPENDIX 1

[REVIEWABLE DESIGN DATA PROGRAMME]²⁰⁹

²⁰⁹ Please refer to comment at Clause 12.5 (*Authority Design Review*).

**SCHEDULE 9:
COLLATERAL AGREEMENTS**

SECTION 1

CONTRACTOR'S COLLATERAL AGREEMENT

COLLATERAL WARRANTY

AMONG:

- (1) [AUTHORITY] (the "**Authority**");
- (2) [CONTRACTOR] (the "**Contractor**");
- (3) [PROJECT CO] ("**Project Co**"); and
- (4) [SECURITY TRUSTEE] ("**Security Trustee**").

WHEREAS:

- (A) The Authority and Project Co have agreed the terms on which Project Co will design, develop and construct and provide certain services in connection with [description of facilities] [(the "**Development**") at the Site[s] (as that expression is defined in the MIM Project Agreement) and, accordingly, have entered into the MIM Project Agreement and the Project Documents.
- (B) [Description of financing arrangements].
- (C) [Description of documents entered into by Project Co as security for its obligations.]
- (D) The Contractor and Project Co have entered into an agreement (the "**Construction Contract**") of even date herewith relating to the provision of the Works (as defined in the MIM Project Agreement) by the Contractor to enable Project Co to discharge its obligations to the Authority regarding such Works under the MIM Project Agreement and the Project Documents.
- (E) This Contractor's Collateral Agreement (the "**Agreement**") is the Contractor's Collateral Agreement contemplated by the MIM Project Agreement.

NOW IT IS HEREBY AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

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

"Ancillary Documents"	has the meaning given in the MIM Project Agreement;
"Business Day"	means a day other than a Saturday, Sunday or a bank holiday in England and Wales;
"Construction Contract"	has the meaning given in the MIM Project Agreement;
"Event of Project Co Default"	has the meaning given in the Construction Contract;
"Funders"	means [♦];
"Funders' Contractor Direct Agreement"	means the agreement of even date herewith between, amongst others, Project Co, the Contractor and the Senior Funder;
"Funders' Direct Agreement"	means [♦];
"Funding Agreements"	means [♦];
"MIM Project Agreement"	means the MIM Project Agreement of even date herewith between (1) the Authority and (2) Project Co;
"Novation Agreement"	has the meaning given in Clause 4.5.2(a);
"Novation Effective Date"	means the date of performance of the obligations set out in Clause 4 (<i>Novation</i>);
"Parent Company Guarantee"	has the meaning given in the Construction Contract;

"Proposed Novation Date"	has the meaning given in Clause 4.1 (<i>Proposed Substitute</i>);
"Proposed Novation Notice"	has the meaning given in Clause 4.1 (<i>Proposed Substitute</i>);
"Proposed Step-in Date"	has the meaning given in Clause 3.1 (<i>Step-in Notice</i>);
"Proposed Substitute"	has the meaning given in Clause 4.1 (<i>Proposed Substitute</i>);
"Security Documents"	has the meaning given in the Funders' Direct Agreement;
"Senior Funder"	means [insert details];
"Step-in Date"	means the date of issue of the Step-in Undertaking;
"Step-in Notice"	has the meaning given in Clause 3.1 (<i>Step-In Notice</i>);
"Step-in Period"	means the period commencing on the Step-in Date and ending on the earliest of: <ul style="list-style-type: none"> (a) the date of the first anniversary of the Step-in Date (but subject always to Clause 4.7 (<i>Extension of Step-In Period</i>)); (b) the Step-out Date; (c) the Novation Effective Date; and (d) termination of the Construction Contract under Clause 3.3 (<i>Restriction of Right of Termination</i>);
"Step-in Undertaking"	has the meaning given in Clause 3.2.4;
"Step-out Date"	has the meaning given in Clause 3.4.1; and

"Termination Notice" has the meaning given in Clause 2.3 (*Termination Notice*).

1.2 Interpretation

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- 1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- 1.2.2 all references to Clauses are references to Clauses of this Agreement;
- 1.2.3 all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;
- 1.2.4 all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;
- 1.2.5 any reference to time of day shall be a reference to Cardiff time;
- 1.2.6 the words "herein", "hereto" and "hereunder" refer to this Agreement as a whole and not to the particular Clause in which such word may be used;
- 1.2.7 words importing the singular include the plural and vice versa;
- 1.2.8 words importing a particular gender include all genders;
- 1.2.9 "person" includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency, unincorporated body of persons or association;
- 1.2.10 any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;

- 1.2.11 references to "Party" means a party to this Agreement and references to "Parties" shall be construed accordingly;
- 1.2.12 all monetary amounts are expressed in Pounds Sterling;
- 1.2.13 references to the word "includes" or "including" are to be construed without limitation;
- 1.2.14 the obligations of any Party under this Agreement are to be performed at that Party's own cost and expense;
- 1.2.15 terms used in this Agreement that are defined in the MIM Project Agreement or the Ancillary Documents shall have the meanings given to them in the MIM Project Agreement or the Ancillary Documents, as appropriate.

2. TERMINATION NOTICE AND AUTHORITY TERMINATION

2.1 Contractor's Warranties and Undertakings

The Contractor warrants and undertakes to the Authority that it has complied with and fulfilled and shall continue to comply with and fulfil its duties and obligations arising under or by virtue of the Construction Contract, provided that the Authority shall only be entitled to make a claim against the Contractor under this Clause 2.1 (*Contractor's Warranties and Undertakings*) if the MIM Project Agreement has terminated and shall not be entitled to do so during the Step-in Period or after the Construction Contract has been novated under Clause 4 (*Novation*).

2.2 Liability of Contractor

Any liability arising from any claim for breach of the warranty under or pursuant to Clause 2.1 (*Contractor's Warranties and Undertakings*) shall be in addition to and without prejudice to any other present or future liability of the Contractor to the Authority (including, without prejudice to the generality of the foregoing, any liability in negligence) and shall not be released, diminished or in any other way be affected by any independent enquiry into any relevant matter which may be made or carried out by or on behalf of the Authority by any person nor by any action or omission of any person whether or not such action or omission might give rise to an independent liability of such person to the Authority provided always that the Contractor shall owe no greater duties or obligations to the Authority under this Agreement than it owes or would have owed to Project Co under the Construction Contract. Without prejudice to Clause 12 (*Aggregate Liability*), the Contractor shall be entitled in any action or proceedings brought by the Authority under this Agreement to rely on any limitation or exclusion of liability in the Construction Contract and to raise equivalent rights in defence of liability (but excluding set-offs and counterclaims) as it would have against Project Co under the Construction Contract.

2.3 Termination Notice

- 2.3.1 The Contractor undertakes not to terminate the Construction Contract on account of an Event of Project Co Default without first giving the Authority not less than [fifteen (15)] Business Days' prior written notice specifying the grounds for that termination. Subject to Clause 2.3.2 below any such notice shall be a "**Termination Notice**".
- 2.3.2 Where the Contractor's right to terminate is subject to the terms of the Funders' Contractor's Direct Agreement then the Contractor shall notify the Authority of the same as soon as reasonably practicable upon becoming aware of the provisions of the Funders' Contractor's Direct Agreement applying. Thereafter as soon as the Contractor becomes entitled to terminate the Construction Contract free from the constraints contained in the Funders' Contractor's Direct Agreement, whether upon the expiry of the Step-in Period (as such term is defined in the Funders' Contractor's Direct Agreement) or otherwise, then the Contractor undertakes to the Authority not to terminate the Construction Contract on account of an Event of Project Co Default (whether occurring before or after the Contractor's right to terminate the Construction Contract was free from the constraints of the Funders' Contractor's Direct Agreement) without first giving the Authority not less than [fifteen (15)] Business Days' prior notice specifying the grounds for that termination and noting that the Contractor's right of termination is not subject to the Funders' Contractor's Direct Agreement. Any such notice, other than one given in circumstances where there is no default under the Construction Contract by Project Co or the Contractor, shall for the purposes of this Agreement also be a Termination Notice and the provisions of this Agreement shall apply accordingly.
- 2.3.3 Notwithstanding any provision of the Construction Contract to the contrary, on termination of the MIM Project Agreement by the Authority, the Parties agree that the Construction Contract shall not come to an end except in accordance with the terms of this Agreement.
- 2.3.4 The Authority acknowledges that it shall not be entitled to exercise its rights under Clauses 3 (*Step-In And Step-Out*) and 4 (*Novation*):
- (a) where the event giving rise to termination of the MIM Project Agreement is a Contractor Event of Default (as that term is defined in the Construction Contract) whether or not at the relevant time there has been notice to terminate the Construction Contract for such Contractor Event of Default;
 - (b) until the Security Trustee has released its security over the Construction Contract; or
 - (c) until the Security Trustee has confirmed to the Authority in writing that it has no further claims or interest in the claims of Project Co or any Suitable Substitute Contractor (as such term is defined in the Funders' Contractor Direct Agreement) against the Contractor whether pursuant to the Security Documents, the Construction Contract or the enforcement of any rights under the

Security Documents or the Funders' Contractor Direct Agreement.

3. STEP-IN AND STEP-OUT

3.1 Step-in Notice

3.1.1 If the Authority has terminated the MIM Project Agreement in accordance with the terms of the MIM Project Agreement or if the Authority has received a Termination Notice, then subject to the provisions of this Agreement, the Authority may give written notice to the Contractor (copied to the Security Trustee) (a "**Step-in Notice**") of the intention of the Authority to issue a Step-in Undertaking on a specified date (the "**Proposed Step-in Date**") provided that such Proposed Step-in Date shall be:

- (a) no later than [five (5)] Business Days after termination of the MIM Project Agreement where this has been terminated by the Authority; and
- (b) no earlier than the date falling five (5) Business Days prior to the date of expiry of the Termination Notice and no later than the date of expiry of the Termination Notice where a Termination Notice has been given by the Contractor.

3.1.2 Unless the Contractor otherwise consents, only one (1) Step-in Notice may be given during the period of this Agreement. Subject to Clause 5.1 (*Rights of Termination*) below, the Contractor shall not be entitled to terminate the Construction Contract until after the Proposed Step-in Date.

3.2 Notice of Obligations and Step-in Undertaking

3.2.1 Within [three (3)] Business Days of receipt of any Step-in Notice, the Contractor shall give written notice to the Authority of any sums of which the Contractor has actual knowledge which are due and payable but unpaid by Project Co and of any other material obligations or liabilities, of which the Contractor has actual knowledge, which should have been performed or discharged by Project Co under the Construction Contract, in each case, as at the date of the Step-in Notice.

3.2.2 The Contractor shall inform the Authority in writing as soon as reasonably practicable of:

- (a) any change in such sums, obligations or liabilities referred to in Clause 3.2.1; and
- (b) any further sums, obligations or liabilities thereafter falling due and payable but unpaid or falling due for performance or

discharge and unperformed or undischarged (as the case may be);

in each case of which the Contractor has actual knowledge, before the Step-in Date.

- 3.2.3 The Contractor shall give the Authority the information referred to in Clauses 3.2.1 and 3.2.2 in good faith and may not give any further notifications pursuant to Clause 3.2.2 less than [two (2)] Business Days prior to the Proposed Step-in Date. The Authority shall not be required to assume any liability under a Step-in Undertaking for any outstanding obligations or liabilities of Project Co to the Contractor which are not notified to the Authority pursuant to Clauses 3.2.1 or 3.2.2.
- 3.2.4 Not later than the Proposed Step-in Date the Authority shall decide if it is prepared to issue a Step-in Undertaking. If it does so decide, the Authority shall promptly give the Contractor written notification of such decision and, at the same time, provide a copy of such notification to the Senior Funder. The Authority shall deliver to the Contractor on the Proposed Step-in Date, a written undertaking in form and substance agreed with the Contractor (both the Authority and the Contractor acting reasonably) (the "**Step-in Undertaking**"), incorporating a Clause in terms similar to Clause 11 (*Default Interest*) (but only to the extent that there will not be double counting of default interest accruing under the Construction Contract and this Agreement), and undertaking to the Contractor:
- (a) to pay or procure the payment to the Contractor, within [fifteen (15)] Business Days of demand by the Contractor, of any sum due and payable but unpaid by Project Co to the Contractor under the Construction Contract before the Step-in Date and which has been notified by the Contractor to the Authority in accordance with Clause 3.2.1 or 3.2.2;
 - (b) to perform or discharge or procure the performance or discharge of any unperformed or undischarged obligations of Project Co under the Construction Contract which shall have fallen due for performance or discharge before the Step-in Date and which have been notified by the Contractor to the Authority in accordance with Clause 3.2.1 or 3.2.2 within such period as the Contractor may reasonably require;
 - (c) to pay or procure the payment of any sum due and payable by Project Co under the Construction Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to Clauses 3.4 (*Step-Out*) and 4.5.3(b)) but not, to avoid doubt, any sum due in respect of any Works carried out before the Step-in Date; and
 - (d) to perform or discharge or procure the performance or discharge of any obligations of Project Co under the Construction Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after

the Step-in Date (but subject to Clauses 3.4 (*Step-Out*) and 4.5.3(b)) but not, to avoid doubt, to perform or discharge or to procure the performance or discharge of any obligations in respect of any Works carried out before the Step-in Date.

- 3.2.5 Following notification of the Authority's decision pursuant to Clause 3.2.4, the Security Trustee shall, on or before the Proposed Step-in Date, take any action which is necessary unconditionally and irrevocably to release the Construction Contract and the Parent Company Guarantee from the security constituted by the Security Documents.
- 3.2.6 Upon release by the Security Trustee of its security over the Parent Company Guarantee in accordance with Clause 3.2.5, Project Co shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority in accordance with Clause [insert reference] of the same.
- 3.2.7 If the Authority shall not have issued the Step-in Undertaking on or before the Proposed Step-in Date the Step-in Notice shall be deemed to have been withdrawn and the rights and obligations of the Parties shall be construed as if the Step-in Notice had not been given.

3.3 Restriction of Right of Termination

During or in respect of the Step-in Period, the Contractor confirms to the Authority that it shall continue to observe and perform its duties and obligations under the Construction Contract and shall, without prejudice to Clause 5.1 (*Rights of Termination*), only be entitled to exercise its rights of termination under the Construction Contract:

- 3.3.1 by reference to an Event of Project Co Default arising during the Step-in Period provided that no event of default by Project Co under the MIM Project Agreement (whether resulting in termination of the MIM Project Agreement or otherwise, and notwithstanding that it has occurred during the Step-in Period) shall entitle the Contractor to exercise such rights of termination during the Step-in Period; or
- 3.3.2 if the Authority, in breach of the terms of the Construction Contract, fails to pay when due any amount owed to the Contractor or fails to perform or discharge when falling due for performance or discharge any obligation under the Step-in Undertaking or fails to procure such payment or performance or discharge; or
- 3.3.3 if such rights of termination arise in circumstances where there is no default under the Construction Contract by the Authority or the Contractor.

3.4 Step-Out

- 3.4.1 The Authority may, at any time, give the Contractor at least [thirty (30)] days' prior written notice to terminate the Step-in Period on a date specified in the notice (the "**Step-out Date**").
- 3.4.2 The Authority shall give the Contractor at least [thirty (30)] days' prior written notice that (subject to Clause 4.4.2) the Step-in Period will end due to the occurrence (subject to Clause 4.7 (*Extension of Step-In Period*)) of the first anniversary of the Step-in Date;

provided that:

- (a) the Authority has performed and discharged in full or procured the performance and discharge in full of any obligations of Project Co under the Construction Contract in relation to the maintenance of records and the provision of reports during the Step-in Period so as to permit the Contractor to monitor the performance of Project Co's other obligations under the Construction Contract; and
- (b) all liability under the Step-in Undertaking pursuant to any claims made up to the date specified in either Clause 3.4.1 or Clause 3.4.2 (as the case may be) shall have been fully and unconditionally discharged,

the Authority shall be released from the Step-in Undertaking on the expiry of the Step-in Period in accordance with Clauses 3.4.1 and 3.4.2. Such release shall not affect the continuation of Project Co's obligations towards the Contractor under the Construction Contract.

- 3.4.3 On expiry or termination of the Step-in Period pursuant to Clauses 3.4.1 and/or 3.4.2 any rights and powers under the Parent Company Guarantee which have been assigned to the Authority pursuant to Clause 3.2.6 shall be re-assigned to Project Co.

4. NOVATION

4.1 Proposed Substitute

At any time that the Authority is entitled to give a Step-in Notice pursuant to Clause 3.1 (*Step-in Notice*) or at any time during the Step-in Period the Authority may give notice (copied to the Security Trustee) (a "**Proposed Novation Notice**") to the Contractor that it wishes itself or another person (a "**Proposed Substitute**") to assume, by way of sale, transfer or other disposal, the rights and obligations of

Project Co under the Construction Contract and specifying a date (the "**Proposed Novation Date**"):

- 4.1.1 falling not later than [fifteen (15)] Business Days after termination of the MIM Project Agreement where this has been terminated by the Authority;
- 4.1.2 falling not later than the expiry of the Termination Notice where a Proposed Novation Notice is given by the Authority at a time when it is entitled to give a Step-in Notice pursuant to Clause 3.1 (*Step-in Notice*); and
- 4.1.3 falling not later than [twenty-eight (28)] Business Days after the date of the Proposed Novation Notice, where a Proposed Novation Notice is given during a Step-in Period.

Save as provided in Clause 4.4 (*Consent Withheld*), only one (1) Proposed Novation Notice may be given during the period of this Agreement. Without prejudice to Clauses 3.3 (*Restriction of Right of Termination*) and 5.1 (*Rights of Termination*), the Contractor shall not be entitled to terminate the Construction Contract during the notice period specified in a Proposed Novation Notice.

4.2 Information for Consent to Novation

If the Proposed Novation Notice specifies the Authority as the Proposed Substitute, the Contractor's consent to the novation shall be deemed to have been given automatically. Where the Proposed Substitute is not the Authority, a novation in accordance with a Proposed Novation Notice shall only be effective if the Contractor consents to that novation in writing in accordance with Clause 4.3 (*Grant of Consent*) and the Authority shall (as soon as practicable) supply the Contractor with the following information (copied to the Security Trustee):

- 4.2.1 the name and registered address of the Proposed Substitute;
- 4.2.2 the names of the shareholders in the Proposed Substitute and the share capital owned by each of them;
- 4.2.3 the names of the directors and the secretary of the Proposed Substitute;
- 4.2.4 details of the means by which it is proposed to finance the Proposed Substitute (including the extent to which such finance is committed and any conditions precedent as to its availability for drawing); and
- 4.2.5 the resources (including contractual arrangements) which are to be available to the Proposed Substitute to enable it to perform its obligations under the Construction Contract.

4.3 Grant of Consent

The Contractor may withhold or delay consent to a novation only where the Proposed Substitute is not the Authority and the Authority has failed to show to the Contractor's satisfaction (acting reasonably) that:

- 4.3.1 the Proposed Substitute has the legal capacity, power and authorisation to become a party to and perform the obligations of Project Co under the Construction Contract; and
- 4.3.2 the technical competence and financial standing of and the technical and financial resources available to the Proposed Substitute are sufficient to perform the obligations of Project Co under the Construction Contract.

The Contractor shall notify the Authority in writing, within [five (5)] Business Days of the later of receipt of a Proposed Novation Notice and all information required under Clause 4.2 (*Information for Consent to Novation*), as to whether or not it has decided to grant such consent (together with an explanation of its reasons if it has decided to withhold its consent).

4.4 Consent Withheld

If, in accordance with Clause 4.3 (*Grant of Consent*), the Contractor withholds its consent to a Proposed Novation Notice, the Authority shall be entitled to give one or more subsequent Proposed Novation Notices, pursuant to the provisions of Clause 4.1 (*Proposed Substitute*), containing changed particulars relating to the same Proposed Substitute or particulars relating to another Proposed Substitute which (where the replacement Proposed Substitute is not the Authority) the Authority has good cause to believe would fulfil the requirements of Clauses 4.3.1 and 4.3.2, provided that only one Proposed Novation Notice may be outstanding at any one time, and provided further that:

- 4.4.1 where a Step-in-Notice has not been issued, any revised Proposed Novation Date shall be a date falling no later than the date specified in Clause 4.1.1 or 4.1.2 as appropriate; and
- 4.4.2 if the Proposed Novation Notice was served during the Step-in Period, any revised Proposed Novation Date shall be a date falling not later than [twenty-eight (28)] Business Days after the date of the revised Proposed Novation Notice.

4.5 Implementation of Novation

- 4.5.1 If the Contractor consents to a novation pursuant to a Proposed Novation Notice (whether automatically or otherwise), then on the Proposed Novation Date and without prejudice to Clause 5.1 (*Rights of Termination*),
- (a) following notification pursuant to Clause 4.1 (*Proposed Substitute*) and in the absence of any prior release in accordance with Clause 3.2.5, the Security Trustee shall, on or before the Proposed Novation Date, take any action which is necessary unconditionally and irrevocably to release the Construction Contract and the Parent Company Guarantee from the security constituted by the Security Documents; and
 - (b) Project Co shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority or other Proposed Substitute in accordance with Clause [insert reference] of the same and on the Proposed Novation Date and without prejudice to Clause 5.1 (*Rights of Termination*).
- 4.5.2 Subject to the prior performance by the Security Trustee and Project Co of their respective obligations under Clause 4.5.1(a) and Clause 4.5.1(b) the Proposed Substitute shall become a party to the Construction Contract in place of Project Co and, thereafter, shall be treated as if it was and had always been named as a party to the Construction Contract in place of Project Co; and
- (a) the Contractor, Project Co and the Proposed Substitute shall enter into a novation agreement (the "**Novation Agreement**") and any other requisite agreements, in form and substance satisfactory to the Contractor (acting reasonably), pursuant to which:
 - (i) the Proposed Substitute shall be granted all of the rights of Project Co under the Construction Contract (including those arising prior to the end of the Step-in Period);
 - (ii) subject to the Contractor giving to the Proposed Substitute within [three (3)] Business Days of receipt of the Proposed Novation Notice such notice as is referred to in Clause 3.2.1 and to the provisions of Clauses 3.2.2 and 3.2.3, mutatis mutandis, the Proposed Substitute shall assume all of the obligations and liabilities of Project Co under the Construction Contract (including those arising prior to the end of any Step-in Period and those arising during the period of the Proposed Novation Notice);

provided that the Contractor will not be in breach of any of its obligations under this Agreement if the Proposed Substitute does not enter into one or other of such agreements.

4.5.3 On and after the Novation Effective Date:

- (a) the Contractor shall owe its obligations under the Construction Contract (whether arising before, on or after such date) to the Proposed Substitute and the receipt, acknowledgement or acquiescence of the Proposed Substitute shall be a good discharge; and
- (b) if the Authority shall have entered into a Step-in Undertaking, the Authority will be released from the Step-in Undertaking, provided that:
 - (i) all obligations of the Authority under the Step-in Undertaking which have accrued up to the Novation Effective Date and are identifiable as at that date shall have been fully and unconditionally discharged; and
 - (ii) the Authority has performed and discharged in full or procured the performance and discharge in full of the obligations of Project Co under the Construction Contract in relation to the maintenance of records and the provision of reports during the Step-in Period up to the Novation Effective Date so as to permit the Contractor to monitor the performance of Project Co's other obligations under the Construction Contract.

4.5.4 The Authority and the Contractor shall use all reasonable endeavours to agree and the Authority shall use reasonable endeavours to procure that the Proposed Substitute agrees any amendments to the Construction Contract necessary to reflect Clause 3.2.2 and the fact that the MIM Project Agreement may have terminated at the time of the Novation Effective Date.

4.6 Termination After Novation

After the Novation Effective Date the Contractor shall only be entitled to exercise its rights of termination under the Construction Contract:

- 4.6.1 in respect of any Event of Project Co Default arising after that date in accordance with the Construction Contract; or
- 4.6.2 if the Proposed Substitute does not discharge the obligations and liabilities assumed by it under Clause 4.5.2(a) which relate to matters arising prior to the end of the Step-in Period within [fifteen (15)] Business Days following the Novation Effective Date.

4.7 Extension of Step-In Period

As at the date of the first anniversary of the Step-in Date, if the Step-in Period has not previously ended, and:

- 4.7.1 the Authority is in the course of conducting discussions in good faith with a Proposed Substitute (the novation to whom has been approved by the Contractor whether automatically or otherwise in accordance with Clause 4.3 (*Grant of Consent*)), the Step-in Period shall be extended and shall continue until such date as is proposed by the Authority and agreed by the Contractor; or
- 4.7.2 a contract has been entered into between the Authority and a Proposed Substitute (which has been approved by the Contractor in accordance with Clause 4.3 (*Grant of Consent*)) as at such date, the Step-in Period shall be extended and shall continue until the date such contract comes into force, provided that such date shall not be later than [thirty (30)] Business Days after the last date of execution of such contract.

5. RIGHTS AND OBLIGATIONS UNDER THE CONSTRUCTION CONTRACT

5.1 Rights of Termination

If:

- 5.1.1 no Step-in Notice or Proposed Novation Notice is given before a Termination Notice expires or within [♦] Business Days after termination of the MIM Project Agreement by the Authority; or
- 5.1.2 a Step-in Undertaking is not issued on the Proposed Step-in Date; or
- 5.1.3 the Step-in Notice is withdrawn or, pursuant to Clause 3.2.7, deemed to have been withdrawn; or
- 5.1.4 the Step-in Period ends before the occurrence of the Novation Effective Date; or
- 5.1.5 in the absence of a Step-in Undertaking, the Contractor withholds its consent to a novation pursuant to a Proposed Novation Notice, in accordance with Clause 4.3 (*Grant of Consent*), and does not subsequently grant consent to a novation in accordance with Clause 4.4 (*Consent Withheld*) on or before the Proposed Novation Date; or
- 5.1.6 in the absence of a Step-in Undertaking, the obligations of the Proposed Substitute set out in Clause 4.5 (*Implementation of Novation*) are not performed on the Proposed Novation Date; or

5.1.7 the Contractor is entitled to terminate the Construction Contract under Clause 3.3 (*Restriction of Right of Termination*) or 4.6 (*Termination After Novation*); or

5.1.8 the Authority exercises its right to Step-out under Clause 3.4.1,

the Contractor shall, on and from the Step-out Date, be entitled to:

5.1.9 exercise all of its rights under the Construction Contract and act upon any and all grounds for termination available to it in relation to the Construction Contract whenever occurring; and/or

5.1.10 pursue any and all claims and exercise any and all rights and remedies against Project Co.

5.2 Project Co's Obligations to Continue

Until completion of a novation pursuant to Clause 4.5 (*Implementation of Novation*) (unless the terms of such novation expressly preserve an obligation or liability of Project Co), Project Co shall continue to be liable for all its obligations and liabilities, whenever occurring, under or arising from the Construction Contract notwithstanding:

5.2.1 the service of a Step-in Notice or the issue of a Step-in Undertaking or the expiry of the Step-in Period or the release of a Step-in Undertaking; or

5.2.2 the service of a Proposed Novation Notice; or

5.2.3 any other provision of this Agreement.

6. REVOCATION OF NOTICES

A Termination Notice and a Step-in Notice may each be revoked (in writing to the recipient) by the Party giving them before the expiry of their respective notice periods. Upon any such revocation, the rights and obligations of the Parties shall be construed as if the relevant notice had not been given.

7. ASSIGNMENT

7.1 Binding on Successors and Assignees

This Agreement shall be binding on and shall enure to the benefit of the Parties and their respective successors and permitted assignees. In the case of the Authority, its successors shall include any person to which the Welsh Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Authority upon

the Authority ceasing to exist, transfers the rights and obligations of the Authority under this Agreement.

7.2 Restriction on Assignment

No Party shall assign or transfer any part of its respective rights or obligations under this Agreement without the prior consent of the others (such consent not to be unreasonably withheld or delayed), provided that:

- 7.2.1 Project Co shall not assign this Agreement to any party other than a party to whom Project Co's interests in the MIM Project Agreement and Construction Contract are assigned in accordance with the terms of the MIM Project Agreement and Construction Contract respectively;
- 7.2.2 the Authority shall be entitled, without the consent of any other Party, to transfer all its rights and obligations hereunder, to any person to whom it assigns or otherwise disposes of the benefit of the MIM Project Agreement in accordance with Clause 58 (*Sub-Contracting and Assignment*) of the MIM Project Agreement and, otherwise, with Project Co's and the Contractor's consent (not to be unreasonably withheld or delayed);
- 7.2.3 nothing in this sub-clause shall restrict the rights of the Welsh Ministers to effect a statutory transfer;
- 7.2.4 the Contractor shall assign this Agreement to any party to whom it assigns the Construction Contract (in accordance with the terms of that agreement); and
- 7.2.5 the Security Trustee may assign or transfer its rights and obligations to a successor trustee of the Funders under the Funding Agreements without the consent of any other Party and this Clause 7.2 (*Restriction on Assignment*) shall not prevent any Funder assigning or transferring its rights under the Funding Agreements and the Security Documents in accordance with the terms of the Funding Agreements.

7.3 No Loss

The Contractor agrees that it shall not at any time assert that any permitted assignee in terms of this Agreement is precluded from recovering any loss resulting from any breach of this Agreement by reason that such assignee is not an original party to this Agreement or that no loss or a different loss has been suffered by such assignee.

8. CONFIDENTIALITY

- 8.1 The parties shall be bound to observe, mutatis mutandis, the terms of Clause [insert reference] of the Construction Contract with respect to any information or document

referred to in Clause [insert reference] of the Construction Contract which shall come into its possession pursuant to this Agreement.

- 8.2 The Contractor agrees that the Authority shall be entitled to disclose the terms of this Agreement in accordance with Clause 62 (*Confidentiality*) of the MIM Project Agreement.

9. NOTICES

- 9.1 Any notice or other communication given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by first class recorded post or emailed to the party named therein at the address or email address of such party shown in this Agreement or such other address or email address as such party may by notice or other communication in writing nominate for the purpose of service.

- 9.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

9.2.1 if delivered by hand at the time of delivery; or

9.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting,

provided that, in either case, a notice or other communication received on a non-Business Day or after 5pm in the place of receipt shall be deemed to be received at 9am on the next following Business Day in such place.

- 9.3 Notices given by email shall be deemed to have been received:

9.3.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the relevant email address specified in Clauses 9.4 to 9.7 (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

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

and provided no error message indicating failure has been received by the sender and provided that within twenty-four (24) hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by hand to the intended recipient in accordance with the provisions of this Clause 9 (*Notices*) and where such notice is addressed to the Authority, copied to [◆²¹⁰].

²¹⁰ Insert Welsh Government details.

- 9.4 Any notice to be given to the [Authority] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing to the relevant party by the [Authority].
- 9.5 Any notice to be given to the [Security Trustee] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Security Trustee].
- 9.6 Any notice to be given to [Project Co] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Project Co].
- 9.7 Any notice to be given to the [Contractor] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Contractor].
- 9.8 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.

10. PAYMENTS AND TAXES

10.1 Payments

All payments under this Agreement to any Party shall be made in Pounds Sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified to the other Parties from time to time.

10.2 VAT

10.2.1 All amounts stated to be payable by any Party under this Agreement shall be exclusive of any VAT properly payable in respect of the supplies to which they relate.

10.2.2 Each Party shall pay any VAT properly payable hereunder in respect of any supply made to it under this Agreement, provided that it shall first have received a valid tax invoice in respect of that supply which complies with the requirements of Part III Value Added Tax Regulations 1995.

10.3 Deductions from payments

All sums payable by a Party to any other Party under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of taxation, save as may be required by Law.

11. **DEFAULT INTEREST**

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

12. **AGGREGATE LIABILITY**

Notwithstanding any other provision of this Agreement, the Contractor's aggregate liability from time to time under this Agreement and the Construction Contract shall not at any time exceed its maximum liability as stated in the Construction Contract.

13. **PROFESSIONAL INDEMNITY INSURANCE**

13.1 The Contractor by this Agreement covenants with the Authority that it has at its own cost taken out, or procured the taking out of, professional indemnity insurance with reputable insurers carrying on business in the European Union with a limit of indemnity of not less than £[♦],000,000 ([♦] million pounds) [on an each and every claim basis][in the annual aggregate] with at least one (1) annual reinstatement, in relation to the Works, provided always that:

13.1.1 such insurance shall be in place from the commencement of the Works until no less than twelve (12) years after the Actual Completion Date or, if earlier, after the date of termination of the Construction Contract;

13.1.2 the insurance premiums in respect of the insurance shall at all times be the responsibility of the Contractor;

13.1.3 if such insurance is not available to the Contractor (and/or design and build contractors engaged in projects of a similar scope, size, nature and complexity as the Contractor) at commercially reasonable rates and terms (excluding any increase in premiums attributable to the actions, omissions, errors or defaults of the Contractor), the Contractor and the Authority will meet and the Contractor will outline the steps it intends to take to manage such risks. If the steps proposed by the Contractor are not acceptable to the Authority (acting reasonably), the Contractor and the Authority shall agree an alternative method of managing such risk.

13.2 The Contractor will, upon request, provide the Authority with reasonable evidence that the policy referred to in this Clause 13 (*Professional Indemnity Insurance*) is in full force and effect in accordance with the requirements of this Clause 13 (*Professional Indemnity Insurance*).

14. **THIRD PARTY RIGHTS**

For the purposes of the Contracts (Rights of Third Parties) Act 1999, it is agreed that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provisions contained herein except for any person to whom the benefit of this Agreement is assigned or transferred in accordance with Clause 7 (*Assignment*).

15. **AGENCY**

15.1 No Delegation

No provision of this Agreement shall be construed as a delegation by the Authority of any of its statutory authority to any other Party.

15.2 No Agency

Save as otherwise provided in this Agreement, no other Party shall be or be deemed to be an agent of the other Parties nor shall any party hold itself out as having authority or power to bind the other parties in any way.

15.3 Independent Contractor

The Parties shall, at all times, be independent contractors and nothing in this Agreement shall be construed as creating any partnership between the Parties or any relationship of employer and employee between the Parties.

16. **WHOLE AGREEMENT**

16.1 This Agreement (when read together with the MIM Project Agreement, the Construction Contract and the Parent Company Guarantee) contains or expressly refers to the entire agreement between the Parties with respect to the specific subject matter of this Agreement and expressly excludes any warranty, condition or other undertaking implied at Law or by custom and supersedes all previous agreements and understandings between the Parties with respect thereto and each of the Parties acknowledges and confirms that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement.

16.2 Nothing in this Agreement is intended to or shall operate so as to exclude or limit any liability for fraud or fraudulent misrepresentation.

17. **WAIVER**

Failure by any Party at any time to enforce any provision of this Agreement or to require performance by the other Parties of any provision of this Agreement shall not be construed as a waiver of such provision and shall not affect the validity of this Agreement or any part of it or the right of the relevant Party to enforce any provision in accordance with its terms.

18. **SEVERABILITY**

If any condition, Clause or provision of this Agreement not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

19. **COSTS AND EXPENSES**

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

20. **AMENDMENTS**

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Parties.

21. **COUNTERPARTS**

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

22. **GOVERNING LAW AND JURISDICTION**

22.1 Law

This Agreement shall be governed by and construed in all respects in accordance with the laws of England and Wales.

22.2 Jurisdiction

The Parties each submit to the jurisdiction of the Courts of England and Wales as regards any claim or matter arising in relation to this Agreement.

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

SECTION 2

SERVICE PROVIDER'S COLLATERAL AGREEMENT

COLLATERAL WARRANTY

AMONG:

- (1) [AUTHORITY] (the "**Authority**");
- (2) [SERVICE PROVIDER] (the "**Service Provider**");
- (3) [PROJECT CO] ("**Project Co**"); and
- (4) [SECURITY TRUSTEE] ("**Security Trustee**").

WHEREAS:

- (A) The Authority and Project Co have agreed the terms on which Project Co will design, develop and construct and provide certain services in connection with the redevelopment of [description of facilities] [(the "**Development**") at the Site[s] (as that expression is defined in the MIM Project Agreement) and, accordingly, have entered into the MIM Project Agreement and the Project Documents.
- (B) [Description of financing arrangements].
- (C) [Description of documents entered into by Project Co as security for its obligations.]
- (D) The Service Provider and Project Co have entered into an agreement of even date herewith relating to the provision of certain of the Services (as defined in the MIM Project Agreement) by the Service Provider to enable Project Co to discharge its obligations to the Authority regarding such Services under the MIM Project Agreement and the Project Documents (the "**Service Contract**").
- (E) This Service Provider's Collateral Agreement (the "**Agreement**") is one of the Service Providers' Collateral Agreements contemplated by the MIM Project Agreement.

NOW IT IS HEREBY AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

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

"Ancillary Documents"	has the meaning given in the MIM Project Agreement;
"Business Day"	means a day other than a Saturday, Sunday or a bank holiday in England and Wales;
"MIM Project Agreement"	means the MIM Project Agreement of even date herewith between (1) the Authority and (2) Project Co;
"Event of Project Co Default"	has the meaning given in the Service Contract;
"Funders"	means [♦];
"Funders' Service Provider Direct Agreement"	is the agreement of even date herewith between, amongst others, Project Co, the Service Provider and the Senior Funder;
"Funders' Direct Agreement"	means [♦];
"Funding Agreements"	means [♦];
"Novation Agreement"	has the meaning given in Clause 4.5.2(a);
"Novation Effective Date"	means the date of performance of the obligations set out in Clause 4 (<i>Novation</i>);
"Parent Company Guarantee"	has the meaning given in the Service Contract;
"Proposed Novation Date"	has the meaning given in Clause 4.1 (<i>Proposed Substitute</i>);

"Proposed Novation Notice"	has the meaning given in Clause 4.1 (<i>Proposed Substitute</i>);
"Proposed Step-in Date"	has the meaning given in Clause 3.1 (<i>Step-in Notice</i>);
"Proposed Substitute"	has the meaning given in Clause 4.1 (<i>Proposed Substitute</i>);
"Retained Employee"	means [♦];
"Security Documents"	has the meaning given in the Funders' Direct Agreement;
"Senior Funder"	means [insert details];
"Service Contract"	has the meaning given in the MIM Project Agreement;
"Step-in Date"	means the date of issue of the Step-in Undertaking;
"Step-in Notice"	has the meaning given in Clause 3.1 (<i>Step-in Notice</i>);
"Step-in Period"	means the period commencing on the Step-in Date and ending on the earliest of: <ul style="list-style-type: none"> (a) the date of the first anniversary of the Step-in Date (but subject always to Clause 4.7 (<i>Extension of Step-In Period</i>)); (b) the Step-out Date; (c) the Novation Effective Date; and (d) termination of the Service Contract under Clause 3.3 (<i>Restriction of Right of Termination</i>);
"Step-in Undertaking"	has the meaning given in Clause 3.2.4;

"Step-out Date"	has the meaning given in Clause 3.4.1;
"Termination Notice"	has the meaning given in Clause 2.4 (<i>Termination Notice</i>).

1.2 Interpretation

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- 1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- 1.2.2 all references to Clauses are references to Clauses of this Agreement;
- 1.2.3 all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;
- 1.2.4 all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;
- 1.2.5 any reference to time of day shall be a reference to Cardiff time;
- 1.2.6 the words "herein", "hereto" and "hereunder" refer to this Agreement as a whole and not to the particular Clause in which such word may be used;
- 1.2.7 words importing the singular include the plural and vice versa;
- 1.2.8 words importing a particular gender include all genders;
- 1.2.9 "person" includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency, unincorporated body of persons or association;
- 1.2.10 any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;

- 1.2.11 references to "Party" means a party to this Agreement and references to "Parties" shall be construed accordingly;
- 1.2.12 all monetary amounts are expressed in Pounds Sterling;
- 1.2.13 references to the word "includes" or "including" are to be construed without limitation;
- 1.2.14 the obligations of any Party under this Agreement are to be performed at that Party's own cost and expense;
- 1.2.15 terms used in this Agreement that are defined in the MIM Project Agreement or the Ancillary Documents shall have the meanings given to them in the MIM Project Agreement or the Ancillary Documents, as appropriate.

2. **TERMINATION NOTICE AND AUTHORITY TERMINATION**

2.1 **Service Provider's Warranties and Undertakings**

The Service Provider warrants and undertakes to the Authority that it has complied with and fulfilled and shall continue to comply with and fulfil its duties and obligations arising under or by virtue of the Service Contract, provided that the Authority shall only be entitled to make a claim against the Service Provider under this Clause 2.1 (*Service Provider's Warranties and Undertakings*) if the MIM Project Agreement has terminated and shall not be entitled to do so during the Step-in Period or after the Service Contract has been novated under Clause 4 (*Novation*).

2.2 **Liability of Service Provider**

Any liability arising from any claim for breach of the warranty under or pursuant to Clause 2.1 (*Service Provider's Warranties and Undertakings*) shall be in addition to and without prejudice to any other present or future liability of the Service Provider to the Authority (including, without prejudice to the generality of the foregoing, any liability in negligence) and shall not be released, diminished or in any other way be affected by any independent enquiry into any relevant matter which may be made or carried out by or on behalf of the Authority by any person nor by any action or omission of any person whether or not such action or omission might give rise to an independent liability of such person to the Authority provided always that the Service Provider shall owe no greater duties or obligations to the Authority under this Agreement than it owes or would have owed to Project Co under the Service Contract. Without prejudice to Clause 12 (*Aggregate Liability*), the Service Provider shall be entitled in any action or proceedings brought by the Authority under this Agreement to rely on any limitation or exclusion of liability in the Service Contract and to raise equivalent rights in defence of liability (but excluding set-offs and counterclaims) as it would have against Project Co under the Service Contract.

2.3 [Retained Employee Indemnity]

If the MIM Project Agreement is terminated because of a Project Co default then the Service Provider shall indemnify and keep indemnified the Authority against all Direct Losses relating to any contractual claims made by Retained Employees as a consequence of their redundancy resulting from the early termination of the MIM Project Agreement and/or the Service Contract. The Authority will use reasonable endeavours to mitigate such Direct Losses.]

2.4 Termination Notice

2.4.1 The Service Provider undertakes not to terminate the Service Contract on account of an Event of Project Co Default without first giving the Authority not less than [fifteen (15)] Business Days' prior written notice specifying the grounds for that termination. Subject to Clause 2.4.2 below any such notice shall be a "**Termination Notice**".

2.4.2 Where the Service Provider's right to terminate is subject to the terms of the Funders' Service Provider Direct Agreement then the Service Provider shall notify the Authority of the same as soon as reasonably practicable upon becoming aware of the provisions of the Funders' Service Provider Direct Agreement applying. Thereafter as soon as the Service Provider becomes entitled to terminate the Service Contract free from the constraints contained in the Funders' Service Provider Direct Agreement, whether upon the expiry of the Step-in Period (as such term is defined in the Funders' Service Provider Direct Agreement) or otherwise, then the Service Provider undertakes to the Authority not to terminate the Service Contract on account of an Event of Project Co Default (whether occurring before or after the Service Provider's right to terminate the Service Contract was free from the constraints of the Funders' Service Provider Direct Agreement) without first giving the Authority not less than [fifteen (15)] Business Days' prior notice specifying the grounds for that termination and noting that the Service Provider's right of termination is not subject to the Funders' Service Provider Direct Agreement. Any such notice, other than one given in circumstances where there is no default under the Service Contract by Project Co or the Service Provider, shall for the purposes of this Agreement also be a Termination Notice and the provisions of this Agreement shall apply accordingly.

2.4.3 Notwithstanding any provision of the Service Contract to the contrary, on termination of the MIM Project Agreement by the Authority, the Parties agree that the Service Contract shall not come to an end except in accordance with the terms of this Agreement.

2.4.4 The Authority acknowledges that it shall not be entitled to exercise its rights under Clauses 3 (*Step-In And Step-Out*) and 4 (*Novation*):

- (a) where the event giving rise to termination of the MIM Project Agreement is a Service Provider Event of Default (as that term is defined in the Service Contract) whether or not at the relevant time there has been notice to terminate the Service Contract for such Service Provider Event of Default;

- (b) until the Security Trustee has released its security over the Service Contract; or
- (c) until the Security Trustee has confirmed to the Authority in writing that it has no further claims or interest in the claims of Project Co or any Suitable Substitute Contractor (as such term is defined in the Funders' Service Provider Direct Agreement) against the Service Provider whether pursuant to the Security Documents, the Service Contract or the enforcement of any rights under the Security Documents or the Funders' Service Provider Direct Agreement.

3. STEP-IN AND STEP-OUT

3.1 Step-in Notice

3.1.1 If the Authority has terminated the MIM Project Agreement in accordance with the terms of the MIM Project Agreement or if the Authority has received a Termination Notice, then subject to the provisions of this Agreement, the Authority may give written notice to the Service Provider (copied to the Security Trustee) (a "**Step-in Notice**") of the intention of the Authority to issue a Step-in Undertaking on a specified date (the "**Proposed Step-in Date**") provided that such Proposed Step-in Date shall be:

- (a) no later than [five (5)] Business Days after termination of the MIM Project Agreement where this has been terminated by the Authority; and
- (b) no earlier than the date falling five (5) Business Days prior to the date of expiry of the Termination Notice and no later than the date of expiry of the Termination Notice where a Termination Notice has been given by the Service Provider.

3.1.2 Unless the Service Provider otherwise consents, only one (1) Step-in Notice may be given during the period of this Agreement. Subject to Clause 5.1 (*Rights of Termination*) below, the Service Provider shall not be entitled to terminate the Service Contract until after the Proposed Step-in Date.

3.2 Notice of Obligations and Step-in Undertaking

3.2.1 Within [three (3)] Business Days of receipt of any Step-in Notice, the Service Provider shall give written notice to the Authority of any sums of which the Service Provider has actual knowledge which are due and payable but unpaid by Project Co and of any other material obligations or liabilities, of which the Service Provider has actual knowledge, which should have been performed or discharged by Project Co under the Service Contract, in each case, as at the date of the Step-in Notice.

3.2.2 The Service Provider shall inform the Authority in writing as soon as reasonably practicable of:

- (a) any change in such sums, obligations or liabilities referred to in Clause 3.2.1; and
- (b) any further sums, obligations or liabilities thereafter falling due and payable but unpaid or falling due for performance or discharge and unperformed or undischarged (as the case may be);

in each case of which the Service Provider has actual knowledge, before the Step-in Date.

3.2.3 The Service Provider shall give the Authority the information referred to in Clauses 3.2.1 and 3.2.2 in good faith and may not give any further notifications pursuant to Clause 3.2.2 less than [two (2)] Business Days prior to the Proposed Step-in Date. The Authority shall not be required to assume any liability under a Step-in Undertaking for any outstanding obligations or liabilities of Project Co to the Service Provider which are not notified to the Authority pursuant to Clauses 3.2.1 or 3.2.2.

3.2.4 Not later than the Proposed Step-in Date the Authority shall decide if it is prepared to issue a Step-in Undertaking. If it does so decide, the Authority shall promptly give the Service Provider written notification of such decision and, at the same time, provide a copy of such notification to the Senior Funder. The Authority shall deliver to the Service Provider on the Proposed Step-in Date, a written undertaking in form and substance agreed with the Service Provider (both the Authority and the Service Provider acting reasonably) (the "**Step in Undertaking**"), incorporating a Clause in terms similar to Clause 11 (*Default Interest*) (but only to the extent that there will not be double counting of default interest accruing under the Service Contract and this Agreement), and undertaking to the Service Provider:

- (a) to pay or procure the payment to the Service Provider, within [fifteen (15)] Business Days of demand by the Service Provider, of any sum due and payable but unpaid by Project Co to the Service Provider under the Service Contract before the Step-in Date and which has been notified by the Service Provider to the Authority in accordance with Clause 3.2.1 or 3.2.2;
- (b) to perform or discharge or procure the performance or discharge of any unperformed or undischarged obligations of Project Co under the Service Contract which shall have fallen due for performance or discharge before the Step-in Date and which have been notified by the Service Provider to the Authority in accordance with Clause 3.2.1 or 3.2.2 within such period as the Service Provider may reasonably require;

- (c) to pay or procure the payment of any sum due and payable by Project Co under the Service Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to Clauses 3.4 (*Step-Out*) and 4.5.3(b)) but not, to avoid doubt, any sum due in respect of any Services provided before the Step-in Date; and
 - (d) to perform or discharge or procure the performance or discharge of any obligations of Project Co under the Service Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to Clauses 3.4 (*Step-Out*) and 4.5.3(b)) but not, to avoid doubt, to perform or discharge or to procure the performance or discharge of any obligations in respect of any Services provided before the Step-in Date.
- 3.2.5 Following notification of the Authority's decision pursuant to Clause 3.2.4, the Security Trustee shall, on or before the Proposed Step-in Date, take any action which is necessary unconditionally and irrevocably to release the Service Contract and the Parent Company Guarantee from the security constituted by the Security Documents.
- 3.2.6 Upon release by the Security Trustee of its security over the Parent Company Guarantee in accordance with Clause 3.2.5 Project Co shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority in accordance with Clause [insert reference] of the same.
- 3.2.7 If the Authority shall not have issued the Step-in Undertaking on or before the Proposed Step-in Date the Step-in Notice shall be deemed to have been withdrawn and the rights and obligations of the Parties shall be construed as if the Step-in Notice had not been given.

3.3 Restriction of Right of Termination

During or in respect of the Step-in Period, the Service Provider confirms to the Authority that it shall continue to observe and perform its duties and obligations under the Service Contract and shall, without prejudice to Clause 5.1 (*Rights of Termination*), only be entitled to exercise its rights of termination under the Service Contract:

- 3.3.1 by reference to an Event of Project Co Default arising during the Step-in Period provided that no event of default by Project Co under the MIM Project Agreement (whether resulting in termination of the MIM Project Agreement or otherwise, and notwithstanding that it has occurred during the Step-in Period) shall entitle the Service Provider to exercise such rights of termination during the Step-in Period; or
- 3.3.2 if the Authority, in breach of the terms of the Service Contract, fails to pay when due any amount owed to the Service Provider or fails to perform or

discharge when falling due for performance or discharge any obligation under the Step-in Undertaking or fails to procure such payment or performance or discharge; or

- 3.3.3 if such rights of termination arise in circumstances where there is no default under the Service Contract by the Authority or the Service Provider.

3.4 Step-Out

- 3.4.1 the Authority may, at any time, give the Service Provider at least [thirty (30)] days' prior written notice to terminate the Step-in Period on a date specified in the notice (the "**Step-out Date**");

- 3.4.2 the Authority shall give the Service Provider at least [thirty (30)] days' prior written notice that (subject to Clause 4.4.2) the Step-in Period will end due to the occurrence (subject to Clause 4.7 (*Extension of Step-In Period*)) of the first anniversary of the Step-in Date;

provided that:

- (a) the Authority has performed and discharged in full or procured the performance and discharge in full of any obligations of Project Co under the Service Contract in relation to the maintenance of records and the provision of reports during the Step-in Period so as to permit the Service Provider to monitor the performance of Project Co's other obligations under the Service Contract; and
- (b) all liability under the Step-in Undertaking pursuant to any claims made up to the date specified in either Clause 3.4.1 or Clause 3.4.2 (as the case may be) shall have been fully and unconditionally discharged,

the Authority shall be released from the Step-in Undertaking on the expiry of the Step-in Period in accordance with Clauses 3.4.1 and 3.4.2. Such release shall not affect the continuation of Project Co's obligations towards the Service Provider under the Service Contract.

- 3.4.3 On expiry or termination of the Step-in Period pursuant to Clauses 3.4.1 and/or 3.4.2 any rights and powers under the Parent Company Guarantee which have been assigned to the Authority pursuant to Clause 3.2.6 shall be re-assigned to Project Co.

4. NOVATION

4.1 Proposed Substitute

At any time that the Authority is entitled to give a Step-in Notice pursuant to Clause 3.1 (*Step-in Notice*) or at any time during the Step-in Period the Authority may give notice (copied to the Security Trustee) (a "**Proposed Novation Notice**") to the Service Provider that it wishes itself or another person (a "**Proposed Substitute**") to assume, by way of sale, transfer or other disposal, the rights and obligations of Project Co under the Service Contract and specifying a date (the "**Proposed Novation Date**"):

- 4.1.1 falling not later than [fifteen (15)] Business Days after termination of the MIM Project Agreement where this has been terminated by the Authority;
- 4.1.2 falling not later than the expiry of the Termination Notice where a Proposed Novation Notice is given by the Authority at a time when it is entitled to give a Step-in Notice pursuant to Clause 3.1 (*Step-in Notice*); and
- 4.1.3 falling not later than [twenty-eight (28)] Business Days after the date of the Proposed Novation Notice, where a Proposed Novation Notice is given during a Step-in Period.

Save as provided in Clause 4.4 (*Consent withheld*), only one (1) Proposed Novation Notice may be given during the period of this Agreement. Without prejudice to Clauses 3.3 (*Restriction of Right of Termination*) and 5.1 (*Rights of Termination*), the Service Provider shall not be entitled to terminate the Service Contract during the notice period specified in a Proposed Novation Notice.

4.2 Information for Consent to Novation

If the Proposed Novation Notice specifies the Authority as the Proposed Substitute, the Service Provider's consent to the novation shall be deemed to have been given automatically. Where the Proposed Substitute is not the Authority, a novation in accordance with a Proposed Novation Notice shall only be effective if the Service Provider consents to that novation in writing in accordance with Clause 4.3 (*Grant of Consent*) and the Authority shall (as soon as practicable) supply the Service Provider with the following information (copied to the Security Trustee):

- 4.2.1 the name and registered address of the Proposed Substitute;
- 4.2.2 the names of the shareholders in the Proposed Substitute and the share capital owned by each of them;
- 4.2.3 the names of the directors and the secretary of the Proposed Substitute;

- 4.2.4 details of the means by which it is proposed to finance the Proposed Substitute (including the extent to which such finance is committed and any conditions precedent as to its availability for drawing); and
- 4.2.5 the resources (including contractual arrangements) which are to be available to the Proposed Substitute to enable it to perform its obligations under the Service Contract.

4.3 Grant of Consent

The Service Provider may withhold or delay consent to a novation only where the Proposed Substitute is not the Authority and the Authority has failed to show to the Service Provider's satisfaction (acting reasonably) that:

- 4.3.1 the Proposed Substitute has the legal capacity, power and authorisation to become a party to and perform the obligations of Project Co under the Service Contract; and
- 4.3.2 the technical competence and financial standing of and the technical and financial resources available to the Proposed Substitute are sufficient to perform the obligations of Project Co under the Service Contract.

The Service Provider shall notify the Authority in writing, within [five (5)] Business Days of the later of receipt of a Proposed Novation Notice and all information required under Clause 4.2 (*Information for Consent to Novation*), as to whether or not it has decided to grant such consent (together with an explanation of its reasons if it has decided to withhold its consent).

4.4 Consent withheld

If, in accordance with Clause 4.3 (*Grant of Consent*), the Service Provider withholds its consent to a Proposed Novation Notice, the Authority shall be entitled to give one or more subsequent Proposed Novation Notices, pursuant to the provisions of Clause 4.1 (*Proposed Substitute*), containing changed particulars relating to the same Proposed Substitute or particulars relating to another Proposed Substitute which (where the replacement Proposed Substitute is not the Authority) the Authority has good cause to believe would fulfil the requirements of Clauses 4.3.1 and 4.3.2, provided that only one (1) Proposed Novation Notice may be outstanding at any one time, and provided further that:

- 4.4.1 where a Step-in-Notice has not been issued, any revised Proposed Novation Date shall be a date falling no later than the date specified in Clause 4.1.1 or 4.1.2 as appropriate; and
- 4.4.2 if the Proposed Novation Notice was served during the Step-in Period, any revised Proposed Novation Date shall be a date falling not later than [twenty-eight (28)] Business Days after the date of the revised Proposed Novation Notice.

4.5 Implementation of Novation

- 4.5.1 If the Service Provider consents to a novation pursuant to a Proposed Novation Notice (whether automatically or otherwise), then on the Proposed Novation Date and without prejudice to Clause 5.1 (*Rights of Termination*):
- (a) following notification pursuant to Clause 4.1 (*Proposed Substitute*) and in the absence of any prior release in accordance with Clause 3.2.5, the Security Trustee shall, on or before the Proposed Novation Date, take any action which is necessary unconditionally and irrevocably to release the Service Contract and the Parent Company Guarantee from the security constituted by the Security Documents; and
 - (b) Project Co shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority or other Proposed Substitute in accordance with Clause [insert reference] of the same, and on the Proposed Novation Date and without prejudice to Clause 5.1 (*Rights of Termination*).
- 4.5.2 Subject to the prior performance by the Security Trustee and Project Co of their respective obligations under Clause 4.5.1(a) and Clause 4.5.1(b) the Proposed Substitute shall become a party to the Service Contract in place of Project Co and, thereafter, shall be treated as if it was and had always been named as a party to the Service Contract in place of Project Co; and
- (a) the Service Provider, Project Co and the Proposed Substitute shall enter into a novation agreement (the "**Novation Agreement**") and any other requisite agreements, in form and substance satisfactory to the Service Provider (acting reasonably), pursuant to which:
 - (i) the Proposed Substitute shall be granted all of the rights of Project Co under the Service Contract (including those arising prior to the end of the Step-in Period);
 - (ii) subject to the Service Provider giving to the Proposed Substitute within [three (3)] Business Days of receipt of the Proposed Novation Notice such notice as is referred to in Clause 3.2.1 and to the provisions of Clauses 3.2.2 and 3.2.3 *mutatis mutandis*, the Proposed Substitute shall assume all of the obligations and liabilities of Project Co under the Service Contract (including those arising prior to the end of any Step-in Period and those arising during the period of the Proposed Novation Notice);

provided that the Service Provider will not be in breach of any of its obligations under this Agreement if the Proposed Substitute does not enter into one or other of such agreements.

4.5.3 On and after the Novation Effective Date:

- (a) the Service Provider shall owe its obligations under the Service Contract (whether arising before, on or after such date) to the Proposed Substitute and the receipt, acknowledgement or acquiescence of the Proposed Substitute shall be a good discharge; and
- (b) if the Authority shall have entered into a Step-in Undertaking, the Authority will be released from the Step-in Undertaking, provided that:
 - (i) all obligations of the Authority under the Step-in Undertaking which have accrued up to the Novation Effective Date and are identifiable as at that date shall have been fully and unconditionally discharged; and
 - (ii) the Authority has performed and discharged in full or procured the performance and discharge in full of the obligations of Project Co under the Service Contract in relation to the maintenance of records and the provision of reports during the Step-in Period up to the Novation Effective Date so as to permit the Service Provider to monitor the performance of Project Co's other obligations under the Service Contract.

4.5.4 the Authority and the Service Provider shall use all reasonable endeavours to agree and the Authority shall use reasonable endeavours to procure that the Proposed Substitute agrees any amendments to the Service Contract necessary to reflect Clause 3.2.2 and the fact that the MIM Project Agreement may have terminated at the time of the Novation Effective Date.

4.6 Termination After Novation

After the Novation Effective Date the Service Provider shall only be entitled to exercise its rights of termination under the Service Contract:

- 4.6.1 in respect of any Event of Project Co Default arising after that date in accordance with the Service Contract; or
- 4.6.2 if the Proposed Substitute does not discharge the obligations and liabilities assumed by it under Clause 4.5.2(a) which relate to matters arising prior to the end of the Step-in Period within [fifteen (15)] Business Days following the Novation Effective Date.

4.7 Extension of Step-In Period

As at the date of the first anniversary of the Step-in Date, if the Step-in Period has not previously ended, and:

- 4.7.1 the Authority is in the course of conducting discussions in good faith with a Proposed Substitute (the novation to whom has been approved by the Service Provider whether automatically or otherwise in accordance with Clause 4.3 (*Grant of Consent*)), the Step-in Period shall be extended and shall continue until such date as is proposed by the Authority and agreed by the Service Provider; or
- 4.7.2 a contract has been entered into between the Authority and a Proposed Substitute (which has been approved by the Service Provider in accordance with Clause 4.3 (*Grant of Consent*)) as at such date,

the Step-in Period shall be extended and shall continue until the date such contract comes into force, provided that such date shall not be later than [thirty (30)] Business Days after the last date of execution of such contract.

5. RIGHTS AND OBLIGATIONS UNDER THE SERVICE CONTRACT

5.1 Rights of Termination

If:

- 5.1.1 no Step-in Notice or Proposed Novation Notice is given before a Termination Notice expires or within [fifteen (15)] Business Days after termination of the MIM Project Agreement by the Authority; or
- 5.1.2 a Step-in Undertaking is not issued on the Proposed Step-in Date; or
- 5.1.3 the Step-in Notice is withdrawn or, pursuant to Clause 3.2.7, deemed to have been withdrawn; or
- 5.1.4 the Step-in Period ends before the occurrence of the Novation Effective Date; or
- 5.1.5 in the absence of a Step-in Undertaking, the Service Provider withholds its consent to a novation pursuant to a Proposed Novation Notice, in accordance with Clause 4.3 (*Grant of Consent*), and does not subsequently grant consent to a novation in accordance with Clause 4.4 (*Consent Withheld*) on or before the Proposed Novation Date; or

5.1.6 in the absence of a Step-in Undertaking, the obligations of the Proposed Substitute set out in Clause 4.5 (*Implementation of Novation*) are not performed on the Proposed Novation Date; or

5.1.7 the Service Provider is entitled to terminate the Service Contract under Clause 3.3 (*Restriction of Right of Termination*) or 4.6 (*Termination After Novation*); or

5.1.8 the Authority exercises its right to Step-out under Clause 3.4.1,

the Service Provider shall, on and from the Step-out Date, be entitled to:

5.1.9 exercise all of its rights under the Service Contract and act upon any and all grounds for termination available to it in relation to the Service Contract whenever occurring; and/or

5.1.10 pursue any and all claims and exercise any and all rights and remedies against Project Co.

5.2 Project Co's Obligations to Continue

Until completion of a novation pursuant to Clause 4.5 (*Implementation of Novation*) (unless the terms of such novation expressly preserve an obligation or liability of Project Co), Project Co shall continue to be liable for all its obligations and liabilities, whenever occurring, under or arising from the Service Contract notwithstanding:

5.2.1 the service of a Step-in Notice or the issue of a Step-in Undertaking or the expiry of the Step-in Period or the release of a Step-in Undertaking; or

5.2.2 the service of a Proposed Novation Notice; or

5.2.3 any other provision of this Agreement.

6. REVOCATION OF NOTICES

A Termination Notice and a Step-in Notice may each be revoked (in writing to the recipient) by the Party giving them before the expiry of their respective notice periods. Upon any such revocation, the rights and obligations of the Parties shall be construed as if the relevant notice had not been given.

7. ASSIGNMENT

7.1 Binding on Successors and Assignees

This Agreement shall be binding on and shall enure to the benefit of the Parties and their respective successors and permitted assignees. In the case of the Authority, its successors shall include any person to which the Welsh Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Authority upon the Authority ceasing to exist, transfers the rights and obligations of the Authority under this Agreement.

7.2 Restriction on Assignment

No Party shall assign or transfer any part of its respective rights or obligations under this Agreement without the prior consent of the others (such consent not to be unreasonably withheld or delayed), provided that:

7.2.1 Project Co shall not assign this Agreement to any party other than a party to whom Project Co's interests in the MIM Project Agreement and Service Contract are assigned in accordance with the terms of the MIM Project Agreement and Service Contract respectively;

7.2.2 the Authority shall be entitled, without the consent of any other Party, to transfer all its rights and obligations hereunder, to any person to whom it assigns or otherwise disposes of the benefit of the MIM Project Agreement in accordance with Clause 58 (*Sub-Contracting and Assignment*) of the MIM Project Agreement and, otherwise, with Project Co's and the Service Provider's consent (not to be unreasonably withheld or delayed);

7.2.3 nothing in this sub-clause shall restrict the rights of the Welsh Ministers to effect a statutory transfer;

7.2.4 the Service Provider shall assign this Agreement to any party to whom it assigns the Service Contract (in accordance with the terms of that agreement); and

7.2.5 the Security Trustee may assign or transfer its rights and obligations to a successor trustee of the Funders under the Funding Agreements without the consent of any other Party and this Clause 7.2 (*Restriction on Assignment*) shall not prevent any Funder assigning or transferring its rights under the Funding Agreements and the Security Documents in accordance with the terms of the Funding Agreements.

7.3 No Loss

The Service Provider agrees that it shall not at any time assert that any permitted assignee in terms of this Agreement is precluded from recovering any loss resulting from any breach of this Agreement by reason that such assignee is not an original

party to this Agreement or that no loss or a different loss has been suffered by such assignee.

8. CONFIDENTIALITY

- 8.1 The parties shall be bound to observe, mutatis mutandis, the terms of Clause [♦] of the Service Contract with respect to any information or document referred to in Clause [♦] of the Service Contract which shall come into its possession pursuant to this Agreement.]
- 8.2 The Service Provider agrees that the Authority shall be entitled to disclose the terms of this Agreement in accordance with Clause 62 (*Confidentiality*) of the MIM Project Agreement.

9. NOTICES

- 9.1 Any notice or other communication given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by first class recorded post or emailed to the party named therein at the address or email address of such party shown in this Agreement or such other address or email address as such party may by notice or other communication in writing nominate for the purpose of service.

- 9.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

9.2.1 if delivered by hand at the time of delivery; or

9.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting,

provided that, in either case, a notice or other communication received on a non-Business Day or after 5pm in the place of receipt shall be deemed to be received at 9am on the next following Business Day in such place; or

- 9.3 Notices given by email shall be deemed to have been received:

9.3.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the relevant email address specified in Clauses [9.4 to 9.7] (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

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

and provided no error message indicating failure has been received by the sender and provided that within twenty-four (24) hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by hand to the intended recipient in accordance with the provisions of this Clause 9 (*Notices*) and where such notice is addressed to the Authority, copied to [♦²¹¹].

- 9.4 Any notice to be given to the [Authority] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing to the relevant party by the [Authority].
- 9.5 Any notice to be given to the [Security Trustee] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Security Trustee].
- 9.6 Any notice to be given to [Project Co] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Project Co].
- 9.7 Any notice to be given to the [Service Provider] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Service Provider].
- 9.8 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.

10. PAYMENTS AND TAXES

10.1 Payments

All payments under this Agreement to any Party shall be made in Pounds Sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified to the other Parties from time to time.

10.2 VAT

- 10.2.1 All amounts stated to be payable by any Party under this Agreement shall be exclusive of any VAT properly payable in respect of the supplies to which they relate.
- 10.2.2 Each Party shall pay any VAT properly payable hereunder in respect of any supply made to it under this Agreement, provided that it shall first have received a valid tax invoice in respect of that supply which complies with the requirements of Part III Value Added Tax Regulations 1995.

²¹¹ Insert Welsh Government details.

10.3 Deductions from payments

All sums payable by a Party to any other Party under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of taxation, save as may be required by Law.

11. DEFAULT INTEREST

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

12. AGGREGATE LIABILITY

Notwithstanding any other provision of this Agreement, the Service Provider's aggregate liability from time to time under this Agreement and the Service Contract shall not at any time exceed its maximum liability as stated in the Service Contract.

13. THIRD PARTY RIGHTS

It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provisions contained herein except for any person to whom the benefit of this Agreement is assigned or transferred in accordance with Clause 7 (*Assignment*).

14. AGENCY

14.1 No Delegation

No provision of this Agreement shall be construed as a delegation by the Authority of any of its statutory authority to any other Party.

14.2 No Agency

Save as otherwise provided in this Agreement, no other Party shall be or be deemed to be an agent of the other Parties nor shall any party hold itself out as having authority or power to bind the other parties in any way.

14.3 Independent Contractor

The Parties shall, at all times, be independent contractors and nothing in this Agreement shall be construed as creating any partnership between the Parties or any relationship of employer and employee between the Parties.

15. **WHOLE AGREEMENT**

15.1 This Agreement (when read together with the MIM Project Agreement, the Service Contract and the Parent Company Guarantee) contains or expressly refers to the entire agreement between the Parties with respect to the specific subject matter of this Agreement and expressly excludes any warranty, condition or other undertaking implied at Law or by custom and supersedes all previous agreements and understandings between the Parties with respect thereto and each of the Parties acknowledges and confirms that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement.

15.2 Nothing in this Agreement is intended to or shall operate so as to exclude or limit any liability for fraud or fraudulent misrepresentation.

16. **WAIVER**

Failure by any Party at any time to enforce any provision of this Agreement or to require performance by the other Parties of any provision of this Agreement shall not be construed as a waiver of such provision and shall not affect the validity of this Agreement or any part of it or the right of the relevant Party to enforce any provision in accordance with its terms.

17. **SEVERABILITY**

If any condition, Clause or provision of this Agreement not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

18. **COSTS AND EXPENSES**

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

19. **AMENDMENTS**

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Parties.

20. **COUNTERPARTS**

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

21. **GOVERNING LAW AND JURISDICTION**

21.1 Law

This Agreement shall be governed by and construed in all respects in accordance with the laws of England and Wales.

21.2 Jurisdiction

The Parties each submit to the jurisdiction of the Courts of England and Wales as regards any claim or matter arising in relation to this Agreement.

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

SECTION 3²¹²

KEY SUB-CONTRACTOR COLLATERAL AGREEMENT

COLLATERAL WARRANTY

AMONG:

[THE AUTHORITY] having its principal offices at [♦] (the "**Beneficiary**" which expression shall include its successors in title or permitted assignees under this Agreement and/or the Beneficiary's appointee);

and

[**Project Co**], a company incorporated in [Scotland/England and Wales/Northern Ireland] under the Companies Acts (Registered Number [♦]) and having its Registered Office at [♦] ("**Project Co**" which expression shall include its successors in title or permitted assignees under this Agreement);

and

[♦] **LIMITED**, a company incorporated in [Scotland/England and Wales/Northern Ireland] under the Companies Acts (Registered Number [♦]) and having its Registered Office at [♦] (the "**Contractor**" which expression shall include its successors in title or permitted assignees under this Agreement);

and

[♦] **LIMITED**, a company incorporated in [Scotland/England and Wales/Northern Ireland] under the Companies Acts (Registered Number [♦]) and having its Registered Office at [♦] (the "**Consultant**").

WHEREAS:

- (A) The Beneficiary and Project Co have entered into an agreement for the design, build, finance and maintenance of [insert name of Facilities] (the "**Project**") on or about the date hereof (the "**DBFM Agreement**").
- (B) Project Co and the Contractor have entered into a contract (the "**Construction Contract**") on or about the date hereof for the design and construction of the Project (the "**Contract Works**").

²¹² Authorities should require a full description of the proposed scope of design team services, including any proposed role in the inspection of works on site. This, together with the quality of the proposed design team and proposed design, should be important factors in the assessment of Stage 2 Submission.

- (C) The Contractor has entered or intends to enter into an agreement with the Consultant whereby the Consultant will provide certain [design] services (the "**Services**") in connection with the Project ("**the Appointment**") as more particularly described in the Appointment.
- (D) It is a condition of the Appointment that the Consultant enters this Agreement with the Beneficiary.
- (E) The Beneficiary shall be entitled to rely and is deemed to have relied on the Consultant's reasonable skill, care and diligence in respect of all matters covered by this Agreement insofar as they relate to the Services provided by the Consultant under the Appointment.

NOW IT IS AGREED as follows:

1. WARRANTY AND UNDERTAKING

1.1 The Consultant warrants and undertakes to the Beneficiary that it has complied and will continue to comply with all the terms and obligations under or arising out of the Appointment on the Consultant's part to be performed and observed and shall complete the Services in accordance with the Appointment.

1.2 Without prejudice to Clause 1.1 (*Warranty And Undertaking*) of this Agreement, the Consultant further warrants and undertakes to the Beneficiary that:

1.2.1 it has exercised and will continue to exercise all the due skill, care and diligence to be expected from a properly qualified and competent consultant experienced in providing design services on projects similar in nature, size and complexity to the Project in:

(a) the [design] of the Contract Works;

(b) the specification of goods and materials for the Contract Works, and in particular in ensuring that it has not and will not specify for use in relation to the Contract Works any products or materials not in conformity with relevant British or European standards or Codes of Practice or which are at the time of specification generally known within the United Kingdom to an experienced designer of such as the Contract Works to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used; and

(c) the performance of the Services to the Contractor under the Appointment;

1.2.2 the final [design] and all materials and goods specified therein will correspond as to description, quality and condition with the requirements of the Construction Contract; and

- 1.2.3 the final [design] will at practical completion or its equivalent under the Construction Contract, as the case may be, comply with all relevant legislation and Good Industry Practice.

2. **INSURANCE**

- 2.1 The Consultant shall maintain throughout the duration of provision of the Services and for a period of twelve (12) years after the date of practical completion or its equivalent under the Construction Contract, professional indemnity insurance in an amount of not less than [♦] million pounds (£[♦],000,000) sterling on an each and every claim basis and for any one (1) occurrence or series of occurrences arising out of any one (1) event with insurer of good repute carrying on business in the European Union provided always that such insurance is available at rates which are commercially reasonable to consultants.
- 2.2 In determining whether or not insurance is available as aforesaid, the financial characteristics and claims' record of the Consultant shall be ignored.
- 2.3 The Consultant shall immediately inform the Beneficiary if such insurance ceases to be available at rates which are commercially reasonable in order that the Consultant and the Beneficiary can consider alternative means of best protecting their respective positions in respect of the Project in the absence of such insurance provided that the Beneficiary shall be entitled to require the Consultant to maintain such lesser amount of Professional Indemnity Insurance as is available to the Consultant at rates which are commercially reasonable.
- 2.4 As and when it is reasonably requested to do so by the Beneficiary the Consultant shall produce for inspection documentary evidence satisfactory to the Beneficiary (acting reasonably) that its professional indemnity insurance is being maintained.
- 2.5 The Consultant confirms that this Agreement has been disclosed to and has been approved by the Consultant's professional indemnity insurers or underwriters.
- 2.6 Should the Consultant be in breach of any of its obligations under this Clause 2 (*Insurance*), the Beneficiary may itself insure against any risk with respect to which the breach shall have occurred and may recover such sum or sums from the Consultant as a debt.

3. **COPYRIGHT**

- 3.1 The Consultant hereby grants to the Beneficiary or its appointee and all those authorised by the Beneficiary an irrevocable, transferable, non-exclusive and royalty-free licence (which shall be capable of assignment) to use and reproduce all information (whether or not stored in computer systems), drawings, models, bills of quantities, specifications, schedules, details, plans, programmes, budgets, reports, calculations or other documents, work or things including all applicable passwords or access codes whatsoever provided or to be provided by the Consultant in connection with the Services (the "**Documents**") for such purposes as the Beneficiary may at its sole discretion require.

- 3.2 Such licence shall carry the right to grant sub-licences and shall subsist notwithstanding that the Appointment is terminated or the obligations and duties there under have been completed. For the avoidance of doubt, the grant of such licence or sub-licences shall not impose any additional liability on the Consultant.
- 3.3 The Consultant shall on reasonable demand provide to the Beneficiary or its appointee and those authorised by the Beneficiary additional copies of any documents on receipt of reasonable copying costs. The Consultant will not be liable for any use by the Beneficiary or any appointee or sub-licensee of any of the Documents for any purpose other than that for which the same were prepared and provided by the Consultant or for any improper or negligent use by the Beneficiary or any appointee or sub-licensee.
- 3.4 The Consultant agrees to indemnify and keep indemnified the Beneficiary from and against all loss, damage, cost, expense, liability or claim in respect of breach of the copyright or other intellectual property rights of any third party caused by or arising out of the carrying out of the Services or the use of the licence.

4. **ASSIGNMENT**

- 4.1 This Agreement may be assigned in whole or in part by the Beneficiary to any successor to the Beneficiary's interest in the Project or any part thereof without the consent of the Consultant being required and such assignment shall be effective upon written notice thereof being given to the Consultant. No assignment of this Agreement by any other party shall be permitted.
- 4.2 The Consultant agrees that it shall not at any time assert that any permitted assignee in terms of this Agreement is precluded from recovering any loss resulting from any breach of this Agreement by reason that such assignee is not an original party to this Agreement or that no loss or a different loss has been suffered by such assignee.

5. **NO WAIVER OR VARIATION**

- 5.1 No failure, approval, act or forbearance on the part of the Beneficiary in respect of any right of the Beneficiary pursuant to this Agreement shall constitute any waiver of any right of the Beneficiary under or arising out of this Agreement nor relieve the Consultant of any of its duties or obligations under or arising out of this Agreement.
- 5.2 The Consultant will not seek to modify or vary any of the obligations for which it is responsible under the Appointment in any respect if that modification or variation will be detrimental to the Beneficiary or affects the Beneficiary's rights or obligations under the DBFM Agreement or affects the Consultant's obligations under this Agreement.

6. **EQUIVALENT RIGHTS**

The obligations of the Consultant under this Agreement shall be no greater in extent or quantity than if the Beneficiary had been named as joint employer with the Contractor under the Appointment. The Consultant shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation in the Appointment and to raise the equivalent rights in defence of liability as it would have against the Contractor under the Appointment (other than counterclaim, set-off or to state a defence of no loss or a different loss has been suffered by the Contractor).

7. **NOTICES**

7.1 Any notice or other communication given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by first class recorded post or emailed to the party named therein at the address or email address of such party shown in this Agreement or such other address or email address as such party may by notice or other communication in writing nominate for the purpose of service.

7.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

7.2.1 if delivered by hand at the time of delivery; or

7.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting,

provided that, in either case, a notice or other communication received on a non-Business Day or after 5pm in the place of receipt shall be deemed to be received at 9am on the next following Business Day in such place.

7.3 Notices given by email shall be deemed to have been received:

7.3.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the relevant email address specified in Clauses [7.4 to 7.7] (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

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

and provided no error message indicating failure has been received by the sender and provided that within twenty-four (24) hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by

hand to the intended recipient in accordance with the provisions of this Clause 7 (*Notices*) and where such notice is addressed to the Authority, copied to [♦²¹³].

- 7.4 Any notice to be given to the [Authority] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing to the relevant party by the [Authority].
- 7.5 Any notice to be given to [Project Co] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by [Project Co].
- 7.6 Any notice to be given to the [Contractor] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Contractor].
- 7.7 Any notice to be given to the [Consultant] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Consultant].
- 7.8 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.
- 7.9 The definitions of words and phrases used in this Agreement shall be those set out in the Construction Contract and Appointment except where expressly defined in this Agreement.
- 7.10 This Agreement shall be governed by and construed in accordance with the Laws of England and Wales and the parties hereto submit to the exclusive jurisdiction of the Courts of England and Wales.
- 7.11 This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.
- 7.12 It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that save to the extent expressly provided in this Agreement no provision of this Agreement is intended to or does confer upon any third party any benefit or right enforceable at the option of that third party or any liability whatsoever to any third party.

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

²¹³ Insert Welsh Government details.

SCHEDULE 10: ²¹⁴

OUTLINE COMMISSIONING PROGRAMME

1. PRE-COMPLETION COMMISSIONING AND POST-COMPLETION COMMISSIONING

- 1.1 Project Co's Pre-Completion Commissioning and Project Co's Post-Completion Commissioning shall comprise the activities identified as such in Table A of Appendix A of this Schedule 10 (*Outline Commissioning Programme*).
- 1.2 The Authority's Commissioning and the Authority's Post-Completion Commissioning shall comprise the activities identified as such in Table A of Appendix A of this Schedule 10 (*Outline Commissioning Programme*).
- 1.3 Project Co shall give written notice in accordance with Clause 17.8.1 (*Commissioning prior to Completion Date/Post Completion Works Date*) of the date of commencement of Project Co's Pre-Completion Commissioning.
- 1.4 Project Co shall give written notice to the Authority's Representative of the date upon which the Authority shall be entitled to commence the Authority's Commissioning, such notice to be given at least [one (1) month] prior to the date when Project Co (acting reasonably) considers that the Authority should commence the Authority's Commissioning in accordance with the [relevant] Final Commissioning Programme.

2. EQUIPMENT

- 2.1 Project Co shall not clean, or move to enable general cleaning any items of Authority Equipment unless the Authority's Representative has given the prior written consent, such consent not to be unreasonably withheld. This shall include but not be limited to:
 - 2.1.1 [*Project Specific Equipment Examples*]
- 2.2 The Authority shall ensure that all of the Authority's Legacy Equipment (including any Legacy ICT Equipment) that is to be transferred to the Facilities has been cleaned in accordance with the Authority's protocols and meets the current health and safety and legislative requirements prior to being transferred to the Facilities.

²¹⁴ Schedule 10 will require to be developed on a project specific basis, with input from technical advisers. The approach needs to be considered in light of Clauses 17 (*Pre-Completion Commissioning and Completion*) and 18 (*Post Completion Commissioning*) and the commissioning activities/start-up of services to be carried out during those periods. This should outline who is responsible for what (and when) and set out the principles for all completion tests and inspections.

SCHEDULE 10²¹⁵

OUTLINE COMMISSIONING PROGRAMME[S]

APPENDIX A

COMMISSIONING RESPONSIBILITIES

[Facility]²¹⁶

Table A²¹⁷²¹⁸:

Item	Pre or Post Completion Activity	Activity²¹⁹	Responsibility	Programme Date²²⁰
[In respect of the Main Works]				
[Group 1 Equipment, Group 2.1 Equipment, Group 2.2 Equipment, Group 3.1 Equipment	Project Co Pre-Completion Commissioning	[The installation, placement and/or commissioning of Group 1 Equipment, Group 2.1, Equipment, Group 2.2 Equipment, Group 3.1 Equipment and	Project Co	Week [◆] to [◆] prior to the Completion Date [for that Facility]

²¹⁵ The Outline Commissioning Programme has been developed for a Schools project and will require project specific review in the context of College projects.

²¹⁶ Repeat as necessary per Facility.

²¹⁷ Timing of activities to be reviewed by the Authority specific to the Project, including any adjustment for phasing of the Works. This is a template only and will require project specific amendment.

²¹⁸ Equipment groupings to align with Schedule 11 (*Equipment*) by the Authority. Examples of Authority hardware could include interactive white boards, teacher walls, and audio systems.

²¹⁹ Indicative details of activities have been set out in summary and should be expanded upon and refined on a project specific basis.

²²⁰ A four week period for all pre-completion commissioning should be provided for in most projects subject to project specific justification for reduction or increase e.g. in the case of primary schools or large colleges. This is the ICT Handover Period. The parties need to consider decant of legacy loose furniture and equipment early on in the ICT Handover Period to allow for installation of new loose ICT equipment by the ICT Installer (along with installation and commissioning of Initial ICT Equipment by Project Co).

Item	Pre or Post Completion Activity	Activity ²¹⁹	Responsibility	Programme Date ²²⁰
and Group 3.2 Equipment]		Group 3.2 Equipment by Project Co or Project Co Parties in accordance with, Schedule 11 (<i>Equipment</i>), Section 2 (<i>Construction Phase Access Protocol</i>) of Schedule 34 (<i>Joint Operating Protocol</i>) and Section 3 (<i>Authority's Construction Requirements</i>) of Schedule 6 (<i>Construction Matters</i>) to be detailed.]		
Training	Project Co Pre-Completion Commissioning	[Project Co to provide or procure provision of the Pre-Completion training referred in Appendix C (<i>Soft Services Training Plan</i>) of this Schedule 10 (<i>Outline Commissioning Programme</i>)]	Project Co	Week [◆] to [◆] prior to the Completion Date [for that Facility]
[Builder Clean, ICT Handover Requirement Tests]	Project Co Pre-Completion Commissioning	[Builder clean and completion test activities to include testing ICT Handover Requirements to trigger Beneficial Access by the Authority and any relevant Authority Party pursuant to paragraph 6.1 of Appendix B of Schedule 10 (<i>Outline Commissioning Programme</i>) and Clause 17.10 (<i>Pre-Completion Inspections</i>)	Project Co	Week [◆] to [◆] prior to the Completion Date [for that Facility]

Item	Pre or Post Completion Activity	Activity ²¹⁹	Responsibility	Programme Date ²²⁰
[ICT Installation and testing²²¹]	Authority Commissioning	[The installation, placement and/or commissioning of ICT Infrastructure by the Authority or Authority Parties in accordance with and Section 2 (<i>Construction Phase Access Protocol</i>) of Schedule 34 (<i>Joint Operating Protocol</i>)]	Authority	Week [◆] to [◆] prior to the Completion Date [for that Facility]
Decant	Project Co Pre-Completion Commissioning	[Decant in accordance with the provisions of the Decant Protocol]	Project Co	Week [◆] to [◆] prior to the Completion Date [for that Facility]
[Pre-Completion Acoustic Testing.]	Project Co Pre-Completion Testing	[◆] ²²²	Project Co	[Week [◆] to [◆] prior to the Completion Date [for that Facility]]

²²¹ Where Project Co has decant responsibilities in respect of Initial Authority ICT, this additional Project Co pre-completion activity will require to be listed separately.

²²² Testing requirements in accordance with the Authority's Construction Requirements to be set out.

Item	Pre or Post Completion Activity	Activity ²¹⁹	Responsibility	Programme Date ²²⁰
[Final Handover Clean and Completion Tests]	Project Co Pre-Completion Commissioning	[Final Handover Clean/'sparkle clean' and tests on completion (including Key Construction Processes) to be notified to the Authority's Representative and Independent Tester and carried out by Project Co in accordance with Clause 17.10 (<i>Pre-Completion Inspections</i>), in order to achieve the test documentation expected to be provided by Project Co to the Independent Tester and the Authority's Representative pursuant to paragraph 5 of Appendix B of Schedule 10 (<i>Outline Commissioning Programme</i>)]	Project Co	Week [♦] to [♦] prior to the Completion Date [for that Facility]
Training	Project Co Post-Completion Commissioning	[Project Co to provide or procure provision of the Post-Completion training referred in Appendix C (<i>Soft Service Training Plan</i>) of this Schedule 10 (<i>Outline Commissioning Programme</i>)]	Project Co	Week [♦] to [♦] after the Actual Completion Date [for that Facility]
[WiFi-Re-Testing]	Project Co Post-Completion Commissioning	[Project Co to procure the final WIFI testing once all active equipment has been installed and commissioned, to demonstrate that no areas are lacking in sufficient bandwidth and/or signal strength when the Facilities are fully occupied and in use.]	Project Co	Week [♦] to [♦] after the Actual Completion Date [for that Facility]

Item	Pre or Post Completion Activity	Activity ²¹⁹	Responsibility	Programme Date ²²⁰
[Energy Efficiency Testing]	[◆]	[◆] ²²³	Project Co	Week [◆] to [◆] after the Actual Completion Date [for that Facility]]
[Further Post Completion [M&E] Testing]	Project Co Post Completion Commissioning	[◆] ²²⁴	Project Co	[Week [◆] to [◆] after the Actual Completion Date [for that Facility]]
[Post Completion Acoustic Testing.]	Project Co Post Completion Testing	[◆] ²²⁵	Project Co	[Week [◆] to [◆] after the Actual Completion Date [for that Facility]]
[In respect of the Post Completion Works ²²⁶]				
[◆]	[◆] ²²⁷	[◆]	[◆]	[Week [◆] to [◆] prior to/ after the [relevant] Post Completion Works Date [for that Facility]]

²²³ Authorities' project specific tailoring should include energy efficiency testing by reference to the Thermal and Energy Efficiency Testing Procedure to be set out in Section 7 of Schedule 6 (*Construction Matters*).

²²⁴ Independent testing required by appropriately qualified professional for further post completion tests such as M&E. Where used, appropriate criteria, testing and certification drafting should be included, following the approach to that provided for WiFi retesting where appropriate.

²²⁵ Testing requirements in accordance with the Authority's Construction Requirements to be set out.

²²⁶ Specific Pre or Post Completion activities should (as required) deal with the Soft Landscaping Works as a distinct category of Post Completion Works.

²²⁷ To be completed as appropriate with reference to relevant commissioning activities of Project Co and the Authority such as pre-completing testing and training.

Item	Pre or Post Completion Activity	Activity ²¹⁹	Responsibility	Programme Date ²²⁰

APPENDIX B

COMPLETION CRITERIA²²⁸

1. General Requirements

- 1.1 Project Co shall provide such labour, materials, stores, test equipment, tools, instruments, apparatus and assistance as are reasonably required for the purpose of any inspection and where appropriate witnessing by the Independent Tester and shall be responsible for the provision of such electricity, fuel, water and other consumables and materials as may be reasonably required for the same. Invitations shall be given to the Authority and its technical advisers to witness such inspections, testing and commissioning activities of the Works as the Authority deems necessary. At least [ten (10)] Business Days' notice of any testing shall be given.
- 1.2 Project Co shall ensure that major items of Plant are tested during the Works for both performance and safety prior to dispatch and provide documentary evidence that testing has been carried out if requested by the Independent Tester. For the purposes of this paragraph "major items of Plant" shall include, but not be limited to: boilers, air handling units, generators, chillers, HV/MV switchgear and pressure vessels. Project Co shall arrange to witness specific unit factory testing [of major items of Plant] and shall give the Authority and its technical advisers the opportunity to witness all such factory testing. The Authority and its technical advisers shall be given at [least ten (10)] Business Days' notice, or such reasonable notice as may be agreed, of such testing of major items of Plant.

2. Works Inspection, Testing and Acceptance Activities²²⁹

2.1 Completion Criteria

Project Co shall demonstrate [in respect of each Facility] that the Works [relating to such Facility] (save for any Snagging Items) are complete in accordance with:

- 2.1.1 the Authority's Construction Requirements;
- 2.1.2 Project Co's Proposals;
- 2.1.3 the terms of this Agreement; and

²²⁸ Authorities should refer to Theme 2 of Chapter 3 of the EPEC/EUROSTAT Guide and ensure the specific criteria for determining whether construction of the asset is complete must be objective, clearly set out and robust. The Completion Criteria have been developed for a Schools project and will require project specific review in the context of College projects.

²²⁹ This section shall be reviewed against Site/Project specific issues, including any phasing of the construction of the Works and Post Completion Works. Where phasing of the construction of the Works is proposed, different sets of Completion Criteria may need to be provided for each phase. Authorities' project specific tailoring should include completion criteria aligned with the energy efficiency solution for the project.

2.1.4 more particularly, in respect of:²³⁰

- (a) the [Main] Works and achievement of the Actual ICT Handover Date, the specific criteria set out in paragraphs [2.1.5(a) to 2.1.5(f)] below (the "**ICT Handover Requirements**");]
- (b) [the [Main] Works and achievement of the Actual Completion Date, the specific criteria set out at paragraphs [2.1.6(a) to 2.1.6(pp)] below (together the "**Payment Commencement Requirements**");] [and]
- (c) [the Post Completion Works and achievement of the Actual Post Completion Works Date, the specific criteria set out at paragraphs [2.1.7(a) to 2.1.7(m)] (together the "**Post Completion Works Requirements**"),]

prior to handover of the [relevant] Works [relating to such Facility];

2.1.5 **ICT Handover Requirements**

- (a) The [Main] Works [relating to such Facility] are complete and meet the Payment Commencement Requirements, [save for paragraphs 2.1.6(i), 2.1.6(g) 2.1.6(aa), 2.1.6(bb), 2.1.6(ee), 2.1.6(ff), 2.1.6(gg), 2.1.6(hh), 2.1.6(ii), 2.1.6(ll), 2.1.6(mm), and 2.1.6(pp)] of this Schedule 10 (*Outline Commissioning Programme*);
- (b) All Group 1 Equipment shown on the Loaded Room Layout Drawings shall have been placed and/ or installed (and commissioned if appropriate) in accordance with Schedule 11 (*Equipment*);
- (c) The decanting into the Facility of the ICT Assets shall have been completed in accordance with the provisions of the Decant Protocol;
- (d) [♦] [paper] copies [and electronic copies (in accordance with the BIM Protocol)] of a draft operation and maintenance manual in sufficient detail to allow the Authority to plan for the safe and efficient operation of the [relevant] Facilities, in accordance with Clause 18.5.1 (*Operational Manuals*);
- (e) [Project Co has carried out the tests on completion to be notified to the Authority's Representative and Independent Tester and carried out by Project Co in respect of the ICT Handover Requirements in accordance with the [relevant] Final Commissioning Programme and Clause 17.10 and provided all

²³⁰ Project specific tailoring anticipated.

documentation to the Independent Tester showing satisfactory completion of the ICT Handover Requirements in accordance with this Agreement and paragraphs [5] (*Testing and Commissioning Documentation*) below;]

- (f) [The buildings, and the [relevant] Site are clean and tidy and all debris, surplus material and rubbish has been removed and the ICT server and hub rooms are clean, free from dust and ready for the ICT Assets to be fitted;] and
- (g) The Collateral Agreements have been duly executed and delivered to the Authority.

2.1.6 Payment Commencement Requirements

- (a) The building(s) is structurally complete, all external fabric is complete, wind and watertight. Internally all the finishes are complete in accordance with the Area Data Sheets;
- (b) Safe access and egress to and within the [relevant] Facilities has been established;
- (c) All incoming Utilities including all relevant backup systems are tested, commissioned and operational;
- (d) All environmental design parameters have been met and mechanical and electrical Plant and systems operate satisfactorily in accordance with the specified design criteria of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*), any manufacturers' operating requirements and the Area Data Sheets;
- (e) Provision of an "as-built" specification confirming compliance with tolerances specified within the Schedule of Accommodation and relevant Area Data Sheets;
- (f) The building management system and automated energy management system is:
 - (i) complete, tested, commissioned and operational including the setting up of graphs, logs or equivalent; and
 - (ii) automated weekly and monthly reports are being generated and uploaded to the k2N portal, or equivalent;

- (g) All Equipment shown on the Loaded Room Layout Drawings shall have been placed and/or installed (and commissioned if appropriate) in accordance with Schedule 11 (*Equipment*) and a Decant Completion Certificate shall have been signed by the Migration Manager and the Facility Representative;
- (h) All keys, access cards, access codes and other access devices, for access to all relevant areas of the Facilities, complete with all relevant schedules, including agreed suiting schedules are ready for handover to the Authority;
- (i) The Works shall be free from all surplus materials, plant and equipment and shall comply with the standards and requirements of paragraph [4] (*Handover Clean*);
- (j) All internal, external and below ground drainage systems are installed, are operational and have been tested and subjected to a CCTV survey;
- (k) [All demolition works as appropriate are complete;]
- (l) [All external soft landscaping/planting is complete (appropriate to the season), free of weeds, moss or other extraneous growth, free from litter, standing water and other foreign matter (such as stones, brick, glass and animal faeces), in healthy growth with no bare patches, free from ruts and other disruptions to the normal contour of the surface and available for use by the Authority;]
- (m) [All grass sports pitches are complete (appropriate to the season), free of weeds, moss or other extraneous growth, free from litter, standing water and other foreign matter (such as stones, brick, glass and animal faeces), in healthy growth with no bare patches, free from ruts and other disruptions to the normal contour of the surface, at a height and lined in accordance with the sport to be played and available for use by the Authority;]²³¹
- (n) [All associated hard-landscaped external works, including roads, car parks, pavements, [hard and artificial sports pitches] and boundary walls/fences are complete free from standing water and litter and available for use by the Authority;]
- (o) All road construction consent remedial works and works under Section 278 of the Highways Act 1980 (as amended) identified by the relevant Local Authority have been undertaken;

²³¹ Authorities may need to adjust requirements to accommodate a post-completion works phase for playing fields/ other soft landscaping and/or different Post Completion Works Requirements that are to apply to different Facilities on multi-facility projects.

- (p) All lift systems are complete, commissioned and operational; including connection and monitoring of lift car emergency call device;
- (q) All building, statutory, directional, departmental, general information, room numbering and external signage as indicated within Project Co's Proposals and/or Reviewable Design Data and necessary to allow the operational Services to commence have been provided and installed. This includes both internal and external signage for the Facilities and areas outwith the Site boundary to include the access routes to the Site;
- (r) Those elements of the fire management strategy and fire safety risk assessment in accordance with the Regulatory Reform (Fire Safety) Order 2005, for which Project Co is responsible, have been produced;
- (s) All fire stopping, fire proofing and fire detection, alarm and suppression systems are complete, tested and commissioned by suitably qualified persons and are fully operational having demonstrated cause and effect testing is complete;
- (t) All external lighting is installed, tested, commissioned and operational;
- (u) All IT and communication systems to be installed by Project Co across the [relevant] Site are complete and tested and test results submitted to the Authority (and if appropriate commissioned) and the ICT Infrastructure Tests labelled 'P1' have been met;
- (v) All small power sockets and data points as defined on the ADS are complete and in the agreed location in each room or space across the [relevant] Site;
- (w) All security and surveillance systems, access controls and call alarms are complete, tested, commissioned, operational and available for use by the Authority;
- (x) All acoustic testing has been completed to prove compliance with Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*) and Section 4 (*Project Co's Proposals*) of Schedule 6 (*Construction Matters*);
- (y) All builder's work in connection with art and ICT installations are complete;

- (z) All specialist systems, including but not limited to [AV systems, stage lighting, and entertainment and [♦]²³² systems], are complete tested, commissioned, witnessed by relevant Authority personnel, operational and available for use by the Authority;
- (aa) Project Co has carried out the tests on completion [(including Key Construction Processes)] to be notified to the Authority's Representative and Independent Tester and carried out by Project Co in accordance with the [relevant] Final Commissioning Programme and Clause 17.10 (*Pre-Completion Inspections*) and provided all documentation to the Independent Tester showing satisfactory completion of the Payment Commencement Requirements in accordance with this Agreement and paragraph [5 (*Testing and Commissioning Documentation*)] below;
- (bb) A final draft operation and maintenance manual for the Facilities has been made available to the Authority in accordance with Clause 18 (*Post Completion Commissioning*), [and Project Co and/or the Contractor have complied with the 'data drops' required pursuant to the BIM Protocol], including delivery of "as-built" drawings, "final issue" construction drawings and the "as-built" specification),] to allow the Facilities to be operated safely;
- (cc) Copies of all Consents and warranties relevant to the Works and original warranties in favour of the Authority in respect of Authority Maintenance Equipment (in accordance with the warranty requirements specified on the Loaded Room Layout Drawings) have each been supplied by Project Co to the Authority;
- (dd) [♦];
- (ee) [Project Co shall ensure the following finishing Works are completed as appropriate to the Facilities:
 - (i) removal of Site establishment and temporary accommodation;
 - (ii) cap off and completely remove temporary site services and record position; and
 - (iii) removal of temporary materials, including surfacing, complete with full reinstatement.]
- (ff) Subject to paragraph [6.5] of this Appendix B (*Completion Criteria*) of Schedule 10 (*Outline Commissioning Programme*),

²³² To be adjusted/ supplemented on a project specific basis as required.

the decanting into the Facility shall have been completed in accordance with the provisions of the Decant Protocol;

- (gg) [Subject to paragraphs 6.2 to 6.4 of this Appendix B of Schedule 10 (*Outline Commissioning Programme*) and Clause 14.8 (*Handover Dates*), at least twenty (20) Business Days shall have passed from the date of issue of the ICT Handover Acceptance Certificate, in accordance with Clause 14.2 (*Dates for Completion*), and Project Co shall have afforded the Authority (and any relevant Authority Party):
 - (i) Beneficial Access on such terms and for such time as is provided for in paragraph 6.1 of Appendix B of Schedule 10 (*Outline Commissioning Programme*) and in accordance with the [relevant] Final Commissioning Programme; or
 - (ii) Such alternative access as may be agreed from time to time by the parties in writing;]
- (hh) Project Co has complied with its obligations under the [Soft Services Training Plan];
- (ii) All end-user training and demonstrations have been recorded (audio + HD video file) and two (2) copies provided to the end-user on flash drives;
- (jj) [provision of the Building User Guides and Room Guides to using heating, lighting, lighting control and ventilation systems and other systems that are to be within the control of the [Authority]/ [School Entity] as detailed in [♦] of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*)]
- (kk) [provision of the User Guide relating to building security, intruder and panic alarms as detailed in [♦] of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*)]
- (ll) Project Co has in respect of each Area (excluding any Areas that are the subject of Post Completion Works) laid out all groups of furniture, fittings and equipment (other than Group 4 Equipment) in accordance with [♦] of the Authority's Construction Requirements and in accordance with the standards and provisions set out in the this Agreement including the Area Data Sheets;
- (mm) the ICT Infrastructure Tests and labelled P2 have been met;

- (nn) photo voltaic system is fully installed, tested and commissioned including the G59 application to the DNO, with all metering installed and operational;
- (oo) the rain water harvesting system is fully installed, tested and commissioned and all filtration checked to ensure no building debris within storage tank; and
- (pp) [Project Co has carried out the tests on completion to be notified to the Authority's Representative and Independent Tester and carried out by Project Co in respect of the [Main] Works in accordance with the [relevant] Final Commissioning Programme and Clause 17.10 (*Pre-Completion Inspections*) and provided all documentation to the Independent Tester showing satisfactory completion of the Payment Commencements Requirements in accordance with this Agreement and paragraphs [5] (*Testing and Commissioning Documentation*) below;]

2.1.7 [Post Completion Works Requirements

- (a) the Post Completion Works (including any associated mechanical, electrical, IT, service and drainage installations) have been completed, finished and laid out in accordance with the standards and provisions set out in the Area Data Sheets for the External Areas that form part of the Authority's Construction Requirements and are available for use by the Authority;
- (b) the external hard and soft play and landscaped areas together with the sports and recreational facilities as shown in the Authority's Construction Requirements and Project Co's Proposals and as approved in any [relevant] Planning Permission have been located on the [relevant] Site;
- (c) external fencing, gates, security equipment, vehicular and pedestrian access are complete as described in the Authority's Construction Requirements and Project Co's Proposals;
- (d) the [relevant] Site, are clean and tidy and all debris, surplus material and rubbish has been removed;
- (e) [all external soft landscaping/planting is complete (appropriate to the season), free of weeds, moss or other extraneous growth, free from litter, standing water and other foreign matter (such as stones, brick, glass and animal faeces), in healthy growth with no bare patches, free from ruts and other disruptions to the normal contour of the surface and available for use by the Authority;]²³³

²³³ Authorities may need to adjust requirements to accommodate a post-completion works phase for playing fields/ other soft landscaping and/or different Post Completion Works Requirements that are to apply to different Facilities on multi-facility projects.

- (f) [all grass sports pitches are complete (appropriate to the season), free of weeds, moss or other extraneous growth, free from litter, standing water and other foreign matter (such as stones, brick, glass and animal faeces), in healthy growth with no bare patches, free from ruts and other disruptions to the normal contour of the surface, at a height and lined in accordance with the sport to be played and available for use by the Authority;]²³⁴

- (g) [all associated hard-landscaped external works, including roads, car parks, pavements, [hard and artificial sports pitches], all fixed games equipment is structurally sound and boundary walls/fences are complete free from standing water and litter and available for use by the Authority;]

- (h) [Project Co has carried out the tests on completion to be notified to the Authority's Representative and Independent Tester and carried out by Project Co in respect of the [relevant] Post Completion Works in accordance with the [relevant] Final Commissioning Programme and Clause 17.10 (*Pre-Completion Inspections*) and provided all documentation to the Independent Tester showing satisfactory completion of the Post Completion Works Requirements in accordance with this Agreement and paragraphs [5] (*Testing and Commissioning Documentation*) below;]

- (i) [Copies of all Consents and warranties relevant to the [relevant] Post Completion Works have been supplied by Project Co to the Authority;]

- (j) [Project Co shall ensure the following finishing Works are completed as appropriate to the [relevant] Facilities:
 - (i) removal of Site establishment and temporary accommodation;
 - (ii) cap off and completely remove temporary site services and record position; and
 - (iii) removal of temporary materials, including surfacing, complete with full reinstatement.]

- (k) All keys, access cards, access codes and other access devices, for access to all relevant areas of the Facilities, complete with all relevant schedules, including agreed suiting schedules are ready for handover to the Authority;

²³⁴ Adjustments to the drafting may be required to reflect different Post Completion Works Dates in respect of grass pitches where relevant.

- (l) All internal, external and below ground drainage systems are installed, are operational and have been tested and subjected to a CCTV survey; and
- (m) [All demolition works as appropriate are complete and cap off all existing services and record position.]]

3. **[WiFi PC Criteria]²³⁵**

4. **Handover Clean²³⁶**

[♦] Business Days prior to the anticipated Actual Completion Date, Project Co shall [offer a cleaned sample area for review by the Authority to establish cleanliness benchmarks prior to conducting the final clean. Project Co shall] remove builders debris, and clean all [applicable] areas of the Facilities including plant rooms, to the standard defined below:

4.1 Floors

- 4.1.1 The floor is cleaned to remove paint, plaster, grit and litter, water and other liquids;
- 4.1.2 The floor is cleaned to remove stains, spots and scuffs;
- 4.1.3 Inaccessible areas (edges and corners) cleaned to remove grit and lint;
- 4.1.4 All carpets, vinyl and similar floor coverings are clean and vacuumed;
- 4.1.5 Specialist floor finishes are cleaned in accordance with manufacturers guidance; and
- 4.1.6 Barrier matting zones/entry floor systems are vacuumed and wells free of debris.

²³⁵ To be considered on a project specific basis.

²³⁶ Handover Clean requirements to be agreed with appropriate Authority personnel.

4.2 Toilets, Sinks, Basins, Baths, Taps and Fixtures

- 4.2.1 All labels, tape and sticky marks to be removed;
- 4.2.2 Porcelain, cubicle rails and plastic surfaces are wiped clean;
- 4.2.3 Metal surfaces, shower screens and mirrors are wiped clean;
- 4.2.4 Wall tiles and wall fixtures (including dispensers, toilet holders, paper dispensers, grab rails and the like) wiped clean to remove grit; and
- 4.2.5 Inaccessible areas (edges, corners, folds and crevices) are cleaned to remove grit and lint.

4.3 All pieces of fixed furniture, equipment and appliances:

- 4.3.1 All high surfaces are wiped clean;
- 4.3.2 Blinds, curtains, screens including hanging rails, hooks and fixings are wiped clean;
- 4.3.3 Shelves, bench tops, cupboards and wardrobes are wiped clean inside and out and are free of litter; and
- 4.3.4 Protective film is removed from all hard surfaces and equipment unless otherwise requested by the Service Provider.

4.4 Low Level Surfaces

- 4.4.1 Internal walls cleaned to remove paint splashes, grit, soil and graffiti;
- 4.4.2 Skirtings, covings and the like are cleaned to remove paint or plaster splashes;
- 4.4.3 Light switches and data and electrical sockets are free from paint and plaster splashes and wiped clean;
- 4.4.4 Protective film is removed from all hard surfaces and fittings including dado trunking, sockets, fittings and the like;

- 4.4.5 All service ducts, exposed pipes, service boxing, protrusions, exposed steelwork and ledges are free from paint and plaster splashes and are wiped cleaned; and
- 4.4.6 All windows (glass internal and external), ironmongery, vents window frames and sills are free from paint and plaster splashes and are wiped cleaned.

4.5 High Level Surfaces

- 4.5.1 Walls and ceilings are cleaned to remove plaster splashes, paint splashes, grit, soil, film and graffiti;
- 4.5.2 Ceilings and light fittings are cleaned to remove surface markings;
- 4.5.3 Doors and doorframes are cleaned to remove grit, soil, and film;
- 4.5.4 Air vents, grilles and other ventilation outlets are unblocked and cleaned to remove grit, soil, scuffs and other marks;
- 4.5.5 Light switches and data and electrical sockets are free from paint and plaster splashes and wiped clean;
- 4.5.6 Protective film is removed from all hard surfaces and fittings including dado trunking, sockets, fittings and the like;
- 4.5.7 All windows (glass internal and external), ironmongery, vents window frames and sills are free from paint and plaster splashes and are wiped cleaned;
- 4.5.8 Door tracks and door jambs are cleaned to remove grit and other debris.
- 4.5.9 External high level signage / entrance canopies are free from paint splashes, grit, soil, film and graffiti;
- 4.5.10 Any solar shading mounted externally eg brise soleil are free from paint splashes, grit, soil, film and graffiti; and
- 4.5.11 Lift car internal surfaces should be clean and unmarked.

5. Testing and Commissioning Documentation

5.1 Documentation

The following is a non-exhaustive list of the test documentation expected to be provided by Project Co to the [Independent Tester and the Authority's Representative]²³⁷:

- 5.1.1 Building regulation certification (BRUKL, EPC and BREEAM rating certificates);
- 5.1.2 Evidence that all conditions for which Project Co is responsible attached to the detailed Planning Approval which are due to have been discharged to the satisfaction of the relevant local authority, have been so discharged;
- 5.1.3 Final road construction consent certificate from the relevant Local Authority should be issued within one (1) month of [the Certificate of Practical Completion];
- 5.1.4 Flushing cleaning and chlorination test certificates;
- 5.1.5 Boiler Plant manufacturers factory test and commissioning sheets in accordance with CIBSE Commissioning Code B, including all steam systems;
- 5.1.6 Ductwork systems pressure test and volume flow rate certificates if appropriate;
- 5.1.7 Kitchen equipment commissioning certificate if appropriate;
- 5.1.8 Electrical installation completion and inspection certificates in accordance with (BS 7671 and NICEIC requirements);
- 5.1.9 Lighting and power test certificates;
- 5.1.10 Fire and intruder alarms commissioning certificates, including intruder detection and alarm, access control system(s), hold-open magnetic locks to internal fire doors and magnetic locks to external exit doors and smoke ventilation systems. [Certification of off-site monitoring links being live shall be provided];

²³⁷ The following should be considered, where relevant, for educational facilities:

- Swimming pool systems and equipment commissioning certificate;
- Multi Use Games Area (MUGA) completion certificate; and
- Acoustic test results in accordance with the guidance of chapter 1.3 of Building Bulletin 93 Acoustic Design of Schools – A Design Guide.

- 5.1.11 General electrical earth loop and insulation resistance test sheets;
- 5.1.12 Testing of all hot water service thermostatic mixing valves ("TMVs") in accordance with BS6700 and tests to comply with HSE Document L8 and HGN 'Safe' Hot Water and Surface Temperatures;
- 5.1.13 Emergency lighting completion and test certificates;
- 5.1.14 Security systems commissioning certificates, including but not limited to Access Control including turnstiles, intruder detection and panic alarm systems;
- 5.1.15 Certificate of soundness testing of gas installation;
- 5.1.16 Gas pipework pressure test and purge certificates;
- 5.1.17 Fire suppression system certificates (in accordance with BS6266 and tests to comply with CIBSE Guidance E);
- 5.1.18 Fire alarm sound record sheets;
- 5.1.19 Lighting calculation sheets and lux level test results in accordance with CIBSE Commissioning Code L;
- 5.1.20 Machine (generator/ups etc) specialist commissioning and factory test sheets;
- 5.1.21 Acoustic test sheets (in accordance with BS EN ISO 717 – 1: 2013);
- 5.1.22 Lift Commissioning in accordance with BS EN 81. Lift Log Book to be provided for each lift;
- 5.1.23 Lightning protection risk analysis and test/commissioning sheets in accordance with BS EN 62305 (2012);
- 5.1.24 Works pressure test certificates for all pressure vessels;
- 5.1.25 Mechanical pipework systems pressure tests;
- 5.1.26 HVAC Equipment performance tests;
- 5.1.27 Condensate clearance tests for HVAC Equipment;

- 5.1.28 BMS/EMS tests/commissioning records in accordance with CIBSE Commissioning Code C. Certification reporting function is complete;
- 5.1.29 Air distribution systems in accordance with CIBSE Commissioning Code A;
- 5.1.30 Water systems (heating and domestic water) in accordance with CIBSE Commissioning Code W;
- 5.1.31 Legionella testing (to include an organic check on the incoming mains) within tolerances given in HSE ACOP test sheets;
- 5.1.32 Domestic water systems bacteriological quality test sheets;
- 5.1.33 Plant (Calorific, Treatment etc.) specialist commissioning and factory test sheets, if applicable;
- 5.1.34 Disabled Toilet Alarm and disabled refuge intercom test certificate [and certification of off-site monitoring links being live shall be provided];
- 5.1.35 Fire Alarm Test Certificate;
- 5.1.36 CCTV, Intruder alarm and access control test certificate. [Certification that off-site monitoring links are live shall be provided];
- 5.1.37 Telephone and data structured cable scheme test certificate, test results and copy of manufacturer's warranty;
- 5.1.38 Induction loop test certificate;
- 5.1.39 Pipeline pressure and flow rate test certificates including drainage and any steam systems;
- 5.1.40 Steam boiler/generator test factory test and commissioning certificates in accordance with CIBSE Commissioning Code B;
- 5.1.41 Refrigerant system factory test and commissioning certificates in accordance with CIBSE Commissioning Code R;
- 5.1.42 Chemical clean and inhibitor dosing certification to heating/chilled water systems including confirmation of compatibility with manufacturers requirements;

- 5.1.43 Ductwork physical cleaning certification in accordance with the HVCA (2005) TR/19 – Guide to good practice;
- 5.1.44 Building air pressure test record certificates;
- 5.1.45 Air tests and test records for the Facilities drains and drainage network. CCTV survey of the full layout of the drainage system and reports to be provided recording pre-handover condition;
- 5.1.46 Renewables or Low carbon technologies (PV, CHP, wind turbine, biomass boiler, GSHP, ASHP, etc) test factory test and commissioning certificates, if applicable;
- 5.1.47 Roller shutter door test certificates;
- 5.1.48 Sprinkler system test and Loss Prevention Council certificate; and
- 5.1.49 Test certificates and sufficient written evidence covering the design, construction and repair etc for all protective devices such as pressure relief valves and the like. Specific reference is made to compliance with Regulation 5 of The Pressure Systems Safety Regulations 2000.

6. **[Authority Commissioning: Access Prior to [the]/[an] Actual Completion Date [for a Facility]**

6.1 **Beneficial Access during ICT Handover Period**

- 6.1.1 Prior to the Actual Completion Date [in respect of a Facility], in order to facilitate Authority Commissioning, Project Co shall, at its own cost, provide the Authority and any relevant Authority Party with:
 - (a) Beneficial Access to the [relevant] Facility²³⁸ on and from the date of the [relevant] ICT Handover Acceptance Certificate in accordance with the [relevant] Final Commissioning Programme, for the period set out in [column 5 of Table A of Appendix A of the [relevant] Final Commissioning Programme], as may be adjusted pursuant to paragraph 6.4 (*Impact of Non-Compliance on Issue of the Certificate of Practical Completion*) below (the "**ICT Handover Period**")]; and
 - (b) [♦].

²³⁸ It may be more appropriate to include details of specific areas where non-exclusive access is required for Authority Commissioning (including works by an ICT Installer). Where exclusive access is required for any such Commissioning to be undertaken by an Authority (or an Authority Party), this should be set out separately in paragraph 6.1.1(b).

- 6.1.2 The parties shall comply with their respective obligations set out in Section 2 (*Construction Phase Access Protocol*) of Schedule 34 (*Joint Operating Protocol*) during the ICT Handover Period.

6.2 Acceptance for Commissioning Commencement and Continuation

- 6.2.1 The Authority shall and shall procure that the ICT Installer and any other Authority Party shall carry out its activities during the ICT Handover Period, such that no act or omission on its behalf shall cause any or all of the ICT Handover Requirements to no longer be met [in respect of a Facility].
- 6.2.2 Where Project Co can show on or before the inspection by the Independent Tester of the Payment Commencement Requirements [for the [relevant] Facility]] pursuant to Clause 17.10 (*Pre-Completion Inspections*) that the ICT Installer has caused the Payment Commencement Requirements to not be met then, to the extent such failure is preventing issue of the Certificate of Practical Completion, the Certificate of Practical Completion will be issued.
- 6.2.3 Subject to paragraphs 6.2.1 and 6.2.2 above and without prejudice to paragraph 6.3 (*Live Testing during ICT Handover Period*) the parties acknowledge that notwithstanding the ICT Handover Acceptance Certificate has been issued, the Independent Tester shall be entitled to refuse to issue the Certificate of Practical Completion [in respect of a Facility] on the basis that at the date of the relevant inspection pursuant to Clause 17.10 (*Pre-Completion Inspection*) the ICT Handover Requirements are no longer being met [in respect of such Facility].

6.3 Live Testing during ICT Handover Period

- 6.3.1 Subject to paragraph 6.3.2 below Project Co shall ensure that [[each]/[the] Facility] has mains power during the ICT Handover Period so that, amongst other things, the ICT Installer can carry out live testing of the ICT Assets.
- 6.3.2 For the purposes of avoiding events that would either endanger any part of the building or cause a risk of injury or death to persons Project Co may shut down or reduce the mains power during the ICT Handover Period, provided that:
- (a) for any shut down or power reduction between 8am and 5pm on a Business Day, Project Co shall have given not less than forty-eight (48) hours' prior written notice of such intention to, and obtained the prior written consent of, the Authority's Representative (such consent not to be unreasonably withheld or delayed, provided that it shall be reasonable for the Authority's Representative not to consent where such shutdown or power reduction could have a material adverse effect on the installation of the ICT Assets); or

(b) for any shut down or power reduction outside the hours set out in paragraph 6.3.2(a) above (an "**Out of Hours Shutdown**"), Project Co shall have given not less than twenty four (24) hours' prior written notice of such intention to the Authority's Representative. If there has been two or more Out of Hours Shutdowns in any week then any further Out of Hours Shutdowns in that week shall also require the prior written consent of the Authority's Representative (such consent not to be unreasonably withheld or delayed, provided that it shall be reasonable for the Authority's Representative not to consent where such shutdown or power reduction could have a material adverse effect on the installation of the ICT Assets).

6.3.3 Project Co shall use its best endeavours to reinstate the mains power to the relevant Area as soon as possible after any such event as referred to in paragraph 6.3.2 above and the Authority shall procure that the ICT Installer shall not attempt to connect to the live power within the relevant Area until Project Co instructs the Authority [or the relevant School Entity] in writing that it is safe to do so.

6.4 Impact of Non-Compliance on Issue of the Certificate of Practical Completion

6.4.1 Subject to paragraphs [6.4.2] to [6.4.3] below where Project Co has not complied with its obligations pursuant to paragraph [2] (*Hours of Access*) of Section 2 (*Construction Phase Access Protocol*) of Schedule 34 (*Joint Operating Protocol*) or paragraph 6.3 (*Live Testing during ICT Handover Period*) of this Appendix B (*Completion Criteria*) of Schedule 10 (*Outline Commissioning Programme*), the Independent Tester shall be entitled to withhold issue of the Certificate of Practical Completion [in respect of the relevant Facility] by one Business Day (only) for each Business Day where it has been agreed or determined that Project Co had not complied.

6.4.2 If the period of Project Co's non-compliance referred to in paragraph 6.4.1 above does not exceed fifteen (15) minutes in aggregate on any Business Day then such non-compliance shall be ignored for the purposes of paragraph 6.4.1 above.

6.4.3 Except where such act or omission is the result of an act or omission of Project Co, if the non-compliance referred to in paragraph 6.4.1 above is due to any act or omission of any provider of utilities or statutory undertaker (and, in each case, of any of their respective agencies, employees, contractors or other persons for whom they are responsible) where Project Co is using all reasonable endeavours to minimise the impact of such act or omission on the performance of its obligations under this Agreement then such non-compliance shall be ignored for the purposes of this Appendix B (*Completion Criteria*) to Schedule 10 (*Outline Commissioning Programme*);

6.5 Notwithstanding anything to the contrary in this Agreement, where the only failure(s) to satisfy the Payment Commencement Requirements [in relation to [the]/[a] Facility]

arise as a direct result of a breach by the Authority of its obligations contained in the Decant Protocol, then:

- 6.5.1 the Independent Tester shall issue a Certificate of Practical Completion if it is satisfied all the other Payment Commencement Requirements have been met in relation to the [relevant] Facility;
- 6.5.2 the parties shall agree, acting reasonably, any necessary revision to the Decant Timetable for the [relevant] Facility in accordance with the Decant Protocol; and
- 6.5.3 to the extent Project Co subsequently breaches the Decant Protocol in relation to the [relevant] Facility, the provisions of Schedule 14 (*Payment Mechanism*) shall apply.]

APPENDIX C
SOFT SERVICES TRAINING PLAN

Project Co shall procure that the training detailed in the table below is carried out.

Key to Soft Services Training Plan Table:

- X = training provided
- PRE-COM = Prior to the [relevant] Actual Completion Date [in respect of each Facility]
- POST-COM = After [relevant] the Actual Completion Date [in respect of each Facility]
- SMT = Senior Management Team or its nominee

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	Training on new build system will be provided for the following areas:	Timing	Hard FM (Service Provider) Team	Facility Premises Team	Soft Services Team	Teaching Staff
1.	Contacting the Helpdesk (Overview)	Pre-COM	X	X	X	X SMT
2.	Contacting the Helpdesk (Detailed)	Pre-COM	X	X		

	Training on new build system will be provided for the following areas:	Timing	Hard FM (Service Provider) Team	Facility Premises Team	Soft Services Team	Teaching Staff
3.	Accessing Data and running reports	Pre-COM	X	X		
4.	Building User Guide	Pre-COM	X	X	X	X SMT
5.	Building Familiarisation (Maintenance)	Pre-COM	X	X		
6.	CAFM System Overview	Pre-COM	X	X		
7.	Data Entry, management and reporting	Pre-COM	X Helpdesk			
8.	PPM issue and completion	Pre-COM	X	X		
9.	Reactive Project works logging, control and completion	Pre-COM	X	X		

	Training on new build system will be provided for the following areas:	Timing	Hard FM (Service Provider) Team	Facility Premises Team	Soft Services Team	Teaching Staff
10.	Purchase Ordering	Pre-COM	X	X		
11.	Responding to Service User Queries	Pre-COM	X	X		
12.	Tour of the building(s) and grounds (Site familiarisation)	Pre-COM Post-COM tours will be provided	X	X	X	X
13.	Inspection of External/Facades etc	Pre-COM	X	X		
14.	Roof access, mansafe systems	Pre-COM	X	X		
15.	Location of Utility meters	Pre-COM	X	X		
16.	Plant and equipment relating to heating and hot water system i.e. boilers, isolation points	Pre-COM	X	X		

	Training on new build system will be provided for the following areas:	Timing	Hard FM (Service Provider) Team	Facility Premises Team	Soft Services Team	Teaching Staff
17.	Plant and equipment relating to any renewable energy system or LZC technology, i.e., heat pumps, PV panels, biomass boilers, wind turbines, etc.	Pre-COM	X	X		
18.	Plumbing/Cold water system, isolation points	Pre-COM	X	X		
19.	Electrical systems, power circuits, distribution boards	Pre-COM	X	X		
20.	Ventilation systems, location, access and controls	Pre-COM	X	X		
21.	All local room controls	Pre-COM followed up Post- COM	X	X	X	X
22.	Uninterruptible power supply systems	Pre-COM	X	X		

	Training on new build system will be provided for the following areas:	Timing	Hard FM (Service Provider) Team	Facility Premises Team	Soft Services Team	Teaching Staff
23.	Building Control and Energy Management systems	Pre-COM	X	X		
24.	Fire Alarm - panel, sounders (audio and visual), heat and smoke detectors, paging systems, deaf alarm	Pre-COM	X	X	X	X
25.	Fire fighting equipment, extinguishers, hydrants	Pre-COM	X	X	X	X
26.	Intruder Alarm - panel and sensors	Pre-COM	X	X		X
27.	Intruder Alarm - handover of codes	Pre-COM	X	X		
28.	Access Control - software and sensors	Pre-COM	X	X	X	X

	Training on new build system will be provided for the following areas:	Timing	Hard FM (Service Provider) Team	Facility Premises Team	Soft Services Team	Teaching Staff
29.	CCTV - software and cameras	Pre-COM	X	X		X SMT
30.	Class Change - software and sounders	Pre-COM	X	X		X SMT
31.	PA system - software and sounders	Pre-COM	X	X		X SMT
32.	Audio devices for aiding hearing and learning	Pre-COM, followed up Post-COM	X	X		X
33.	Audio visual devices in the classroom and teaching spaces	Pre-COM, followed up Post-COM	X	X		X
34.	Lighting system - internal, lamp controls/override capability	Pre-COM, followed up Post-COM	X	X	X	X

	Training on new build system will be provided for the following areas:	Timing	Hard FM (Service Provider) Team	Facility Premises Team	Soft Services Team	Teaching Staff
35.	Lighting system - external, lamp controls/override capability	Pre-COM, followed up Post-COM	X	X	X	X SMT
36.	Lighting - internal classroom controls	Pre-COM, followed up Post-COM	X	X	X	X
37.	Lighting - internal sports/hall/dining/studio lamp controls override/ capability	Pre-COM, followed up Post-COM	X	X	X	X
38.	Lighting - external sports pitch controls	Pre-COM, followed up Post-COM	X	X		X
39.	Emergency Lighting	Pre-COM	X	X		
40.	Emergency Stop circuits i.e. Technology/Home economics/Science labs	Pre-COM, followed up Post-COM	X	X	X	X

	Training on new build system will be provided for the following areas:	Timing	Hard FM (Service Provider) Team	Facility Premises Team	Soft Services Team	Teaching Staff
41.	Telephone system - software	Pre-COM, followed up Post-COM	X	X		X
42.	Telephone system - Handsets	Pre-COM, followed up Post-COM	X	X		X
43.	IT/Data systems	Pre-COM, followed up Post-COM	X	X		X
44.	Joint inspection of building clean	Pre-COM	X	X		X SMT
45.	Kitchen Equipment, cooking, refrigeration, water and energy management, ventilation, drainage, waste management - Demo / Training / Daily maintenance	Pre-COM	X	X	X	
46.	Cashless catering system	Pre-COM, followed up Post-COM	X	X	X	

	Training on new build system will be provided for the following areas:	Timing	Hard FM (Service Provider) Team	Facility Premises Team	Soft Services Team	Teaching Staff
47.	Lifts	Pre-COM, followed up Post-COM	X	X	X	X
48.	Hoists	Pre-COM, followed up Post-COM	X	X		X
49.	Electronic security gates	Pre-COM	X	X		
50.	Door internal, manual and automatic	Pre-COM, followed up Post-COM	X	X	X	X
51.	Door external, manual and automatic	Pre-COM, followed up Post-COM	X	X	X	X
52.	Folding doors	Pre-COM, followed up Post-COM	X	X		X
53.	Window and room ventilation controls - winter and summer mode	Pre-COM, followed up Post-COM	X	X		X

	Training on new build system will be provided for the following areas:	Timing	Hard FM (Service Provider) Team	Facility Premises Team	Soft Services Team	Teaching Staff
54.	Black out blinds and blinds in classrooms	Pre-COM, followed up Post-COM	X	X		X
55.	Locking mechanisms, keys	Pre-COM, followed up Post-COM	X	X	X	X
56.	Equipment - Fume Cupboards	Pre-COM, followed up Post-COM	X	X		X
57.	Equipment - Design and Technology Equipment	Pre-COM, followed up Post-COM	X	X		X
58.	Electric vehicle charging points	Pre-COM, followed up Post-COM	X	X		X
59.	Equipment- - Heat bay Equipment	Pre-COM, followed up Post-COM	X	X		X
60.	Equipment- - Light and Sound Equipment	Pre-COM, followed up Post-COM	X	X		X

	Training on new build system will be provided for the following areas:	Timing	Hard FM (Service Provider) Team	Facility Premises Team	Soft Services Team	Teaching Staff
61.	Equipment – specialist ventilation, dust collection/extract systems, fume extract ventilation systems, etc	Pre-COM, followed up Post-COM	X	X		X
62.	Equipment - Library Security	Pre-COM, followed up Post-COM	X	X		X
63.	Equipment- Kiln	Pre-COM, followed up Post-COM	X	X		X
64.	Waste management including waste hierarchy	Pre-COM, followed up Post-COM	X	X	X	X
65.	Asbestos Management and awareness (Retained / Refurbished Buildings	Post-COM	X	X	X	X SMT
66.	Room Guide	Pre-COM followed up Post-COM	X	X	X	X

	Training on new build system will be provided for the following areas:	Timing	Hard FM (Service Provider) Team	Facility Premises Team	Soft Services Team	Teaching Staff
67.	Building Locking Up and Opening Guide	Pre-COM followed up Post-COM	X	X	X	X

SCHEDULE 11:

EQUIPMENT²³⁹

SECTION 1

GENERAL

1. Project Co Equipment

1.1 Project Co Equipment Classification

Project Co Equipment is split into [◆]²⁴⁰ two separate groups:

1.1.1 [Group 1 Equipment]; and

1.1.2 [Group 2.2 Equipment],

each such item of Equipment being shown on the Loaded Room Layout Drawings [in respect of the relevant Facility].

1.2 Project Co Equipment Responsibilities

1.2.1 The respective obligations of the Authority and Project for Project Co Equipment are summarised in [Table 41 (*Equipment Responsibilities*)] of Part 1 (*Generic Design Requirements*) of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*).

1.2.2 Without limiting its other obligations under this Agreement, Project Co will procure, deliver to and where necessary construct, install, commission and (subject to paragraph 1.3.1 (*Maintenance of Project Co Equipment*)) maintain at the Facilities, the Project Co Equipment.

1.2.3 Project Co represents, warrants and undertakes to the Authority that in so procuring, delivering, constructing, installing, commissioning and (subject

²³⁹ Schedule 11 and associated drafting throughout the Project Agreement assumes that Project Co and the Authority's responsibilities in respect of Equipment follow the Equipment Responsibilities Table (Table 41) in the Generic Design Requirements. In the event that an Authority wished to procure Group 3 Equipment as part of the Project, project specific amendments to this Schedule and associated provisions of the Project Agreement would be required. Consideration of these terms is required in respect of a College project.

²⁴⁰ Responsibilities to be considered on a project specific basis, in particular whether Group 2.2 is needed. Further split in classes of equipment to be considered as necessary.

to paragraph 1.3.1 (*Maintenance of Project Co Equipment*) maintaining the Project Co Equipment it will comply with:

- (a) Good Industry Practice;
- (b) Section 3 (*Authority's Construction Requirements*) and Section 4 (*Project Co's Proposals*) of Schedule 6 (*Construction Matters*);
- (c) Schedule 12 (*Service Requirements*), this Schedule 11 (*Equipment*);
- (d) Clause 20 (*Quality Assurance*);
- (e) Law and all Consents;
- (f) Clause 23 (*Maintenance*); and
- (g) and Clause 24 (*Lifecycle Replacement*).

1.2.4 Project Co will not remove any Project Co Equipment from the Facilities during the Project Term, (except for such temporary removal as may be required for replacement, maintenance and repair agreed in advance with the Authority's Representative) without the consent of the Authority's Representative (such consent not to be unreasonably withheld or delayed).

1.2.5 The Project Co Equipment will have the benefit of any warranties available from manufacturers and/or suppliers and which are included in the price of the Project Co Equipment. Project Co will use all reasonable endeavours to procure such warranties are assignable in favour of the Authority.

1.2.6 Any interest of any third party in any Project Co Equipment will be notified to the Authority as soon as reasonably practicable after Project Co is or should be aware of any such interest. No third party will have any interest in any Project Co Equipment which would or might act to the detriment of the Authority in exercising its rights under this Agreement.

1.2.7 [Project Co will ensure any Leased Equipment will be leased on terms which allow Clause 48 (*Handback Procedure*) to have effect at no cost to the Authority in excess of any included in respect thereof in the Base Case.]²⁴¹

²⁴¹ Relevance to be considered on a project specific basis. If this provision is retained, the clause that follows relating to title to the Project Co Equipment will need to be adjusted.

- 1.2.8 [Once Project Co has installed Group 2.2 Equipment at the [relevant] Facility, title in that Equipment shall pass to the Authority [or if directed by the Authority, to the [relevant] School Entity].]
- 1.2.9 Unless specifically stated to the contrary in this Agreement, all costs associated with Project Co's obligations in respect of Project Co Equipment has been accounted for in the Base Case.

1.3 Maintenance of Project Co Equipment

- 1.3.1 [Project Co will not be responsible for the maintenance or replacement of Group 2.2 Equipment subject to [♦] or unless agreed in writing between Project Co and the Authority.]²⁴²
- 1.3.2 Project Co shall replace any item of Group 1 Equipment and make it available for use before it becomes unreliable, unsafe, has significant deterioration from the condition it should have been in or becomes unsuitable for its intended purpose or unable to properly operate and function.
- 1.3.3 Any repair or replacement of Group 1 Equipment required during the period of the manufacturer's or supplier's warranty that is not covered by such warranty due to the Authority's failure to perform its obligations under this Agreement must be carried out by or on behalf of the Authority but only where the Authority has been made aware of the relevant manufacturer's or supplier's warranty by Project Co.
- 1.3.4 Where the Authority (acting reasonably) considers that:
- (a) for health and safety reasons; or
 - (b) in order for the Authority to fulfil its duty to provide or procure the provision of the catering service,

there is in either case an urgent need to undertake maintenance of the Group 1 Equipment that would otherwise be the responsibility of Project Co then the Authority shall, to that extent, be authorised to undertake the relevant element of maintenance itself provided that it shall do so in accordance with Good Industry Practice. Project Co shall reimburse the Authority's costs of carrying out such maintenance.

1.4 Installation of Project Co Equipment

Project Co will, at its own cost, carry out its responsibilities in respect of the installation of Project Co Equipment so that it is available for use in accordance with the terms of this Agreement, including but not limited to Section 3 (*Authority's*

²⁴² Relevance to be considered on a project specific basis.

Construction Requirements) of Schedule 6 (*Construction Matters*) and Schedule 12 (*Service Requirements*) from:

- 1.4.1 the [relevant] Actual ICT Handover Date [for each Facility] in respect of Group 1 Equipment; and
- 1.4.2 [the [relevant] Actual Completion Date [for each Facility] in respect of Group 2.2 Equipment.]

2. Authority Equipment & Authority Maintenance Equipment

2.1 Authority Equipment Classification

Authority Equipment is split into [♦]²⁴³ separate groups:

- 2.1.1 [Group 2.1 Equipment];
- 2.1.2 [Group 3.1 Equipment];
- 2.1.3 [Group 3.2 Equipment]; and
- 2.1.4 [Group 4 Equipment],

each such item of Equipment being shown on the Loaded Room Layout Drawings [in respect of each relevant Facility].

2.2 Authority Equipment Responsibilities

- 2.2.1 The respective obligations of the Authority and Project Co for Authority Equipment are summarised in [Table 41] [and 3.2 (*Allocation of Responsibilities*) of Part 1 (*Generic Design Requirements*) of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*)].
- 2.2.2 Without limiting its other obligations under this Agreement, Project Co will deliver, construct, install, commission and (subject to paragraph 2.4 (*Maintenance of Authority Equipment*) of Section 1 (*General*) of Schedule 11 (*Equipment*)) maintain at the Facilities, the Authority Equipment.
- 2.2.3 Project Co represents, warrants and undertakes to the Authority that in so delivering, constructing, installing, commissioning and (subject to paragraph 2.4 (*Maintenance of Authority Equipment*) of Section 1

²⁴³ Further split in classes of equipment to be considered as necessary.

(General) of Schedule 11 (Equipment) maintaining the Authority Equipment it will comply with:

- (a) Good Industry Practice;
- (b) Section 3 (Authority's Construction Requirements) and Section 4 (Project Co's Proposals) of Schedule 6 (Construction Matters);
- (c) Schedule 12 (Service Requirements), this Schedule 11 (Equipment);
- (d) Clause 20 (Quality Assurance);
- (e) Law and all Consents;
- (f) Clause 23 (Maintenance); and
- (g) Clause 24 (Lifecycle Replacement).

2.2.4 Project Co will not remove any Authority Equipment from the Facilities during the Project Term, (except for such temporary removal as may be required for replacement, maintenance and repair agreed in advance with the Authority's Representative) without the consent of the Authority's Representative (such consent not to be unreasonably withheld or delayed).

2.2.5 The Authority does not guarantee, warrant or give any assurances as to the age, condition or state of repair of any item of any item of Authority Equipment.

2.2.6 Project Co has (exercising the level of skill and care reasonably to be expected from an appropriately qualified and competent operator providing services in relation to a project of similar size and scope to the Project) carried out its own inspections and made its own assessment of the suitability and condition of the Group 2.1 Equipment.

2.2.7 Unless specifically stated to the contrary in this agreement, all costs associated with Project Co's obligations in respect of Authority Equipment has been accounted for in the Base Case.

2.3 Decanting and Installation of Authority Equipment

2.3.1 Project Co will, at its own cost, carry out its responsibilities in respect of Decant and relocation of the Authority Equipment from the [relevant] [Existing Facility] directly to the [relevant] Facility pursuant to the Decant

Protocol so that it is available for use in accordance with the requirements of this Agreement, including but not limited to Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*) and Schedule 12 (*Service Requirements*) from:

- (a) the [relevant] Actual ICT Handover Date in respect of Group 1 Equipment; and
- (b) the [relevant] Actual Completion Date for a Facility in respect of Group 2.1 Equipment, Group 3.1 Equipment, Group 3.2 Equipment and Group 4 Equipment. In the event Project Co fails in its obligations to Decant the Authority Equipment as required under this Agreement, the Authority may within three (3) Business Days of the [relevant] Planned Decant Completion Date undertake such decanting and recover the cost of doing so from Project Co as a debt.

2.3.2 The Authority shall comply with its obligations under Section 2 (*Decant Protocol*) of this Schedule 11 (*Equipment*) and shall procure that Project Co, its Sub-Contractors and their respective employees and agents have access to the Existing Facilities at the times agreed in the Decant Timetable, subject to Section 2 (*Construction Phase Access Protocol*) of Schedule 34 *Joint Operating Protocol*) for the sole purpose of allowing Project Co to perform its obligations pursuant to paragraph 2.3 above.

2.4 Maintenance of Authority Equipment

Authority Equipment will at all times remain in the ownership of the Authority [or the relevant School Entity] and Project Co will not be responsible for its maintenance and replacement other than to the extent provided specifically to the contrary in this Agreement or unless agreed in writing between Project Co and the Authority.

2.5 Authority Maintenance Equipment

2.5.1 The Authority shall, [and shall procure that the relevant School Entity shall,] have regard to the impact of any changes in the specification of the Authority Maintenance Equipment on the Services when replacing the Authority Maintenance Equipment.

2.5.2 Project Co shall inform the Authority [and the relevant Facility Representative] at the same time that it submits the Lifecycle Schedule which items of Authority Maintenance Equipment will in Project Co's reasonable opinion require replacement by the Authority within the Academic Year.

2.5.3 Project Co shall inform the Authority [and the relevant Facility Representative] in writing if at any time any Authority Maintenance Equipment requires immediate replacement on the grounds that it creates a health and safety risk and/or is likely to damage other elements of the

Facilities or Site[s] if left in use, despite not being itemised in a Lifecycle Schedule.

2.5.4 If the Authority Maintenance Equipment is the subject of a notice given under paragraph 2.5.3 above and as such requires immediate replacement, then the Authority shall or shall procure that such Authority Maintenance Equipment shall be taken out of service as soon as reasonably practicable. Project Co will not be liable for any Deductions that directly arise from the failure by the Authority to take such Authority Maintenance Equipment out of service in accordance with this paragraph 2.5.4.

2.5.5 Project Co shall upon request provide to the Authority [and the relevant School Entity] access to all Project Co's records, receipts, invoices, reports, drawings, technical specifications and performance logs required by the Authority [and/or the relevant School Entity] to enable them to accurately assess any [Approved Contractor Equipment] supplied, installed or commissioned by Project Co or [Approved Contractor Equipment] which Project Co proposes to supply, install or commission.

2.6 Loose Equipment Purchase Protocol

Project Co and the Authority shall comply with their respective obligations under the Loose Equipment Purchase Protocol.

2.7 Handback

The Authority Equipment will not be subject to the Handback Requirements.

SECTION 2

DECANT PROTOCOL

1. INTRODUCTION AND INTERPRETATION

- 1.1 This Section 2 (*Decant Protocol*) of Schedule 11 (*Equipment*) sets out the scope, responsibilities, organisation, management and processes agreed for the planning and implementation of the Decant.
- 1.2 A recommended decant sequence is provided in this protocol. Any actions set out in this protocol, unless stated otherwise, are to be performed by Project Co.
- 1.3 Project Co shall notify the Authority of its proposed move contractor and, at Project Co's own cost, Project Co shall procure the appointment of an appropriately skilled and qualified move contractor with the prior written consent of the Authority (such consent not to be unreasonably withheld or delayed) in order to carry out the Decant.
- 1.4 In developing the Decant Timetable Project Co shall consider all third party interfaces which may be required.

2. BUILDINGS

- 2.1 Each Existing Facility may have a number of areas with difficulties such as outside classrooms, single and multi-storey blocks, isolated buildings with long winding corridors and different levels within each block. Each of these areas will be tackled on their own merits and their priority listing would be to generally start from the top of each building, and work down to the ground floor as the decant process progresses.
- 2.2 Within the Existing Facilities where lifts are present within the buildings these will be utilised to remove boxed items to the ground floor provided that: no Educational Services are being undertaken at the Existing Facility at that time; that the finishes in the lift are protected from impact or other damage; and, that the operation of the lift is undertaken in a safe manner including compliance with loading requirements.
- 2.3 Existing Facilities for which decanting will be required are:
 - [◆]
 - [◆]

3. **INFORMATION**

3.1 The Authority shall, not less than [three (3)] months before the Planned Decant Start Date in respect of each Existing Facility, provide to Project Co an updated Authority Equipment list, which will include the identification of the following items of Authority Equipment:

3.1.1 items considered by the Authority to be of a fragile nature; and

3.1.2 all hazardous materials.

3.2 If the Authority requires any hazardous materials not included on the Authority Equipment list to be moved as part of the Authority Equipment, such hazardous material must be identified to Project Co, and Project Co shall have a right to object to such move if such move would cause material increase in cost to Project Co.

3.3 If Project Co reasonably believes the Decant of an item of Authority Equipment to [any/ the] Facility will cause the [relevant] Facility not to comply with applicable Law at the time of such Decant, then Project Co shall have a right to notify the Authority as soon as reasonably practicable of such anticipated non-compliance and a proposed solution or solutions within two (2) Business Days of becoming aware of such anticipated non-compliance, and, provided such Decant will actually cause such non-compliance with applicable Law, the Authority will take into account the reasonable representations in relation to such solution or solutions made by Project Co.

4. **ACCESS**

4.1 The Existing Facilities will only be approached by designated vehicular routes, which shall be agreed in writing between the Authority's Representative and Project Co prior to the commencement of the Decant.

4.2 Drivers will carry out their duties and drive between the Existing Facilities and the Facilities and will be instructed on a variety of issues, including:

4.2.1 to drive at a safe speed, taking cognisance of the weather, speed and use of the road by others including pedestrians;

4.2.2 to reverse only in the presence of a second employee acting as banks man; and/or

4.2.3 to comply with all speed limits.

5. CRATES

- 5.1 Crates, sealing tape and labels for use by the staff of the Existing Facilities will be delivered in accordance with the Decant Timetable.
- 5.2 An area within the Existing Facility will be identified by the Authority for the short term storage of the empty crates upon delivery.
- 5.3 Guidance will be provided by Project Co in the use of the crates, labels and tape.
- 5.4 Project Co will allow for the provision of sufficient crates to move all the Authority Equipment (total weight of each crate when packed will not exceed [(25kg)]). The crates will be rigid plastic with lids that are safely stackable six high (or similar). Any Authority Equipment which cannot fit into a crate ("**Loose Equipment**") will be labelled by the staff of the Existing Facilities and moved by Project Co.
- 5.5 Project Co shall provide all necessary information to [each]/[the] Facility Representative relating to training in the safe assembly, handling, sealing and stacking of crates provided by Project Co.

6. LABELLING

Colour coded labels shall be used for designated areas of both the Existing Facilities and the Facilities. This is crucial to the success of the decant process when receiving and distributing crates within each Facility. Coloured labels will be supplied by Project Co. The Authority will inform Existing Facility staff in advance of the dates detailed in the Decant Timetable as set out in paragraph 20 of this Section 2 (*Decant Protocol*).

7. AUTHORITY EQUIPMENT

- 7.1 For the purposes of this Agreement, all equipment (including Loose Equipment) and items stored in crates, labelled or prepared for removal from the Existing Facilities to the Facilities in accordance with this Section 2 (*Decant Protocol*) of Schedule 11 (*Equipment*) (including the ICT Assets) shall comprise Authority Equipment.
- 7.2 Project Co shall supply all labour, materials, transportation and equipment (including move crates, labels, tape, seals, protective material, wrapping, specialist packaging and tackle) necessary to manage and implement the Decant.
- 7.3 Project Co will be responsible for:
 - 7.3.1 identifying a sufficient number of crates required for the Decant;
 - 7.3.2 providing such crates by the relevant date specified in accordance with the Decant Timetable; and

- 7.3.3 ensuring the Decant of all Authority Equipment(including the ICT Assets) can be carried out by Project Co in a timely manner and in accordance with this Section 2 (*Decant Protocol*) of Schedule 11 (*Equipment*);
- 7.3.4 ensuring the Decant of ICT Assets is also carried out in accordance with Section 2 (*Construction Phase Access Protocol*) of Schedule 34 (*Joint Operating Protocol*) and the Authority's Construction Requirements.
- 7.4 The Authority shall, unless prevented by reason of any breach by Project Co of its obligations under this Agreement, be responsible for:
 - 7.4.1 the packing of Authority Equipment (excluding Loose Equipment) within the crates provided in accordance with paragraph 7.3.2 above by the date specified in the Decant Timetable for such packing; and
 - 7.4.2 labelling such packed crates (with the colour coded labels provided by Project Co as referred to in paragraph 6 above (*Labelling*)).
- 7.5 Project Co shall, unless prevented by reason of any breach by the Authority of its obligations under this Agreement, be responsible for the packing and unpacking all Loose Equipment, [including all ICT Assets] and heavy items (as necessary).
- 7.6 The Authority shall, unless prevented by reason of any breach by Project Co of its obligations under this Agreement, unpack such items of Authority Equipment referred to in paragraph 7.4 above from the crates within [two (2)] full Business Days (or such other period as may be agreed between the Parties) of the Authority being notified by Project Co that such crates being located within their correct locations within the relevant Facility.
- 7.7 Once the Authority has packed the crates in accordance with paragraph 7.4 above then Project Co shall move such crates (along with the Loose Equipment) to their new location in accordance with the provisions of this Section 2 (*Decant Protocol*) of Schedule 11 (*Equipment*).
- 7.8 The parties agree to provide each other with all reasonable assistance in relation to the Decant. In particular, Project Co agrees to provide such assistance as the Authority may reasonably require in respect of the provision of guidance on the use of crates, labels and tape.

8. PROTECTION

Project Co will identify and use appropriate external entry doors to those parts of the Facilities that have adequate space to receive the dimensions of inbound crates. The flooring of these areas will be protected using hardboard, or other appropriate material. The hardboard will be laid and removed at the start and completion of the Decant process. All relevant doors and passageways will also be protected as necessary. Project Co will be responsible for the provision of all necessary safety signage and protection barriers as may be required.

9. **IDENTIFICATION OF PROJECT CO PARTIES**

- 9.1 Project Co Parties carrying out their duties within the confines of the Existing Facilities will be clearly identifiable as staff of the removals firm ("**Porters**") by wearing suitably marked hi-viz vests or similar.
- 9.2 For the avoidance of doubt, all potential Project Co Parties or persons performing any portion of the Decant likely to come into contact with any Student whilst at the Existing Facilities shall obtain security clearance in accordance with Clauses 28.8 and 28.9 (*Convictions and Disciplinary Action*) of this Agreement

10. **REPORT TIMES ON SITES**

- 10.1 Project Co Parties carrying out decant related works will arrive on the Sites/at the Existing Facilities and remain on site during periods previously agreed with the School/Authority ([♦] to [♦] minimum period on Site) until such time as all decanting work has been completed.
- 10.2 The Authority will be responsible for the control of opening and closing of the Existing Facilities buildings during the Decant. Access for Project Co to and from the Existing Facilities to decant outwith the normal hours which the Existing Facility is normally open will not be unreasonably withheld by the Authority and both parties acknowledge the requirement to work together to achieve the dates detailed within the Decant Timetable.
- 10.3 Discussion will be required if the Authority indicates that the Existing Facilities will close at a time which may be contradictory to the Decant Timetable. Guidance will be required at an early date and before the start date of a specific task.

11. **PROJECT CO'S SOLE POINT OF CONTACT ("MIGRATION MANAGER")**

- 11.1 A migration manager will be appointed by Project Co who will be the sole point of contact for the Decant (the "**Migration Manager**"). The Facility Representative [for each Facility] will be solely responsible for direct liaison with the Migration Manager and the issue of any instructions [in respect of the relevant Facility].
- 11.2 It is to be agreed that all instructions, deviations from agreed plans etc, will be conveyed through the Migration Manager for instruction thereafter to the relevant Project Co Parties. It must be acknowledged by all parties that no approach can be made directly to any Project Co Party to alter his work practices or schedule to accommodate a task not designated in a particular system of undertaking at that time.

12. PACKING AND PREPARATION

- 12.1 The majority of items for packing by the [Authority/ School Entity] will consist of stationery, text books and may include small, lightweight teaching aid items and will include sports equipment in the form of balls, rackets, bats and the like (and similar items of Group 4 Equipment).
- 12.2 Glassware and fragile instruments shall however be securely wrapped by Project Co in bubble wrap (where appropriate) provided by Project Co before being transferred to [a/the] Facility by Project Co (together with all other Authority Equipment).

13. THE MOVE

The decant process is to be carried out in accordance with the Decant Timetable. A sufficient number of vehicles, (including where deemed appropriate by Project Co mechanical moving equipment) and Porters to undertake the Decant within the specified period will be provided by Project Co. Care in the handling of all crates and all Loose Equipment to be transferred will be provided and tidiness on site will be considered an essential part of that process.

14. DAMAGE AND LOSSES DURING THE MOVE

- 14.1 Project Co shall be responsible for:
- 14.1.1 all the Authority Equipment (other than ICT Assets) in its care; and
 - 14.1.2 all ICT Assets outwith the Authority Control Period pursuant to Section 2 (*Construction Phase Access Protocol*) of Schedule 34 (*Joint Operating Protocol*),

including but not limited to the period during which such property is in transit from the Existing Facilities to the Facilities.
- 14.2 Subject to paragraph 14.3 below, Project Co shall remedy and make good any loss or damage to the Authority Equipment [including the ICT Assets]²⁴⁴ in accordance with paragraphs 14.4 to 14.12 inclusive.
- 14.3 To the extent any Authority Equipment is broken or otherwise damaged, or lost, the Authority shall as soon as reasonably practicable upon becoming aware, provide evidence to Project Co of such breakage, damage or loss.

Consideration will be required to Project Co's right to replace Authority Equipment on a case by case basis and whether any exceptions or additional conditions are required to this. Similarly consideration should be given to the Initial ICT Equipment and any processes to be put in place as regards damage to the ICT Assets procured through the ICT Installer (outside of the general indemnity position).

- 14.4 If an item of Authority Equipment is broken or otherwise damaged during the Decant and Project Co has:
- 14.4.1 repaired or replaced the item with an object of equivalent specification, quality and where relevant warranty, to the Authority's satisfaction by 0730 on the first day Education Services are to be provided at the Facility following such Decant, then it will be deemed to have been moved in accordance with Project Co's obligations in this Section 2 (*Decant Protocol*) of Schedule 11 (*Equipment*), or
- 14.4.2 not repaired or replaced the item in accordance with paragraph 14.4.1 above, as soon as reasonably practicable, and no later than two (2) Business Days after becoming aware of the breakage, Project Co shall present to the Authority the following options in respect of any broken item insofar as they are applicable:
- (a) Project Co pays compensation to the Authority such compensation as shall be sufficient to purchase an item of equivalent specification and quality applicable to such item to the satisfaction of the Authority (acting reasonably);
 - (b) Project Co procures the repair of the broken item and gives an estimated date for the repair;
 - (c) Project Co procures the temporary repair of the broken item such that it functions until Project Co procures its repair or replacement in accordance with paragraphs 14.4.2(b) or 14.4.2(d) in respect of which estimated dates will be given;
 - (d) Project Co procures the replacement of the broken item with an item of equivalent specification and quality and gives an estimated date for the installation of the replacement; and/or
 - (e) Project Co procures the temporary replacement of the broken item until Project Co procures a repair or replacement in accordance with paragraphs 14.4.2(b) or 14.4.2(d) above in respect of which an estimated date will be given;
- 14.5 The Authority and Project Co, both acting reasonably, shall agree which option or options in paragraph 14.4 shall be implemented (including, but not limited to, the rectification period within which the temporary and permanent repair or replacement must be completed), and if such agreement cannot be reached, determined in accordance with Clause 57 (*Dispute Resolution Procedure*) of this Agreement, and Project Co shall implement such agreed or determined option or options.

14.6 In respect of a broken item it shall be deemed to be moved (for the purposes of determining whether the sign off procedure is complete) as follows:

14.6.1 where the option in paragraph 14.4.2(a) is agreed the item shall be deemed to be moved on the day the compensation is paid by Project Co to the Authority;

14.6.2 where the option in paragraph 14.4.2(b) is agreed it shall be deemed to be moved on the day the repair is effected; and

14.6.3 where the option in paragraph 14.4.2(d) is agreed it shall be deemed to be moved on the day the replacement is installed,

and in each case Project Co and the [relevant] Facility Representative shall each in their respective opinions verify the same and the Decant Completion Certificate in accordance with Schedule 22 (*Certificates*) shall be updated accordingly.

14.7 If an item is lost during the Decant and Project Co:

14.7.1 has found or replaced the item with an object of equivalent specification and quality to the Authority's satisfaction by 0730 on the first day which the Authority is due to provide Educational Services at the [relevant] Facility following such Decant, then it will be deemed to have been moved; or

14.7.2 has not found or replaced the item in accordance with paragraph 14.7.1, Project Co shall promptly, and no later than two (2) Business Days after becoming aware of the loss, advise the Authority of the estimated date upon which a replacement item of equivalent specification and quality can be installed and if such replaced item is to the Authority's satisfaction and can be installed within five (5) Business Days following the planned Decant Completion Date, Project Co shall promptly order the replacement item and install such replacement item within five (5) Business Days.

14.8 If such estimated date for replacement is later than the five (5) Business Days following the Planned Decant Completion Date, Project Co and the Authority shall within two (2) Business Days of the notification referred to in paragraph 14.7.2 above, both acting reasonably, agree which of the following options to implement:

14.8.1 Project Co shall pay compensation to the Authority such compensation as shall be sufficient to purchase an item of equivalent specification and quality applicable to such item to the satisfaction of the Authority (acting reasonably); or

14.8.2 Project Co procure the replacement of the lost item with an item of equivalent specification and quality to the satisfaction of the Authority

(acting reasonably) (including, but not limited to, the rectification period within which the replacement must be completed),

and if such agreement cannot be reached, the option to be implemented shall be determined in accordance with Clause 57 (*Dispute Resolution Procedure*) of this Agreement.

- 14.9 Project Co shall order the replacement item pursuant to paragraph 14.7.2 or, if applicable shall implement the option agreed pursuant to paragraph 14.8.
- 14.10 In respect of an item which is lost it shall be deemed to be moved (for the purpose of determining whether the Decant Completion Certificate may be issued) as follows:
- 14.10.1 where the option in paragraph 14.8.1 is selected by the Authority, the item shall be deemed to be moved on the next Business Day after the day Project Co pays the compensation to the Authority (which date for payment shall not be earlier than the fifth (5th) Business Day following the Decant and not later than the tenth (10th) Business Day following the Decant); and
- 14.10.2 where Project Co orders the replacement item pursuant to paragraph 14.7.2 or where, if applicable, the option in paragraph 14.8.2 is agreed, the item shall be deemed to be moved on the date the replacement is installed, and
- 14.10.3 each of the Migration Manager and the [relevant] Facility Representative shall in their respective opinions verify the same and the Decant Completion Certificates shall be updated accordingly.
- 14.11 If Authority Equipment (including an ICT Asset (subject to Section 2 (*Construction Phase Access Protocol*) of Schedule 34 (*Joint Operating Protocol*)) is broken, lost, or otherwise damaged by Project Co, its employees, agent or sub-contractor in carrying out the Decant, Project Co shall remain responsible for such breakage, loss or damage notwithstanding any acknowledgement of the Decant Completion Certificate by the Authority's Representative, and the certification of the Decant Completion Certificate by the Migration Manager shall not waive, prejudice or in any way compromise the Authority's rights under this Agreement.
- 14.12 Liability for all loss, breakage or other damage of any Authority Equipment pursuant to this paragraph 14 shall be responsibility of Project Co and Project Co shall bear all costs in relation to any repair or replacement preferred to in this paragraph 14.

15. **DECANT COMPLETION DATE**

The Decant Completion Certificate shall be in the relevant form included in Schedule 22 (*Certificates*).

16. **INSURANCE**

For the avoidance of doubt, Project Co shall be required to maintain insurances in relation to the Decant as specified within the Clause 54 (*Insurance*) of this Agreement.

17. **DECANT PROCESS / DECANT COMPLETION**

To achieve a systematic and economical Decant the following procedure will be undertaken:

17.1 one floor at a time will be completely "boxed up" and cleared out of the Existing Facility before commencing onto lower floors, regardless of where it is going in the Facilities. The Migration Manager along with the [relevant] Facility Representative will upon completion of each floor check and sign off each area within the Existing Facilities on the relevant Decant Completion Certificate; and

17.2 subject to paragraph 14 above, upon the delivery of the last crate(s) and Loose Equipment to the correct locations in the relevant [Facility] and the subsequent sign-off by Migration Manager along with the [relevant] Facility Representative on the relevant Decant Completion Certificate, the Decant will be deemed to be complete.

18. **INITIAL ICT EQUIPMENT**

Project Co shall carry out the activities in connection with the decant of Initial ICT Equipment in accordance with this Section 2 (*Decant Protocol*) of Schedule 11 (*Equipment*) and paragraph 4.11 (*ICT Decant Protocol*) of Part 1 (*Generic Design Requirements*) of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*);.

19. **POST DECANT ACTIVITIES**

For the avoidance of doubt, the following activities will occur after completion of the Decant process:

19.1 Unpacking

The staff of the Existing Facilities will be responsible for the unpacking of crates.

19.2 Removal of Empty Crates

Following the unpacking of the crates, the staff of the Existing Facilities will make available the empty crates by the date in the Decant Timetable. Project Co shall collect the empty containers from an agreed central storage location and remove from Site on the date in the Decant Timetable or other such date as may be agreed with the Authority's Representative.

19.3 Removal of Existing Facility Items of Equipment

19.3.1 Within a period of two weeks following the [relevant] Actual Completion Date for [the]/[each] Facility, the Authority [and the School Entity] will be entitled to remove from the Existing Facilities any equipment that does not form part of the Authority Equipment, Project Co Equipment or the Initial ICT Equipment. Any items of redundant equipment within [a/the] the Existing Facility not removed by the Authority in the agreed period of two weeks will be removed by Project Co [during the Post Completion Works [relevant to that Facility]].

19.3.2 The Authority/School Entity shall remove or pay Project Co the reasonable costs of removal of any such electrical items or hazardous materials within the aforementioned period of three weeks following the relevant Services Availability Date.

20. DECANT TIMETABLE

Facility			
Existing Facility			
Planned Decant Start Date ²⁴⁵			
Empty crates delivered to the Existing Facility by Project Co			
Empty crates packed and labelled by the Existing Facility			
Loose Equipment, all information technology equipment, photocopiers and heavy items to be packed by Project Co			
Filled crates and Loose Equipment transported from the Existing Facility to the Facility by Project Co			
Empty crates available for removal by Project Co			

²⁴⁵ This is an outline programme only to be developed on a project specific basis. Schools/ Colleges may find that it better suits their requirements to have the empty crates delivered, packed and removed in phases rather than dealing with all crates in the relevant Facility at once

The dates in this timetable will be varied by agreement of the parties (acting reasonably), in writing, in the event that the ICT Handover Date or Actual Completion Date [in respect of a Facility] will not be achieved due to a material delay.

**SCHEDULE 12:
SERVICE REQUIREMENTS²⁴⁶**

SECTION 1

SERVICE LEVEL SPECIFICATION

²⁴⁶ Specific reference ought to be made to Chapter 2 of the EPEC/EUROSTAT Guide regarding the scope of services to be provided by Project Co on accommodation projects and Theme 4 of Chapter 3 of the EPEC/EUROSTAT Guide in connection with contractual standards. The Service Level Specification has been developed for a schools project and will require project specific review in the context of college projects.

SECTION 2

METHOD STATEMENTS²⁴⁷

²⁴⁷ The Method Statements will be project specific. The Authority should ensure the Method Statements capture all the service provision descriptions that were included in the Stage 2 Submission and which formed part of the offer in reaching the decision to proceed with Stage 2 Approval.

SECTION 3

SERVICES QUALITY PLAN²⁴⁸

²⁴⁸ The Services Quality Plan will be project specific and developed during or out of documents produced during the Stage 2 Approval process.

SECTION 4

INTERFACE PROTOCOL

1. Project Co and the Authority have a duty to cooperate and recognise the interactive nature of the activities of both parties, and the need to avoid interference with each other's activities. The parties recognise that there is a need to clearly identify and document the points of interface and the responsibilities of each party.
2. Project Co will provide help and assistance to the Authority to ensure that the Services are fully integrated with the Authority Services. This will include training, attendance at Site meetings, and provision of support to the Authority to manage its operations.
3. The Authority and Project Co have agreed an Interface Protocol which sets out the allocation of responsibilities between the Authority and Project Co. The Interface Protocol identifies the Soft Services and the interfaces between Project Co and the Authority in respect of the delivery of the Soft Services and the Services respectively.
4. Project Co shall, or shall procure that the Project Co Parties shall carry out the activities identified as Project Co's responsibility in the Responsibility Matrix contained within the Interface Protocol, in accordance with its terms.
5. The Authority shall, or shall procure that the Authority Parties shall carry out the activities identified as the Authority's responsibility in the Responsibility Matrix contained within the Interface Protocol, in accordance with its terms. Subject always to paragraph 4 above, it is acknowledged and agreed by the parties that failure on the part of the Authority to satisfy any of the dependencies identified as the Authority's responsibility in the Interface Protocol (save for any minor failures that do not directly cause or contribute to the occurrence of an Availability Failure and/or Performance Failure) shall be treated as a breach of the Agreement by the Authority for the purposes of Clause 52.2.1 (*Excusing Causes*) only and in no other respect.

SCHEDULE 13:
INDEPENDENT TESTER CONTRACT²⁴⁹

AGREEMENT

AMONG:

- (1) [AUTHORITY] (the "**Authority**");
- (2) [PROJECT CO] ("**Project Co**");
- (3) [INDEPENDENT TESTER] (the "**Independent Tester**");
- (4) [FUNDER] (in its capacity as "**Agent**" on behalf of the Senior Funders);
- (5) [CONTRACTOR] (the "**Contractor**"); and
- (6) [EQUIPMENT SERVICES PROVIDER] (the "**Equipment Services Provider**");]

WHEREAS:

- (A) Project Co and the Authority have entered into an agreement for the financing, design and construction of and the provision of certain services in connection with [details of facilities] at the Site[s] (the "**Project**") (the "**MIM Project Agreement**") under the terms of which they have jointly agreed to appoint an independent tester.
- (B) Project Co has entered into the Construction Contract with the Contractor for the development of [details of facilities] at the Site[s].
- (C) Project Co has entered into the [Senior Funding Agreements] with the Senior Funders.
- (D) The Independent Tester is an independent adviser willing to provide services to Project Co and the Authority and for the benefit of the Senior Funders.

²⁴⁹ Tailoring will be required to this contract on a sector specific basis. The Independent Tester Contract must be publicly tendered during stage 2 of the New Project Approval Process under the SPA. The evaluation criteria must recognise that all Key Personnel must have a minimum of 10 years' experience of completion testing in the relevant sector.

The level of fees should reflect the level of service required and the scope of service should be explicitly set out in Appendix 1.

Please refer to MIM Supplementary Guidance for Accommodation projects in respect of the Independent Tester Contract. The specific amendments to scope of services in Appendix 1 which are marked up in that guidance have been incorporated here.

- (E) Project Co and the Authority have jointly agreed to engage the Independent Tester to carry out the duties and obligations ascribed to the Independent Tester in the MIM Project Agreement upon the terms of this Agreement.

IT IS AGREED as follows:

1. INTERPRETATION

- 1.1 Unless the context otherwise requires, words and expressions defined in the MIM Project Agreement have the same meanings in this Agreement as in the MIM Project Agreement.
- 1.2 The headings in this Agreement do not affect its interpretation.
- 1.3 Unless the context otherwise requires, all references to Clauses and Appendices are references to clauses of and appendices to this Agreement.

2. APPOINTMENT

- 2.1 Project Co and the Authority jointly appoint the Independent Tester to perform the obligations and tasks which are ascribed to the Independent Tester under the MIM Project Agreement and which are set out in Appendix 1 upon the terms and conditions set out below. The Contractor [and the Equipment Services Provider] is a party [are parties] to this Agreement solely to make the commitments on its part [their respective parts] as expressly made in this Agreement and, for the avoidance of doubt, the Independent Tester shall have no liability to the Contractor [and the Equipment Services Provider]²⁵⁰.
- 2.2 The Independent Tester shall provide the services under Clause 2.1 (*Appointment*) above (the "**Services**") independently, fairly and impartially to and as between Project Co and the Authority in relation to the MIM Project Agreement at such times and at such locations as the parties shall agree from time to time. In performing the Services, the Independent Tester shall have regard to the interest of the Senior Funders. Whilst the Independent Tester shall take account of any representations made by Project Co and the Authority and the Contractor (as appropriate) [and the Senior Funders' Technical Adviser] the Independent Tester shall not be bound to comply with any representations made by any of them in connection with any matter on which the Independent Tester is required to exercise his professional judgement.
- 2.3 The Independent Tester shall, as far as it is in its reasonable control, ensure that the Services and Varied Services are carried out by the Key Personnel listed in Appendix 3 only (the "**Key Personnel**"). In the event that, due to matters outwith the Independent Tester's control, it is necessary for there to be a change in any Key

²⁵⁰ It has been suggested on some projects that the Contractor should receive the benefit of a duty of care from the Independent Tester (whether under this agreement or through a collateral warranty). Authorities should consider the implications fully and seek advice from their legal advisers on this point. Authorities' interests are likely to be prejudiced as a result. Issues that need to be considered include: whether this would increase the fee; whether the financial liability of the IT would be diluted (e.g. consider any cap on liability); whether the IT's liability to the Authority may be prejudiced as a result of a claim made by the Contractor; whether there could be any adverse impact on the resources of the IT; whether the Contractor's remedy should lie against Project Co in the event of any claim; and other project specific considerations.

Personnel, the Independent Tester shall by written notice to the Authority and Project Co propose a suitable substitute for approval, taking into account the experience of the Key Personnel. Such appointment shall be subject to the approval of Project Co and the Authority (not to be unreasonably withheld or delayed).

3. SERVICES AND VARIED SERVICES

- 3.1 Subject to the prior written agreement of the Authority and Project Co to the costs thereof, the Independent Tester shall carry out and perform any additional and/or varied services required for the implementation of the Project reasonably required by the Authority and Project Co which are not included in, or which are omitted from, the Services (the "**Varied Services**") on the same terms as required for the Services pursuant to Clause 2.2 (*Appointment*). If the Independent Tester shall at any time be required to perform Varied Services, it shall give to the Authority and Project Co a written quote of the cost thereof (taking into account any reduction in work or other expense which might also occur as a result of the circumstances giving rise to the Varied Services) pursuant to Clause 5.7 (*Fee*).
- 3.2 The written agreement by the Authority and Project Co pursuant to Clause 3.1 (*Services and Varied Services*) shall state whether (and where applicable in what proportions) the Authority and/or Project Co will be responsible for the payment of the fee agreed for the Varied Services. The Independent Tester acknowledges that the liability of Project Co and the Authority to pay the Independent Tester for the Varied Services shall be several and not joint.
- 3.3 Where a change to the Project occurs pursuant to the terms of the MIM Project Agreement (whether by virtue of a Delay Event, Compensation Event, Change, change to the Programme or otherwise) which may materially impact on the Services or otherwise on the Independent Tester, the Authority and Project Co shall promptly notify the Independent Tester of such change. The Independent Tester shall within [♦] Business Days of receiving such notification, notify the Authority and Project Co of the impact of such change, if any, on the Services or otherwise, including whether such change gives rise to any Varied Services and the provisions of this Clause 3 (*Services and Varied Services*) shall apply accordingly.
- 3.4 The Independent Tester shall promptly and efficiently provide the Services and the Varied Services:
- 3.4.1 with the reasonable care, skill and diligence to be expected of a properly qualified and competent professional adviser who has held itself out as competent and experienced in rendering such services for projects of a similar size, nature, scope and complexity to the Project; and
- 3.4.2 in accordance with all applicable Law .
- 3.5 All instructions to the Independent Tester must be signed and given jointly by the Authority's Representative and Project Co's Representative or such other person appointed pursuant to Clause 8 (*Representatives*) of the MIM Project Agreement and, for the avoidance of doubt, the Independent Tester shall not act in accordance with any instructions given to him by either the Authority or Project Co (or any other

person) not given in accordance with the provisions of this Clause 3.5 (*Services and Varied Services*).

- 3.6 The Independent Tester shall comply with all reasonable instructions given to it by Project Co and the Authority pursuant to Clause 3.5 (*Services and Varied Services*) except and to the extent that the Independent Tester reasonably considers that any such instructions vary or might vary the Services or its authority or responsibilities under this Agreement or prejudices or might prejudice the exercise by the Independent Tester of its professional judgement in accordance with Clauses 2.2 (*Appointment*) and 3.4 (*Services and Varied Services*) above. The Independent Tester shall promptly confirm in writing to Project Co and the Authority whether or not it shall comply with any such instruction setting out the grounds upon which the decision is made.
- 3.7 The Authority, Project Co, and the Contractor agree to co-operate with and provide reasonable assistance to the Independent Tester to familiarise the Independent Tester with all necessary aspects of the Project to enable the Independent Tester to carry out its obligations under this Agreement.
- 3.8 The Independent Tester shall be deemed to have full knowledge of the provisions of the MIM Project Agreement, the Construction Contract, the Service Contract, the Senior Funding Agreements and the [Sub-Contractor Co-operation Agreement (as defined in the Construction Contract)] such as relates to the Services or Varied Services and shall be deemed to be aware of and to have taken full account of all the undertakings and warranties, both expressed and implied, on the part of Project Co and the Authority which are set out in the MIM Project Agreement provided always that true and accurate copies have been delivered to the Independent Tester.
- 3.9 Subject to Clause 3.10 (*Services and Varied Services*), the Independent Tester shall use the following partners, directors or employees: [insert names of individuals] in connection with the performance of the Services and any Varied Services and such persons' services shall be available when necessary and for so long as may be necessary to ensure the proper performance by the Independent Tester of the Services and any Varied Services. Such persons shall have full authority to act on behalf of the Independent Tester for all purposes in connection with the Services and any Varied Services.
- 3.10 The Independent Tester may by written notice to the Authority and Project Co replace the staff identified in Clause 3.9 (*Services and Varied Services*) taking into account the need for liaison, continuity, level of qualification and availability of personnel in respect of the Project. Such replacement shall be subject to approval in writing by Project Co and the Authority (not to be unreasonably withheld or delayed).

4. DURATION

- 4.1 The Services shall commence on the date of this Agreement²⁵¹.
- 4.2 The parties hereby agree that this Agreement governs all of the Services (including the Varied Services, if any) provided by the Independent Tester in relation to the Project whether before or after the date hereof.

5. FEE

- 5.1 Project Co shall pay to the Independent Tester a fee of [INSERT FEE] for the Services provided under this Agreement. The fee is exclusive of value added tax and inclusive of disbursements. The Independent Tester shall issue an invoice to Project Co on a monthly basis in accordance with Appendix 2 Section 1 (*Schedule of Drawdown of Fees*) (the "**Application for Payment**"). The date on which the Application for Payment is received by Project Co shall constitute the due date (the "**Due Date**"). The final date for payment by Project Co shall be thirty (30) days after the Due Date (the "**Final Date**"). If Varied Services are provided then they shall be paid for in accordance with the agreement between the Independent Tester and the Authority and Project Co pursuant to Clause 3.1 and 3.2 (*Services and Varied Services*) and paid for in accordance with the provisions of this Clause 5 (*Fee*).
- 5.2 Not later than five (5) days after the Due Date is ascertained in accordance with Clause 5.1 (*Fee*), Project Co shall give written notice to the Independent Tester stating the amount which Project Co considers to be or have been due at the Due Date and the basis on which the amount is calculated (the "**Payment Notice**"). It is immaterial that the sum referred to in this notice may be zero. If Project Co fails to give a Payment Notice in accordance with this Clause 5.2 (*Fee*) and the Independent Tester has given an Application for Payment in accordance with Clause 5.1 (*Fee*), subject to any Pay Less Notice given under Clause 5.3 (*Fee*), the sum to be paid to the Independent Tester shall be the sum specified in the Application for Payment.
- 5.3 Where Project Co intends to pay less than the sum stated as due pursuant to this Agreement, Project Co shall, not later than two (2) days before the relevant Final Date, give a written notice to the Independent Tester (a "**Pay Less Notice**"). Such Pay Less Notice shall specify both the sum that Project Co considers to be due to the Independent Tester at the date the notice is given and the basis on which that sum is calculated. It is immaterial that the sum referred to in this Clause 5.3 (*Fee*) may be zero. Where any Pay Less Notice is given, the payment to be made on or before the relevant Final Date shall be not less than the amount stated as due in such notice.
- 5.4 If Project Co fails to pay a sum, or any part of it, due to the Independent Tester under this Agreement by the relevant Final Date, Project Co shall, in addition to any unpaid amount that should properly have been paid, pay the Independent Tester simple interest on that amount from the Final Date until the actual date of payment at the Default Interest Rate.

²⁵¹ Authorities to amend according to specific requirements.

- 5.5 If Project Co fails to pay any amount properly due pursuant to this Agreement by the relevant Final Date and the failure continues for twenty-one (21) days after the Independent Tester has given notice to Project Co of its intention to suspend performance of all or any of the Services or Varied Services and the ground or grounds on which it is intended to suspend performance, the Independent Tester may suspend performance of any or all of its obligations until payment is made in full. [Any period of suspension of the Services or Varied Services in accordance with this Clause 5.5 (*Fee*) shall be disregarded in computing any contractual time limit to complete work directly or indirectly affected by the exercise of the rights conferred by this Clause 5.5 (*Fee*), or as the case may be and the time for completion of such work shall be extended by a period equal to the period of suspension.]²⁵²

Where the Independent Tester exercises its right of suspension under this Clause 5.5 (*Fee*), it shall be entitled to a reasonable amount in respect of costs and expenses reasonably incurred by it as a result of the exercise of that right. Any such costs and expenses shall be included in the Independent Tester's next Application for Payment and the Independent Tester shall, with its application, submit such details of the costs and expenses as are reasonably necessary to enable the Independent Tester's entitlement to be ascertained.

- 5.6 Without prejudice to Clause 3.5 (*Services and Varied Services*), neither the Authority nor Project Co shall issue instructions or do anything which does or is reasonably likely materially to increase the fees payable to the Independent Tester without the prior approval of the other (such approval not to be unreasonably withheld or delayed).
- 5.7 As soon as the Independent Tester becomes aware of the same and before acting on the same the Independent Tester shall inform the Authority and Project Co of any instructions given to him pursuant to Clause 3.5 (*Services and Varied Services*) which will or could reasonably be expected to increase the fees payable to the Independent Tester under the terms of this Agreement. The Independent Tester shall if requested by either Project Co or the Authority provide both the Authority and Project Co with as detailed an estimate as is reasonably practicable of the increase to the fees payable to it if it carries out such instructions. The estimate of increased fees shall be based upon the rates contained in Appendix 2, Section 2 (*Schedule of Daily Rates*).

6. LIMITATIONS ON AUTHORITY

- 6.1 The Independent Tester shall not:
- 6.1.1 make or purport to make any alteration or addition to or omission from the design of the Facilities (including, without limitation, the setting of performance standards) or issue any instruction or direction to any contractor or professional consultant employed or engaged in connection with the Project; or

²⁵² Authorities to consider whether this or similar drafting is necessary for compliance with the Housing Grants and Construction Act 1996, as amended.

- 6.1.2 (unless both Project Co and the Authority consent in writing) consent or agree to any waiver or release of any obligation of Project Co or the Authority under the MIM Project Agreement or of any contractor or professional consultant employed or engaged in connection with the Project.
- 6.2 For the avoidance of doubt, the Independent Tester shall not express an opinion on and shall not interfere with or give any advice, opinion or make any representation in relation to any matters which are beyond its role and responsibilities under this Agreement.

7. TERMINATION

- 7.1 Project Co and the Authority may by joint notice in writing (a "**Joint Notice**") immediately terminate this Agreement if the Independent Tester:
 - 7.1.1 is in breach of any of the terms of this Agreement which, in the case of a breach capable of remedy, shall not have been remedied by the Independent Tester within twenty-one (21) days of receipt by the Independent Tester of a Joint Notice specifying the breach and requiring its remedy;
 - 7.1.2 is incompetent, guilty of gross misconduct and/or any material failure, negligence or delay in the provision of the Services and/or its other duties under this Agreement;
 - 7.1.3 fails or refuses after written warning to provide the Services and/or its other duties under this Agreement reasonably and as properly required of him; or
 - 7.1.4 is subject to an event analogous to any of the events set out in Clause 40.1.1 (*Insolvency*) of the MIM Project Agreement.
- 7.2 If the MIM Project Agreement is rescinded, terminated or repudiated for any reason and, notwithstanding that the validity of such rescission, termination or repudiation may be disputed, this Agreement may be terminated by Joint Notice and with immediate effect.
- 7.3 Following any termination of this Agreement, but subject to any set-off or deductions which Project Co or the Authority may be entitled properly to make as a result of any breach of this Agreement by the Independent Tester, the Independent Tester shall be entitled to be paid in full and final settlement of any valid claim which the Independent Tester may have in consequence thereof for any fees due under Clause 5 (*Fee*) above in respect of the Services or Varied Services carried out in accordance with this Agreement prior to the date of termination.
- 7.4 Termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination (including the right of Project Co and the Authority to recover damages from the Independent Tester).

- 7.5 If this Agreement is terminated in accordance with Clause 7.1 (*Termination*), Project Co and the Authority shall use reasonable endeavours to engage an alternative Independent Tester within thirty (30) days, subject to Law and public procurement rules. If within such period Project Co and the Authority are unable to procure the appointment of an alternative Independent Tester on reasonable commercial terms, the Independent Tester shall pay to Project Co and/or the Authority, as the case may be, any reasonable incremental loss, damage or extra costs suffered by each of them.
- 7.6 If Project Co fails to make a payment of any undisputed sum to the Independent Tester within [♦] Business Days of the expiry of any notice issued pursuant to Clause 5.5 (*Fee*) in respect of such sum, the Independent Tester may issue a further written notice to the Authority and Project Co specifying that the payment remains outstanding (the "**Second Notice**") and if payment is not made within [♦] Business Days of receipt of the Second Notice the Independent Tester may issue a further written notice terminating this Agreement with immediate effect. Failure by Project Co to pay, following receipt of a Second Notice pursuant to this Clause 7.6 (*Termination*), shall be the Independent Tester's sole ground for terminating this Agreement by reason of breach of this Agreement by the Authority and/or Project Co.
- 7.7 Termination of this Agreement shall not affect the continuing rights and obligations of Project Co, the Authority and the Independent Tester under Clauses 6 (*Limitations On Authority*), 8 (*Confidential Information And Copyright*), 9 (*Professional Indemnity Insurance*), 18 (*Dispute Resolution Procedure*) and this Clause or under any other Clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

8. CONFIDENTIAL INFORMATION AND COPYRIGHT

- 8.1 The Independent Tester shall treat as secret and confidential and shall not at any time for any reason disclose or permit to be disclosed to any person or otherwise make use of or permit to be made use of any unpublished information relating to Project Co's or the Authority's or the Contractor's (if appropriate) technology or other know-how business plans or finances or any such information relating to a subsidiary, supplier, customer or client of Project Co or the Authority or the Contractor (if appropriate) where the information was received during the period of this Agreement except as may be reasonably necessary in the performance of the Services or Varied Services. Upon termination of this Agreement for whatever reasons the Independent Tester shall offer to deliver up to Project Co or the Authority (as appropriate) all working papers, computer disks and tapes or other material and copies provided to or prepared by him pursuant either to this Agreement or to any previous obligation owed to Project Co or the Authority provided always that the Independent Tester shall be entitled to retain copies of all such items where such offer is accepted.
- 8.2 The obligation to maintain confidentiality does not apply to any information or material to the extent that the Independent Tester is compelled to disclose any such information or material by law or any regulatory or Government authority.
- 8.3 The copyright in all reports, and other documents produced by the Independent Tester in connection with the Project shall remain vested in the Independent Tester but the Independent Tester grants to Project Co and Authority and their nominees

with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such reports, and other documents and to reproduce the information contained in them for any purpose related to the Project including (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Project. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties.

- 8.4 The Independent Tester shall not be liable for use by any person of the documents, (including reports, details, plans, specifications, schedules, computer programs, software, consents and any other papers, works, reports and inventions produced by the Independent Tester) for any purpose other than that for which the same were prepared by or on behalf of the Independent Tester.

9. PROFESSIONAL INDEMNITY INSURANCE

- 9.1 Without prejudice to its obligations under this Agreement, or otherwise at law, the Independent Tester shall maintain professional indemnity insurance with a limit of indemnity of not less than [[♦] (£♦)]²⁵³ for any one (1) claim in respect of any neglect, error or omission on the Independent Tester's part in the performance of its obligations under this Agreement for the period commencing on the date of this Agreement and expiring twelve (12) years after:

9.1.1 the date of final certification of the Works; or

9.1.2 the termination of this Agreement,

whichever is the earlier, provided that such insurance is available in the market place at commercially reasonable rates.

- 9.2 The Independent Tester shall maintain such insurance with reputable insurers carrying on business in the United Kingdom.

- 9.3 Any increased or additional premium required by insurers by reason of the Independent Tester's own claims record or other acts, omissions, matters or things particular to the Independent Tester shall be deemed to be within commercially reasonable rates.

- 9.4 The Independent Tester shall as soon as reasonably practicable inform Project Co and the Authority if such insurance ceases to be available at commercially reasonable rates in order that the Independent Tester and Project Co and the Authority can discuss means of best protecting the respective positions of Project Co and the Authority and the Independent Tester in respect of the Project in the absence of such insurance.

- 9.5 The Independent Tester shall fully co-operate with any measures reasonably required by Project Co and the Authority including (without limitation) completing

²⁵³ Authorities to take advice from insurance advisers on appropriate level of PII cover for the scheme. The minimum level is £10 million.

any proposals for insurance and associated documents and maintaining such insurance at rates above commercially reasonable rates if Project Co and the Authority undertake in writing to reimburse the Independent Tester in respect of the net cost of such insurance to the Independent Tester above commercially reasonable rates.

- 9.6 The Independent Tester shall, prior to commencing the provision of the Services and as soon as reasonably practicable following Renewal Dates, produce for inspection by Project Co and the Authority documentary evidence that such insurance is being properly maintained.
- 9.7 The above obligations in respect of professional indemnity insurance shall continue notwithstanding termination of this Agreement for any reason whatsoever, including (without limitation) breach by Project Co and the Authority.

10. **LIMITATION OF LIABILITY**

- 10.1 With the exception of liability for death, personal injury and/or any other liability that cannot lawfully be excluded or limited, the Independent Tester's maximum [aggregate] liability to all parties, under or in connection with this Agreement, whether in contract or in tort, or for breach of statutory duty is limited to £[♦]²⁵⁴ million.
- 10.2 [Notwithstanding anything to the contrary stated elsewhere in this Agreement, the parties hereby expressly agree that the Independent Tester shall have no liability to any party under or in connection with this Agreement for any claim or claims related to terrorism, asbestos or toxic mould.]²⁵⁵
- 10.3 No action or proceedings under or in connection with this Agreement shall be commenced against the Independent Tester after the expiry of twelve (12) years from the earlier of: (a) the date of final certification of the Works; and (b) the termination of this Agreement.

11. **SUB-CONTRACTOR LOSSES AND NO LOSS AVOIDANCE**

- 11.1 Without prejudice to Clause 10 (*Limitation Of Liability*) the Independent Tester hereby acknowledges and accepts (a) that a breach or failure on the part of the Independent Tester could have adverse financial consequences for the Sub-Contractors (or any of them) and (b) any losses, damages, costs and/or other liabilities suffered or incurred by the Sub-Contractors (or any of them) (as the case may be) arising from or in connection with any breach or failure on the part of the Independent Tester under this Agreement shall, for the purposes of this Agreement and notwithstanding the provisions of any Sub-Contract, be deemed to be losses, damages, costs and/or liabilities suffered or incurred by Project Co arising from or in connection with such breach or failure.

²⁵⁴ Authorities to consider appropriate cap in the context of the specific project and scope of service. The cap should be set out at a minimum level of £10 million.

²⁵⁵ This may be appropriate where the IT's insurance cover excludes liability for these occurrences. Authorities to check.

- 11.2 Where the Independent Tester would otherwise be liable to make a payment by way of compensation to Project Co including amounts which, in turn, comprise compensation to any Sub-Contractor which is payable by Project Co and/or which would be payable by way of compensation to any Sub-Contractor by Project Co the Independent Tester shall not be entitled to withhold, reduce or avoid any such payment to Project Co in reliance (in whole or in part) on the fact that payment of the amount which is or would be due from Project Co to the Sub-Contractor or the entitlement of the Sub-Contractor to receive payment of such amount (as a result of the circumstances giving rise to the Independent Tester's obligation to pay such compensation) is conditional on receipt by Project Co of such amount from the Independent Tester.

12. NOTICES

- 12.1 Any notice or other communication given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by first class recorded post or emailed to the party named therein at the address or email address of such party shown in this Agreement or such other address or email address as such party may by notice or other communication in writing nominate for the purpose of service.

- 12.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

12.2.1 if delivered by hand at the time of delivery; or

12.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting,

provided that, in either case, a notice or other communication received on a non-Business Day or after 5pm in the place of receipt shall be deemed to be received at 9am on the next following Business Day in such place; or

- 12.3 Notices given by email shall be deemed to have been received:

12.3.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the relevant email address specified in Clauses [12.4 to 12.9] (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

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

and provided no error message indicating failure has been received by the sender and in the case of a notice issued pursuant to Clause 7 (*Termination*) provided that within twenty-four (24) hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by hand to the intended recipient in accordance with the provisions of this Clause 12 (*Notices*) and where

such notice issued pursuant to Clause 7 (*Termination*) is addressed to the Authority, copied to [♦²⁵⁶].

- 12.4 Any notice to be given to the [Authority] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing to the relevant party by the [Authority].
- 12.5 Any notice to be given to the [Project Co] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Project Co].
- 12.6 Any notice to be given to the [Independent Tester] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Independent Tester].
- 12.7 Any notice to be given to the [Senior Funder] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Senior Funder].
- 12.8 Any notice to be given to the [Contractor] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Contractor].
- 12.9 [Any notice to be given to the [Equipment Service Provider] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Equipment Service Provider].]
- 12.10 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.

13. **ASSIGNMENT**

- 13.1 The Independent Tester shall not assign or transfer any of its rights or obligations under this Agreement or sub-contract the whole or any part of the Services or the Varied Services.²⁵⁷
- 13.2 Neither Project Co nor the Authority shall be entitled to assign or transfer any of their respective rights or obligations under this Agreement save that the parties hereby consent to any such assignment or transfer which is contemporaneous to the assignment or transfer of the MIM Project Agreement and is made to the same assignee or transferee. In the event that the MIM Project Agreement is novated to

²⁵⁶ Insert Welsh Government details.

²⁵⁷ Where the Independent Tester intends to sub-contract any part of the Services, additional drafting should be included to identify any such sub-contractors and to ensure that the Independent Tester remains liable for the relevant part of the Services. The Authority should consider whether it is appropriate to obtain a warranty from such sub-contractors.

a third party, the term "MIM Project Agreement" shall include any replacement contract arising from such novation.

- 13.3 The Independent Tester shall not be entitled to contend that any person to whom this Agreement is assigned in accordance with Clause 13.2 (*Assignment*) is precluded from recovering under this Agreement any loss incurred by such assignee resulting from any breach of this Agreement (whenever happening) by reason that such person is an assignee and not a named promisee under this Agreement.

14. **CUMULATIVE RIGHTS AND ENFORCEMENT**

- 14.1 Any rights and remedies provided for in this Agreement whether in favour of Project Co or the Authority or the Independent Tester are cumulative and in addition to any further rights or remedies which may otherwise be available to the parties.
- 14.2 The duties and obligations of the Independent Tester arising under or in connection with this Agreement are owed to Project Co and the Authority both jointly and severally and Project Co and the Authority may accordingly enforce the provisions hereof and pursue their respective rights hereunder in their own name, whether separately or with each other.
- 14.3 Project Co and the Authority covenant with each other that they shall not waive any rights, remedies or entitlements or take any other action under this Agreement which would or might reasonably be expected to adversely affect the rights, remedies or entitlements of the other without the other's prior written consent, such consent not to be unreasonably withheld or delayed.

15. **WAIVER**

The failure of any party at any one time to enforce any provision of this Agreement shall in no way affect its right thereafter to require complete performance by any other party, nor shall the waiver of any breach or any provision be taken or held to be a waiver of any subsequent breach of any provision or be a waiver of the provision itself.

16. **SEVERABILITY**

In the event that any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, clause or provision shall, to that extent, be omitted from this Agreement and the rest of this Agreement shall stand, without affecting the remaining clauses.

17. **VARIATION**

A variation of this Agreement is valid only if it is in writing and signed by or on behalf of each party.

18. **DISPUTE RESOLUTION PROCEDURE**

18.1 All disputes shall be resolved in accordance with terms equivalent (mutatis mutandis) to the Dispute Resolution Procedure as set out in the MIM Project Agreement.²⁵⁸

18.2 Project Co, the Authority and the Independent Tester shall co-operate to facilitate the proper, just, economical and expeditious resolution of any and all such disputes which arise under this Agreement.

19. **GOVERNING LAW AND JURISDICTION**

Subject to Clause 18 (*Dispute Resolution Procedure*) above, this Agreement shall be governed by and construed in accordance with the laws of England and Wales, and (subject as aforesaid) the parties hereby submit to the non-exclusive jurisdiction of the courts of England and Wales.

20. **COUNTERPARTS**

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes

21. **DELIVERY**

This Agreement is delivered on the date written at the start of this Agreement.

22. **THIRD PARTY RIGHTS**

It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that save as expressly set out herein, no provision of this Agreement is intended to or does confer upon any third party any benefit or right enforceable at the option of that third party against any party to this Agreement.

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

²⁵⁸ Authorities should consider whether this is appropriate or whether a more specific Dispute Resolution Procedure should be included in this document. This may depend on whether the Dispute Resolution Procedure contained in Schedule 20 (*Dispute Resolution Procedure*) is considered to be Construction Act compliant.

APPENDIX 1

SCOPE OF SERVICES - INDEPENDENT TESTER CONTRACT²⁵⁹

The Independent Tester shall perform the role of Independent Tester as referred to in Clauses 17 (*Pre-Completion Commissioning and Completion*) and 18 (*Post Completion Commissioning*) (including complying with any time limits specified in such Clauses) and Schedule 6 (*Construction Matters*), Schedule 7 (*The Programme*), Schedule 8 (*Review Procedure*), Schedule 10 (*Outline Commissioning Programme*) and Schedule 17 (*Compensation on Termination*) of the MIM Project Agreement²⁶⁰, by providing the following scope of Services:

1. MONTHLY REPORT AND COMPLETION CERTIFICATION

The Independent Tester shall:

- 1.1 During [the Works]²⁶¹, attend monthly site progress meetings and provide the Authority and Project Co with a monthly report on the activities carried out by the Independent Tester and the status of the Project.
- 1.2 Undertake [regular on-site monitoring and inspections (with the aggregate duration of such inspections being [♦] hours a month) (including attendance at the monthly site progress meetings referred to at paragraph 1.1 above)]²⁶² during the Works, and in the case of completion activities, in accordance with Clauses [17.8 (*Commissioning prior to Completion Date/Post Completion Works Date*), 17.10 (*Pre-Completion Inspections*) and 18.4 (*Information*)] of the MIM Project Agreement²⁶³.
- 1.3 Report on the completion status of the Project, identifying any work that is not compliant with the Authority's Construction Requirements, Project Co's Proposals, the Approved RDD Items ("**Approved RDD**") and/or the Completion Criteria in accordance with Clause 17.11 (*Pre-Completion Matters*) of the MIM Project Agreement.
- 1.4 Determine whether the [Main] Works] [and/or the [relevant] Post Completion Works] [in respect of each Facility] [is/are] finished or complete in accordance with the Completion Criteria and advise Project Co and the Authority of the need for any re-testing which may be necessary to demonstrate whether the [Main] Works and/or

²⁵⁹ Authorities to ensure that the scope of services is appropriate and includes (where relevant) Post Completion Works.

²⁶⁰ Authorities to insert any other relevant references.

²⁶¹ Authorities and their advisers should consider whether the regularity of progress meetings and monitoring ought to differ in the context of the specific Post Completion Works to be undertaken on the Project and adjust the drafting accordingly.

²⁶² Develop specifics on a project by project basis. The regularity of inspections should be governed by the capex of the project as follows:

- £5,000,000 - £24,999,999: four (seven hour) days a month (2 visits, monthly meeting, desk study and reporting)
- £25,000,000 - £99,999,999: five (seven hour) days a month (3 visits, monthly meetings, desk study and reporting)
- £100,000,000 upwards: seven (seven hour) days a month (3 visits, monthly meetings, desk study and reporting)

²⁶³ Insert periods here if not included in Completion Criteria. Consider stages before the works are 'closed up'.

the [relevant] Post Completion Works] [for the relevant Facility] [is]/[are] finished or complete.

- 1.5 [Certify that the ICT Handover Requirements relating to the [Main] Works [in respect of a Facility] have been met and issue an ICT Acceptance Certificate, in accordance with the MIM Project Agreement.]
- 1.6 Certify the Actual Completion Date[s] [and Actual Post Completion Works Date[s] and issue a Certificate of Practical Completion in accordance with the MIM Project Agreement.²⁶⁴
- 1.7 On the same day as the date of issue of the [relevant] ICT Acceptance Certificate or Certificate of Practical Completion (as applicable), issue a Snagging List [or PCW Snagging List (in the case of a Certificate of Practical Completion in respect of Post Completion Works)] specifying any Snagging Items. Monitor and review rectification of such Snagging Items in accordance with Clauses 17.14 to 17.16 (*Snagging Items*) of the MIM Project Agreement.
- 1.8 Review the Snagging Programme [or PCW Snagging Programme (as appropriate)] for the rectification of all Snagging Items to be carried out and advise Project Co and the Authority as appropriate. Identify items that have a lead time of more than twenty (20) Business Days from date of issue of the Snagging List and advise on the reasonableness of any such longer lead times (up to a maximum period of three (3) months) in accordance with Clauses 17.14 to 17.16 (*Snagging Items*) of the MIM Project Agreement.
- 1.9 Monitor and report (weekly) on the completion of Snagging Items against the Snagging Programme [or PCW Snagging Programme (as appropriate)]. On satisfactory completion of the Snagging List [or PCW Snagging List (as appropriate)] , issue the Snagging Items Completion Certificate in accordance with Clause 17.17 (*Snagging Items*) of the MIM Project Agreement.
- 1.10 In order to enable the Independent Tester to discharge these primary functions which are to be performed independently, fairly and impartially to and as between Project Co and the Authority and having regard to the interests of Funders, the Independent Tester shall discharge the further duties described below.
- 1.11 [The Independent Tester shall:
 - 1.11.1 In accordance with the [relevant] Final Commissioning Programme and no earlier than the date that falls on the date that is [♦] weeks following the [relevant] Actual Completion Date, carry out the [WiFi Post-Completion Tests].
 - 1.11.2 Within five (5) Business Days of any inspection made pursuant to paragraph 1.11.1 above notify Project Co and the Authority of any

²⁶⁴ This will include (amongst other things) testing Energy Efficiency against the levels bid (and incorporated within Project Co's Proposals).

outstanding matters required to be attended to before the WiFi Post-Completion Tests can be considered to be completed.

- 1.12 Determine whether the WiFi is finished or complete in accordance with the WiFi-PC Criteria and advise Project Co and the Authority of the need for any re-testing which may be necessary to demonstrate whether the WiFi is finished or complete.
- 1.13 Certify the WiFi Actual Completion Date and issue a Certificate of WiFi Completion.]²⁶⁵

2. GENERAL

The Independent Tester shall:

- 2.1 Familiarise itself with the MIM Project Agreement (including the Design Data, the Design Quality Plan, the Construction Quality Plan²⁶⁶ and any Changes issued from time to time and any other relevant documentation or information referred to in the MIM Project Agreement, relevant Service Level Specification and Method Statements)[, the Equipment Services Contract] and the Construction Contract to the extent necessary to enable it to provide a report to the Authority and Project Co on any contradictory requirements contained within the same and to be in a position to carry out the Services in accordance with the terms of the MIM Project Agreement and this Agreement.
- 2.2 Following notification by Project Co, pursuant to Clauses 17.8 and 17.10 (*Pre-Completion Inspections*) of the MIM Project Agreement, inspect and comment as required on the Works [and in respect of the Post Completion Works] as required by Clause 17.11 (*Pre-Completion Matters*) of the MIM Project Agreement.

3. DESIGN AUDIT REVIEW

The Independent Tester shall:

- 3.1 Monitor and report upon the implementation of the Design Quality Plan for the construction, structural and engineering services design for the Project, [on a monthly basis during the Works].
- 3.2 Through sample audit of [twenty-five percent (25%)] of the detailed working drawings and specifications for a range and type of rooms or such greater number as is in his professional judgment appropriate to be selected by the Independent Tester, monitor and verify that they comply with the Approved RDD as described in the MIM Project Agreement. If in the professional judgment of the Independent Tester, because of the results of its sample or other circumstances a greater than [twenty-five percent (25%)] sampling percentage is appropriate, he shall provide a detailed report in respect of that and, if so agreed (or determined as between Project

²⁶⁵ Where specific post completion commissioning and or separate certification is required in respect of the energy efficiency solution on a project appropriate the Independent Tester's scope of services should be amended accordingly.

²⁶⁶ Insert reference to any equipment list or other document as appropriate.

Co and the Authority by the Dispute Resolution Procedure) any increase in the percentage sampling resulting in a change in fees will be borne by Project Co and the Authority as they shall agree or as determined by the Dispute Resolution Procedure.

- 3.3 [Review the detailed design information for any approved design or specification variations for compliance with the performance and quality standards of the MIM Project Agreement, [insert reference to Equipment Services Contract and any Equipment performance measures] and quality standards as set out in the [refer to Equipment Service Level Specification] and the Quality Plans.]

4. **PROCEDURE REVIEW**

The Independent Tester shall:

- 4.1 Monitor and report on the operation of the quality assurance procedures of the Contractor at [monthly] intervals during the execution of the Works.
- 4.2 The Independent Tester shall familiarise itself with the proposed procedures and programmes for the testing and commissioning of the [Mechanical and Electrical engineering services] prior to the Authority's occupation.
- 4.3 Monitor the procedures for the identification, approval and recording of agreed Changes to the Works in accordance with the MIM Project Agreement.
- 4.4 Review any samples or mock ups as required by Schedule [♦] and check that they have been approved in accordance with the MIM Project Agreement.

5. **CONSTRUCTION REVIEW**

The Independent Tester shall:

- 5.1 Visit the Site[s] and monitor the Works for their compliance with the Authority's Construction Requirements, Project Co's Proposals and the Approved RDD.²⁶⁷ The frequency and timing of the Independent Tester's visits are dependent on the progress of construction on [the relevant] Site. The Contractor shall agree a programme with the Independent Tester for the inspection of [Key Construction Processes]²⁶⁸ and the completed Works [and the Post Completion Works] and shall give the Independent Tester advance notice of these Works being carried out on the Site[s].

²⁶⁷ Authorities to insert any other relevant documents.

²⁶⁸ To be defined on a project specific basis. This should include stages of the Works that need to be inspected before being covered over by subsequent activity so that the Independent Tester may satisfy himself that these stages have been constructed in accordance with the Quality Plans, without the need for opening up

- 5.2 At least [once a month], randomly check that the Works are being undertaken in accordance with the Authority's Construction Requirements and²⁶⁹ the Construction Quality Plan that has been agreed by the Authority and Project Co and report on findings.
- 5.3 Review the written mechanical and electrical engineering services testing and commissioning procedure pursuant to paragraph 4.2 above and through a sample audit of [fifty percent (50%)] undertake selective witnessing of the mechanical and electrical services final testing and commissioning. The Independent Tester shall review [one hundred] percent [(100%)] of all final test certification and reports. If in the professional judgment of the Independent Tester, because of the results of witnessing (or because of other circumstances) a different sampling percentage is appropriate for final testing and commissioning he shall provide a detailed report in respect of that and any change in the percentage sampling resulting in a change of fees will be borne by Project Co, the Authority or the Contractor as they shall agree and failing such agreement, as determined by the Dispute Resolution Procedure.
- 5.4 Inspect rectification works which have previously prevented the Independent Tester from certifying the Project as complete.
- 5.5 Check the delivery of hard copies of the relevant operating manuals, relevant approvals, test results, inspection records, "final issue" construction drawings, "as-built" specification and "as-built" drawings to the Authority [and monitor compliance with required 'data drops' of the same, pursuant to the BIM Protocol and the MIM Project Agreement].

6. PARTICIPATION IN DISPUTE RESOLUTION

In accordance with Clause 3 (*Services and Varied Services*) of the Independent Tester Contract, as and when required by the Authority or Project Co, the Independent Tester shall participate in the Dispute Resolution Procedure of the MIM Project Agreement (as such term is defined in the MIM Project Agreement) and/or the Dispute Resolution Procedure of the Construction Contract (as the case may be) to the extent that such issues relate to the Independent Tester's other obligations and tasks as set out in this Appendix 1 and this Agreement.

APPENDIX 2

[↕]

SECTION 1

SCHEDULE OF DRAWDOWN OF FEES

SECTION 2

SCHEDULE OF DAILY RATES

APPENDIX 3
KEY PERSONNEL

SCHEDULE 14: ²⁷⁰

PAYMENT MECHANISM

²⁷⁰ See separate consultation document.

SCHEDULE 15:
INSURANCE REQUIREMENTS²⁷¹

SECTION 1

**POLICIES TO BE TAKEN OUT BY PROJECT CO AND MAINTAINED DURING THE DESIGN AND
CONSTRUCTION PHASE**

Common to each policy in Section 1 (*Policies to be taken out by Project Co and maintained during the design and construction phase*) (unless stated otherwise):

Insureds:

1. Authority
2. Project Co
3. Contractor
4. Service Provider
5. Construction sub-contractors of any tier
6. Senior Funders
7. Subordinated Funders
8. Consultants - for their site activities only

each for their respective rights and interests in the Project

²⁷¹ Authorities should seek independent advice on the scope and terms of the project insurances on a project specific basis.

In relation to Business Interruption cover the Authority should be named as a co-insured party to the extent it has a demonstrable insurable interest. This will be in connection with any additional cost of working insured against under the terms of the policy, and not with respect to any loss of anticipated revenue.

1. **Contractors' 'All Risks' Insurance (CAR)**

1.1 **Insured Property**

The permanent and temporary works, materials [(including but not limited to equipment supplied by the Authority²⁷²], goods, plant and equipment for incorporation in the Works (other than constructional plant, tools, accommodation and equipment belonging to or the responsibility of the Contractor or the Construction sub-contractors) and all other property used or for use in connection with works associated with the Project.

1.2 **Coverage**

"All risks" of physical loss or damage to the Insured Property unless otherwise excluded.

1.3 **Sum Insured**

At all times an amount not less than the full reinstatement or replacement value of the Insured Property, but not less than the value specified in the Construction Contract plus provision to include Cover Features & Extensions as appropriate.

1.4 **Maximum Deductible**

£[♦]²⁷³.

1.5 **Territorial Limits**

United Kingdom including offsite storage and during inland transit.

1.6 **Period of Insurance**

From the date of this Agreement until the [later of the [final] Actual Completion Date and the [final] Actual Post Completion Works Date]²⁷⁴ and thereafter in respect of defects liability until expiry of the twelve (12) months defects liability period.

²⁷² Details (description and reinstatement value) of any such equipment will need to be provided to ProjectCo to enable them to include cover under the CAR policy.

²⁷³ It may be appropriate for an Authority to specify a different deductibles in respect of a Site specific risk, such as flood risk, following consultation with its insurance adviser. Authority to determine a maximum deductible level that is commensurate with the risk based on prevailing UK insurance market conditions.

²⁷⁴ The Authority should populate the period of insurance relative to the requirement in question. The period of insurance should reflect the period that the relevant insurable risk can materialise and take into account any contract specific issues such as phasing.

1.7 Cover Features & Extensions

- 1.7.1 Terrorism
- 1.7.2 Munitions of war clause
- 1.7.3 Additional costs of completion clause
- 1.7.4 Professional fees clause
- 1.7.5 Debris removal clause
- 1.7.6 Seventy-two (72) hour clause
- 1.7.7 European Union local authorities clause
- 1.7.8 Free issue materials clause
- 1.7.9 Ten per cent (10%) escalation clause
- 1.7.10 Automatic reinstatement of sum insured clause
- 1.7.11 Loss minimisation
- 1.7.12 Subrogation waiver extended to Authority Parties (other than Contractors and Sub-Contractors)²⁷⁵

1.8 Principal Exclusions

- 1.8.1 War and related perils (UK market agreed wording)
- 1.8.2 Nuclear/radioactive risks (UK market agreed wording)
- 1.8.3 Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds
- 1.8.4 Wear, tear and gradual deterioration

²⁷⁵ In consultation with its insurance adviser the Authority should consider what additional cover features and extensions may be required to protect its interests.

- 1.8.5 Consequential financial losses
- 1.8.6 Cyber risks
- 1.8.7 Inventory losses
- 1.8.8 Fraud and employee dishonesty
- 1.8.9 DE5/DE3 drop down option

2. Delay In Start Up Insurance (DSU)

2.1 Insureds

- 2.1.1 Project Co
- 2.1.2 Senior Funders
- 2.1.3 Subordinated Funders
- 2.1.4 [Authority]²⁷⁶

each for their respective rights and interests in the Project.

2.2 Indemnity

In respect of:

- 2.2.1 loss of anticipated Revenue during at least the Minimum Indemnity Period arising from a delay in completion of the Project as a result of loss or damage covered under the Contractors' All Risks' Insurance effected in accordance with paragraph 1 of Section 1 (*Policies to be taken out by Project Co and maintained during the design and construction phase*) of Schedule 15 (*Insurance Requirements*), including physical loss or damage which would be indemnifiable but for the application of any deductible;
- 2.2.2 the economic additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing the loss of Revenue of Project Co

²⁷⁶ The Authority should be named as a co insured party to the extent it has a demonstrable insurable interest. This will be in connection with any additional cost of working insured against under the terms of the policy, and not with respect to any loss of anticipated revenue.

which without such expenditure would have taken place, during the Minimum Indemnity Period.

2.3 Sum Insured

An amount sufficient to cover the sums the subject of the Indemnity for the Minimum Indemnity Period.

2.4 Maximum Excess

[♦] days²⁷⁷.

2.5 Minimum Indemnity Period

[♦] months.

2.6 Period of Insurance

As per the Contractors' "All Risks" Insurance, excluding the defects liability period.

2.7 Cover Features & Extensions

2.7.1 Denial of access

2.7.2 Utilities

2.7.3 Terrorism

2.7.4 Automatic Reinstatement of sum insured

2.7.5 Professional Fees

2.7.6 Subrogation waiver extended to Authority Parties (other than Contractors and Sub-Contractors)²⁷⁸

²⁷⁷ It may be appropriate for an Authority to specify a different period that is to apply in respect of a Site specific risk, such as flood risk, following consultation with its insurance adviser.

²⁷⁸ Authority to determine a maximum deductible level that is commensurate with the risk based on prevailing UK insurance market conditions.

2.8 Principal Exclusions

2.8.1 The exclusions under the Contractors' 'All Risks' Insurance, other than for consequential financial losses.

2.8.2 Delayed response by a public body or state authority.

3. Construction Third Party Liability Insurance

3.1 Interest

To indemnify the Insured in respect of all sums that they may become legally liable to pay (including claimant's costs and expenses) as damages in respect of accidental:

3.1.1 death, or bodily injury, illness, disease contracted by any person;

3.1.2 loss or damage to property;

3.1.3 interference to property or any easement right of air, light, water or way or the enjoyment or use thereof by obstruction, trespass, nuisance, loss of amenities, or any like cause.

happening during the Period of Insurance and arising out of or in connection with the Project.

3.2 Limit of Indemnity

Not less than £[♦]m in respect of any one (1) occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution liability.²⁷⁹

3.3 Maximum Deductible

£[♦] for each and every occurrence of property damage. (Personal injury claims will be paid in full).²⁸⁰

²⁷⁹ The Authority should set the Limit of Indemnity by way of an insurable risk review the level specified should be predicated upon:

- The risk profile represented by the Authority requirement in question
- Potential frequency and severity of claims and losses (not the value of the contract) relative to the risk exposure
- Insurance market availability in prevailing insurance market conditions.

²⁸⁰ Authority to determine a maximum deductible level that is commensurate with risk based on prevailing UK insurance market conditions.

3.4 Territorial Limits

UK [and elsewhere in the world in respect of non-manual visits].

3.5 Jurisdiction

Worldwide excluding USA and Canada.

3.6 Period of Insurance

As per the Contractors' "All Risks" Insurance, including the defects liability period.

3.7 Cover Features & Extensions

3.7.1 Munitions of war

3.7.2 Cross liability clause

3.7.3 Contingent motor

3.7.4 Legal defence costs

3.7.5 Subrogation waiver extended to Authority Parties (other than Contractors and Sub-Contractors)²⁸¹

3.8 Principal Exclusions

3.8.1 Liability for death, illness, disease or bodily injury sustained by employees of the Insured.

3.8.2 Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by legislation in respect of such vehicles.

3.8.3 Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the Insured.

3.8.4 Liability in respect of loss or damage to property in the care, custody and control of the Insured but this exclusion is not to apply to all property

²⁸¹ In consultation with its insurance adviser the Authority should consider what additional cover features and extensions may be required to protect its interests.

belonging to the Authority which is in the care, custody and control of another Insured.

- 3.8.5 Events more properly covered under a professional indemnity policy.
- 3.8.6 Liability arising from the ownership, possession or use of any aircraft or marine vessel.
- 3.8.7 Liability arising from seepage and pollution unless caused by a sudden, unintended and unexpected occurrence.
- 3.8.8 Losses indemnified under the CAR policy or DSU policy.

SECTION 2

POLICIES TO BE TAKEN OUT BY PROJECT CO AND MAINTAINED FROM THE [RELEVANT] ACTUAL COMPLETION DATE

Common to all policies in Section 2 (*Policies to be taken out by Project Co and maintained from the [relevant] Actual Completion Date*) (unless stated otherwise):

Insureds

1. Authority
2. Project Co
3. Service Provider
4. Service Provider's sub-contractors (where required by contract)
5. Senior Funders
6. Subordinated Funders

each for their respective rights and interests in the Project.

1. **Property Damage Insurance**

1.1 **Insured Property**

The project assets which are the property of Project Co or for which Project Co may be responsible including but not limited to the Facilities.

1.2 **Coverage**

"All risks" of physical loss or damage to the Insured Property from any cause not excluded, including machinery breakdown and computer breakdown in respect of appropriate equipment.

1.3 **Sum Insured**

At all times an amount not less than the total reinstatement or replacement value of the Insured Property plus provision to include other Cover Features and Extensions as appropriate.

1.4 Maximum Deductible

£[♦] each and every claim (indexed as required in accordance with Clause 54.4.8 (*Project Co Insurances*)).²⁸²

1.5 Territorial Limits

United Kingdom plus elsewhere whilst in inland transit.

1.6 Period of Insurance

From the [relevant] Actual Completion Date or as otherwise specified in this Agreement for the duration of this Agreement and renewable on an annual basis unless agreed otherwise by the Parties.²⁸³

1.7 Cover Features & Extensions

1.7.1 Terrorism

1.7.2 Automatic reinstatement of sum insured

1.7.3 Capital additions clause

1.7.4 Seventy-two (72) hour clause

1.7.5 European Union local authorities clause

1.7.6 Professional fees

1.7.7 Debris removal

1.7.8 Pollution and contamination to the Insured Property arising from an event which itself is not otherwise excluded

1.7.9 Repair / reinstatement basis of claims settlement with cash option for non-reinstatement

²⁸² Authority to determine a maximum deductible level that is commensurate with the risk based on prevailing UK insurance market conditions.

²⁸³ The Authority should populate the period of insurance relative to the requirement in question. The period of insurance should reflect the period that the relevant insurable risk can materialise and take into account any contract specific issues such as phasing.

- 1.7.10 Subrogation waiver extended to Authority Parties (other than Contractors and Sub-Contractors)²⁸⁴

1.8 Principal Exclusions

- 1.8.1 War and related perils (UK market agreed wording)
- 1.8.2 Nuclear/radioactive risks (UK market agreed wording)
- 1.8.3 Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds
- 1.8.4 Wear, tear and gradual deterioration
- 1.8.5 Consequential financial losses
- 1.8.6 Cyber risks
- 1.8.7 Losses recovered under the CAR policy

2. BUSINESS INTERRUPTION INSURANCE

2.1 Insureds

- 2.1.1 Project Co
- 2.1.2 Senior Funders
- 2.1.3 Subordinated Funders
- 2.1.4 [Authority]²⁸⁵

each for their respective rights and interests in the Project.

²⁸⁴ In consultation with its insurance adviser the Authority should consider what additional cover features and extensions may be required to protect its interests.

²⁸⁵ The Authority should be named as a co insured party to the extent it has a demonstrable insurance interest. This will be in connection with any additional cost of working insured against under the terms of the policy, and not with respect to any loss of anticipated revenue.

2.2 Indemnity

In respect of:

- 2.2.1 loss of Revenue during at least the Minimum Indemnity Period arising from an interruption or interference in the operation of the Project as a result of loss or damage covered under Property Damage Insurance effected in accordance with paragraph 1 of Section 2 (*Policies to be taken out by Project Co and maintained from the [relevant] Actual Completion Date*) of this Schedule 15 (*Insurance Requirements*) including physical loss or damage which would be indemnifiable but for the application of any deductible;
- 2.2.2 the economic additional expenditure necessarily and reasonably incurred for the purpose of avoiding or reducing the loss of Revenue of Project Co which without such expenditure would have taken place, during the Indemnity Period.

2.3 Sum Insured

An amount sufficient to cover the sums the subject of the Indemnity for the Minimum Indemnity Period.

2.4 Maximum Excess

[£]/[♦ days].

2.5 Minimum Indemnity Period

[♦] months.

2.6 Period of Insurance

From the [relevant] Actual Completion Date for the duration of this Agreement and renewable on an annual basis unless agreed otherwise.²⁸⁶

²⁸⁶ The Authority should populate the period of insurance relative to the requirement in question. The period of insurance should reflect the period that the relevant insurable risk can materialise and take into account any contract specific issues such as phasing.

2.7 Cover Features & Extensions

2.7.1 Denial of access

2.7.2 Terrorism

2.7.3 Utilities

2.7.4 Accountants Clause

2.7.5 Automatic reinstatement of sum insured

2.7.6 Subrogation waiver extended to Authority Parties (other than Contractors and Sub-Contractors)²⁸⁷

2.8 Principal Exclusions

2.8.1 The exclusions under the Property Damage Insurance, other than for consequential financial losses

2.8.2 Delayed response by a public body or state authority

3. THIRD PARTY PUBLIC AND PRODUCTS LIABILITY INSURANCE

3.1 Indemnity

To indemnify the Insured in respect of all sums that they may become legally liable to pay (including claimant's costs and expenses) as damages in respect of accidental:

3.1.1 death, or bodily injury, illness, disease contracted by any person;

3.1.2 loss or damage to property;

²⁸⁷ In consultation with its insurance adviser the Authority should consider what additional cover features and extensions may be required to protect its interests.

3.1.3 interference to property or any easement right of air, light, water or way or the enjoyment or use thereof by obstruction, trespass, nuisance, loss of amenities, or any like cause.

happening during the period of insurance and arising out of or in connection with the Project and the provision of the Services.

3.2 Limit of Indemnity

Not less than £[♦] (indexed as required in accordance with Clause 54.4.8 (*Project Co Insurances*)) in respect of any one (1) occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution and products liability.²⁸⁸

3.3 Maximum Deductible

£[♦] for each and every occurrence of property damage indexed as required in accordance with Clause 54.4.8 (*Project Co Insurances*). (Personal injury claims will be paid in full).²⁸⁹

3.4 Territorial Limits

UK [and elsewhere in the world in respect of non-manual visits].

3.5 Jurisdiction

Worldwide excluding USA and Canada.

3.6 Period of Insurance

From the [relevant] Actual Completion Date or as otherwise specified in this Agreement for the duration of this Agreement and renewable on an annual basis unless agreed otherwise.²⁹⁰

²⁸⁸ The Authority should set the Limit of Indemnity by way of an insurable risk review. The level specified should be predicated upon:

- The risk profile represented by the Authority requirement in question,
- Potential frequency and severity of claims and losses (not the value of the contract) relative to the risk exposure.
- Insurance market availability in prevailing insurance market conditions.

²⁸⁹ Authority to determine a maximum deductible level that is commensurate with the risk based on prevailing UK insurance market conditions.

²⁹⁰ The Authority should populate the period of insurance relative to the requirement in question. The period of insurance should reflect the period that the relevant insurable risk can materialise and take into account any contract specific issues such as phasing.

3.7 Cover Features & Extensions

- 3.7.1 Munitions of war
- 3.7.2 Cross liability clause
- 3.7.3 Contingent motor
- 3.7.4 Legal defence costs in addition to the Limit of Indemnity
- 3.7.5 Subrogation waiver extended to Authority Parties (other than Contractors and Sub-Contractors)²⁹¹

3.8 Principal Exclusions

- 3.8.1 Liability for death, illness, disease or bodily injury sustained by employees of the Insured.
- 3.8.2 Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by legislation in respect of such vehicles.
- 3.8.3 Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the Insured.
- 3.8.4 Liability in respect of loss or damage to property in the care, custody and control of the Insured but this exclusion is not to apply to all property belonging to the Authority which is in the care, custody and control of another Insured Party.
- 3.8.5 Liability arising out of technical or professional advice (given for a fee) other than in respect of death or bodily injury to persons or damage to third party property.
- 3.8.6 Liability arising from the ownership, possession or use of any aircraft or marine vessel.
- 3.8.7 Liability arising from seepage and pollution unless caused by a sudden, unintended and unexpected occurrence.
- 3.8.8 Losses under the property damage policy or business interruption policy.

²⁹¹ In consultation with its insurance adviser the Authority should consider what additional cover features and extensions may be required to protect its interests.

SECTION 3

ENDORSEMENTS²⁹²

Unless the context otherwise requires defined terms set out in the following endorsements shall have the meaning set out in the Agreement.

Endorsement 1

Cancellation

1. This policy shall not be cancelled or terminated before the original expiry date is to take effect except in respect of non-payment of premium.
2. The insurer shall by written notice advise the Authority:
 - 2.1 at least thirty (30) days before any such cancellation or termination is to take effect;
 - 2.2 at least thirty (30) days before any reduction in limits or coverage or any increase in deductibles is to take effect; and
 - 2.3 of any act or omission or any event of which the insurer has knowledge and which might invalidate or render unenforceable in whole or in part this policy.

Endorsement 2

Multiple Insured/Non-Vitiation Clause

1. Each of the parties comprising the insured shall for the purpose of this policy be considered a separate co-insured entity, insured on a composite basis, with the words "the insured" applying to each as if they were separately and individually insured provided that the total liability of the insurers under each section of this policy to the insured collectively shall not (unless the policy specifically permits otherwise) exceed the limit of indemnity or amount stated to be insured under that section or policy. Accordingly, the liability of the insurers under this policy to any one insured shall not be conditional upon the due observance and fulfilment by any other insured party of the terms and conditions of this policy or of any duties imposed upon that insured party relating thereto, and shall not be affected by any failure in such observance or fulfilment by any such other insured party.
2. It is understood and agreed that any payment or payments by insurers to any one or more of the insureds shall reduce, to the extent of that payment, insurers' liability to all such parties

²⁹² The endorsements are recommended drafting. Whilst the parties should endeavour to obtain cover in accordance with this wording, if these endorsements are not in practice available, the parties should obtain the best terms reasonably available in the market at the time.

arising from any one (1) event giving rise to a claim under this policy and (if applicable) in the aggregate.

3. Insurers shall be entitled to avoid liability to or (as may be appropriate) claim damages from any insured party in circumstances of fraud misrepresentation non-disclosure or material breach of warranty or condition of this policy (each referred to in this clause as a "**Vitiating Act**") committed by that insured party save where such misrepresentation non-disclosure or breach of warranty or condition was committed innocently and in good faith.
4. For the avoidance of doubt it is however agreed that a Vitiating Act committed by one insured party shall not prejudice the right to indemnity of any other insured who has an insurable interest and who has not committed the Vitiating Act.
5. Insurers hereby agree to waive all rights of subrogation and/or recourse which they may have or acquire against any insured party (together with their employees and agents) except where the rights of subrogation or recourse are acquired in consequence of a Vitiating Act in which circumstances insurers may enforce such rights against the insured responsible for the Vitiating Act notwithstanding the continuing or former status of the vitiating party as an insured.
6. Notwithstanding any other provision of this policy or any other document or any act and/or omission by any insured party insurers agree that:
 - 6.1 no party other than the Authority has any authority to make any warranty, disclosure or representation in connection with this policy on behalf of the Authority;
 - 6.2 where any warranty, disclosure or representation is required from the Authority in connection with this policy insurers will contact the Authority in writing (in accordance with Endorsement 3 to the Contract) and set out expressly the warranty, disclosure and/or representation required within a reasonable period of time from the Authority (regarding itself); and
 - 6.3 save as set out in a request from insurers to the Authority in accordance with paragraph 2 above, the Authority shall have no duty to disclose any fact or matter to insurers in connection with this policy save to the extent that for the Authority not to disclose a fact or matter would constitute fraudulent misrepresentation and/or fraudulent non-disclosure.

Endorsement 3

Communications

1. All notices or other communications under or in connection with this policy shall be given to each insured (and the Authority) in writing or by email. Any such notice will be deemed to be given as follows:
 - 1.1 if in writing, when delivered;

1.2 [if by email:

1.2.1 at the time the email enters the information system of the intended recipient designated by them to receive electronic notices pursuant to paragraph 2 below, if sent on a Business Day between the hours of 9am and 4pm; or

1.2.2 by 11am on the next following Business Day, if the email enters the intended recipient's relevant information system after 4pm, on a Business Day but before 9am on that next following Business Day,

and provided no error message indicating failure has been received by the sender and in the case of notices issued pursuant to paragraph 2 of Endorsement 1 of Section 3 (*Endorsements*) of this Schedule 15 (*Insurance Requirements*) provided that within twenty-four (24) hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by hand to the intended recipient [and, where such notice is addressed to the Authority, copied to [♦²⁹³].]

2. The postal address and email address of the Authority for all notices under or in connection with this policy are those notified from time to time by the Authority for this purpose to Project Co at the relevant time. The initial postal address and email address of the Authority are as follows:

The Authority: [♦]

Address: [♦]

Email: [♦]

Attention: The Chief Executive from time to time of the Authority

3. It is further agreed that a notice of claim given by the Authority or any other insured shall in the absence of any manifest error be accepted by the insurer as a valid notification of a claim on behalf of all insureds.

Endorsement 4

Loss Payee (applicable only to the Physical Damage Policies)

Subject to the provision of Clause 54.18 (*Application of Proceeds*) of the Agreement all proceeds of this policy shall be payable without deduction or set-off to the Insurance Proceeds Account.

²⁹³ Insert Welsh Government details.

Endorsement 5

Primary Insurance

It is expressly understood and agreed that this policy provides primary cover for the insured parties and that in the event of loss destruction damage or liability covered by this policy which is covered either in whole or in part under any other policy or policies of insurance effected by or on behalf of any of the insured parties the insurers will indemnify the insured parties as if such other policy or policies of insurance were not in force and the insurers waive their rights of recourse if any against the insurers of such other policy or policies of insurance.

Endorsement 6

Ringfencing

The level of any indemnity available to an insured party under this policy in relation to any claim(s) concerning the Project shall not be affected and/or reduced by any claim(s) unrelated to the Project.

SECTION 4

INSURANCE ARRANGEMENTS²⁹⁴

1. For the purpose of this Section 4 (*Insurance Arrangements*) of this Schedule 15 (*Insurance Requirements*) the following words shall have the following meanings:

"Actual Relevant Insurance Cost" means the aggregate of the annual insurance premiums reasonably incurred by Project Co to maintain the Operational Insurance during the relevant Insurance Review Period;

"Insurance Cost Factors" has the meaning given to it in paragraph 7.2.3 of this Section 4 (*Insurance Arrangements*) of this Schedule 15 (*Insurance Requirements*);

"Insurance Renewal Report" shall bear the meaning ascribed to it in paragraph 7.2.10 of this Section 4 (*Insurance Arrangements*) of this Schedule 15 (*Insurance Requirements*);

"Insurance Review Date" means the Operational Insurance Inception Date, the second anniversary of the Operational Insurance Inception Date and the date falling on each subsequent two year anniversary, during the Project Term;

"Insurance Review Period" means a two (2) year period from the Operational Insurance Inception Date and each subsequent two (2) year period commencing on the second anniversary of the Operational Insurance Inception Date except where the end of such period lies beyond the end of the Project Term, in which case the Insurance Review Period shall be the period from the end of the penultimate Insurance Review Period to the last day of the Project Term;

"Insurance Summary Sheet" has the meaning given to it in paragraph 7.2.2 of this Section 4 (*Insurance Arrangements*) of this Schedule 15 (*Insurance Requirements*);

"Joint Insurance Cost Report" shall bear the meaning ascribed to it in paragraph 7.2 of this Section 4 (*Insurance Arrangements*) of this Schedule 15 (*Insurance Requirements*);

"Market Presentations" shall bear the meaning ascribed to it in paragraph 7.2.9 of this Section 4 (*Insurance Arrangements*) of this Schedule 15 (*Insurance Requirements*);

"Operational Insurance Inception Date" means the date on which the Operational Insurance is first providing active insurance cover to the Project Co, being a date no earlier than [first Phase Actual Completion Date];

²⁹⁴ This contains provisions to oblige Project Co to take steps to procure the project insurances on terms that represent best value for money to the Authority. Given the Authority will ultimately bear most insurance costs, it is important that it is given sufficient information on how such costs are being accumulated and managed. There is an Information Breach where Project Co fails to procure that the Authority receives such information.

"Portfolio Cost Saving" means any insurance cost saving which arises from Project Co changing the placement of the Operational Insurances from being on a stand-alone project specific basis, to being on the basis of a policy (or policies) also covering risks on other projects or other matters which are outside the scope of the Project so as to benefit from portfolio savings. A Portfolio Cost Saving is defined to be a positive sum and cannot be less than zero;

"Project Co Factors" shall bear the meaning ascribed to it in paragraph 7.2.5 of this Section 4 (*Insurance Arrangements*) of this Schedule 15 (*Insurance Requirements*);

"Relevant Insurance Market" means the insurance market which insures the majority of all MIM/PFI/PF2/PPP/NPD projects across all of the MIM/PFI/PF2/PPP/NPD sectors (as determined by the number of MIM/PFI/PF2/PPP/NPD projects) and at the date of this Agreement the Relevant Insurance Market is the United Kingdom; and

"Renewal Date" the date on which the relevant existing Insurance policy is due to expire.

2. Project Co must comply with the provisions of this Section 4 (*Insurance Arrangements*) of Schedule 15 (*Insurance Requirements*) when placing or renewing the Operational Insurances.
3. Not less than [sixty (60)] Business Days prior to the [relevant] Completion Date and each subsequent Renewal Date in respect of each of the Operational Insurances, Project Co must inform the Authority Representative of the forthcoming requirement to place or renew an Operational Insurance and provide either:
 - 3.1 confirmation that the existing long-term insurance arrangement (entered into with the agreement of the Authority) is being maintained: or
 - 3.2 its proposals for obtaining competitive quotations from at least three (3) suitable insurers (including any portfolio arrangements where such arrangements are available to Project Co). Project Co must take advice from reputable insurance brokers experienced in arranging insurances for similar risks as to which insurers are most likely to provide quotations that will represent best value for money for the Authority as payer of the premiums for such insurance. In considering which insurers to approach, Project Co must consider whether any of the Shareholders enjoys any special relationship with any insurer and/or is otherwise able to procure the placing of the relevant insurance in any particular manner consistent with the requirements of this Agreement that may result in lower premiums and shall include such insurers in its proposal under this paragraph 3.
4. Within [ten (10)] Business Days of receiving a notice from Project Co pursuant to paragraph 3, the Authority may provide Project Co with details of any other insurers that it wishes Project Co to invite to quote for provision of the relevant Operational Insurance.
5. Not less than [thirty (30)] Business Days prior to the [relevant] Completion Date and each subsequent Renewal Date for any of the Operational Insurances, Project Co must forward to the Authority's Representative quotes from the proposed insurers (together with Insurance Summary Sheets, Market Presentations and Insurance Renewal Reports in respect of each quote), to include any insurer nominated by the Authority pursuant to paragraph 4, including

a reasoned recommendation as to which quote Project Co views as offering best value for money for the Authority, taking into account all relevant circumstances.

6. Within [fifteen(15)] Business Days of receiving a recommendation from Project Co pursuant to paragraph 5, the Authority must notify Project Co in writing which insurer it is to place the relevant Operational Insurance with, failing which Project Co shall be entitled to place the relevant Operational Insurance with the insurer recommended by Project Co.

7. **Insurance Review Procedure**

- 7.1 This procedure shall be used to determine whether any increase or decrease in Operational Insurance costs is to be excluded from the Operational Insurance costs to be charged by Project Co to the Authority as Other Costs pursuant to Section 6 (*Other Costs*) of Schedule 14 (*Payment Mechanism*).

- 7.2 Project Co's insurance broker shall prepare a report on behalf of both Project Co and the Authority (the "**Joint Insurance Cost Report**"). The Joint Insurance Cost Report is to be prepared at Project Co's expense, and should, as a minimum, contain the following information for the relevant Insurance Review Period:

- 7.2.1 A full breakdown of the Actual Relevant Insurance Cost for the current Insurance Review Period, together with the Actual Relevant Insurance Cost for the previous Insurance Review Period.

- 7.2.2 A spreadsheet (the "**Insurance Summary Sheet**") detailing separately:

- (a) the sum(s) insured/limit of indemnity (i.e. rateable factor) for each of the Operational Insurances;
- (b) the premium rate for each of the Operational Insurances;
- (c) the gross premium paid (or to be paid) for each of the Operational Insurances;
- (d) the deductible(s) for each Operational Insurance;
- (e) details of any claims (paid or reserved) (including incident date, type and quantum) in excess of £[♦]; and
- (f) details of any insurance broker remuneration and/or commissions.

- 7.2.3 Full details of the amount of the premium reasonably considered by Project Co's insurance broker to be attributable to:
- (a) circumstances generally prevailing in the Relevant Insurance Market together with reasoning for such view;
 - (b) the claims history of the Authority;
 - (c) [Malicious Damage at the Facilities];²⁹⁵ [and]
 - (d) [A Flooding Event,]²⁹⁶
- (the "**Insurance Cost Factors**") together with the insurance brokers reasons for such view (specifying the impact of each of the factors and quantifying the amount attributable to each factor specified above).
- 7.2.4 Full details of any Portfolio Cost Saving;
- 7.2.5 Full details of any factor which increases the cost of the insurance premium and the associated amount of the premium reasonably considered by Project Co's insurance broker to be attributable to any factor other than the Insurance Cost Factors (the "**Project Co Factors**"), together with reasoning for such view (specifying the impact of each of the factors and quantifying the amount attributable to each factor specified);²⁹⁷
- 7.2.6 The calculation of the Other Costs in respect of the Operational Insurances, in accordance with paragraph 8 (*Calculation of Insurance Costs Anticipated to be Payable by the Authority*) below, over the course of the relevant Insurance Review Period (stated on a monthly basis);
- 7.2.7 Evidence satisfactory to the Authority (acting reasonably) of any changes to circumstances generally prevailing in the Relevant Insurance Market that are relied on by the Insurance Broker in preparing the Insurance Summary Sheet;
- 7.2.8 Details of movements from a recognised insurance index plus, if available from other appropriate sources, details of changes in insurance cost across the Relevant Insurance Market as a whole;

²⁹⁵ Malicious damage only to be referred to here where it is an Authority risk.

²⁹⁶ This additional limb should be included where a Site specific flood risk has been identified and this is an Authority risk.

²⁹⁷ Malicious damage only to be referred to here where it is an Authority risk.

- 7.2.9 A copy of the market presentation(s) prepared by Project Co's insurance broker and issued to insurers in respect of the relevant Insurance Review Period (the "**Market Presentations**"); and
 - 7.2.10 A copy of the insurance renewal report prepared by Project Co's insurance broker in respect of the relevant Insurance Review Period (the "**Insurance Renewal Report**").
- 7.3 Project Co shall procure that the insurance broker, no later than the date which is ten (10) Business Days after the Insurance Review Date, delivers to the Authority, at the same time as it delivers to Project Co, at least two (2) copies of the Joint Insurance Cost Report. Following receipt of the Joint Insurance Cost Report, the Authority shall notify Project Co in writing within fifteen (15) Business Days whether or not it accepts the Joint Insurance Cost Report including full details of any disagreement. If the Authority does not provide such notification and/or details of any disagreement to Project Co within fifteen (15) Business Days, the Authority shall be deemed to have accepted the Joint Insurance Cost Report. If the Authority disagrees with any item in the Joint Insurance Cost Report, the parties shall use their respective reasonable endeavours acting in good faith to agree the contents of the Joint Insurance Cost Report. If the parties fail to agree the contents of the Joint Insurance Cost Report within thirty-five (35) Business Days from the date it was delivered to the Authority, the matter shall be resolved pursuant to Clause 57 (*Dispute Resolution Procedure*).
- 7.4 The Authority may make the Joint Insurance Cost Report available to any of its [or the Welsh Government's] agents or advisers or other body or bodies nominated by the Welsh Government for insurance cost verification, benchmarking or similar purpose.

8. **Calculation of Insurance Costs Anticipated to be Payable by the Authority**

The calculation of the Other Costs to be included in the Insurance Summary Sheet pursuant to paragraph 7.2.6 above, shall be a sum equal to:

- 8.1 the Actual Relevant Insurance Costs;
- plus
- 8.2 any fee which Project Co's insurance broker anticipates will be payable pursuant to paragraph 1.3 of Section 6 (*Other Costs*) of Schedule 14 (*Payment Mechanism*) to this Agreement;
- minus
- 8.3 the Project Co Factors.

SECTION 5

BROKER'S LETTER OF UNDERTAKING²⁹⁸

To: The Authority

Dear Sirs

Agreement dated [♦] entered into between [♦] Limited ("Project Co") and [♦] (the "Authority") (the "Agreement")

1. We refer to the Agreement. Unless the context otherwise requires, terms defined in the Agreement shall have the same meaning in this letter.
2. We act as insurance broker to Project Co in respect of the Insurances and in that capacity we confirm that the Insurances which are required to be procured pursuant to Clause 54 (*Insurance*) and Schedule 15 (*Insurance Requirements*) of the Agreement:
 - 2.1 where appropriate name you and such other persons as are required to be named pursuant to the Agreement for their respective interests;
 - 2.2 are, in our reasonable opinion as insurance brokers, as at today's date, in full force and effect in respect of all the matters specified in the Agreement; and
 - 2.3 that all premiums due to date in respect of the Insurances are paid and the Insurances are, to the best of our knowledge and belief, placed with insurers which, as at the time of placement, are reputable and financially sound. We do not, however, make any representations regarding such insurers' current or future solvency or ability to pay claims; and that
 - 2.4 the endorsements set out in Section 3 (*Endorsements*) of Schedule 15 (*Insurance Requirements*) of the Agreement are as at today's date in full force and effect in respect of the Insurances.
3. We further confirm that the attached cover notes confirm this position.

²⁹⁸ This is recommended drafting. If agreement to this wording is not in practice achievable, then the parties should agree the best terms reasonably available in the market at the time. Project Co's broker may wish to limit its liability and include additional liability wording in the Broker's Letter of Undertaking. Whilst this is in principle acceptable, the Authority will need to check that (i) the scope of such additional wording is appropriate (e.g. does not extend to a limitation of liability for fraudulent acts), and (ii) the capped amount is set at a sufficiently high level.

4. Pursuant to instructions received from Project Co and in consideration of your approving our appointment [or continuing appointment] as brokers in connection with the Insurances, we hereby undertake in respect of the interests of the Authority in relation to the Insurances:

4.1 Notification Obligations

- 4.1.1 to notify you at least thirty (30) days prior to the expiry of any of the Insurances if we have not received instructions from Project Co to negotiate renewal and in the event of our receiving instructions to renew, to advise you promptly of the details thereof; and
- 4.1.2 to notify you at least thirty (30) days prior to ceasing to act as brokers to Project Co unless, due to circumstances beyond our control, we are unable to do so in which case we shall notify you as soon as practicable.

4.2 Advisory Obligations

- 4.2.1 to notify you promptly of any default in the payment of any premium for any of the Insurances;
- 4.2.2 to notify you if any insurer cancels or gives notification of cancellation of any of the Insurances, at least thirty (30) days before such cancellation is to take effect or as soon as reasonably practicable in the event that notification of cancellation takes place less than thirty (30) days before it is to take effect;
- 4.2.3 to notify you of any act or omission, breach or default of which we have knowledge which in our reasonable opinion may either invalidate or render unenforceable in whole or in part any of the Insurances or which may otherwise materially impact on the extent of cover provided under the Insurances; and
- 4.2.4 to advise Project Co of its duties of disclosure to insurers and to specifically advise upon:
- (a) the facts, circumstances and beliefs that should generally be disclosed to insurers; and
 - (b) the obligation not to misrepresent any facts, matters or beliefs to insurers.

4.3 Disclosure Obligations

- 4.3.1 to disclose to insurers all information made available to us from any source and any fact, change of circumstances or occurrence made known to us from any source which in our reasonable opinion is material to the risks insured against under the Insurances and which properly should be

disclosed to insurers as soon as practicable after we become aware of such information, fact, change of circumstance or occurrence whether prior to inception or renewal or otherwise; and

- 4.3.2 to treat as confidential all information so marked or otherwise stated to be confidential and supplied to us by or on behalf of Project Co or the Authority and not to disclose such information, without the prior written consent of the supplier, to any third party other than those persons who, in our reasonable opinion have a need to have access to such information from time to time, and for the purpose of disclosure to the insurers or their agents in respect of the Insurances in discharge of our obligation set out at Clause 4.3.1 of this letter. Our obligations of confidentiality shall not conflict with our duties owed to Project Co and shall not apply to disclosure required by an order of a court of competent jurisdiction, or pursuant to any applicable law, governmental or regulatory authority having the force of law or to information which is in the public domain.

4.4 Administrative Obligations

- 4.4.1 to hold copies of all documents relating to or evidencing the Insurances, including but without prejudice to the generality of the foregoing, insurance slips, contracts, policies, endorsements and copies of all documents evidencing renewal of the Insurances, payment of premiums and presentation and receipt of claims;
- 4.4.2 to supply to the Authority and/or its insurance advisers (or the Authority's or its insurance advisers' authorised representatives) promptly on written request copies of the documents set out in Clause 4.4.1 of this letter, and to the extent available, to make available to such persons promptly upon the Authority's request the originals of such documents;
- 4.4.3 to pay into the Insurance Proceeds Account without set off or deduction of any kind for any reason all payments in respect of claims received by us from insurers in relation to the Insurances specified in Clauses 54.1 to 54.3 (*Project Co Insurances*) of the Agreement.
- 4.4.4 to administer the payment of premiums due pursuant to the Insurances such that, in so far as we hold appropriate funds, all such premiums shall be paid to insurers in accordance with the terms of the Insurances;
- 4.4.5 to administer the payment of claims from insurers in respect of the Insurances (the "**Insurance Claims**") including:
- (a) negotiating settlement of Insurance Claims presented in respect of the Insurances;
 - (b) collating and presenting all information required by insurers in relation to Insurance Claims presented in respect of the Insurances; and

(c) insofar as it is relevant and practicable, liaising with and reporting to each Authority throughout the settlement, payment and administration of such Insurance Claims.

4.4.6 to advise the Authority promptly upon receipt of notice of any material changes which we are instructed to make in the terms of the Insurances and which, if effected, in our opinion as Insurance Brokers would result in any material reduction in limits or coverage or in any increase in deductibles, exclusions or exceptions;

4.4.7 to advise the Authority in advance of any change to the terms of, or any lapse, non-renewal and/or cancellation of any policy maintained in respect of the Insurances;

4.4.8 to use our reasonable endeavours to have endorsed on each and every policy evidencing the Insurances (when the same is issued) endorsements substantially in the form set out in Section 3 (*Endorsements*) to Schedule 15 (*Insurance Requirements*) of the Agreement; and

4.4.9 to:

(a) prepare prior to the commencement of the Operational Insurances and prior to each Insurance Review Date, at the expense of the Project Co, a Joint Insurance Cost Report on behalf of both the Project Co and the Authority in accordance with the insurance review procedure as set forth in Section 4 (*Insurance Arrangements*) of Schedule 15 (*Insurance Requirements*) to the Project Agreement. We shall ensure that the information in the Joint Insurance Cost Report is fairly represented, based on the information available to us; and

(b) provide prior to each Renewal Date such other information required to satisfy the requirement of Section 4 (*Insurance Arrangements*) of Schedule 15 (*Insurance Requirements*) to the Project Agreement,

in each case, supported by appropriate evidence, of the generally prevailing market for the relevant Operational Insurance and of any other circumstances relevant to the application of Section 6 (*Other Costs*) of Schedule 14 (*Payment Mechanism*) to the Project Agreement.

5. We shall supply further letters substantially in this form on renewal of each of the Insurances and shall supply copies of such letters to those parties identified to us by the Authority for such purposes.

6. This letter shall be governed by and construed in accordance with the laws of England and Wales.

Yours faithfully

For and on behalf of [Project Co's broker]

SCHEDULE 16: ²⁹⁹

CHANGE PROTOCOL

SECTION 1

DEFINITIONS

In this Schedule 16 (*Change Protocol*) and elsewhere in this Agreement (save where Schedule 1 (*Definitions and Interpretation*) provides to the contrary) the following words shall have the following meanings:

"Adjustment Date"	means the date on which the adjustment to the Annual Service Charges takes effect in accordance with the provisions of this Agreement, or such other date as is agreed between the parties;
"Affordable"	means within the revenue resource parameters determined by the Authority and notified in writing by it to Project Co as available for a proposed High Value Change;
"Approval Criteria"	has the meaning given in paragraph 7 (<i>Approval Criteria</i>) of Section 4 (<i>High Value Changes</i>) of this Schedule 16 (<i>Change Protocol</i>);
"Approved Project"	has the meaning given in paragraph 8.2.1 of Section 4 (<i>High Value Changes</i>) of this Schedule 16 (<i>Change Protocol</i>);
"Assumption Adjustment"	means an adjustment to any of the assumptions contained in the Financial Model;
"Authority Change"	means, as the case may be, a Low Value Change, a Medium Value Change or a High Value Change;
"Authority Change Notice"	means a notice issued in accordance with this Schedule 16 (<i>Change Protocol</i>) requiring an Authority Change;

²⁹⁹ The Authority should consider the suitability of the thresholds between the three categories of Authority Changes (see the individual definitions), but should not propose changes without prior approval from the Welsh Government.

The Authority should consider the limit on Senior Funders' due diligence costs (paragraph 12 in Section 3 and paragraph 14 in Section 4) but should not propose changes without prior approval from the Welsh Government.

The Change Protocol envisages that the parties agree a Catalogue that will govern the pricing of low value changes. Including a well-developed Catalogue in the Agreement from day 1 will be in both parties' interests as it will create a clear and practical framework (with greater price certainty) for agreeing day-to-day low value changes.

Authorities undertaking must always seek Welsh Government approval to any Changes, other than Derogated Low Value Changes or Low Value Changes, to ensure ongoing compliance with the relevant accounting and statistical classification.

"Calculation Date"	means the relevant date for the purposes of calculating the Incurred Change Management Fee in accordance with Section 4 (<i>High Value Changes</i>) of this Schedule 16 (<i>Change Protocol</i>);
"Capital Cost"	means in relation to any High Value Change the cost of carrying out the design, construction and commissioning of any construction works required to implement that High Value Change;
"Catalogue of Small Works and Services" and "Catalogue"	means the list of prices and time periods for types of Low Value Changes set out in 1 Part 1 (<i>Catalogue</i>) to this Schedule 16 (<i>Change Protocol</i>), as amended from time to time in accordance with paragraph 3 (<i>Project Co Response and Authority Confirmation</i>) of Section 2 (<i>Low Value Changes</i>) of this Schedule 16 (<i>Change Protocol</i>);
"Catalogue Price"	means the total cost (excluding VAT) of carrying out a Low Value Change as set out in the Catalogue;
"Catalogue Review Date"	means each third anniversary of the Commencement Date;
"Change"	means a change in the Works, the Facilities and/or Services or additional works and/or services or a change in the Authority's Policies that may be made under Clause 34 (<i>Change Protocol</i>) or this Schedule 16 (<i>Change Protocol</i>);
"Change in Costs"	<p>means in respect of any Relevant Event, the effect of that Relevant Event (whether of a one-off or recurring nature, and whether positive or negative) upon the actual or anticipated costs, losses or liabilities of Project Co and/or the Contractor and/or any Service Provider (without double counting), including, as relevant, the following:</p> <ul style="list-style-type: none"> (a) the reasonable costs of complying with the requirements of Clauses 26.9 (<i>Authority's Remedial Rights</i>), 30 (<i>Delay Events and Compensation Events</i>), 33 (<i>Changes in Law</i>) and/or Sections 2 (<i>Low Value Changes</i>) to 4 (<i>High Value Changes</i>) of this Schedule 16 (<i>Change Protocol</i>), including the reasonable costs of preparation of design and estimates; (b) the costs of continued employment of, or making redundant, staff who are no longer required; (c) the costs of employing additional staff;

- (d) reasonable professional fees;
- (e) the costs to Project Co of financing any Relevant Event (and the consequences thereof) including commitment fees and capital costs interest and hedging costs, lost interest on any of Project Co's own capital employed and any finance required pending receipt of a lump sum payment or adjustments to the Annual Service Charge;
- (f) the effects of costs on implementation of any insurance reinstatement in accordance with this Agreement, including any adverse effect on the insurance proceeds payable to Project Co (whether arising from physical damage insurance or business interruption insurance (or their equivalent)) in respect of that insurance reinstatement and any extension of the period of implementation of the insurance reinstatement;
- (g) operating costs, or lifecycle maintenance or replacement costs;
- (h) Capital Expenditure (or, in the case of a Relevant Event which is a Relevant Change in Law, Capital Expenditure for which the Authority is responsible);
- (i) the costs required to ensure continued compliance with the Funding Agreements;
- (j) any deductible or increase in the level of deductible, or any increase in premium under or in respect of any insurance policy; and
- (k) Direct Losses or Indirect Losses, including reasonable legal expenses on an indemnity basis;

"Change in Revenue"

means, in respect of any Relevant Event, the effect of that Relevant Event (whether of a one-off or recurring nature, and whether positive or negative) upon the actual or anticipated income of Project Co and/or any Service Provider [from third party use] or from other income committed from third parties (without double counting);

"Change Management Fee"

means the fee calculated in accordance with paragraph 10 (*Change Management Fee*) of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*);

"Cost" where used in the definitions of High Value Change and Low Value Change means the immediate cost that will be incurred by Project Co to implement the relevant Change, disregarding any Whole Life Costs;

"Derogated Low Value Change" means:

- (a) [list specific types of Changes to be allowed] and
- (b) any [other] Low Value Change that:
 - (i) consists of minor works;
 - (ii) only affects the interior of the Facilities;
 - (iii) does not affect any of the mechanical and electrical equipment of the Facilities;
 - (iv) does not involve any interference with the service media in the Facilities;
 - (v) will not conflict with any Programmed Maintenance or Lifecycle Replacement; and
 - (vi) will not prejudice any of the Operational Insurances;

"Derogated Low Value Change Notice" means a notice given by the Authority in accordance with paragraph 1.2 of Section 2 (*Low Value Changes*) of this Schedule 16 (*Change Protocol*);

"Estimate" has the meaning given in paragraph 3 of Section 3 (*Medium Value Changes*) of this Schedule 16 (*Change Protocol*);

"Estimated Change in Project Costs" means, in respect of any Relevant Event, the aggregate of any Change in Costs [and/or (without double counting) Change in Revenue (as relevant)];

"High Value Change" means:

- (a) a Change requested by the Authority that, in the reasonable opinion of the Authority, is likely either to Cost in excess of [one hundred thousand pounds

(£100,000)] (index linked) or to require an adjustment to the Annual Service Charge that on a full year basis is 2% or more of the Annual Service Charge in the relevant Contract Year provided that the parties may agree that such a Change should instead be processed as a Medium Value Change; or

- (b) any other Change that the parties agree is to be treated as a High Value Change;

"High Value Change Proposal" means a proposal satisfying the requirements of paragraph 3.4 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*);

"High Value Change Requirements" has the meaning given in paragraph 2.1.3 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*);

"High Value Change Stage 2 Submission" has the meaning given in paragraph 4.1.1 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*);

"Incurred Change Management Fee" means the amounts actually incurred or payable by or on behalf of Project Co up to the Calculation Date in respect of matters identified by Project Co pursuant to paragraphs 3.4.3 and/or 4.3.7 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*) as falling within the Change Management Fee (and not already reimbursed by the Authority);

"Input Adjustment" means any adjustment to the Financial Model other than Assumption Adjustment and Logic Adjustments;

"Key Ratios" means the following ratios:

- (a) the [Loan Life Cover Ratio] (as defined in the Senior Funding Agreements);
- (b) the [Annual Debt Service Cover Ratio] (as defined in the Senior Funding Agreements); and
- (c) the [Equity IRR];

"Logic Adjustment" means an adjustment to the logic or formulae contained in the Financial Model;

"Low Value Change" means a Change which is either:

- (a) of a type listed in the Catalogue of Small Works and Services; or
- (b) is not so listed, but has an individual Cost not exceeding [ten thousand pounds (£10,000)] (index linked), or as otherwise agreed from time to time, except for any request that would (if implemented) increase the likelihood of Project Co failing to meet the Authority's Construction Requirements and/or the Service Level Specification or materially and adversely affect Project Co's ability to perform its obligations under this Agreement;

"Medium Value Change"	means a Change requested by the Authority which is not a Low Value Change or a High Value Change;
"Post-Adjustment Financial Model"	means the Financial Model in effect immediately following the making of the relevant adjustments;
"Pre-Adjustment Financial Model"	means the Financial Model in effect immediately prior to the making of the relevant adjustments;
"Project Co Change"	means a Change that is initiated by Project Co by submitting a Project Co Notice of Change to the Authority pursuant to Section 5 (<i>Project Co Changes</i>) of this Schedule 16 (<i>Change Protocol</i>);
"Project Co Notice of Change"	has the meaning given in paragraph 1 of Section 5 (<i>Project Co Changes</i>) of this Schedule 16 (<i>Change Protocol</i>);
"Relevant Event"	means an event or circumstance in which this Agreement expressly provides for an adjustment to the Annual Service Charges to be made;
"Review Procedure"	means the procedure set out in Schedule 8 (<i>Review Procedure</i>);
"Small Works and Services Rates"	means the rates to be applied in respect of any request from the Authority for a Low Value Change set out in Appendix 1 Part 2 (<i>Small Works And Services Rates</i>) to this Schedule 16 (<i>Change Protocol</i>), as amended from time to time in accordance with paragraph 8 of Section 2 (<i>Low Value Changes</i>) of this Schedule 16 (<i>Change Protocol</i>);
"Stage 1 Approval"	has the meaning given in paragraph 3.7 of Section 4 (<i>High Value Changes</i>) of this Schedule 16 (<i>Change Protocol</i>);

"Stage 1 Approved Project"	has the meaning given in paragraph 3.7 of Section 4 (<i>High Value Changes</i>) of this Schedule 16 (<i>Change Protocol</i>);
"Stage 2 Approval"	has the meaning given in paragraph 8.2.1 of Section 4 (<i>High Value Changes</i>) of this Schedule 16 (<i>Change Protocol</i>);
"Stage 2 Approved Project"	has the meaning given in paragraph 8.2.1 of section 4 (<i>High Value Changes</i>) of this Schedule 16 (<i>Change Protocol</i>);
"Target Cost"	has the meaning given in paragraph 2.1.2 of Section 4 (<i>High Value Changes</i>) of this Schedule 16 (<i>Change Protocol</i>);
"Third Party Costs"	means: <ul style="list-style-type: none"> (a) in relation to a Medium Value Change, the costs incurred by Project Co with third parties in responding to an Authority Change Notice for a Medium Value Change , including, but not limited to, the Sub-Contractors, consultants and advisers; and (b) in relation to a High Value Change, the costs incurred by Project Co with third parties in responding to an Authority Change Notice for a High Value Change, including, but not limited to, the Sub-Contractors, consultants and advisers but under the exclusion of any costs incurred by the Sub-Contractors [and [Management Service Provider]] in relation to project managing the development, procurement and implementation of the High Value Change; and
"Whole Life Cost"	means the estimated and (to the extent that such information is available) the actual cost of operating and maintaining that High Value Change over its intended design life (consistent with Project Co's Proposals).

SECTION 2

LOW VALUE CHANGES

1. Low Value Change Notice

- 1.1 Subject to paragraph 1.2 of this Section 2 (*Low Value Changes*), where a Low Value Change is required by the Authority, it must submit an Authority Change Notice to Project Co.
- 1.2 The Authority may carry out Derogated Low Value Changes during the Operational Term. If the Authority wishes to carry out a Derogated Low Value Change it shall send Project Co a notice at least [five (5)] Business Days prior to the date on which it proposes to start to implement the Change setting out the nature of the proposed Change in sufficient detail to enable Project Co to satisfy itself that the proposed Change constitutes a Derogated Low Value Change. Project Co may notify the Authority within [three (3)] Business Days of receipt of a Derogated Low Value Change Notice that it does not agree that the proposed Change constitutes a Derogated Low Value Change and, unless the parties otherwise agree, the Authority must not take any steps to carry out the proposed Change unless it has referred the dispute to the Dispute Resolution Procedure and it has been determined that the proposed Change is a Derogated Low Value Change.
- 1.3 If it carries out a Derogated Low Value Change, the Authority must use Good Industry Practice to the standards that would have applied to Project Co if it had carried it out as a Low Value Change.

2. Authority Change Notice

An Authority Change Notice for a Low Value Change must:

- 2.1 state that it relates to a Low Value Change;
- 2.2 contain a description of the works and/or the change to the Works and/or the Services that the Authority requires including, if relevant, the applicable type of Low Value Change listed in the Catalogue; and
- 2.3 if there is no applicable type of change listed in the Catalogue, specify the time period within which the Authority requires the Change to be implemented.

3. Project Co Response and Authority Confirmation

Within five (5) Business Days of receipt of an Authority Change Notice for a Low Value Change, Project Co must notify the Authority of:

- 3.1 the cost of implementing the required Low Value Change; and

- 3.2 the time period for implementing the Low Value Change (taking into account the requirements of Section 3 (*Access To Work Protocol*) of Schedule 34 (*Joint Operating Protocol*)),

in each case in accordance with paragraph 4 of this Section 2 (*Low Value Changes*).

4. **Cost and Timing**

- 4.1 If the Low Value Change is of a type listed in the Catalogue, the cost of carrying out that Low Value Change shall not exceed the relevant Catalogue Price and the time period for implementing the Low Value Change shall not exceed the relevant time specified in the Catalogue.
- 4.2 If the Low Value Change is not of a type that is listed in the Catalogue, the cost of carrying out that Low Value Change shall be calculated on the basis that:
- 4.2.1 wherever practicable the Low Value Change will be carried out by an [existing on-site and] suitably qualified employee of Project Co or a Project Co Party and in that case Project Co may not charge for labour. Where there is no such suitably qualified on-site employee reasonably available to carry out the Low Value Change, the cost of the labour element will be calculated in accordance with the Small Works and Services Rates or, where such rates are not applicable, in accordance with rates which are fair and reasonable; and
- 4.2.2 the materials element will be charged at the cost of materials to Project Co or to the Project Co Party carrying out the work (net of all discounts) and there shall be no management fee, margin, overhead, contingency or other cost applied in relation thereto.
- 4.3 Other than the costs referred to in paragraphs 4.1 and 4.2 of this Section 2 (*Low Value Changes*) Project Co may not charge the Authority for processing, implementing or managing a Low Value Change.

5. **Authority Objection**

The Authority may object in writing within five (5) Business Days of receipt of Project Co's notice pursuant to paragraph 3 of this Section 2 (*Low Value Changes*), to any part of that notice and in that event the parties shall act reasonably to endeavour to agree as soon as practicable how the Low Value Change is to be implemented, which may include the Authority withdrawing the Authority Notice of Change.

6. Implementation

- 6.1 Project Co must implement a required Low Value Change so as to minimise any inconvenience to the Authority and, subject to paragraph 10.2 of this Section 2 (*Low Value Changes*), within the timescale specified in the notice given by Project Co pursuant to paragraph 3 of this Section 2 (*Low Value Changes*) (or agreed by the parties pursuant to paragraph 5 of this Section 2 (*Low Value Changes*)).
- 6.2 Project Co shall notify the Authority when it considers that the Low Value Change has been completed.
- 6.3 If Project Co:
- 6.3.1 fails to give a notice to the Authority in accordance with paragraph 3 of this Section 2 (*Low Value Changes*) within fifteen (15) Business Days of the date of the Authority Change Notice; or
 - 6.3.2 gives a notice pursuant to paragraph 3 of this Section 2 (*Low Value Changes*) to which the Authority has objected pursuant to paragraph 5 of this Section 2 (*Low Value Changes*) on any ground other than the cost of the Low Value Change, the parties have not reached agreement as to how the Low Value Change is to be implemented and the objection has not been referred to the Dispute Resolution Procedure; or
 - 6.3.3 gives a notice pursuant to paragraph 3 of this Section 2 (*Low Value Changes*) to which the Authority does not object pursuant to paragraph 5 but then fails to fully implement the Low Value Change within ten (10) Business Days after the timescale specified in that notice or agreed in accordance with paragraph 5 of this Section 2 (*Low Value Changes*),

then, subject to paragraph 10.3 of this Section 2 (*Low Value Changes*), the Authority may notify Project Co that the Low Value Change Notice is withdrawn and, following such notification, may procure the implementation of the Low Value Change without further recourse to Project Co, but the Authority must ensure that the Low Value Change is carried out in accordance with Good Industry Practice and to the standards that would have applied to Project Co if it had implemented the Low Value Change.

7. Payment

Unless the Authority notifies Project Co within five (5) Business Days of receipt of a notice from Project Co pursuant to paragraph 6.2 above that the Low Value Change has not been implemented to its reasonable satisfaction:

- 7.1 Project Co shall, where the Low Value Change is implemented prior to the Operational Term, issue an invoice in respect of the costs of the Low Value Change, which the Authority must pay within twenty (20) Business Days of receipt; or

7.2 Project Co shall, where the Low Value Change is implemented during the Operational Term, include the costs of the Low Value Change in the next Monthly Invoice submitted pursuant to Clause 35.2 of this Agreement following completion or implementation of the relevant Low Value Change and the amounts payable for the Low Value Changes shall be invoiced and paid in accordance with the procedure described in Clause 35 (*Payment*) of this Agreement.

8. Update of Catalogue and Small Works and Services Rates

8.1 From the Commencement Date the Catalogue shall be that set out in Part 1 (*Catalogue*) of Appendix 1 to this Schedule 16 (*Change Protocol*) and the Small Works and Services Rates shall be those set out in Part 2 of (*Small Works And Services Rates*) 1 to this Schedule 16 (*Change Protocol*).

8.2 Subject to paragraph 8.3 of this Section 2 (*Low Value Changes*), the unit prices and the Small Works and Services Rates set out in the Catalogue and the Small Works and Services Rates shall be indexed on each anniversary of the Commencement Date for the change in RPIX since the Commencement Date or, after the first Catalogue Review Date, since the most recent Catalogue Review Date.

8.3 On the date which is twenty (20) Business Days before each Catalogue Review Date, Project Co must provide the Authority with:

8.3.1 a revised and updated Catalogue which:

- (a) includes in the Catalogue unit prices for any types of Low Value Changes which have occurred and which the parties consider are reasonably likely to reoccur during the life of the Project and any other types of Low Value Changes as the parties may agree; and
- (b) includes time periods for the carrying out of each listed type of Low Value Change; and

8.3.2 updated Small Works and Services Rates.

The unit prices and Small Works and Services Rates will be for the ensuing three (3) year period following the Catalogue Review Date. The unit prices must represent good value for money having regard to:

- (a) prices prevailing for similar items in the market at the time; and
- (b) paragraph 4.2 of this Section 2 (*Low Value Changes*).

The Small Works and Services Rates must provide value for money with reference to rates prevailing for similar services in the market at the time.

- 8.4 Within ten (10) Business Days of the submission by Project Co of the revised and updated Catalogue and Small Works and Services Rates pursuant to paragraph 8.3 of this Section 2 (*Low Value Changes*), the Authority shall confirm in writing whether or not it agrees that the revised and the updated Catalogue shall constitute the Catalogue and the updated Small Works and Services Rates shall constitute the Small Works and Services Rates for the purposes of this Agreement from the relevant Catalogue Review Date;
- 8.5 If the Authority does not confirm to Project Co that it agrees with the revised and updated Catalogue and/or Small Works and Services Rates provided by Project Co pursuant to paragraph 8.3 of this Section 2 (*Low Value Changes*), the parties shall meet and endeavour, in good faith, to agree any amendments to the Catalogue and/or Small Works and Services Rates. Any dispute in relation to this paragraph 8 may be referred by either party to the Dispute Resolution Procedure. The revised and updated Catalogue and revised and updated Small Works and Services Rates with such amendments as are agreed by the parties or determined under the Dispute Resolution Procedure shall constitute the Catalogue and the Small Works and Services Rates for the purposes of this Agreement from the relevant Catalogue Review Date.

9. Documentation and Monitoring

- 9.1 No due diligence (whether funder, legal, technical, insurance or financial) shall be required in relation to Low Value Changes unless otherwise agreed between the parties.
- 9.2 The Works, Services, Facilities and/or Authorities Policies (as appropriate) shall be deemed to be amended pursuant to Clause 73 (*Amendments*), to include any required Low Value Change implemented by Project Co pursuant to paragraph 6.1 of this Section 2 (*Low Value Changes*). Subject to paragraph 9.3 of this Section 2 (*Low Value Changes*), no other changes shall be made to this Agreement or any Project Document as a result of a Low Value Change, unless otherwise agreed between the parties.
- 9.3 Where it is agreed that an adjustment of the Annual Service Charge is required in respect of a Low Value Change, the Financial Model and Annual Service Charge shall be adjusted to give effect to such Low Value Changes once each Contract Year on a date to be agreed between the parties and all relevant Low Value Changes that have occurred since the preceding such adjustment shall be aggregated together into a single cumulative adjustment in accordance with Section 6 (*Changing The Financial Model*) of this Schedule 16 (*Change Protocol*).
- 9.4 Project Co shall keep a record of all Low Value Changes processed, completed and outstanding and shall provide the Authority with a copy of that record whenever reasonably required by the Authority.

10. Disputes

- 10.1 Any dispute concerning any matter referred to in this Section 2 (*Low Value Changes*) may be referred by either party to the Dispute Resolution Procedure.

- 10.2 Project Co shall not be obliged to implement the Low Value Change until any dispute has been determined except that where such dispute concerns only the cost of a Low Value Change, unless the Authority otherwise directs, Project Co must continue to carry out or implement the Low Value Change within the prescribed timescale notwithstanding the dispute.
- 10.3 The Authority is not entitled to withdraw an Authority Change Notice and procure implementation of a Low Value Change in respect of which there is a dispute that has been referred to the Dispute Resolution Procedure, unless that dispute has been determined in its favour and Project Co has not confirmed to the Authority in writing within five (5) Business Days of the date of the determination that it will implement and carry out the Low Value Change in accordance with the determination.

SECTION 3

MEDIUM VALUE CHANGES

1. Medium Value Changes

- 1.1 If the Authority requires a Medium Value Change, it must serve an Authority Change Notice on Project Co in accordance with paragraph 2 (*Medium Value Change Notice*) of this Section 3 (*Medium Value Changes*).
- 1.2 Project Co shall be entitled to refuse a Medium Value Change that:
 - 1.2.1 requires the Works and/or the Services to be performed in a way that infringes any Law or is inconsistent with Good Industry Practice;
 - 1.2.2 would cause any Consent to be revoked (or would require a new consent to be obtained or any existing Consent to be amended which, after using reasonable efforts, Project Co has been unable to obtain);
 - 1.2.3 would materially and adversely affect Project Co's ability to deliver the Works and/or the Services (except those Works and/or Services which have been specified as requiring to be amended in the Authority Change Notice) in a manner not compensated for pursuant to this Section 3 (*Medium Value Changes*);
 - 1.2.4 would materially and adversely affect the health and safety of any person;
 - 1.2.5 would, if implemented, materially and adversely change the nature of the Project (including its risk profile);
 - 1.2.6 is the subject of an Authority Change Notice that cannot reasonably be complied with;
 - 1.2.7 the Authority does not have the legal power or capacity to require implementation of; or
 - 1.2.8 would, if implemented, adversely affect the enforceability or priority of the security held by or on behalf of the existing Senior Funders.

2. Medium Value Change Notice

- 2.1 An Authority Change Notice for a Medium Value Change must:
 - 2.1.1 state that it refers to a Medium Value Change;

- 2.1.2 set out the change in the Works or Services or the additional works or services required in sufficient detail to enable Project Co to calculate and provide the Estimated Change in Project Costs in accordance with paragraph 3 (*Contractor's Estimate*) of this Section 3 (*Medium Value Changes*);
 - 2.1.3 set out whether, in respect of any additional facilities, Project Co is expected to provide facilities management services and lifecycle maintenance services in respect of such additional facilities; and
 - 2.1.4 set out the timing of the additional works or services required by the Authority (taking into account the requirements of Section 3 (*Access To Work Protocol*) of Schedule 34 (*Joint Operating Protocol*)).
- 2.2 Within fifteen (15) Business Days of receipt of the Medium Value Change Notice, Project Co must notify the Authority in writing:
- 2.2.1 whether it considers that it is entitled to refuse the Medium Value Change on any of the grounds set out in paragraphs 1.2.1 to 1.2.6 of this Section 3 (*Medium Value Changes*);
 - 2.2.2 when it will provide the Estimate to the Authority bearing in mind the requirement in paragraph 7.2.2 of this Section 3 (*Medium Value Changes*); and
 - 2.2.3 its estimate of the Third Party Costs that it will incur to prepare the Estimate.
- 2.3 If Project Co notifies the Authority that it considers that it is entitled to refuse the Medium Value Change on one or more of the grounds set out in paragraphs 1.2.1 to 1.2.6 of this Section 3 (*Medium Value Changes*), then unless the parties otherwise agree, the Authority shall be deemed to have withdrawn the Authority Notice of Change if it has not referred the matter to the Dispute Resolution Procedure within [twenty (20)] Business Days of receipt of Project Co's notice.
- 2.4 If the Authority considers that Project Co's proposed time for providing the Estimate is not reasonable, the parties shall endeavour to agree the time, failing which the matter may be referred to the Dispute Resolution Procedure.
- 2.5 If the Authority considers that the Project Co's estimate of Third Party Costs to prepare the Estimate is not reasonable, the parties shall endeavour to agree the same, failing which the matter may be referred to the Dispute Resolution Procedure.
- 2.6 If any matter is referred to the Dispute Resolution Procedure pursuant to paragraph 2 (*Medium Value Change Notice*) of this Section 3 (*Medium Value Changes*), the time for Project Co to provide the Estimate shall be counted from the date of determination of that dispute if the dispute is determined in Project Co's favour.

3. Contractor's Estimate

As soon as reasonably practicable and in any event within the time period agreed or determined pursuant to paragraph 2.4 of this Section 3 (*Medium Value Changes*), Project Co shall deliver to the Authority the Estimate.

The Estimate must contain:

- 3.1 a detailed timetable for implementation of the Medium Value Change (taking into account the requirements of Section 3 (*Access To Work Protocol*) of Schedule 34 (*Joint Operating Protocol*));
- 3.2 any requirement for relief from compliance with obligations, including the obligations of Project Co:
 - 3.2.1 to achieve the Actual Completion Date [in respect of a Facility] by the [relevant] Completion Date; and
 - 3.2.2 to achieve [a/the] Actual Post Completion Works Date by the [relevant] Post Completion Works Date; and
 - 3.2.3 to meet the requirements set out in the Authority's Construction Requirements and/or the Service Level Specification during the implementation of the Medium Value Change;
- 3.3 an outline of the proposed design solution and design, including an appropriate analysis/risk appraisal and, to the extent relevant, the impact on whole life costings;
- 3.4 any impact on the provision of the Works and/or the Services;
- 3.5 a value for money justification for any proposed change to the quality of the works or the services comprised in the Medium Value Change as compared to the Works and the Services;
- 3.6 any amendment required to this Agreement and/or any Project Document as a result of the Medium Value Change;
- 3.7 any Estimated Change in Project Costs that results from the Medium Value Change;
- 3.8 any Capital Expenditure that is required or no longer required as a result of the Medium Value Change;
- 3.9 amendments to existing Consents that are required;

- 3.10 a payment schedule for any Capital Expenditure required to implement the Change, based on milestones where relevant;
- 3.11 costs and details of (i) any other approvals required and/or due diligence permitted pursuant to paragraph 12 of this Section 3 (*Medium Value Changes*); and (ii) any Third Party Costs;
- 3.12 the method of implementation and the proposed method of certification of any construction aspects of the Medium Value Change, if not covered by the procedures specified in Clause 14 (*Programme and Dates for Completion*); and
- 3.13 any other information requested by the Authority in the Authority Change Notice.

together the "**Estimate**".

4. **Costing of the Estimate**

In calculating the Estimated Change in Project Costs and/or the Capital Expenditure for the purposes of the Estimate, Project Co shall apply the following principles wherever applicable:

- 4.1 unless the Authority's requirements for the Medium Value Change specify a different quality as compared to the Works:
 - 4.1.1 the unit cost of any construction or installation works or associated preliminaries (excluding any temporary or demolition works, professional fees, contingencies, overheads and profit margins) required to implement the Medium Value Change is the equivalent unit rate set out in Part 1 (*Unit Cost For Construction Or Installation Costs*) of Appendix 2 of this Schedule 16 (*Change Protocol*), uplifted using the Department for Trade and Industry PUBSEC index for construction cost inflation in the period between the Commencement Date and the date the Medium Value Change is to be commenced;
 - 4.1.2 any lifecycle replacement and maintenance associated with additional works (or changes to the Works) are consistent with the lifecycle and maintenance profile of the Facilities envisaged in Section 4 (*Project Co's Proposals*) of Schedule 6 (*Construction Matters*) including (without limitation) in terms of the replacement cycles for equipment, provided that Project Co must reflect improvements in technology that can optimise Whole Life Costs for the Authority; and
 - 4.1.3 the unit costs to be applied to the pricing of lifecycle replacement and maintenance is the equivalent unit rate set out in Part 2 (*Unit Costs For Lifecycle Maintenance*) of Appendix 2 of this Schedule 16 (*Change Protocol*) (index linked). If any such additional works are specified to a higher quality as compared to the Works, then the unit Lifecycle Replacement and maintenance cost shall be (in real terms) lower;

- 4.2 any professional fees, contingencies, overheads and/or profit margins to be charged by any consultant, sub-contractor or supplier in respect of construction and/or installation and/or lifecycle and/or service provision for the Medium Value Change are the equivalent rates set out in Part 3 (*Consultant, Sub-Contractor Or Supplier Fees*) of Appendix 2 of this Schedule 16 (*Change Protocol*), or if the professional fees, contingencies, overheads and profit margins being charged by consultants, sub-contractors and/or suppliers in current market conditions have changed significantly from those set out in Part 3 (*Consultant, Sub-Contractor Or Supplier Fees*) of Appendix 2 of this Schedule 16 (*Change Protocol*), such other rates as the parties agree or failing agreement as may be determined under the Dispute Resolution Procedure as being consistent with those charged in current market conditions;
- 4.3 unless the Authority's requirements for the Medium Value Change specify a different quality than required by the Service Level Specification, the unit cost of any extension of, or change to, any Service (either in scope or area), taking into account the capacity of existing labour resources, is consistent with the equivalent unit rate set out in Part 4 (*Unit Costs For Labour Rates*) of Appendix 2 to this Schedule 16 (*Change Protocol*);
- 4.4 other than as referred to in paragraphs 4.1 to 4.3 of this Section 3 (*Medium Value Changes*) no charge shall be made in respect of Project Co's time, or that of any Project Co Party spent processing, managing or monitoring the Medium Value Change (and no additional mark up or management fee shall be applied by Project Co); and
- 4.5 where aspects of the Medium Value Change are not addressed by paragraphs 4.1 to 4.4 of this Section 3 (*Medium Value Changes*), they shall be costed on a fair and reasonable basis reflecting the then current market rates.

5. **Standards of Provision of the Estimate**

In providing the Estimate Project Co must:

- 5.1 use reasonable endeavours to oblige its Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;
- 5.2 demonstrate how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred, reasonably foreseeable Changes in Law at that time have been taken into account; and
- 5.3 demonstrate that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Medium Value Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under paragraphs 3.7 and/or 3.8 of this Section 3 (*Medium Value Changes*); and
- 5.4 provide written evidence of Project Co's compliance with paragraphs 5.1 to 5.3 of this Section 3 (*Medium Value Changes*).

6. Determination of the Estimate

As soon as practicable after the Authority receives the Estimate, the parties shall discuss and endeavour to agree the contents of the Estimate. If the parties cannot agree on the contents of the Estimate, the matter may be referred by either party to the Dispute Resolution Procedure to determine if the Estimate represents a fair and reasonable approach to implementing the Medium Value Change in all respects.

7. Confirmation or Withdrawal of the Medium Value Change Notice

7.1 As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to paragraph 6 of this Section 3 (*Medium Value Changes*), the Authority shall:

7.1.1 confirm in writing to Project Co the Estimate (as modified); or

7.1.2 withdraw the Authority Change Notice.

7.2 If, in any Contract Year, the Authority has either not confirmed an Estimate (as modified, if applicable) within twenty (20) Business Days of the contents of the Estimate having been agreed or determined in accordance with the foregoing provisions of this Section 3 (*Medium Value Changes*) or has withdrawn an Authority Change Notice for a Medium Value Change on three or more occasions, then the Authority shall pay to Project Co on the third and each subsequent such occasion in that Contract Year the reasonable additional Third Party Costs incurred by Project Co in preparing the Estimate provided that:

7.2.1 Project Co has used all reasonable endeavours to submit a reasonably priced Estimate; and

7.2.2 Project Co made available to the Authority, with the Estimate, a cost break down of Third Party Costs incurred by Project Co to prepare the Estimate, which shall be consistent with the estimate of such costs approved by the Authority pursuant to paragraph 2.5 of this Section 3 (*Medium Value Changes*).

8. Implementation of the Medium Value Change

8.1 When the Authority has confirmed the Estimate in accordance with paragraph 7.1 of this Section 3 (*Medium Value Changes*), Project Co shall, subject to Project Co obtaining all new or amended Consents that are required and have not already been obtained, implement the required Medium Value Change in accordance with the Estimate. Where an extension of time has been agreed as part of the Estimate the [relevant] Completion Date [and/or the [relevant] Post Completion Works Date, as applicable] shall be extended as agreed in the Estimate.

8.2 Project Co shall notify the Authority when it considers that the Medium Value Change has been completed.

8.3 If:

- 8.3.1 Project Co fails to provide a response pursuant to paragraph 2.2 of this Section 3 (*Medium Value Changes*) within fifteen (15) Business Days of the date of the Medium Value Change Notice; or
- 8.3.2 Project Co fails to provide an Estimate in accordance with paragraph 3 of this Section 3 (*Medium Value Changes*); or
- 8.3.3 the Authority has confirmed an Estimate but Project Co fails to fully implement the Medium Value Change within [ten (10)] Business Days after the expiry of the time for implementing the Medium Value Change set out in the Estimate Low Value Change (as such time may be extended for any delay that is, or is equivalent to, a Delay Event);

then, subject to paragraph 14.3 of this Section 3 (*Medium Value Changes*), the Authority may notify Project Co that the Medium Value Change Notice is withdrawn and, following such notification, may procure the implementation of the Medium Value Change without further recourse to Project Co, but the Authority must ensure that the Medium Value Change is carried out in accordance with Good Industry Practice and to the standards that would have applied to Project Co if it had implemented the Medium Value Change.

9. **Certification of the Medium Value Change**

- 9.1 Where the Medium Value Change is implemented at the Facilities before the Actual Completion Date [for that Facility] [or where the Medium Value Change is relevant to the Post Completion Works, the [relevant] Actual Post Completion Works Date], the procedure set out at Clause 17 (*Pre-Completion Commissioning and Completion*) shall apply to the Medium Value Change at the same time as it applies to the original [Main] Works [or Post Completion Works, as applicable].
- 9.2 Where the Medium Value Change is implemented at the Facilities after the Actual Completion Date [for that Facility] [and does not relate to the Post Completion Works or, relates to the Post Completion Works and occurs after the [relevant] Actual Post Completion Works Date], and constitutes additional works, the procedure set out and agreed in the Estimate for certifying the completion of the Medium Value Change shall apply to determine whether the Medium Value Change has been completed appropriately.

10. **Method of Payment of Authority Contribution**

- 10.1 Project Co shall invoice the Authority for Capital Expenditure incurred by Project Co to implement a Medium Value Change according to the payment schedule set out in the Estimate as referred to in paragraph 3.10.
- 10.2 The Authority shall make a payment to Project Co within fifteen (15) Business Days of receipt by the Authority of invoices presented to the Authority (complete in all material respects) in accordance with paragraph 10.1 of this Section 3 (*Medium*

Value Changes) accompanied by the relevant evidence (where applicable) that the relevant part of the Medium Value Change has been carried out.

11. **Adjustment to Annual Service Charge**

Any adjustment to the Annual Service Charge that is necessary due to the implementation of a Medium Value Change shall be calculated in accordance with Section 6 (*Changing the Financial Model*) of this Schedule 16 (*Change Protocol*).

12. **Due Diligence**

12.1 Project Co shall procure that the Senior Funders shall not:

12.1.1 (in any event) withhold or delay any consents that are required pursuant to the Senior Funding Agreements to a Medium Value Change other than on the basis that the Senior Funders, acting pursuant to the terms of the Senior Funding Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.6 of this Section 3 (*Medium Value Changes*) apply; or

12.1.2 carry out any due diligence (whether funder, legal, technical, insurance or financial) in relation to the carrying out of any Medium Value Change unless either (i) the Medium Value Change in question would result in an adjustment to the Annual Service Charge that, on a full year basis, is in excess of one percent (1%) of the Annual Service Charge in the relevant Contract Year or (ii) the Senior Funders, acting pursuant to the terms of the Senior Funding Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.6 of this Section 3 (*Medium Value Changes*) apply.

12.2 Where not prohibited by paragraph 12.1 of this Section 3 (*Medium Value Changes*), the Senior Funders may carry out legal, financial, insurance and/or technical due diligence on any proposal for a Medium Value Change. In the event that such due diligence is permitted and required, the parties shall agree a budget for the due diligence not exceeding 5% of the overall value of the Medium Value Change in question unless the parties (acting reasonably) agree otherwise. Any costs incurred by Project Co as a result of the Senior Funders due diligence shall be reimbursed by the Authority following agreement or determination of the contents of the Estimate within ten (10) Business Days of Project Co submitting an invoice for and evidence of such costs, subject to the invoices being in accordance with the agreed budget.

12.3 It is acknowledged that Changes (particularly where they involve a change to the Works or the Facilities) may require authorisation from the insurers under the Insurances. Project Co shall notify the relevant insurance broker immediately upon any material Medium Value Change being agreed (materiality being judged in relation to the size and nature of the scope of the Medium Value Change).

13. **Project Documentation**

- 13.1 The Works, Services, Facilities and/or Authorities Policies (as appropriate) shall be deemed to be amended pursuant to Clause 73 (*Amendments*), to include any required Medium Value Change implemented by Project Co pursuant to paragraph 8 of this Section 3 (*Medium Value Changes*). Subject to paragraph 11 of this Section 3 (*Medium Value Changes*), no other changes to the Project Documents shall be made as a result of a Medium Value Change, unless the parties otherwise agree.
- 13.2 Project Co shall, no later than one (1) month following completion of a Medium Value Change, provide updated hard copies and electronic copies (in accordance with the requirements of the BIM Protocol) of the "as-built" drawings, "as-built" specification and the operating and maintenance manuals to the Authority , as necessary to reflect the Medium Value Change.

14. **Disputes**

- 14.1 Any dispute concerning any matter referred to in this Section 3 (*Medium Value Changes*) may be referred by either party to the Dispute Resolution Procedure.
- 14.2 Project Co shall not be obliged to implement the Medium Value Change until the dispute has been determined.
- 14.3 The Authority is not entitled to withdraw an Authority Change Notice and procure implementation of a Medium Value Change in respect of which there is a dispute that has been referred to the Dispute Resolution Procedure, unless that dispute has been determined in its favour and Project Co has not confirmed to the Authority in writing within five (5) Business Days of the date of the determination that it will implement and carry out the Medium Value Change in accordance with the determination.

SECTION 4

HIGH VALUE CHANGES

1. High Value Changes

- 1.1 If the Authority requires a High Value Change it must serve an Authority Change Notice on Project Co in accordance with paragraph 2 of this Section 4 (*High Value Changes*).
- 1.2 Project Co shall be entitled to refuse a High Value Change that:
 - 1.2.1 requires the Works and/or the Services to be performed in a way that infringes any Law or is inconsistent with Good Industry Practice;
 - 1.2.2 would cause any Consent to be revoked (or would require a new consent to be obtained to implement the relevant change in the Works and/or the Services which, after using reasonable efforts, Project Co has been unable to obtain);
 - 1.2.3 would materially and adversely affect Project Co's ability to deliver the Works and/or the Services (except those Works and/or Services which have been specified as requiring to be amended in the High Value Change Notice) in a manner not compensated pursuant to this Section 4 (*High Value Changes*);
 - 1.2.4 would materially and adversely affect the health and safety of any person;
 - 1.2.5 would, if implemented, materially and adversely change the nature of the Project (including its risk profile);
 - 1.2.6 is the subject of an Authority Change Notice that cannot reasonably be complied with;
 - 1.2.7 the Authority does not have the legal power or capacity to require implementation of; or
 - 1.2.8 would, if implemented, adversely affect the enforceability or priority of the security held by or on behalf of the existing Senior Funders.

2. High Value Change Notice

- 2.1 An Authority Change Notice for a High Value Change must:
- 2.1.1 state that it refers to a High Value Change;
 - 2.1.2 set out the maximum available capital and/or revenue the Authority is able to commit to that High Value Change (the "**Target Cost**");
 - 2.1.3 identify any requirements of the Authority that must be satisfied as part of the High Value Change Proposal (the "**High Value Change Requirements**"); and
 - 2.1.4 identify how the Authority will assess whether the High Value Change Stage 2 Submission offers it value for money.
- 2.2 The parties may agree written protocols with express reference to this Section 4 (*High Value Changes*) which explain or clarify any aspects of the High Value Change approval procedure set out in this Section 4 (*High Value Changes*) and such protocols shall be read as if incorporated into this Section 4 (*High Value Changes*) (including accelerated procedures with reduced requirements for High Value Changes of relatively low values).
- 2.3 The parties must:
- 2.3.1 within five (5) Business Days of receipt by Project Co of any High Value Change Notice, discuss and review the nature of the High Value Change, including a discussion as to which of the items set out in paragraph 3.4 of this Section 4 (*High Value Changes*) are appropriate to be included within the High Value Change Proposal; and
 - 2.3.2 within five (5) Business Days of a High Value Change Proposal becoming a Stage 1 Approved Project, discuss and review the nature of the Stage 1 Approved Project, including a discussion as to which of the items set out in paragraph 4.3 of this Section 4 (*High Value Changes*) are appropriate to be included within the High Value Change Stage 2 Submission.

3. High Value Change Proposal

- 3.1 Project Co must notify the Authority in writing as soon as practicable and in any event within fifteen (15) Business Days after having received the Authority Change Notice for a High Value Change if it considers that any of the circumstances set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply. If no such notice is served, Project Co must (within thirty (30) Business Days after having received the Authority Change Notice) either:
- 3.1.1 submit a High Value Change Proposal to the Authority; or

- 3.1.2 notify the Authority as to when the High Value Change Proposal will be provided to it (provided that Project Co shall use all reasonable endeavours to obtain all the information that it requires, expeditiously).
- 3.2 If Project Co notifies the Authority that it considers that one or more of the grounds set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply, then unless the parties otherwise agree, the Authority shall be deemed to have withdrawn the Authority Notice of Change if it has not referred the matter to the Dispute Resolution Procedure within [twenty (20)] Business Days of receipt of Project Co's notice. If the matter is referred to the Dispute Resolution Procedure the time for Project Co to provide the High Value Change Proposal shall be counted from the date of determination of that dispute if the dispute is determined in Project Co's favour.
- 3.3 If the Authority considers that Project Co's proposed time for providing the High Value Change Proposal is not reasonable, the parties shall endeavour to agree the time, failing which the matter may be referred to the Dispute Resolution Procedure.
- 3.4 Unless Project Co has submitted a High Value Change Proposal in accordance with paragraph 3.1.1 of this Section 4 (*High Value Changes*), Project Co must deliver to the Authority the High Value Change Proposal as soon as reasonably practicable and in any event within the time period agreed or determined pursuant to paragraph 3.3 of this Section 4 (*High Value Changes*). Unless the parties agree otherwise, a High Value Change Proposal will contain at least the following information in sufficient detail to enable the Authority to make an informed decision under paragraph 3.6 of this Section 4 (*High Value Changes*):
- 3.4.1 a description of the High Value Change, with evidence of how the High Value Change meets the High Value Change Requirements;
 - 3.4.2 an outline of the proposed building solution and design including an appropriate analysis/risk appraisal of, in each case to the extent relevant (if at all), the preferred investment solution contemplated in terms of new build, refurbishment, whole life costings;
 - 3.4.3 the Change Management Fee for the High Value Change, which shall be a capped fee calculated in accordance with paragraph 10 of this Section 4 (*High Value Changes*);
 - 3.4.4 details of the third party activity likely to be required by Project Co in developing a High Value Change Stage 2 Submission together with a budget (or budgets) for relative Third Party Costs;
 - 3.4.5 an estimated programme for submission of the High Value Change Stage 2 Submission and for the implementation of the High Value Change (including, if appropriate, proposals for the decanting of Students so that teaching is not disrupted and taking into account the requirements of Section 3 (*Access To Work Protocol*) of Schedule 34 (*Joint Operating Protocol*));

- 3.4.6 any requirement for relief from compliance with obligations, including the obligations of Project Co:
- (a) to achieve the Actual Completion Date [in respect of a Facility] by the [relevant] Completion Date;
 - (b) to achieve [an/the] Actual Post Completion Works Date by the [relevant] Post Completion Works Date; and
 - (c) meet the requirements set out in the Authority's Construction Requirements and/or the Service Level Specification
- during the implementation of the High Value Change;
- 3.4.7 any impact on the provision of the Works and/or the Services;
- 3.4.8 any amendment required to this Agreement and/or any Project Document as a result of the High Value Change;
- 3.4.9 any Estimated Change in Project Costs that results from the High Value Change;
- 3.4.10 an outline of how Project Co proposes to finance any Capital Expenditure required for the High Value Change;
- 3.4.11 Project Co's suggested payment schedule for any Capital Expenditure to be incurred in implementing the Change that is to be borne by the Authority, based on milestones where relevant;
- 3.4.12 any new Consents and/or any amendments to existing Consents which are required;
- 3.4.13 costs and details of any other approvals required or due diligence permitted pursuant to paragraph 14 of this Section 4 (*High Value Changes*);
- 3.4.14 the proposed method of certification of any construction or operational aspects of the Works or the Services required by the proposed High Value Change if not covered by the procedures specified in Clause 17 (*Pre-Completion Commissioning and Completion*); and
- 3.4.15 a value for money assessment explaining why Project Co's proposals represent value for money taking into account both the proposed Capital Cost and Whole Life Cost.

3.5 Liaison between Project Co, the Authority and Relevant End Users

In developing a High Value Change Proposal Project Co must liaise with the Authority and relevant end users (being such persons or organisations as Project Co in consultation with the Authority considers appropriate). The Authority must provide Project Co with such information about its requirements as Project Co reasonably requires and must assist Project Co in the review of any draft designs in relation to the High Value Change Proposal. Any and all information and other input or feedback provided by the Authority to Project Co, unless expressly stated otherwise by the Authority, will be without warranty and will be provided without prejudice to the Authority's rights under this Section 4 (*High Value Changes*).

3.6 Consideration of a High Value Change Proposal by the Authority

The Authority will consider in good faith each High Value Change Proposal put forward by Project Co and the Authority will not unreasonably withhold or delay its consent to a High Value Change Proposal. If, acting reasonably, the Authority finds that any material aspects of the High Value Change Proposal are unsatisfactory to it, it shall notify Project Co of the same and offer reasonable assistance to Project Co to enable it to revise and resubmit the High Value Change Proposal as soon as reasonably practicable.

3.7 Authority Response to a High Value Change Proposal

If the Authority approves a High Value Change Proposal (including any revised High Value Change Proposal resubmitted pursuant to paragraph 3.5 of this Section 4 (*High Value Changes*)), then it shall be a "**Stage 1 Approved Project**" or be referred to as having received "**Stage 1 Approval**", as the context requires.

3.8 Project Co Not Entitled to Dispute Non-Approval

Project Co shall not be entitled to refer any dispute concerning the Authority's failure to approve a High Value Change Proposal to the Dispute Resolution Procedure.

4. Stage 2 Submission

4.1 Development of a High Value Change Stage 2 Submission

4.1.1 Within ten (10) Business Days of a High Value Change Proposal having become a Stage 1 Approved Project, the parties shall seek to agree the time period within which Project Co must develop the Stage 1 Approved Project into a detailed submission (the "**High Value Change Stage 2 Submission**"). If the parties are unable to agree a reasonable time period for such submission any dispute may be referred to the Dispute Resolution Procedure.

4.1.2 Following agreement or determination of what is an appropriate time period for submission by Project Co of the High Value Change Stage 2

Submission pursuant to paragraph 4.1.1 of this Section 4 (*High Value Changes*), Project Co shall proceed regularly and diligently to produce and submit the same to the Authority within the agreed or determined time period.

4.2 Liaison between Project Co, the Authority and Relevant End Users

In developing a High Value Change Stage 2 Submission Project Co must continue to liaise with the Authority and relevant end users (being such persons or organisations as the Authority in consultation with Project Co considers appropriate). The Authority must provide Project Co with such information as to its requirements as is reasonably necessary to enable Project Co to submit a full and complete High Value Change Stage 2 Submission and any such other information as Project Co may reasonably require and must assist Project Co in the review of any draft designs in relation to the Stage 1 Approved Project and in the development of other aspects of the High Value Change Stage 2 Submission (but not where this would involve the Authority incurring additional material expense). Any and all information and other input or feedback provided by the Authority to Project Co will be without warranty and will be provided without prejudice to the Authority's rights under this Section 4 (*High Value Changes*).

4.3 Content Requirements in Relation to a High Value Change Stage 2 Submission

Save where the parties agree otherwise, in relation to the relevant Stage 1 Approved Project, Project Co shall procure that a High Value Change Stage 2 Submission includes (but not be limited to):

- 4.3.1 draft(s) of the relevant Project Document(s) identifying (if relevant) any material changes or amendments proposed in respect of the relevant Stage 1 Approved Project, together with the reasons for any such changes or amendments proposed and including full details of which provisions of the relevant Project Documents will apply to the High Value Change so that it is implemented in equivalent manner and to an equivalent standard as required in respect of the Works and/or Services as appropriate;
- 4.3.2 detailed design solutions (to RIBA Level [3]);
- 4.3.3 appropriate plans and drawings;
- 4.3.4 relevant detailed planning permissions and any other relevant planning approvals and Consents (or such lesser confirmation or information in relation to planning as may be agreed with the Authority);
- 4.3.5 a proposed revised Financial Model including the detailed price estimates for the Stage 1 Approved Project;
- 4.3.6 an explanation (together with appropriate supporting evidence) as to why the High Value Change Stage 2 Submission meets the Approval Criteria (as defined in paragraph 7 of this Section 4 (*High Value Changes*));

- 4.3.7 confirmation (or details of any requested variations to (with supporting justification)) of the Change Management Fee referred in paragraph 3.4.3 of this Section 4 (*High Value Changes*);
- 4.3.8 the proposed method of certification of any construction aspects of the High Value Change, if not covered by the procedures specified in Clause 17 (*Pre-Completion Commissioning and Completion*);
- 4.3.9 a value for money assessment explaining why Project Co's proposals represent value for money taking into account both the proposed Capital Cost and Whole Life Cost;
- 4.3.10 a timetable (taking into account the requirements of Section 3 (*Access To Work Protocol*) of Schedule 34 (*Joint Operating Protocol*)) and method statement setting out how the relevant High Value Change will be delivered, which shall include (but not be limited to) in so far as relevant:
- (a) proposals for the effective management of the building programme;
 - (b) [project specific information];
 - (c) an assessment as to the savings to be generated by the High Value Change, particularly on staff costs and lifecycle replacement and maintenance and operation of Services;
 - (d) details of the Sub-Contractors together with evidence and explanation of the value testing undertaken by Project Co in relation to the High Value Change;
 - (e) a completed risk register showing the potential risks identified in relation to the delivery of the High Value Change the occurrence of which are capable of adversely affecting the time for completion, cost and/or quality of the Project, the probability of such risks occurring and a financial estimate of the most likely consequences of each risk occurring together with the prioritisation of all continuing risks and an action plan in respect of, and risk owners for, all risks prioritised as serious risks;
- 4.3.11 any surveys and investigations and associated reports that are reasonably necessary to ascertain (in relation to Changes involving the construction of additional buildings) information as to the nature, location and condition of the relevant land (including hydrological, geological, geotechnical and sub-surface conditions) together with information relating to archaeological finds, areas of archaeological, scientific or natural interest and (in relation to the refurbishment of any existing buildings) information on the condition and quality of existing structures and, in particular, the presence of any latent defects.

Co-operation of the Authority

4.4 The Authority will co-operate with Project Co in relation to any High Value Change Stage 2 Submission being developed by Project Co, including (without limitation) promptly providing:

4.4.1 written confirmation of the Target Cost and/or High Value Change Requirements and any change to such Target Cost and/or High Value Change Requirements; and

4.4.2 any information reasonably required by Project Co to enable it to satisfy the requirements of paragraph 4.3 of this Section 4 (*High Value Changes*).

5. Time Periods for Approval

5.1 Each High Value Change Proposal and each High Value Change Stage 2 Submission shall be valid for a period of three (3) months from the date of its submission by Project Co.

5.2 If by the end of the three (3) month period referred to in paragraph 5.1 of this Section 4 (*High Value Changes*) the Authority has not:

5.2.1 in relation to a High Value Change Proposal, approved or rejected that High Value Change Proposal in accordance with the procedures set out in this Section 4 (*High Value Changes*):

(a) Project Co shall be entitled to withdraw the High Value Change Proposal; and

(b) Project Co shall not be entitled to any costs relating to the High Value Change Proposal unless the Authority has either not responded to the High Value Change Proposal and/or is in material breach of its obligations in paragraph 3 and/or paragraph 4.4 of this Section 4 (*High Value Changes*) in which case paragraph 8.5 of this Section 4 (*High Value Changes*) shall apply;

5.2.2 in relation to a High Value Change Stage 2 Submission, approved or rejected that High Value Change Stage 2 Submission in accordance with the procedures set out in this Section 4 (*High Value Changes*) (or has not given any notification of the Authority's response to the High Value Change Stage 2 Submission or has given written notice to Project Co withdrawing or cancelling the High Value Change to which the High Value Change Stage 2 Submission relates) then the High Value Change Stage 2 Submission shall be deemed to have been improperly rejected by the Authority and paragraph 8.5 shall apply.

6. Changes to the High Value Change Requirements or Approval Criteria

If the High Value Change Requirements or Approval Criteria are subject to any material variation in relation to a High Value Change by the Authority after the High Value Change Proposal has been submitted then:

- 6.1 Project Co and the Authority shall negotiate in good faith as to the implications on the High Value Change Proposal or High Value Change Stage 2 Submission (as the case may be) and shall seek to agree changes thereto to accommodate the variation (including any change to the Target Cost and/or to the Change Management Fee);
- 6.2 if agreement has not been reached pursuant to paragraph 6.1 of this Section 4 (*High Value Changes*) within twenty (20) Business Days (or such longer period as the parties may agree) then:
 - 6.2.1 Project Co shall be entitled by notice in writing to the Authority to withdraw the High Value Change Proposal or the High Value Change Stage 2 Submission (as the case may be) and to be paid the Incurred Change Management Fee with the Calculation Date being the date of the variation notified by the Authority; and
 - 6.2.2 the Authority shall not be entitled to procure the High Value Change without issuing a new Authority Change Notice for the High Value Change and complying with the procedure in this Section 4 (*High Value Changes*) in relation to that High Value Change.
- 6.3 The Authority may, at any time, give notice in writing to Project Co that it proposes to cancel a High Value Change without completing the process set out in this Section 4 (*High Value Changes*) in which case the Authority must pay Project Co the Incurred Change Management Fee in respect of the cancelled High Value Change with the Calculation Date being the date of such notice.

7. Approval Criteria

For the purposes of this Section 4 (*High Value Changes*), Approval Criteria means the criteria against which any Stage 1 Approved Project is to be judged by the Authority in determining whether it achieves Stage 2 Approval. The criteria are:

- 7.1 whether the costs of the Stage 1 Approved Project are within the Target Cost notified to Project Co by the Authority;
- 7.2 whether it has been demonstrated that the Stage 1 Approved Project provides value for money assessed in accordance with the measures identified by the Authority in accordance with paragraph 2.1.4 of this Section 4 (*High Value Changes*);
- 7.3 whether the Authority, acting reasonably, is satisfied that the High Value Change Stage 2 Submission meets the High Value Change Requirements;

- 7.4 whether any material changes or amendments to the relevant Project Document(s) as detailed pursuant to paragraph 4.3.1 of this Section 4 (*High Value Changes*) are acceptable to the Authority, acting reasonably; and
- 7.5 whether the High Value Change Stage 2 Submission contains all the information required pursuant to paragraph 4.3 of this Section 4 (*High Value Changes*) (or as otherwise agreed by the parties).

8. **Submission of the High Value Change Stage 2 Submission to the Authority and consideration of that submission by the Authority**

8.1 The Authority will consider in good faith High Value Change Stage 2 Submissions submitted by Project Co and the Authority will not unreasonably withhold or delay its consent to a High Value Change Stage 2 Submission. The Authority is entitled to call for such reasonable information and assistance as it considers appropriate to enable it to decide whether the High Value Change Stage 2 Submission meets the Approval Criteria. Project Co must reply promptly to all such requests for further information and assistance.

8.2 As soon as reasonably practicable after the submission to it of a High Value Change Stage 2 Submission (including any revised High Value Change Stage 2 Submission re-submitted by Project Co) the Authority must give written notice of whether it:

8.2.1 approves the relevant Stage 1 Approved Project (in which case the Stage 1 Approved Project will be referred to as having received "**Stage 2 Approval**" or as being a "**Stage 2 Approved Project**" or an "**Approved Project**" as the context requires); or

8.2.2 rejects the Stage 1 Approved Project:

(a) on the ground that the High Value Change Stage 2 Submission in relation to the relevant Stage 1 Approved Project has failed to meet one or more of the Approval Criteria (except as referred to in paragraph 8.2.2(b)(i) or paragraph 8.2.2(b)(ii)), in which case (subject to resubmission under paragraph 8.2.3) paragraph 8.3 shall apply; or

(b)

(i) because, as a result of any change to the Target Cost referred to in paragraph 2.1.2, the Stage 1 Approved Project is not in fact Affordable despite the High Value Change Stage 2 Submission being within the Target Cost notified by the Authority pursuant to paragraph 2.1.2 of this Section 4 (*High Value Changes*); or

(ii) because Project Co has failed to meet one or more of the Approval Criteria and the sole reason for that

failure is that any Consent identified by Project Co (in compliance with paragraph 3.4.12 of this Section 4 (*High Value Changes*)) has not been obtained; or

- (iii) otherwise on grounds other than those set out in paragraphs 8.2.2(a), 8.2.2(b)(i) and 8.2.2(b)(ii) of this Section 4 (*High Value Changes*),

in which case paragraph 8.5 shall apply.

8.2.3 If the Authority rejects the High Value Change Stage 2 Submission on the grounds set out in paragraph 8.2.2(a) the Authority and Project Co will work together to address the reasons for such failure and attempt in good faith to produce a revised High Value Change Stage 2 Submission for Project Co to re-submit to the Authority.

8.2.4 If:

- (a) a resubmitted High Value Change Stage 2 Submission is rejected by the Authority on the ground set out in paragraph 8.2.2(a) (subject to paragraphs 16.3 to 16.4 (if applicable) of this Section 4 (*High Value Changes*)); or
- (b) no resubmission of the High Value Change Stage 2 Submission is made within thirty (30) Business Days of the date of the notice of rejection (or such longer period as the parties may agree),

then the relevant Stage 1 Approved Project shall be treated as having been properly rejected, the provisions of paragraph 8.3 of this Section 4 (*High Value Changes*) shall apply and neither the Authority nor Project Co will have any further obligations in relation to the relevant High Value Change referred to in the High Value Change Stage 2 Submission.

If a High Value Change Stage 2 Submission is Properly Rejected by the Authority

8.3 Where this paragraph 8.3 applies (as set out in paragraph 8.2.2(a), paragraph 8.2.4 and paragraph 16.4.2 of this Section 4 (*High Value Changes*)) the Authority shall not be required to reimburse or compensate Project Co in respect of any costs relating to the High Value Change including the Change Management Fee.

8.4 If:

8.4.1 Project Co fails to provide a response to an Authority Change Notice in accordance with paragraph 3.1 of this Section 4 (*High Value Changes*); or

- 8.4.2 (where applicable) Project Co fails to provide a High Value Change Proposal in accordance with paragraph 3.4 of this Section 4 (*High Value Changes*); or
- 8.4.3 Project Co fails to submit a High Value Change Stage 2 Submission in accordance with paragraph 4.1.2 of Section 4 (*High Value Changes*); or
- 8.4.4 the Authority has validly rejected a High Value Change Stage 2 Submission in accordance with paragraph 8.2 and the matter has not been referred to the Dispute Resolution Procedure or any such dispute has been determined as described in paragraph 16.4.2 of this Section 4 (*High Value Changes*),

then, subject to paragraph 17 of this Section 4 (*High Value Changes*), the Authority may notify Project Co that the High Value Change Notice is withdrawn and, following such notification, may procure the implementation of the High Value Change without further recourse to Project Co, but the Authority must ensure that the High Value Change is carried out in accordance with Good Industry Practice and to the standards that would have applied to Project Co if it had implemented the High Value Change.

If a High Value Change Stage 2 Submission is Improperly Rejected by the Authority

- 8.5 Where this paragraph 8.5 applies (as set out in paragraph 5.2.1(b), paragraph 5.2.2 paragraph [8.2.2(b) and paragraph 16.4.1)), the Incurred Change Management Fee and Third Party Costs incurred by Project Co to prepare the High Value Change Proposal and Stage 2 Submission, which shall be in accordance with the activities and budget referred to in paragraph 3.4.4 of this Section 4 (*High Value Changes*), in relation to the relevant High Value Change will be paid by the Authority within ten (10) Business Days of the date on which Project Co receives written notice of the rejection or the date of the deemed rejection (as the case may be) with the date of the rejection or the deemed rejection (as the case may be) being the Calculation Date for the purposes of calculating the amount of the Incurred Change Management Fee (unless a different Calculation Date is expressly stated in this Section 4 (*High Value Changes*) in relation to the circumstances giving rise to the entitlement of Project Co to be paid the Incurred Change Management Fee).

9. Information and Notifications by the Authority to Project Co and Cooperation of the Authority

- 9.1 The Authority must notify Project Co as soon as it becomes aware of any matter which may have a reasonably foreseeable material adverse effect on the viability of any High Value Change including any:
 - 9.1.1 planning issues likely to cause a material delay in the anticipated programme for the High Value Change or material cost increases; and
 - 9.1.2 changes to funding which the Authority receives or to the way in which funding may be applied, either or both of which may affect whether a High Value Change is Affordable.

- 9.2 The Authority shall provide reasonable assistance to Project Co in relation to the procurement by Project Co of all relevant Consents.

10. **Change Management Fee**

The Change Management Fee is to reimburse Project Co for the time spent by its employees and the employees of the Contractor, the Service Provider [and the [Management Service Provider]] in project managing the development, procurement and implementation of the High Value Change and shall:

- 10.1 be based on actual time spent (validated by time sheets);
- 10.2 be calculated at the daily rates as set out in Appendix 2 Part 3 (*Consultant, Sub-Contractor Or Supplier Fees*) to this Schedule 16 (*Change Protocol*), but capped at the sum set out in the High Value Change Proposal;
- 10.3 not include the time of any person who is not employed by Project Co the Contractor, the Service Provider [and/or the [Management Service Provider]], as the case may be;
- 10.4 not include any mark-up or profit or additional overheads;
- 10.5 be paid in three (3) stages as follows:
- 10.5.1 on Stage 1 Approval;
- 10.5.2 on Stage 2 Approval; and
- 10.5.3 when any works involved in the High Value Change have been completed,

and at each stage Project Co shall charge the Authority (subject to the applicable cap) only for the time incurred by its staff up to completion of that stage.

11. **Implementation of the High Value Change**

Project Co must implement any High Value Change approved by the Authority so as to minimise any inconvenience to the Authority and to the provision of Authority Services and in accordance with the Approved Project. Where an extension of time has been agreed as part of the Stage 2 Approval the [relevant] Completion Date [and/or the [relevant] Post Completion Works Date, as applicable] shall be extended as agreed in the Approved Project.

12. Method of Payment of Authority Contribution

- 12.1 This paragraph 12 shall apply where Capital Expenditure for an Approved Project is to be funded in whole or part by the Authority.
- 12.2 Project Co shall invoice the Authority for Capital Expenditure incurred by Project Co to implement a High Value Change that is to be borne by the Authority according to the payment schedule set out in the High Value Change Stage 2 Submission as referred to in paragraph 3.4.11 of this Section 4 (*High Value Changes*).
- 12.3 The Authority shall make a payment to Project Co within fifteen (15) Business Days of receipt by the Authority of invoices presented to the Authority (complete in all material respects) in accordance with paragraph 12.2 of this Section 4 (*High Value Changes*), accompanied by the relevant evidence (where applicable) that the relevant part of the High Value Change has been carried out.

13. Adjustment to Annual Service Charge

Any adjustment to the Annual Service Charge which is necessary as a result of the implementation of a High Value Change shall be calculated in accordance with Section 6 (*Changing the Financial Model*) of this Schedule 16 (*Change Protocol*).

14. Due Diligence

- 14.1 Where the Authority is funding the High Value Change, Project Co shall procure that the Senior Funders shall not withhold or delay any consents which are required pursuant to the Senior Funding Agreements to such High Value Change other than on the basis that the Senior Funders, acting pursuant to the terms of the Senior Funding Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply.
- 14.2 Where the Authority is not funding the High Value Change, Project Co shall procure that the Senior Funders do not unreasonably withhold or delay any consents which are required pursuant to the Senior Funding Agreements to such High Value Change other than on the basis that the Senior Funders, acting pursuant to the terms of the Senior Funding Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.8 of this Section 4 (*High Value Changes*) apply.
- 14.3 The parties agree that the Senior Funders may carry out legal, financial, insurance and technical due diligence on any proposal for a High Value Change. The parties shall agree a budget for the due diligence provided that the costs may not exceed the lower of (i) three per cent (3%) of the overall value of the High Value Change in question or (ii) fifty thousand pounds (£50,000) unless, in either case, the parties (acting reasonably) agree otherwise. Any costs incurred by Project Co as a result of the Senior Funders due diligence will be reimbursed by the Authority following the conclusion of the process in this Section 4 (*High Value Changes*) within ten (10) Business Days of Project Co submitting an invoice for and evidence of such costs, subject to the invoices being in accordance with the agreed budget.

- 14.4 It is acknowledged that High Value Changes (particularly where they involve a change to the Works or the Facilities) may require authorisation from the insurers under the Insurances required to be taken out and maintained pursuant to Clause 54 (*Insurance*). Project Co shall notify the relevant insurance broker immediately upon any material High Value Change being agreed (materiality being judged in relation to the size and nature of the scope of the High Value Change).
- 14.5 The parties agree that paragraph 14.2 of this Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*) does not oblige the Senior Funders to provide any additional funding for the relevant High Value Change, which shall be in their absolute discretion.

15. **Project Documentation**

- 15.1 The only changes to the Project Documents or Ancillary Documents to be made as a result of a High Value Change shall be those identified in the Approved Project (subject to any amendments to it agreed by the parties).
- 15.2 Project Co shall, within [♦] days of completion of the Change, deliver updated hard copies and electronic copies (in accordance with the requirements of the BIM Protocol) of the "as-built" drawings, "as-built" specification and the operating and maintenance manuals as necessary to reflect the High Value Change.

16. **Disputes**

- 16.1 Except as otherwise expressly provided, any dispute concerning any matter referred to in this Section 4 (*High Value Changes*) may be referred by either party to the Dispute Resolution Procedure.
- 16.2 The Authority shall not be entitled to approve a High Value Change Proposal or a High Value Change Stage 2 Submission that is the subject of a dispute until the dispute has been determined.
- 16.3 If the Authority rejects a High Value Change Stage 2 Submission pursuant to the provisions of paragraph 8.2.2(a) of this Section 4 (*High Value Changes*), Project Co shall be entitled to refer the matter for consideration under the Dispute Resolution Procedure within ten (10) Business Days after receiving written notice of the Authority's decision.
- 16.4 If, following a referral to the Dispute Resolution Procedure, it is agreed or determined:
- 16.4.1 that the High Value Change rejected by the Authority pursuant to paragraph 8.2.2(a) of this Section 4 (*High Value Changes*) met the Approval Criteria the Authority shall either:
- (a) declare that the relevant High Value Change has received Stage 2 Approval and that High Value Change shall proceed; or

(b) declare that its rejection of the relevant High Value Change be treated as an improper rejection and that the provisions of paragraph 8.5 of this Section 4 (*High Value Changes*) shall apply.

16.4.2 the High Value Change did not meet the Approval Criteria, save in one of the respects referred to in paragraphs 8.2.2(b)(i) or 8.2.2(b)(ii) the provisions of paragraph 8.3 of this Section 4 (*High Value Changes*) shall apply.

17. The Authority is not entitled to withdraw an Authority Change Notice and procure implementation of a High Value Change in respect of which there is a dispute that has been referred to the Dispute Resolution Procedure, unless that dispute has been determined in its favour and Project Co has not confirmed to the Authority in writing within five (5) Business Days of the date of the determination that it will comply with its obligations under this Section 4 (*High Value Changes*) in accordance with the determination.

SECTION 5

PROJECT CO CHANGES

1. If Project Co wishes to introduce a Project Co Change, it shall serve a notice containing the information required pursuant to paragraph 2 of this Section 5 (*Project Co Changes*) (a "**Project Co Notice of Change**") on the Authority.
2. A Project Co Notice of Change shall:
 - 2.1 set out the proposed Project Co Change in sufficient detail to enable the Authority to evaluate it in full;
 - 2.2 specify Project Co's reasons for proposing the Project Co Change;
 - 2.3 indicate any implications of the Project Co Change;
 - 2.4 indicate what savings, if any, will be generated by the Project Co Change, including:
 - 2.4.1 whether a reduction of the Annual Service Charge is proposed; or
 - 2.4.2 whether such savings will be paid to the Authority in a lump sum,in each case giving details in accordance with paragraph 8 of this Section 5 (*Project Co Changes*);
 - 2.5 indicate whether there are any critical dates by which a decision by the Authority is required (taking into account the requirements of Section 3 (*Access To Work Protocol*) of Schedule 34 (*Joint Operating Protocol*)); and
 - 2.6 request the Authority to consult with Project Co with a view to deciding whether to agree to the Project Co Change and, if so, what consequential changes the Authority requires as a result.
3. The Authority shall evaluate Project Co Notice of Change in good faith, taking into account all relevant issues, including whether:
 - 3.1 a revision of the Annual Service Charge will occur;
 - 3.2 the Project Co Change may affect the quality of the Services and/or the Works or the likelihood of successful completion of the Works and/or delivery of the Services (or any of them);

- 3.3 the Project Co Change will interfere with the relationship of the Authority with third parties;
 - 3.4 the financial strength of Project Co is sufficient to perform the Works and/or Services after implementation of the Project Co Change;
 - 3.5 the value and/or life expectancy of any of the Facilities will be reduced; or
 - 3.6 the Project Co Change materially affects the risks or costs to which the Authority is exposed.
4. As soon as practicable after receiving the Project Co Notice of Change, the parties shall meet and discuss the matters referred to in it, including in the case of a Relevant Change in Law those matters referred to in Clause 33.4 (*Relevant Changes in Law*) of this Agreement. During discussions the Authority may propose modifications to, or accept or reject, the Project Co Notice of Change.
 5. If the Authority accepts the Project Co Notice of Change (with or without modification) the parties shall consult and agree the remaining details as soon as practicable and upon agreement the Authority shall issue a notice confirming the Project Co Change which shall set out the agreed Project Co Change and:
 - 5.1 shall enter into any documents to amend this Agreement or any relevant Ancillary Document which are necessary to give effect to Project Co Change;
 - 5.2 subject to paragraph 7 of this Section 5 (*Project Co Changes*), the Annual Service Charge shall be revised in accordance with Section 6 (*Changing The Financial Model*) of this Schedule 16 (*Change Protocol*); and
 - 5.3 the Project Co Change shall be implemented within the period specified by the Authority in its notice of acceptance.
 6. If the Authority rejects the Project Co Notice of Change, it shall not be obliged to give its reasons for such a rejection and Project Co shall not be entitled to reimbursement by the Authority of any of its costs involved in the preparation of the Project Co Notice of Change.
 7. Unless the Authority's written acceptance expressly agrees to an increase in the Annual Service Charge or that Project Co should be entitled to relief from any of its obligations, there shall be no increase in the Annual Service Charge or relief granted from any obligations as a result of a Project Co Change.
 8. If a Project Co Change causes, or will cause, Project Co's costs or those of a sub-contractor to decrease, there shall be a decrease in the Annual Service Charge such that any cost savings (following deduction of costs reasonably incurred by Project Co in implementing such Project Co Change) will be shared on the basis of fifty per cent (50%) of the saving being retained by Project Co and fifty per cent (50%) of the saving being paid to the Authority as a lump sum within ten (10) Business Days of agreement or determination or by way of revision

of the Annual Service Charge pursuant to Section 6 (*Changing The Financial Model*) of this Schedule 16 (*Change Protocol*).

SECTION 6

CHANGING THE FINANCIAL MODEL

Procedure

1. If a Relevant Event occurs, the Financial Model shall be adjusted in accordance with this Section 6 (*Changing the Financial Model*) of this Schedule 16 (*Change Protocol*).

Adjusting the Logic or Formulae

2. If it is necessary to make a Logic Adjustment to permit an Input Adjustment or Assumption Adjustment to be made, Project Co shall make such Logic Adjustment only:
 - 2.1 to the extent necessary;
 - 2.2 in accordance with generally accepted accounting principles in the United Kingdom; and
 - 2.3 so as to leave Project Co in no better and no worse a position.
3. In order to demonstrate that the conditions in paragraph 2 are met, Project Co shall prepare:
 - 3.1 a run of the Financial Model before making any Assumption Adjustment or Input Adjustment and immediately prior to making the Logic Adjustment; and
 - 3.2 a run of the Financial Model immediately following the Logic Adjustment which shows that Project Co is in no worse and no better a position following the making of the Logic Adjustment.

Adjusting the Assumptions

4. Subject to paragraph 5, Project Co may make an Assumption Adjustment so that the Assumptions in the Financial Model reflect:
 - 4.1 reasonable economic assumptions prevailing at the Adjustment Date; and
 - 4.2 reasonably foreseeable changes in the prospective technical performance of the Project arising as a result of the Relevant Event.
5. In making Assumption Adjustments, Project Co may make such adjustments only insofar as they relate to the Relevant Event, and such adjustments shall not have effect in relation to

any period prior to the Adjustment Date, nor in relation to any aspect of the Project other than the Relevant Event in the period following the Adjustment Date.

Adjusting the Inputs

6. Project Co may make Input Adjustments to the extent required to reflect the Estimated Change in Project Costs arising out of the Relevant Event.

Adjusting the Annual Service Charges

7. In order to calculate the adjustment to be made to the Annual Service Charges, Project Co shall run the Financial Model after making the Logic Adjustments, the Assumption Adjustments and the Input Adjustments relating to the Relevant Event and permitted by this Section 6 (*Changing the Financial Model*) of this Schedule 16 (*Change Protocol*) so that, following the Relevant Event, it is in no better and no worse a position than it would have been if no Relevant Event had occurred.
8. The Annual Service Charges shall be adjusted by such amount as leaves Project Co, following the Relevant Event, in no better and no worse a position than it would have been if no Relevant Event had occurred.

No Better and No Worse

9. Any reference in this Agreement to "no better and no worse" or to leaving Project Co in "no better and no worse a position" shall be construed by reference to Project Co's:
 - 9.1 rights, duties and liabilities under or arising pursuant to performance of this Agreement, the Funding Agreements, the Construction Contract and Service Contracts; and
 - 9.2 ability to perform its obligations and exercise its rights under this Agreement, the Funding Agreements, the Construction Contract and Service Contracts,so as to ensure that:
 - 9.3 Project Co is left in a position in relation to the Key Ratios which is no better and no worse in the Post-Adjustment Financial Model than it is in the Pre-Adjustment Financial Model; and
 - 9.4 following the making of the Adjustments, the ability of Project Co to comply with this Agreement is not adversely affected or improved as a consequence of the Relevant Event.

SECTION 7³⁰⁰

[PARTIAL TERMINATION]

1. Provided the Authority's right under this paragraph 1 of this Section 7 (*[Partial Termination]*) shall not be exercised more than [♦] times during the Project Term, at any time following the date that falls ten (10) years after the [final] Actual Completion Date the Authority may serve notice of its intention to remove a Facility from this Agreement by way of an Authority Change Notice for a High Value Change (a "**Partial Termination Authority Notice of Change**") in accordance with this paragraph 1 and with paragraph 2 of this Section 7 (*[Partial Termination]*).
2. The Authority's right under paragraph 1 of this Section 7 (*[Partial Termination]*) may only be exercised by the Authority where a Partial Termination Event has arisen. No other change of status of a Facility or a [School Entity] will trigger a partial termination under this Section 7 (*[Partial Termination]*).
3. Subject to paragraphs 4 and 5 of this Section 7 (*[Partial Termination]*), where the Authority has served a Partial Termination Authority Notice of Change, the provisions of paragraphs 2 to 17 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*) shall apply save that Project Co shall include in its High Value Change Proposals details of the amount that is standing to the credit of the [Maintenance Reserve Account] (as defined in the [Credit Agreement]), or that would have been standing to the credit of that account had Project Co complied with its obligations under the [Credit Agreement] that relate to the Schedule of Programmed Maintenance for the affected Facility. Project Co shall not be entitled to serve a notice under paragraph 3.1 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*) in respect of any Partial Termination Authority Notice of Change.
4. Proposals delivered by Project Co under paragraph 3.1 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*) relating to a Partial Termination Authority Notice of Change shall be calculated on the basis that the partial termination shall be carried out such that:
 - 4.1 the Base Case Equity IRR shall be adjusted by []% relative to a "no better no worse" position in accordance with paragraph 9 of Section 6 (*Changing the Financial Model*) of this Schedule 16 (*Change Protocol*); and
 - 4.2 the Annual Service Charge shall other than as set out in paragraph 4.1 of this Section 7 (*[Partial Termination]*) be adjusted so as to leave Project Co in a "no better no worse" position in accordance with paragraph 9 of Section 6 (*Changing the Financial Model*) of this Schedule 16 (*Change Protocol*).
5. In the event a High Value Change Proposal pursuant to a Partial Termination Authority Notice of Change is confirmed by the Authority in accordance with paragraph 8.2.1 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*) the adjustment to the Annual Service Charge under paragraph 13 of Section 4 (*High Value Changes*) of this Schedule 16 (*Change Protocol*) shall be carried out on the basis that the Base Case Equity IRR shall be adjusted by

³⁰⁰ In multi-facility projects in the education sector, such as batched schools, an Authority may wish to have the ability to remove one facility from the Project. Where this is the case, the following drafting should be included as a new Section 7 of Schedule 16 (*Change Protocol*) In single Facility Projects this drafting should be deleted.

[◆] % relative to a "no better no worse" position in accordance with paragraph 9 of Section 6 (*Changing the Financial Model*) of this Schedule 16 (*Change Protocol*);]

APPENDIX 1

**PART 1
CATALOGUE**

[♦]

PART 2
SMALL WORKS AND SERVICES RATES

[♦]

APPENDIX 2

PART 1

UNIT COST FOR CONSTRUCTION OR INSTALLATION COSTS

[♦]

PART 2
UNIT COSTS FOR LIFECYCLE MAINTENANCE

[♦]

PART 3

CONSULTANT, SUB-CONTRACTOR OR SUPPLIER FEES

[♦]

PART 4
UNIT COSTS FOR LABOUR RATES

[♦]

SCHEDULE 17:
COMPENSATION ON TERMINATION

SECTION 1³⁰¹

COMPENSATION ON TERMINATION FOR AUTHORITY DEFAULT AND VOLUNTARY TERMINATION

1. Compensation on Termination for the Authority Default and Voluntary Termination

1.1 If Project Co terminates this Agreement pursuant to Clause 39 (*Authority Events of Default*) or the Authority terminates this Agreement pursuant to Clause 42 (*Authority Voluntary Termination*) the Authority shall pay to Project Co the "**Authority Default Termination Sum**" as set out in paragraph 1.2.

1.2 Subject to paragraphs 1.4 to 1.6 below the Authority Default Termination Sum shall be an amount equal to the aggregate of:

1.2.1 the Base Senior Debt Termination Amount;

1.2.2 Redundancy Payments and Sub-Contractor Losses; and

1.2.3 the aggregate amount for which the share capital of Project Co and the amounts outstanding under the Subordinated Funding Agreements could have been sold on an open market basis based on the Relevant Assumptions,³⁰²

LESS, to the extent it is a positive amount, the aggregate of without double counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below:

1.2.4 the value of any right of Project Co to receive insurance proceeds (save where such insurance proceeds are held in the Insurance Proceeds Account and are to be applied in accordance with Clause 54.19 (*Application of Proceeds*) of this Agreement in reinstatement, restoration or replacement or, in the case of any third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined provided that in such case Project Co shall assign any such rights and claims under the Sub-Contracts or claims against other

³⁰¹ The Welsh Government Education team are continuing to consider the drafting in this Section 1 of Schedule 17 from a policy perspective.

³⁰² This assumes Project Co's share capital and subordinated debt are stapled.

third parties to the Authority and give the Authority reasonable assistance in prosecuting such claims; and

- 1.2.5 Not Used
- 1.2.6 amounts which the Authority is entitled to set off pursuant to Clause 46.11 (*Rights of Set-Off*) of this Agreement.
- 1.3 Without prejudice to Clause 47 (*Consequences of Termination*), on payment of the Authority Default Termination Sum, the Authority shall have the option to require Project Co to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority.
- 1.4 If the aggregate of the amounts referred to in paragraphs 1.2.1 and 1.2.3 is less than the Revised Senior Debt Termination Amount, then the Authority Default Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 1.2.2 LESS without double counting in relation to the calculation of the Revised Senior Debt Termination Amount, the amounts referred to in paragraphs 1.2.4 and 1.2.6 above; provided always that (a) the amount referred to in paragraph 1.2.2 shall only be paid to the extent that Project Co has demonstrated to the reasonable satisfaction of the Authority that the amount will not be applied (in whole or in part) in payment of any Distribution and (b) if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Losses shall be paid in respect of any Sub Contract in circumstances where there is an event of default under such Sub-Contract which would entitle Project Co to terminate such Sub-Contract.
- 1.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and Project Co has wilfully, or through gross negligence failed to comply with its obligations under Clause 9.4.4(a) of the Funders' Direct Agreement then in addition to the deduction of the Distribution made pursuant to paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Authority Default Termination Sum, provided that the amount of the Authority Default Termination Sum shall never be less than the Revised Senior Debt Termination Amount.
- 1.6 If Project Co has wilfully or through gross negligence failed to comply with its obligations under Clause 9.4.4(b) of the Funders' Direct Agreement and there has been an overstatement of the cash balances by Project Co as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*), then the Authority Default Termination Sum shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Authority Default Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 1.7 The Authority Default Termination Sum shall be payable in accordance with Section 4 (*General*) of this Schedule 17 (*Compensation on Termination*).

SECTION 2

COMPENSATION FOR PROJECT CO DEFAULT

1. If the Authority terminates this Agreement pursuant to Clause 40 (*Project Co Event of Default*) or Clause 43 (*Termination for Persistent Breach by Project Co*), the Authority shall pay to Project Co such sum as is calculated according to this Section 2 (*Compensation for Project Co Default*) of this Schedule 17 (*Compensation on Termination*).

2. Retendering Election

2.1 The Authority shall be entitled to retender the provision of the Project Operations in accordance with paragraph 3 (*Retendering Procedure*) and the provisions of paragraph 3 (*Retendering Procedure*) shall apply if:

2.1.1 the Authority notifies Project Co on or before the date falling twenty (20) Business Days after the Termination Date that it intends to retender; and

2.1.2 there is a Liquid Market³⁰³; and either

(a) the Senior Funders have not exercised their rights to step-in under Clause 5 (*Representative*) of the Funders' Direct Agreement; or

(b) Project Co or the Senior Funders have not procured the transfer of Project Co's rights and liabilities under this Agreement to a Suitable Substitute Contractor and have failed to use all reasonable efforts to do so

but otherwise the Authority shall not be entitled to re-tender the provision of the Project Operations and paragraph 4 (*No Retendering Procedure*) shall apply.

3. Retendering Procedure

3.1 The objective of the Tender Process shall be to enter into a New Agreement with a Compliant Tenderer.

3.2 The Authority shall (subject to any legal requirements preventing it from doing so) use all reasonable endeavours to complete the Tender Process as soon as practicable.

3.3 The Authority shall as soon as reasonably practicable notify Project Co of the Qualification Criteria and the other requirements and terms of the Tender Process,

³⁰³ Unless agreed by the parties, a novation to a vehicle controlled by the Senior Funders under the Funders' Direct Agreement should not on its own be sufficient to constitute a Liquid Market.

including the timing of the Tender Process, and shall act reasonably in setting such requirements and terms.

- 3.4 Project Co authorises the release of any information by the Authority under the Tender Process which would otherwise be prevented under Clause 62 (*Confidentiality*) that is reasonably required as part of the Tender Process.
- 3.5 For all or any part of a month, falling within the period from the Termination Date to the Compensation Date, the Authority shall pay to Project Co:
 - 3.5.1 the Post Termination Service Amount for each completed month, on or before the date falling ten (10) Business Days after the end of that month; and
 - 3.5.2 the Post Termination Service Amount for the period from the end of the last completed month until the Compensation Date, on or before the date falling twenty (20) Business Days after the Compensation Date.
- 3.6 Project Co may, at its own cost, appoint a person to monitor the Tender Process for the purpose of monitoring and reporting to Project Co and the Senior Funders on the Authority's compliance with the Tender Process.
- 3.7 The Tender Process Monitor shall enter into a confidentiality agreement with the Authority in a form acceptable to the Authority and shall be entitled to attend all meetings relating to the Tender Process, inspect copies of all the tender documentation and bids and make representations to the Authority as to compliance with the Tender Process. The Authority shall not be bound to consider or act upon such representations but acknowledges that such representations may be referred to by Project Co in the event that Project Co refers a dispute as to the Adjusted Highest Compliant Tender Price to the Dispute Resolution Procedure. The Tender Process Monitor will not disclose confidential information to Project Co or the Senior Funders or any other person (and shall provide an undertaking to the Authority to such effect as a condition of his appointment) but shall be entitled to advise Project Co and the Senior Funders on whether it considers that the Authority has acted in accordance with the Tender Process and correctly determined the Adjusted Highest Compliant Tender Price.
- 3.8 If any Post Termination Service Amount is less than zero then it may be carried forward and may be set off against any future positive Post Termination Service Amounts³⁰⁴.
- 3.9 The Authority shall require bidders to bid on the basis that they will receive the benefit of any outstanding claims under Physical Damage Policies and the amount (if any) standing to the credit of the Insurance Proceeds Account on the date that the New Agreement is entered into.

³⁰⁴ Negative Post Termination Service Amounts will always be taken into account in reducing the Adjusted Highest Compliant Tender Price irrespective of whether or not they have been set off against Positive Termination Service Amount. The effect of setting off is merely to reduce the sums payable by the Authority during the re-tendering period.

- 3.10 As soon as practicable after tenders have been received, the Authority shall (acting reasonably) review and assess the Compliant Tenders and shall notify Project Co of:
- 3.10.1 the Highest Compliant Tender Price;
- 3.10.2 the Tender Costs; and
- 3.10.3 the Adjusted Highest Compliant Tender Price.
- 3.11 If Project Co refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with Clause 57 (*Dispute Resolution Procedure*), the Authority shall irrespective of such dispute be entitled to enter into a New Agreement.
- 3.12 The Adjusted Highest Compliant Tender Price, shall be paid in accordance with Section 4 (*General*) of this Schedule 17 (*Compensation on Termination*).
- 3.13 Subject to paragraphs 1.7 and 1.9 of Section 4 (*General*) of this Schedule 17 (*Compensation on Termination*), if the Authority has not paid an amount equal to the Adjusted Highest Compliant Tender Price to Project Co on or before the date falling two (2) years after the Termination Date then the following provisions of this paragraph 3 shall not apply to that termination and the provisions of paragraph 4 (*No Retendering Procedure*) shall apply instead.
- 3.14 Subject to paragraph 2.1 of this Section 2 (*Compensation For Project Co Default*) of this Schedule 17 (*Compensation on Termination*), the Authority may elect at any time prior to the receipt of a Compliant Tender, to follow the No Retendering Procedure under paragraph 4 (*No Retendering Procedure*) by notifying Project Co that this election has been made.
- 3.15 In the event that the Adjusted Highest Compliant Tender Price exceeds the Maximum Termination Amount, the Adjusted Highest Compliant Tender Price shall be deemed to be an amount equal to the Maximum Termination Amount.

4. **No Retendering Procedure**

- 4.1 Subject to paragraph 4.2, if the provisions of this paragraph 4 (*No Retendering Procedure*) apply Project Co shall not be entitled to receive any Post Termination Service Amount.
- 4.2 If the Authority elects to follow the no retendering procedure in accordance with this paragraph 4 (*No Retendering Procedure*) after it has elected to follow the procedure under paragraph 3 (*Retendering Procedure*), then the Authority shall continue to pay to Project Co each Post Termination Service Amount until the Compensation Date, in accordance with paragraph 3 (*Retendering Procedure*).

- 4.3 In agreeing or determining the Estimated Fair Value of the Agreement the parties shall be obliged to follow the principles set out below:
- 4.3.1 all forecast amounts of revenues and costs should be calculated in nominal terms at current prices, recognising the adjustment for indexation in respect of forecast inflation between the date of calculation and the forecast payment date(s) as set out in this Agreement;
- 4.3.2 the total of all payments of the full Monthly Service Payments forecast to be made from the Termination Date to the Expiry Date shall be calculated and discounted at the Discount Rate;
- 4.3.3 the total of all costs reasonably forecast to be incurred by the Authority as a result of termination shall be calculated and discounted at the Discount Rate and deducted from the payment calculated pursuant to paragraph 4.3.2 above, such costs to include (without double counting):
- (a) a reasonable risk assessment³⁰⁵ of any cost overruns that will arise, whether or not forecast in the relevant base case;
 - (b) the costs of providing the Services reasonably forecast to be incurred by the Authority from the Termination Date to the Expiry Date in providing the Project Operations to the standard required³⁰⁶; and
 - (c) any rectification costs required to deliver the Project Operations to the standard required (including any costs reasonably forecast to be incurred by the Authority to complete the Works) and additional operating costs required to restore operating services standards less (to the extent that such sums are included in any calculation of rectification costs for the purposes of this paragraph) the aggregate of:
 - (i) any insurance proceeds received (or held in the Insurance Proceeds Account) or which will be received pursuant to policies maintained in accordance with Clause 54 (*Insurance*); [and]
 - (ii) amounts payable by the Authority in respect of Capital Expenditure under this Agreement which have not been paid[,]/ [and]

³⁰⁵ A methodology can be agreed in advance for agreeing what constitutes a reasonable risk assessment.

³⁰⁶ This includes both the everyday running costs and the costs of the service and life cycle maintenance costs. Forecasts are determined by agreement or, in the event of disputes, by an expert.

- (d) [any outstanding part of the Contribution will be deemed to have become payable on the Termination Date,]³⁰⁷

in each case such costs to be forecast at a level that will deliver the Services to the standards required by this Agreement;

- 4.4 If the parties cannot agree on the Adjusted Estimated Fair Value of the Agreement on or before the date falling twenty (20) Business Days after the date on which the Authority elected or was required pursuant to paragraph 2 (*Retendering Election*) or paragraph 3 (*Retendering Procedure*) to follow the no retendering procedure in accordance with this paragraph 4 (*No Retendering Procedure*), then the Adjusted Estimated Fair Value of the Agreement shall be determined in accordance with Clause 57 (*Dispute Resolution Procedure*).
- 4.5 The Adjusted Estimated Fair Value of the Agreement shall be paid in accordance with Section 4 (*General*) of this Schedule 17 (*Compensation on Termination*).
- 4.6 In the event that the Adjusted Estimated Fair Value of the Agreement exceeds the Maximum Termination Amount, the Adjusted Estimated Fair Value of the Agreement shall be deemed to be an amount equal to the Maximum Termination Amount.

³⁰⁷ Drafting to be used where a capital contribution is to be made by an Authority after Financial Close. Otherwise paragraph 4.3.3(d) should be deleted.

SECTION 3

COMPENSATION ON TERMINATION FOR FORCE MAJEURE

1. Consequences of Termination for Force Majeure

- 1.1 If Project Co or the Authority terminates this Agreement pursuant to Clause 32.1 (*Force Majeure*) or Clause 54.14.2 the Authority shall pay to Project Co the "**Force Majeure Termination Sum**" as set out in paragraph 1.2.
- 1.2 Subject to paragraphs 1.4 to 1.6 below the Force Majeure Termination Sum shall be an amount equal to the aggregate of:
- 1.2.1 the Base Senior Debt Termination Amount;
 - 1.2.2 Redundancy Payments and Sub-Contractor Losses (but excluding therefrom any claims for loss of profit);
 - 1.2.3 an amount equal to all amounts paid to Project Co by way of subscription for shares in the capital of Project Co less dividends and other distributions paid to the shareholders of Project Co provided that where such figure is a negative number it shall be instead be zero;
 - 1.2.4 an amount equal to the Subordinated Debt less an amount equal to the aggregate of payments of interest paid on the Subordinated Debt provided that where such figure is a negative number it shall be instead fixed at zero³⁰⁸; and

LESS, to the extent it is a positive amount, the aggregate of (without double counting) in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below:

- 1.2.5 the value of any right of Project Co to receive insurance proceeds (save where such insurance proceeds are held in the Insurance Proceeds Account and are to be applied in accordance with Clause 54.19 of this Agreement in reinstatement, restoration or replacement, or in the case of third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined provided that in such case Project Co shall assign any such rights and claims under the Sub-Contracts or claims against other third parties to the Authority and give the Authority reasonable assistance in prosecuting such claims; and

³⁰⁸ This excludes interest accrued but unpaid but the Subordinated Debt documentation should, of course, be checked to ensure this is the way it works. Repayment of principal is caught through the definition of Subordinated Debt.

- 1.2.6 Not Used
- 1.2.7 amounts which the Authority is entitled to set off pursuant to Clause 46.11 (*Rights of Set-Off*) of this Agreement.
- 1.3 Without prejudice to Clause 47 (*Consequences of Termination*), on payment of the Force Majeure Termination Sum, the Authority shall have the option to require Project Co to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority.
- 1.4 If the aggregate of the amounts referred to in paragraphs 1.2.1 and 1.2.4 is less than the Revised Senior Debt Termination Amount, then the Force Majeure Termination Sum shall be increased so that it is equal to the aggregate of the Revised Senior Debt Termination Amount and the amount referred to in paragraph 1.2.2 LESS without double counting in relation to the calculation of the Revised Senior Debt Termination Amount the amounts referred to at paragraphs 1.2.5 and 1.2.7 above; provided always that (a) the amount referred to in paragraph 1.2.2 above shall only be paid to the extent that Project Co has demonstrated to the reasonable satisfaction of the Authority that the amount will not be paid (in whole or in part) in payment of any Distribution and (b) if, at the time of termination, there are any Additional Permitted Borrowings outstanding, no Sub-Contractor Losses shall be paid in respect of any Sub-Contract in circumstances where there is an event of default under such Sub-Contract which would entitle Project Co to terminate such Sub-Contract.
- 1.5 If a Distribution is made whilst any Additional Permitted Borrowing is outstanding and Project Co has wilfully, or through gross negligence failed to comply with its obligations under Clause 9.9.4(a) of the Funders' Direct Agreement then in addition to the deduction of the Distribution made pursuant to paragraph (v) of the definition of Revised Senior Debt Termination Amount, the Authority shall be entitled to set off the value of that Distribution a second time against the Force Majeure Termination Sum, provided that the amount of the Force Majeure Termination Sum shall never be less than the Revised Senior Debt Termination Amount.
- 1.6 If Project Co has wilfully or through gross negligence failed to comply with its obligations under clause 9.4.4(b) of the Funders' Direct Agreement and there has been an overstatement of the cash balances by Project Co as at that date which has caused the Authority to reasonably believe that it would be required to pay a lesser sum at the Termination Date than it actually is required to pay under the terms of this Section 3 (*Compensation On Termination For Force Majeure*), then the Force Majeure Termination Sum shall be reduced by the amount of such overstatement (to the extent such overstatement is still applicable at the Termination Date), provided that the amount of the Force Majeure Termination Sum will never be less than the Revised Senior Debt Termination Amount.
- 1.7 The Force Majeure Termination Sum shall be paid in accordance with Section 4 (*General*) of this Schedule 17 (*Compensation on Termination*).

SECTION 4

General

1. Payment and Interest

1.1 Subject to paragraphs 1.2 and 1.6 below, the Authority shall pay to Project Co the Termination Sum, together with interest on any Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount element of the Termination Sum at the No Default Interest Rate, on or before the date falling sixty (60) days after the Notice Date provided that, if the Authority fails to pay the Termination Sum in full by such date, interest shall accrue at the Default Interest Rate on any unpaid amount from (but not including) such date until the date such amount is paid.

1.2 The Authority may, other than where payment is to be made pursuant to Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of this Schedule 17 (*Compensation on Termination*), elect to pay the Adjusted Estimated Fair Value of the Agreement or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum:

1.2.1 in instalments as follows:

(a) where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant) is greater than or equal to the Outstanding Principal:

(i) in respect of that element of the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant) representing the Outstanding Principal, on the dates (the "**Instalment Dates**") and in the amounts that Project Co would have been required to pay principal to the Senior Funders under the terms of the [Credit Agreement] had the Termination Date not occurred; and

(ii) in respect of the sum (if any) remaining after deducting the Outstanding Principal from the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant), in equal instalments on the Instalment Dates;

(b) where the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount or the Adjusted Estimated Fair Value of the Agreement (as relevant) is less than the Outstanding Principal, on the Instalment Dates pro rata to the amounts that Project Co would have been required to pay to the Senior Funders on each Instalment Date under the terms of the [Credit Agreement] had the Termination Date not occurred; or

1.2.2 as the parties may otherwise agree.

1.3 From the Notice Date until the date of payment, interest shall accrue on any unpaid element of the Termination Sum at the No Default Interest Rate and be payable on the next occurring Instalment Date.

1.4 If the Authority has elected to pay in accordance with paragraph 1.2 above, it may (on twenty-eight (28) days' prior written notice to Project Co) elect to pay the outstanding part of the Adjusted Estimated Fair Value of the Agreement or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum in full on any Instalment Date. If the Authority fails to make a payment to Project Co in accordance with paragraphs 1.1 or 1.2 or 1.3 above, Project Co may issue a notice to the Authority declaring any unpaid and outstanding element of (as applicable) the Adjusted Estimated Fair Value of the Agreement or the Base Senior Debt Termination Amount or the Revised Senior Debt Termination Amount (as relevant) element of the Termination Sum and any accrued but unpaid interest to be immediately due and payable.

1.5 To the extent that the Adjusted Estimated Fair Value of the Agreement is less than zero, then an amount equal to the Adjusted Estimated Fair Value of the Agreement shall be due and payable by Project Co to the Authority on the Compensation Date.

Following Retendering

1.6 Subject to paragraphs 1.8 and 1.9 following a retendering exercise under Section 2 (*Compensation For Project Co Default*) of this Schedule 17 (*Compensation on Termination*) the Authority shall pay to Project Co an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling twenty (20) Business Days after the later of:

1.6.1 the date of the New Agreement; and

1.6.2 if Project Co has referred a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution pursuant to paragraph 3.11 of Section 2 (*Compensation For Project Co Default*) of this Schedule 17 (*Compensation on Termination*), the date on which the dispute is finally determined in accordance with Clause 57 (*Dispute Resolution Procedure*),

provided that, to avoid doubt, if the dispute referred by Project Co to dispute resolution (pursuant to paragraph 1.6.2 above) concerns only a proportion of the Adjusted Highest Compliant Tender Price then the Authority shall pay the undisputed proportion of such sum no later than twenty (20) Business Days after

the date referred to in paragraph 1.6.1 above (the "**Undisputed Payment Date**") and the Authority shall pay interest to Project Co on any amount of the Adjusted Highest Compliant Tender Price which has been withheld, from the Undisputed Payment Date until the date on which payment is due under paragraph 1.6.2 above at the No Default Interest Rate.

1.7 If the Authority has received all bids from bidders under the Tender Process and has received a Compliant Tender but decides not to complete the Tender Process, it shall notify Project Co of this decision and (if the Adjusted Highest Compliant Tender Price is a positive number) pay to Project Co an amount equal to the Adjusted Highest Compliant Tender Price within twenty (20) Business Days of such notification.

1.8 If the Authority fails to pay the Adjusted Highest Compliant Tender Price (or any proportion thereof) by the date on which payment is due in accordance with paragraph 1.6 or paragraph 1.7 above, the Authority shall pay to Project Co interest on such unpaid amount, which shall accrue on such amount at the Default Interest Rate from (but not including) the date on which payment is due in accordance with paragraph 1.6 or paragraph 1.7 above until such amount is paid.

1.9 If the Adjusted Highest Compliant Tender Price is zero or a negative number then, on entering into the New Agreement with the New Project Co, the Authority shall have no obligation to make any payment to Project Co and (if a negative number) an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by Project Co to the Authority on the date of the New Agreement or (where paragraph 1.7 applies) within twenty (20) Business Days of notification from the Authority pursuant to that paragraph.

2. **Full and Final Settlement**

2.1 Any and all sums irrevocably paid by the Authority to Project Co under this Schedule 17 (*Compensation on Termination*) will be in full and final settlement of each party's rights and claims against the other for breaches and/or termination of this Agreement and any other Project Document whether under contract, tort, restitution or otherwise but without prejudice to:

2.1.1 any antecedent liability of Project Co to the Authority which the Authority has been unable to set off pursuant to Clause 46.11 (*Rights of Set-Off*) of this Agreement;

2.1.2 any antecedent liability of either party to the other that arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining or agreeing the Authority Default Termination Sum, the Adjusted Highest Compliant Tender Price, the Adjusted Estimated Fair Value of the Agreement or the Force Majeure Termination Sum as the case may be; and

2.1.3 any liabilities arising in respect of any breach by either party of their obligations under Clause 47.6 (*Continuing Obligations*) of this Agreement which arises or continues after the Termination Date.

3. **Costs**

The costs and/or expenses to be taken into account in the calculation of all termination sums due pursuant to this Schedule 17 (*Compensation on Termination*) shall only be such costs and/or expenses to the extent that they are reasonable and proper in quantum and shall have been or will be reasonably and properly incurred and shall only be counted once.

4. **Undisputed Amounts**

If the calculation of any termination amount is disputed then any undisputed element of that amount shall be paid in accordance with this Section 4 (*General*) of this Schedule 17 (*Compensation on Termination*) and the disputed element shall be dealt with in accordance with Schedule 20 (*Dispute Resolution Procedure*).

5. **Outstanding Senior Debt Amount**

5.1 The Authority shall be entitled to rely on the certificate of the [Senior Funders' Agent] as conclusive as to the amount of the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount (as the case may be) outstanding at any relevant time.

5.2 The receipt by the [Senior Funders' Agent] of the Base Senior Debt Termination Amount or Revised Senior Debt Termination Amount or elements thereof (as appropriate) (as the case may be) (and where appropriate any accrued interest or breakage costs as certified in accordance with paragraph 5.1 above) shall discharge the Authority's obligations to pay such sums to Project Co.

SECTION 5

Definitions

"Adjusted Estimated Fair Value of the Agreement"

means, subject to paragraph 4.6 of Section 2 (*Compensation For Project Co Default*) of this Schedule 17 (*Compensation on Termination*), the Estimated Fair Value of the Agreement adjusted as follows³⁰⁹:

- (a) where in respect of any month or part of a month from the Termination Date to the Compensation Date the Post Termination Service Amount is a negative number, the aggregate of all such negative Post Termination Service Amounts shall be set against and shall reduce the Estimated Fair Value of the Agreement (whether or not such amounts have been set-off by the Authority pursuant to paragraph 3.8 of Section 2 (*Compensation For Project Co Default*) of this Schedule 17 (*Compensation on Termination*));

and the aggregate of the following amounts shall be deducted from the Estimated Fair Value of the Agreement:

- (b) the Post Termination Service Amounts actually paid by the Authority to Project Co prior to the Compensation Date;
- (c) the Tender Costs; and
- (d) amounts that the Authority is entitled to set off or deduct;

and the aggregate of the following amounts shall be added to the Estimated Fair Value of the Agreement:

- (e) all credit balances on any bank accounts held by or on behalf of Project Co on the date that the Estimated Fair Value of the Agreement is calculated; and
- (f) any insurance proceeds and other amounts owing to Project Co (and which Project Co is entitled to retain), to the extent not included in (e);

³⁰⁹ There will only be any Post Termination Service Amounts available to the extent that the Authority starts the retendering process, but then decides to follow the no-retendering approach. These amounts are not deducted to the extent paragraph (c) of the definition of "New Agreement" is a period from the date of the New Contract to the original Expiry Date (rather than the Termination Date to the original Expiry Date).

to the extent that:

- (i) (e) and (f) have not been directly taken into account in calculating the Estimated Fair Value of the Agreement; and
- (ii) the Authority has received such amounts in accordance with this Agreement or such amounts are standing to the credit of the Insurance Proceeds Account;

"Adjusted Highest Compliant Tender Price"

means, subject to paragraph 3.15 of Section 2 (*Compensation For Project Co Default*) of this Schedule 17 (*Compensation on Termination*), the Highest Compliant Tender Price adjusted as follows³¹⁰:

- (a) where in respect of any month or part of a month from the Termination Date to the Compensation Date the Post Termination Service Amount is a negative number, the aggregate of all such negative Post Termination Service Amounts shall be set against and shall reduce such highest tender price (whether or not such amounts have been set-off by the Authority pursuant to paragraph 3.8 of Section 2 (*Compensation For Project Co Default*) of this Schedule 17 (*Compensation on Termination*));

and the aggregate of the following amounts shall be deducted from the Highest Compliant Tender Price:

- (b) the Post Termination Service Amounts actually paid by the Authority to Project Co prior to the Compensation Date;
- (c) the Tender Costs; and
- (d) amounts that the Authority is entitled to set off or deduct under this Agreement,

and the aggregate of the following amounts shall be added to such highest tender price:

³¹⁰ Negative Post Termination Service Amounts ("PTSA") represent an out of pocket cost to the Authority and will therefore need to be deducted from any payment of compensation due to Project Co. Positive PTSA, on the other hand, are regarded as a form of prepayment – the benefit of reduced service costs is also reflected in the tender price, which is likely to be higher. To avoid double counting, any PTSA actually paid to Project Co need to be deducted from the tender price. The effect of set-off of negative PTSA under paragraph 3.8 of Section 2 (*Compensation for Project Co Default*) of Schedule 17 (*Compensation on Termination*) simply reduces the amount of any prepayment and is therefore neutral. In reality on the Project Co Default (d) and (e) are likely to be the same amounts.

- (e) all credit balances on any bank accounts held by or on behalf of Project Co on the date that the highest priced Compliant Tender is received; and
- (f) any insurance proceeds and other amounts owing to Project Co (and which Project Co is entitled to retain), to the extent not included in (c);

to the extent that:

- (i) (e) and (f) have not been directly taken into account in that Compliant Tender; and
- (ii) the Authority has received such amounts in accordance with this Agreement;

"APB Distribution"

means, for the period during which the Additional Permitted Borrowing subsists, an amount equal to the aggregate of all Distributions made during that period up to an amount equal to the principal of the Additional Permitted Borrowing on the first day of that period;

"Authority Default Termination Sum"

has the meaning given in paragraph 1.1 of Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of Schedule 17 (*Compensation on Termination*);

"Base Senior Debt Termination Amount"

means, subject to Clause 4.3 (*Changes to Funding Agreements and Refinancing*)³¹¹:

- (a) [all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from Project Co to the Senior Funders in respect of Permitted Borrowings (other than in respect of Additional Permitted Borrowing); and
- (b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by Project Co to the Senior Funders as a result of a prepayment in respect of Permitted Borrowings (other than in respect of Additional Permitted Borrowing), or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement, subject to Project Co and the Senior Funders mitigating all such costs to the extent reasonably possible;

³¹¹ This definition assumes traditional debt finance.

less, to the extent it is a positive amount the aggregate of (without double counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below)

- (i) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (ii) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Funders to Project Co as a result of prepayment of amounts outstanding in respect of Permitted Borrowings (other than in respect of Additional Permitted Borrowing), or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement;
- (iii) all other amounts received by the Senior Funders on or after the Termination Date and before the date on which any compensation is payable by the Authority to Project Co as a result of enforcing any other rights they may have; and
- (iv) all credit balances on any bank accounts (but excluding the Insurance Proceeds Account) held by or on behalf of Project Co on the Termination Date;]

"Compensation Date"

means either:

- (a) if paragraph 3 (*Retendering Procedure*) of Section 2 (*Compensation For Project Co Default*) of this Schedule 17 (*Compensation on Termination*) applies, the earlier of:
 - (i) the date that the New Agreement is entered into; and
 - (ii) the date on which the Authority pays the Adjusted Highest Compliant Tender Price to Project Co; or
- (b) if paragraph 4 (*No Retendering Procedure*) of Section 2 (*Compensation For Project Co Default*) of this Schedule 17 (*Compensation on Termination*) applies, the

date that the Adjusted Estimated Fair Value of the Agreement has been agreed or determined;

- "Compliant Tender"** means a tender that meets all of the Qualification Criteria;
- "Compliant Tenderer"** means a Suitable Substitute Contractor who submits a Compliant Tender;
- ["Contingent Funding Liabilities"]** [insert any contingent liabilities of the shareholders in respect of financial obligations owed to Project Co and/or Funders under the Funding Agreements which are triggered as a result of or in relation to the termination of the Agreement, e.g. guarantees or letters of credit in respect of deferred equity]³¹²;
- "Credit Agreement"** means [♦] as at the date of this Agreement or as amended as permitted pursuant to Clause 4 (*Project Documents*);
- "Deemed New Agreement"** means an agreement on the same terms and conditions as this Agreement, as at the Termination Date³¹³, but with the following amendments:
- (a) if this Agreement is terminated prior to the [final] Actual Completion Date, then the Longstop Date [relevant Longstop Date(s)] shall be extended by a period to allow a New Project Co (had one been appointed) to achieve the Actual Completion Date, prior to the Longstop Date [relevant Longstop Date(s)];
 - (b) any accrued Deductions and/or Warning Notices shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions, be cancelled; and
 - (c) the term of such agreement shall be for a period equal to the term from the Termination Date to the Expiry Date;
- "Discount Rate"** means a discount rate expressed as $[(1 + \text{real base case project IRR} + \text{Gilt B} - \text{Gilt A}) * (1 + i) - 1]$
- where:
- "real base case project IRR"** is the real pre-tax [Project IRR] as set out in the Financial Model at Financial Close;

³¹² This is intended to be an exhaustive list of all such arrangements put in place at Financial Close.

³¹³ The Termination Date here is the relevant date as no new contract is actually being entered into.

"i" is the agreed assumed forecast rate of increase in RPI set out in the Financial Model as at Financial Close, for the remaining term of the Agreement;

"Gilt A" is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Financial Model at Financial Close; and

"Gilt B" is the real yield to maturity on a benchmark government Gilt instrument of the same maturity as the average life of the outstanding Senior Debt as shown in the Financial Model as on the Termination Date;

"Distribution" has the meaning given in Schedule 23 (*Refinancing*);

"Estimated Fair Value of the Agreement" means the amount determined in accordance with paragraph 4 (*No Retendering Procedure*) of Section 2 (*Compensation For Project Co Default*) of this Schedule 17 (*Compensation on Termination*) that a third party would pay to the Authority as the market value of the Deemed New Agreement;

"Fair Value" means the amount at which an asset or liability could be exchanged in an arm's length transaction between informed and willing parties, other than in a forced or liquidated sale;

"Highest Compliant Tender Price" means the price offered by the Compliant Tenderer (if any) with the highest tender price, and, if no Compliant Tenders are received, means zero;

"Invoice Date" means, in respect of the Authority Default Termination Sum, the Force Majeure Termination Sum or the Corrupt Gifts Termination Sum (as appropriate), the date that is the later of:

- (a) the date on which the Authority receives an invoice from Project Co for the relevant termination sum; and
- (b) the date on which the Authority receives the supporting evidence required pursuant to paragraph [♦] of Section 4 (*General*) of this Schedule 17 (*Compensation on Termination*);

"Liquid Market" means that there are sufficient willing parties (being at least two (2) parties, each of whom is capable of being a Suitable Substitute Contractor) in the market for design, build, finance and maintain contracts or similar contracts for the provision of services (in each case the same as or similar to this Agreement) for the price that is

likely to be achieved through a tender to be a reliable indicator of Fair Value provided always that any vehicle controlled and established by the Senior Funders specifically for the purposes of the Project and to which this Agreement may be novated shall be discounted in assessing whether there are sufficient willing parties in the market for such purposes³¹⁴;

["Market Value Availability Deduction Amount"

means for any month or part of a month, an amount equal to the availability deduction that was made to the Monthly Service Payment under Section 2 of Schedule 14 (*Payment Mechanism*) in the month immediately preceding the Termination Date, less an amount equal to any availability deduction that was made for an Area which was unavailable at the Termination Date but which has subsequently become available whether as a result of the Authority incurring Rectification Costs or otherwise];

"Maximum Service Payment"

means one twelfth of the Annual Service Charge payable at any time before any deductions under Section 2 of Schedule 14 (*Payment Mechanism*) but allowing for indexation under the [indexation provisions];

"Maximum Termination Amount"

means either an amount equal to the aggregate of³¹⁵:

- (a) the Base Senior Debt Termination Amount; and
- (b) the principal amount of the Subordinated Debt outstanding; and
- (c) Redundancy Payments and Sub-Contractor Losses;
- (d) OR, if the aggregate of the amounts referred to in (a) and (b) above is less than the Revised Senior Debt Termination Amount then an amount equal to the aggregate of:
- (e) the Revised Senior Debt Termination Amount; and

Redundancy Payments;

³¹⁴ Unless agreed by the parties, a novation to a vehicle controlled by the Senior Funders under the Funders' Direct Agreement should not on its own be sufficient to constitute a Liquid Market.

³¹⁵ In line with MIM principles, this ensures Project Co does not make any windfall gain from compensation on termination for Project Co default.

"New Agreement"	means an agreement on the same terms and conditions as this Agreement at the Termination Date, but with the following amendments ³¹⁶ :
	(a) if this Agreement is terminated prior to the [final] Actual Completion Date, then the Longstop Date [relevant Longstop Date(s)] shall be extended by a period to allow a New Project Co to achieve the Actual Completion Date, prior to the Longstop Date [relevant Longstop Date(s)];
	(b) any accrued Deductions and/or Warning Notices shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions, be cancelled;
	(c) the term of such agreement shall be equal to the term from the [Termination Date] until the Expiry Date; and
	(d) any other amendments which do not adversely affect the Project Co;
"New Project Co"	means the person who has entered or who will enter into the New Agreement with the Authority;
"No Default Interest Rate"	means [incorporate the non-default interest rate definition in the Senior Funding Agreements];
"Notice Date"	means the later of the Termination Date and (if paragraph 4 (<i>No Retendering Procedure</i>) of Section 2 (<i>Compensation For Project Co Default</i>) of this Schedule 17 (<i>Compensation on Termination</i>) applies) the date that the Adjusted Estimated Fair Value of the Agreement has been agreed or determined;
"Outstanding Principal"	means the principal amount outstanding at the Termination Date of each borrowing (other than any borrowing under any equity bridge facility) under the [Credit Agreement];
"Post Termination Service Amount"	means for the purposes of paragraph 3 (<i>Retendering Procedure</i>) of Section 2 (<i>Compensation For Project Co Default</i>) of this Schedule 17 (<i>Compensation on Termination</i>), for the whole or any part of a month for the period from the Termination Date to the Compensation Date, an amount equal to the Maximum Service Payment (pro rata for part of a month) which would have been payable under this Agreement had this Agreement not been

³¹⁶ This should also include other documents entered into between the parties, where appropriate. In projects in which the Services cease to be required on or shortly after the original expiry Date, then the term of the New Contract will be reduced and so Post Termination Service Amounts will not be deducted (or added back).

terminated, less an amount equal to the aggregate of (without double counting):

- (a) (where relevant) the amount by which the Post Termination Service Amounts for the previous month was less than zero;
- (b) the [Market Value Availability Deduction Amount] for that month; and
- (c) the Rectification Costs incurred by the Authority in that month³¹⁷;

"Qualification Criteria"

means the criteria that the Authority requires tenderers to meet as part of the Tender Process, which (subject to compliance with procurement regulations) shall be:

- (a) the New Agreement terms;
- (b) tenderers should have the financial ability to pay the capital sum tendered for the New Agreement and the financial ability to deliver the Works and/or the Services (as appropriate) for the price tendered;
- (c) the tenderers may only bid on the basis of a single capital payment to be made on the date of the New Agreement³¹⁸;
- (d) the tenderer is experienced in providing the Services or similar services;
- (e) the technical solution proposed by the tenderers is capable of delivery and the tenderer is technically capable of delivery of the Services; and
- (f) any other tender criteria agreed by the Authority and the Project Co;

"Rectification Costs"

means, for the purposes of any Termination Date that occurs after the Actual Completion Date [in respect of a Facility], or, in respect

³¹⁷ This payment is made both to ensure the Authority is incentivised to expedite the retender and any value received by the Authority is reflected post termination. Usage based payments will need to be addressed specifically. It is recommended that their effects are, where possible, stripped out. A positive Post Termination Service Amount will occur where the cost incurred by the Authority in procuring the Service itself (including rectification costs) is less than the Monthly Service Payment. A negative Post Termination Service Amount will arise if the costs incurred in procuring the Service (including rectification costs) are greater than the Annual Service Charge.

³¹⁸ If tenderers are not required to bid on the basis of a single capital payment then the Authority would have to fund the delay in payment of the compensation amount which is not recommended.

of the Post Completion Works, the [first] Actual Post Completion Works Date an amount equal to the reasonable and proper costs incurred by the Authority in a particular month or part of a month in ensuring that the Services are available;

"Redundancy Payments"

means redundancy payments and other termination payments which are required under Law to be made to employees of Project Co reasonably and properly incurred by Project Co arising as a direct result of terminating this Agreement (provided that Project Co shall use all reasonable endeavours to mitigate its loss) and provided that in calculating such amount no account should be taken of any liabilities and obligations of Project Co arising out of:

- (a) contracts of employment or other agreements or arrangements entered into by Project Co to the extent that such contracts of employment agreements or arrangements were not entered into in connection with the Project; and/or
- (b) contracts of employment or other agreements or arrangements entered into by Project Co to the extent that such contracts of employment agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms;

"Relevant Assumptions"

means the assumptions that the sale of Project Co is on the basis that there is no default by the Authority, that the sale is on a going concern basis, that no restrictions exist on the transfer of share capital, that no Additional Permitted Borrowing has taken place and therefore that the effect of the Additional Permitted Borrowing on the calculation of such amount is disregarded but that otherwise the actual state of affairs of Project Co and the Project is taken into account;

"Revised Senior Debt Termination Amount"

means³¹⁹, subject to Clause 4.3 (*Changes to Funding Agreements and Refinancing*):

- (a) [all amounts outstanding at the Termination Date, including interest and (other than in respect of Additional Permitted Borrowing) Default Interest accrued as at that date, from Project Co to the Senior Funders in respect of Permitted Borrowing; and
- (b) all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by Project Co to the Senior Funders as a result of a prepayment in respect of Permitted Borrowing, or, in the case of early termination or interest rate hedging arrangements only, as a result of termination of this

³¹⁹Traditional bank debt finance has been assumed for the purpose of this definition.

Agreement subject to Project Co and the Senior Funders mitigating all such costs to the extent reasonably possible;

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Revised Senior Debt Termination Amount or the amounts below):

- (i) all credit balances on any bank accounts (but excluding the Insurance Proceeds Account) held by or on behalf of Project Co on the Termination Date;
- (ii) any amounts claimable on or after the Termination Date in respect of Contingent Funding Liabilities;
- (iii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Funders to Project Co as a result of prepayment of amounts outstanding in respect of Permitted Borrowing, or, in the case of early termination of interest rate hedging arrangements only, as a result of termination of this Agreement;
- (iv) all other amounts received by the Senior Funders on or after the Termination Date and before the date on which any compensation is payable by the Authority to Project Co as a result of enforcing any other rights they may have; and
- (v) all APB Distributions;]

"Senior Debt" means the financing provided by the Senior Funders under the Senior Funding Agreements³²⁰;

"Senior Funding Agreements" has the meaning given in Schedule 1 (*Definitions and Interpretation*);

³²⁰Traditional bank debt finance has been assumed for the purpose of this definition.

"Sub-Contractor Losses"

means³²¹:

- (a) the amount reasonably and properly payable by Project Co to the Contractor under the terms of the Construction Contract as a direct result of the termination of this Agreement provided that such amount shall be reduced to the extent that Project Co fails to use all reasonable endeavours to mitigate such amount; and
- (b) the amount reasonably and properly payable by Project Co to the Service Providers [under their respective contracts with Project Co] (as the case may be) as a direct result of the termination of this Agreement provided that such amount shall be reduced to the extent that Project Co fails to use all reasonable endeavours to mitigate such amount;

provided that in both cases no account should be taken of any liabilities and obligation of Project Co to the Sub-Contractors arising out of:

- (i) agreements or arrangements entered into by Project Co and/or the Sub-Contractors to the extent that such agreements or arrangements were not entered into in connection with those parties obligations in relation to the Project; and/or
- (ii) agreements or arrangements entered into by Project Co and/or the Sub-Contractors to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms;

"Suitable Substitute Contractor"

has the meaning given in the Funders' Direct Agreement;

"Subordinated Debt"

means [◆];

"Tender Costs"

means the reasonable and proper costs of the Authority incurred in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value of the Agreement;

"Tender Process"

means the process by which the Authority requests tenders from any parties interested in entering into a New Agreement, evaluates

³²¹ The Authority must review sub-contracts to ensure payments due on early termination are not excessive e.g. operational subcontracts in place where the operational phase has not yet started.

the responses from those interested parties and enters into a New Agreement with a new service provider, in accordance with paragraph 3 (*Retendering Procedure*) of Section 2 (*Compensation For Project Co Default*) of this Schedule 17 (*Compensation on Termination*);

"Tender Process Monitor" means the person appointed under paragraph 3.6 of Section 2 (*Compensation For Project Co Default*) of this Schedule 17 (*Compensation on Termination*);

"Termination Sum" means any compensation payable by the Authority to Project Co pursuant to this Schedule 17 (*Compensation on Termination*) (excluding the Adjusted Highest Compliant Tender Price).

SCHEDULE 18:
HANDBACK PROCEDURE

1. **Definitions**

In this Schedule 18 (*Handback Procedure*) and elsewhere in this Agreement (save where Schedule 1 (*Definitions and Interpretation*) provides to the contrary) the following words shall have the following meanings:

"Building Element"	has the meaning given to that term in the Authority's Construction Requirements;
"Handback Amount"	means the estimated cost of carrying out the Handback Works;
"Handback Bond"	has the meaning given in paragraph 9 of this Schedule 18 (<i>Handback Procedure</i>);
"Handback Deficiencies Notice"	has the meaning given in paragraph 14.2 of this Schedule 18 (<i>Handback Procedure</i>);
"Handback Programme"	means the programme for carrying out the Handback Works over the remainder of the Project Term describing the total works to be carried out and the method of carrying out such works during the overall period in which the Handback Works are to be executed;
"Handback Response Notice"	has the meaning given in paragraph 16 of this Schedule 18 (<i>Handback Procedure</i>);
"Handback Survey"	means one or more of the surveys of the Facilities by the Independent Surveyor to be carried out pursuant to paragraph 3 and paragraph 13 of this Schedule 18 (<i>Handback Procedure</i>) to evaluate whether the Facilities and the Building Elements do, and will at the Expiry Date, meet the Handback Requirements;
"Handback Works"	means the maintenance works (if any) required to be carried out in respect of the Facilities in order to procure that they will, on the Expiry Date, satisfy the Handback Requirements;
"Independent Surveyor"	means an independent surveyor who is appropriately qualified to report on whether the Handback

Requirements have been met or will be met on the Expiry Date;

"Minimum Residual Life Expectancy Requirement"

means the required period of time after the Expiry Date for which an element, item, or product is expected to satisfy residual life requirements, such period of time being set out in column 4 of the table in Appendix D of the Service Level Specification; and

"Retention Fund"

has the meaning given in paragraph 8 of this Schedule 18 (*Handback Procedure*).

2. On the Expiry Date, each element of the Facilities shall be in a condition which is:
 - 2.1 consistent with due performance by Project Co of its obligations under this Agreement including but not limited to:
 - 2.1.1 Clause 23 (*Maintenance*);
 - 2.1.2 Clause 24 (*Lifecycle Replacement*);
 - 2.1.3 the Service Level Specification; and
 - 2.1.4 Method Statements.
 - 2.2 consistent with the Facilities and each of the elements of them having been designed, constructed and maintained in accordance with the applicable design life requirements set out in paragraph [1.4.5 (*Minimum Life Expectancy and Residual Life*)] of Part 1 (*Generic Design Requirements*) of the Authority's Construction Requirements and the Minimum Residual Life Expectancy Requirements,
- together referred to as (the "**Handback Requirements**").

3. The Authority and Project Co shall cooperate and shall take all reasonable steps to ensure that the Authority may procure the appointment of an Independent Surveyor to conduct initial Handback Surveys of the relevant Building Elements of [each/ the Facility] by a date which is no later than the time period specified in respect of that Building Element in the [5th] column of the table set out in Appendix D of the Service Level Specification. The Authority shall meet the cost of the Handback Surveys provided that where any Handback Survey reveals that [the/any] Facility or part thereof has not been maintained in accordance with Project Co's obligations under this Agreement, the cost of such survey shall be due and immediately payable by Project Co to the Authority. Where the Authority procures the carrying out of a Handback Survey pursuant to this paragraph 3, Project Co shall, at the Authority's option, act as joint appointer and in such circumstances the parties shall act reasonably in agreeing the terms of the Independent Surveyor's appointment, the scope of which appointment shall also, where applicable, include the Handback Survey to be carried out pursuant to paragraph 13 below and certification pursuant to paragraph 12 below. In all circumstances Project Co shall provide such assistance to the Authority and any Independent Surveyor, in respect of the

Handback Survey at no cost. Where Project Co is not party to the appointment of the Independent Surveyor the Authority shall be responsible for procuring that the Independent Surveyor has a duty of care to Project Co in respect of the Handback Surveys carried out by it.

4. The Authority shall procure that Project Co has no less than [ten (10)] Business Days' notice of the date or dates on which the relevant Handback Survey is to be carried out provided that where Project Co (acting reasonably) can demonstrate by a date being no later than [five (5)] Business Days prior to the relevant Handback Survey being due to commence that the carrying out of the relevant Handback Survey on such date or dates shall materially prejudice its ability to deliver the Services. The parties shall seek to agree alternative dates for carrying out the Handback Survey as soon as possible and in any event within ten (10) Business Days, failing which the date for carrying out the relevant Handback Survey shall be determined pursuant to Schedule 20 (*Dispute Resolution Procedure*).
5. Within twenty (20) Business Days after the completion of the relevant Handback Survey pursuant to paragraph 3 above, if it is found that any element of the Facilities is not in a condition consistent with the Handback Requirements at the Expiry Date, Project Co shall forthwith provide to the Authority's Representative in accordance with Schedule 8 (*Review Procedure*):
 - 5.1 Project Co's proposal as to the Handback Works;
 - 5.2 Project Co's proposal as to the Handback Programme and
 - 5.3 Project Co's estimate of the cost of the Handback Amount.
6. The Authority's Representative may, within twenty (20) Business Days after receipt of the details set out in paragraph 5 above from Project Co, raise comments in accordance with paragraph 3 of Schedule 8 (*Review Procedure*) on Project Co's proposals and estimate referred to in paragraph 5 above.
7. On agreement, or determination in accordance with Schedule 20 (*Dispute Resolution Procedure*), of the Handback Works, the Handback Programme and/or the Handback Amount (as the case may be), Project Co shall procure that the Handback Works are carried out in accordance with the Handback Programme so as to meet the Handback Requirements. Project Co shall carry out the Handback Works at its own cost notwithstanding that the actual cost of the Handback Works may be higher than the Handback Amount.
8. From the date of the agreement (or determination in accordance with Schedule 20 (*Dispute Resolution Procedure*)) of the matters identified in paragraph 7, the Authority shall be entitled to withhold all or a proportion of each subsequent Monthly Service Payment up to the amount of the Handback Amount, provided that prior to the [Senior Debt Final Repayment Date]³²² the Authority shall not be entitled to withhold more than [30%] of each Monthly Service Payment and the provisions of paragraph 12 shall apply. The Authority shall pay such amounts into an interest bearing account in its own name (the "**Retention Fund**").

³²² The retention provided for at paragraph 8 may be reviewed on a project specific basis in consultation with the Welsh Government. The Authority should seek advice on suitable standards.

9. Project Co may elect by notice in writing to the Authority within ten (10) Business Days of the agreement (or determination in accordance with Schedule 20 (*Dispute Resolution Procedure*)) of the matters identified in paragraph 7 to procure the provision of a bond (the "**Handback Bond**") in favour of the Authority (and in a form acceptable to the Authority (acting in its sole discretion)) for an amount equal to the Handback Amount and from a bank or insurance company authorised to carry out business in the United Kingdom, and upon delivery of the same to the Authority, the provisions of paragraph 8 shall not apply.
10. Project Co shall carry out the Handback Works to the satisfaction of the Authority's Representative in accordance with Good Industry Practice and in accordance with the Handback Programme so as to meet the Handback Requirements.
11. Notwithstanding:
 - 11.1 the agreement of the Authority's Representative to any Handback Works, the Handback Programme or the Handback Amount;
 - 11.2 the participation of the Authority's Representative in any inspection under this Schedule; and/or
 - 11.3 the complete or partial carrying out of the Handback Works,

Project Co shall not be relieved or absolved from any obligation to conduct any other survey, inspection or to perform any other works in accordance with the Service Level Specification and Method Statements, Clause 23 (*Maintenance*) or Clause 24 (*Lifecycle Replacement*) and the provisions of this Schedule 18 (*Handback Procedure*); shall in no way be seen to limit the Authority's general rights to inspect and survey the Facilities.

12. Where this paragraph 12 applies, if and to the extent that Project Co carries out any material part of the Handback Works in accordance with paragraph 7, Project Co may make a claim for payment for the work carried out. Any such claim shall be accompanied by a certificate by Project Co setting out the works performed and the value of such works. The Authority shall be entitled to require any reasonable further evidence in respect of the valuation of the works and the Authority may require that such claim is verified through certification by the Independent Surveyor. The Authority shall make payment of the amount of a valid claim within twenty (20) Business Days of the date of receipt of the claim and shall be entitled to withdraw that amount from the Retention Fund. If at any time the amount in the Retention Fund is insufficient to cover the costs claimed by Project Co, the Authority shall pay the unpaid portion of such valid claim from any amounts which subsequently stand to the credit of the Retention Fund. In the event that the amount remaining in the Retention Fund on the Expiry Date is insufficient to cover Project Co's costs which have not been paid, Project Co shall bear the balance of such costs itself.
13. The Authority shall procure that not later than sixty (60) Business Days before the Expiry Date, a further Handback Survey is carried out. Such inspection shall confirm whether or not the condition of the Facilities is in accordance with paragraph 2 above.

14. On, or within ten (10) Business Days after, the Expiry Date:
 - 14.1 the Independent Surveyor (where applicable) shall issue to Project Co and the Authority a Handback Certificate and the Authority shall return the Handback Bond or pay any balance standing to the credit of the Retention Fund (as appropriate), to Project Co; or
 - 14.2 the Independent Surveyor (where applicable) shall notify Project Co and the Authority of its decision not to issue the Handback Certificate, stating the reasons for such decision (the "**Handback Deficiencies Notice**").
15. A Handback Deficiencies Notice shall set out each respect in which the Handback Works have not been completed or the Facilities do not comply with the Handback Requirements and shall state the estimated cost of procuring that the Facilities comply in all respects with the Handback Requirements.
16. Project Co may, within ten (10) Business Days after receipt of the Handback Deficiencies Notice by notice to the Authority's Representative and the Independent Surveyor, object to any matter set out in the Handback Deficiencies Notice. The notice from Project Co shall give details of the grounds of such objection and shall set out Project Co's proposals in respect of such matters (the "**Handback Response Notice**").
17. If no agreement is reached between Project Co and the Authority's Representative as to any matter referred to in the Handback Response Notice within fifteen (15) Business Days of receipt of that notice by the Authority's Representative, then either Project Co or the Authority's Representative may refer the following matters for determination in accordance with Schedule 20 (*Dispute Resolution Procedure*):
 - 17.1 whether the Facilities comply in all respects with the Handback Requirements; and
 - 17.2 the estimated cost of procuring that the Facilities comply in all respects with the Handback Requirements, where the Facilities do not comply in all respects with the Handback Requirements.
18. If it is agreed or determined in accordance with Schedule 20 (*Dispute Resolution Procedure*) that the Facilities did not, at the Expiry Date, comply in all respects with the Handback Requirements, Project Co shall pay to the Authority an amount equal to the estimated cost of completing such Handback Works (less, where applicable, any amounts standing to the credit of the Retention Fund at that time) or procuring that the Facilities comply in all respects with the Handback Requirements. Such payment shall be made not later than twenty (20) Business Days after the estimated cost has been agreed or determined and, upon such payment being received by the Authority, the Authority's Representative shall issue the Handback Certificate and return (where applicable) the Handback Bond to Project Co.
19. Project Co shall comply with the provisions of this Agreement which are applicable at expiry including but not limited to Clause 47.2 (*Transfer to Authority of Assets, Contracts etc.*) to 47.5 (*Transitional Arrangements*).

20. Project Co shall within [five (5) Business Days] remove from the Site[s] all property not acquired by the Authority pursuant to Clause 47.2 (*Transfer to Authority of Assets, Contracts etc.*) (or not belonging to the Authority or any Authority Party) and if it has not done so within [twenty (20)] Business Days after any notice from the Authority requiring it to do so the Authority may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred to the credit of Project Co;
21. Project Co shall procure that:
- 21.1 on or by the Expiry Date any security passwords, access codes and other keys to the Facilities and the equipment are delivered to the Authority's Representative; and
- 21.2 without prejudice to Clause 56 (*Intellectual Property*), on or by the Expiry Date, any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facilities (but excluding computer programmes, which have been developed or acquired by a Service Provider for its own use and not solely for the purposes of provision of any of the Services at the Facilities or the assignment or transfer of which is otherwise restricted) are delivered to the Authority's Representative; and
- 21.3 Project Co and Project Co Parties shall vacate the Site[s] and shall leave the Site[s] and the Facilities in a safe, clean and orderly condition on the Expiry Date.

SCHEDULE 19:
RECORD PROVISIONS³²³

SECTION 1

General Requirements

1. Project Co shall retain and maintain all the records (including superseded records) referred to in Section 2 (*Records to be Kept*) of this Schedule 19 (*Record Provisions*) in accordance with this Section 1 (*General Requirements*) of this Schedule 19 (*Record Provisions*), the requirements of Good Industry Practice, in chronological order, in a form that is capable of audit and at its own expense. Project Co shall make such records available for inspection to the Authority where it has reasonable cause for requiring such records, on giving reasonable notice shall provide such facilities as the Authority may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this Schedule 19 (*Record Provisions*).
2. Wherever practical, original records shall be retained and maintained in hard copy form. True copies of the original records may be kept by Project Co where it is not practicable to retain original records.
3. Those records relating to the Project Operations (including the design, construction, development, enhancement and maintenance of the Facilities) shall be retained for the duration of the Agreement.
4. Financial and other records (including without limitation all information provided in support of any Change) shall be retained and maintained by Project Co for a period of at least six (6) years after the end of the Project Term in sufficient detail, in appropriate categories and generally in such a manner to enable Project Co to comply with its obligations under Clause 64.1 (*Information and Audit Access*) and where appropriate to enable the data in such records to be entered into the Financial Model so that the output from the Financial Model (on the basis of such data) can be directly compared with the actual financial cashflow and performance of Project Co.
5. Where Project Co wishes to dispose of any records maintained as provided in this Schedule 19 (*Record Provisions*) which are more than fifteen (15) years old, or in respect of which the required period for their retention has expired, then Project Co shall notify the Authority and if, within forty (40) Business Days of such notice, the Authority elects to receive certain of those records, then Project Co shall deliver up such records to the Authority in the manner and at the location as the Authority shall reasonably specify, and the costs of retaining those records in safe storage and delivering up the same shall be borne by Project Co.
6. Subject to paragraph 5, for a period of not more than six (6) years following the termination for whatever reason of this Agreement, Project Co shall retain in safe storage all such records as are referred to in Section 2 (*Records to be Kept*) of this Schedule 19 (*Record Provisions*) which were in existence at the date of termination of this Agreement. On the expiry of such

³²³ Section 1 has been included for the purpose of providing a general framework and should be amended to reflect project specifics. The records to be kept by Project Co are to be determined on a project specific basis, but should as a minimum include those items listed in Section 2.

period or at the earlier request of the Authority (and the Parties acknowledge that such a request shall be deemed to have been issued by the Authority upon the occurrence of any of the events set out in Clause 40.1.1 (*Project Co Event of Default*) whether prior to or following termination of this Agreement), Project Co shall deliver up all those records (or where those records are required by statute to remain with Project Co or a Contracting Associate of Project Co, copies thereof) to the Authority in the manner and at the location as the Authority shall reasonably specify. The Authority shall make available to Project Co all the records Project Co delivers up pursuant to this paragraph subject to reasonable notice. The costs of retaining those records in safe storage and delivering up the same shall be borne:

- 6.1 by Project Co where the termination arises as a result of a Project Co Event of Default; and
 - 6.2 by the Authority where the termination arises for any other cause.
7. Without prejudice to the foregoing, Project Co shall provide the Authority:
- 7.1 as soon as they may be available and in any event within sixty (60) Business Days after the end of the first six (6) months of each financial year of Project Co which falls during the Project Term, a copy, certified as a true copy by an officer of Project Co, of its unaudited interim accounts and, if appropriate, of consolidated unaudited interim accounts of Project Co, its Subsidiaries and Holding Company (if any) which would (if Project Co were listed on the London Stock Exchange whether or not it is) be required to be sent to shareholders as at the end of and for each such six (6) month period; and
 - 7.2 as soon as they shall have been sent to its shareholders in order to be laid before an annual general meeting of Project Co but not later than one hundred and thirty (130) Business Days after the end of each accounting reference period of Project Co part or all of which falls in a Contract Year, a copy of Project Co's audited accounts and if appropriate, of the consolidated audited accounts of Project Co and, its Associated Companies (if any), in respect of that period, prepared in accordance with the Companies Act 2006 and generally accepted accounting principles and bases in England and Wales, consistently applied together with copies of all related directors' and auditors' reports and all other notices/circulars to shareholders.
8. Project Co shall provide to the Authority on 31 March, 30 June, 30 September and 31 December each year a document listing all information provided by it to the Senior Funders during the preceding three (3) month period and, at the request of the Authority, provide to the Authority any information provided to it by the Senior Funders during the Project Term and any other information relating to the Project that the Authority may reasonably require.
9. Any drawings required to be made or supplied pursuant to this Agreement shall be of a size appropriate to show the detail to be depicted clearly without magnifying aids and shall conform to British Standards 1192 or 308 or equivalent as appropriate. Where by prior agreement the Authority has agreed to accept microfilm, microfiche or other storage media (which must include secure back up facilities), drawings and other documents shall be made or supplied in such form as has been agreed.
10. Upon termination or expiry of this Agreement, and in the event that the Authority wishes to enter into another contract for the operation and management of the Project, Project Co shall

(and shall ensure that the sub-contractors will) comply with all reasonable requests of the Authority to provide information relating to Project Co's costs of operating and maintaining the Project.

11. Project Co shall use all reasonable endeavours to assist the Authority in its preparation of any report and/or return required pursuant to regulations, directions or guidance applicable to the Authority (in each case as amended, replaced or consolidated from time to time) or as required by external agencies including without limitation, reports and returns regarding the physical condition of the Facilities, health and safety, under the Regulatory Reform (Fire Safety) Order 2005, relating to environmental health or required by the Welsh Ministers, from time to time.
12. Project Co shall, at the same time as it is required to satisfy each of the reporting obligations to the Authority under the terms of this Agreement (as summarised in the table below) also submit the relevant document or report to WEPCo (addressed to [♦]³²⁴ or such other address as WEPCo may notify Project Co from time to time) and [and the Contract Management Unit] of Welsh Government (addressed to [♦]³²⁵ or such other address as Welsh Government may notify Project Co from time to time) provided that WEPCo and/or Welsh Government (as applicable) have confirmed their agreement in writing to be subject to the same obligations of confidentiality applicable to the Authority under this Agreement.³²⁶

DETAIL REQUIRED	CROSS REFERENCE TO PROVISION	REGULARITY	DUE DATE	COMMENT
[♦]	[♦]	[♦]	[♦]	[♦]
[♦]	[♦]	[♦]	[♦]	[♦]
[♦]	[♦]	[♦]	[♦]	[♦]

To the extent that there is any conflict between information in the table above and the relevant provision of this Agreement referred to, the relevant provision of the Agreement shall prevail.

³²⁴ WEPCo address for email communications to be inserted.

³²⁵ Welsh Government Contract Management Unit email address to be inserted.

³²⁶ To be populated on a project specific basis.

SECTION 2

Records to be Kept

1. This Agreement, its Schedule and the Project Documents including all amendments to such agreements.
2. Project Co shall at all times maintain a full and easily searchable record of particulars of the costs of performing the Project Operations, including those relating to the design, construction, maintenance, operation and finance of the Facilities. This shall require Project Co to keep (and where appropriate to procure that the sub-contractors shall keep) books of account in accordance with best accountancy practice with respect to the Agreement showing in detail:
 - 2.1 administrative overheads;
 - 2.2 payments to the Sub-Contractors and to sub-contractors;
 - 2.3 capital and revenue expenditure;
 - 2.4 such other items as the Authority may reasonably require to conduct cost audits for verification of cost expenditure or estimated expenditure, for the purpose of Clause 30.12 (*Compensation*), Schedule 16 (*Change Protocol*) and Clause 33 (*Changes in Law*),and Project Co shall have (and procure that the sub-contractors shall have) the books of account evidencing the items listed in paragraphs 2.1 to 2.4 available for inspection by the Authority (and any expert) upon reasonable notice, and shall present a report of these to the Authority as and when requested.
3. All other documents, software or other information expressly referred to in this Agreement.
4. Records relating to the appointment and supersession of the Authority's Representative and Project Co's Representative.
5. Project Data.
6. Documents, drawings, design data or submissions raised in accordance with Schedule 8 (*Review Procedure*).
7. Documents relating to planning applications, consents, refusals and appeals.
8. Records relating to any specialist or statutory inspections of the Facilities, including any roadways.

9. Notices, reports, results and certificates relating to completion of the Works and completion of the commissioning activities (including all documents related to the building warrant).
10. All operation and maintenance manuals and a full record of all maintenance procedures carried out during the Project Term.
11. Documents relating to events of Force Majeure, Delay Events, Compensation Events and Relief Events and the consequences of the same.
12. All formal notices, reports or submissions made to or received from the Authority's Representative in connection with the provision of Services, the Monitoring of Performance [or the availability of the Facilities].
13. All certificates, licences, registrations or warranties related to the provision of Services.
14. Documents in support of claims for Services Payments.
15. Documents submitted in accordance with Schedule 16 (*Change Protocol*) and all documents provided in support.
16. Documents related to referrals to the Dispute Resolution Procedure.
17. Documents related to change in ownership or any interest in any or all of the shares in Project Co and/or Hold Co.
18. Documents relating to the rescheduling of the indebtedness of Project Co or refinancing of the Project.
19. Tax invoices and records related to Value Added Tax.
20. Financial records, including audited and unaudited accounts of [Hold Co and] Project Co and related reports.
21. Records required by Law (including in relation to Health and Safety matters and health and safety files prepared pursuant to CDM Regulations) and all Consents.
22. Documents relating to insurance and insurance claims.
23. All other records, notices or certificates required to be produced and/or maintained by Project Co pursuant to this Agreement or any Project Document.
24. Records of all persons employed by Project Co or its sub-contractors and who are wholly or mainly engaged in the delivery of Services [including information equivalent to that referred to

in Section 1 (*Employee Information*) of Schedule 31 (*Employment and Pensions*) and identifying any person who is a Eligible Employee].³²⁷

25. For the avoidance of doubt, all items listed above should be stored in a secure but easily searchable and retrievable format.

³²⁷ Delete where 'No Employee Transfer' provisions adopted.

SCHEDULE 20:

DISPUTE RESOLUTION PROCEDURE

1. The procedure set out in this Schedule 20 (*Dispute Resolution Procedure*) shall apply to any dispute, claim or difference arising out of or relating to this Agreement ("**Dispute**") except where it has been excluded from this procedure by an express term of this Agreement.
2. This Dispute Resolution Procedure shall not impose any pre-condition on either party or otherwise prevent or delay either party from commencing proceedings in any court of competent jurisdiction in relation to any Dispute in which that party requires either:
 - 2.1 an order (whether interlocutory or final) restraining or requiring the other party from doing any act or compelling the other party to do any act; or
 - 2.2 a judgement for a liquidated sum to which there is no arguable defence.
3. Further, this Dispute Resolution Procedure shall not impose any pre-condition on either party or otherwise prevent or delay either party from commencing proceedings in any court of competent jurisdiction in relation to any Dispute where an Adjudication in accordance with paragraph 6 of this Schedule 20 (*Dispute Resolution Procedure*) has not been commenced or concluded. However, in such circumstances, the parties shall jointly apply to the Court for such proceedings to be stayed until no earlier than twenty-eight (28) days from the provision of a decision to be issued in accordance with paragraph 6.6 of this Schedule 20 (*Dispute Resolution Procedure*).
4. **Liaison Committee**

Subject to paragraph 2 of this Schedule 20 (*Dispute Resolution Procedure*), any Dispute shall first be referred to the Liaison Committee.
5. **Mediation**
 - 5.1 The parties may (if both parties so agree) refer the Dispute to mediation on such conditions as may be agreed. Any mediation shall be completed within thirty (30) Business Days of such referral (unless otherwise agreed by the parties) and any agreement arising therefrom shall be recorded in writing and signed by the parties and shall be binding and final to the extent set out in such agreement unless otherwise agreed.
 - 5.2 For the avoidance of doubt, mediation shall not be a precondition to the commencement of Adjudication or court proceedings.

6. Adjudication

- 6.1 Any Dispute shall be referred to Adjudication by either party at any time (notwithstanding that other dispute resolution procedures are running concurrently) giving the other party to the Dispute notice of its intention to refer the Dispute to adjudication (the "**Notice of Adjudication**"). The party giving the Notice of Adjudication (the "**Referring Party**") shall by the same means of communication send a copy of the Notice of Adjudication to an adjudicator selected in accordance with paragraph 6.2 below or paragraph 6.14 below (the "**Adjudicator**").
- 6.2 The Adjudicator nominated to consider a Dispute referred to him shall, subject to paragraph 6.14, be selected from the panel of adjudicators (the "**Construction and Operational Panel**") appointed in accordance with the following:
- 6.2.1 the first Construction and Operational Panel is comprised of the individuals that are named in paragraph 9 (*Panel Members*) of this Schedule 20 (*Dispute Resolution Procedure*);
- 6.2.2 if any member of either panel resigns or is otherwise no longer available to act as an adjudicator during the term of the Agreement, a replacement expert shall be appointed by Project Co and the Authority as soon as practicable;
- 6.2.3 the adjudicator to be appointed to the Construction and Operational Panel shall be wholly independent of Project Co, the Authority, the relevant Sub-Contractor and any of the major competitors of Project Co or the relevant Sub-Contractor;
- 6.2.4 if Project Co and the Authority are unable to agree on the identity of any replacement expert, the President for the time being of the Chartered Institute of Arbitrators Wales Branch shall appoint such adjudicator(s) within seven (7) days of any application for such appointment by either party;
- 6.2.5 no expert shall be entitled to accept an appointment to the Construction and Operational Panel unless he is willing also to be appointed as the adjudicator to adjudicate any dispute which:
- (a) may arise between Project Co and the Contractor and raises issues which, in the opinion of Project Co, are substantially the same as or connected with the Dispute in relation to which he has been appointed;
- (b) may arise between Project Co and the Service Provider and raises issues which, in the opinion of Project Co, are substantially the same as or connected with the Dispute in relation to which he has been appointed; and/or

- (c) may arise between Project Co and the Independent Tester and raises issues which, in the opinion of Project Co, are substantially the same as or connected with the Dispute in relation to which he has been appointed.
- 6.3 In the event that the first panel member approached is unable or unwilling to confirm acceptance of his appointment as Adjudicator or where he fails to respond within two (2) days of the date of the Notice of Adjudication, then the Referring Party shall invite an alternative person from the Construction and Operational Panel to act as Adjudicator. In the event that the second panel member is unwilling or unable to confirm acceptance of his appointment as Adjudicator within four (4) days of the date of the Notice of Adjudication or if the parties disagree as to the Construction and Operational Panel, then the Referring Party may apply to the President for the time being of the Chartered Institute of Arbitrators Wales Branch who shall within seven (7) days of the date of the Notice of Adjudication, nominate an Adjudicator (who shall also within the same period, confirm acceptance of his appointment as Adjudicator) to determine the Dispute described in the Notice of Adjudication;
- 6.4 The Referring Party shall, within seven (7) days of the date of the Notice of Adjudication, serve its statement of case (the "**Referral Notice**") on the Adjudicator (appointed pursuant to paragraph 6.3) and the other party to the Dispute (the "**Responding Party**"). The Referral Notice shall set out each element of the Referring Party's claim and the relief or remedy sought in sufficient detail so as to enable the Responding Party to understand and, where appropriate, respond to the claim and the Referral Notice shall be accompanied by copies of, or relevant extracts from, this Agreement and such other documents as the Referring Party intends to rely upon. The date of the referral of the Dispute (the "**Referral**") shall be the date of the Referral Notice.
- 6.5 Within seven (7) days of appointment in relation to a particular Dispute, the Adjudicator shall establish the procedure and timetable for the adjudication. The Adjudicator shall have absolute discretion as to how to conduct the adjudication, including whether a meeting is necessary. He shall establish the procedure and timetable subject to any limitation within this Agreement. The parties shall comply with any request or direction of the Adjudicator in relation to the adjudication.
- 6.6 The Adjudicator shall reach a decision on the Dispute within twenty-eight (28) days of the date of the Referral (or such other period as the parties may agree). The Adjudicator may extend the period of twenty-eight (28) days by up to fourteen (14) days with the consent of the Referring Party. Unless the parties otherwise agree, the Adjudicator shall give reasons for his decision. Unless and until the Dispute is finally determined by Court proceedings or by an agreement in writing between the parties, the Adjudicator's decision shall be binding on both parties who shall forthwith give effect to the decision.
- 6.7 The Adjudicator's costs of any reference shall be borne as the Adjudicator shall specify or, in default, equally by the parties. Each party shall bear its own costs arising out of the adjudication, including legal costs and the costs and expenses of any witnesses.
- 6.8 The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an adjudicator and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.

- 6.9 The Adjudicator shall act fairly and impartially and may take the initiative in ascertaining the facts and the Law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Agreement.
- 6.10 All information, data or documentation disclosed or delivered by a party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by Clause 62 (*Confidentiality*), disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the party disclosing or delivering the same and all copies shall be returned to such party on completion of the Adjudicator's work.
- 6.11 The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.
- 6.12 The Adjudicator may on his own initiative or on the request of the Referring Party or Responding Party correct his decision so as to remove a clerical or typographical error arising by accident or omission.
- 6.13 Any correction of a decision shall be made within five (5) days of the date upon which the Adjudicator's decision was delivered to the parties. Any correction of a decision shall form part of the decision.
- 6.14 If any Dispute raises issues which, in the opinion of Project Co, are substantially the same as or connected with issues raised in a dispute or difference arising out of or relating to any other agreement (all such agreements being referred to as the "**Related Agreements**") between:
- 6.14.1 Project Co and the Contractor;
- 6.14.2 Project Co and the Service Provider;³²⁸ and/or,
- 6.14.3 Project Co and the Independent Tester,

which was or has been referred to adjudication (the "**Related Adjudication**") and an adjudicator has already been appointed (the "**Related Adjudicator**") then Project Co may request that the Dispute be referred to the Related Adjudicator and paragraphs 6.15 to 6.17 shall apply.

³²⁸ Insert additional reference to the Welsh Ministers where the Deed of Reliance is being provided on a college project.

- 6.15 Subject to paragraphs 6.16 and 6.17 below, in the event that a Related Adjudicator directs that a Dispute under this Agreement be consolidated with a Related Adjudication with which he is dealing under the Related Agreement, then:
- 6.15.1 with effect from the time of such direction, the Dispute shall be determined by the Related Adjudicator, who shall become the Adjudicator; and
- 6.15.2 such direction shall be binding on Project Co and the Authority and both of them shall acknowledge the appointment of the Related Adjudicator as the adjudicator of the Dispute, with Project Co or the Authority (as the case may be) using its best endeavours to procure that the third party who is a party to the Related Agreement shall with effect from the time of such direction comply with the requirements of the Related Agreement (including if applicable any requirement or direction of the Related Adjudicator appointed under such Related Agreement) as to the future conduct of the determination of the Dispute and the Related Adjudication; and
- 6.15.3 notwithstanding paragraph 6.7, Project Co and the Authority shall be jointly responsible with the third party who is a party to the Related Agreement for the Related Adjudicator's fees and expenses including those of any specialist consultant appointed under the adjudication procedure in the Related Agreement, in respect of the period in which the Dispute is consolidated with the Related Adjudication pursuant to a direction of the Related Adjudicator ("**Consolidated Adjudication Costs**"). Project Co and the Authority agree that the Related Adjudicator shall have the discretion to make directions to require Project Co, the Authority and the third party who is a party to the Related Agreement to pay or make contribution to the Consolidated Adjudication Costs in different proportions. If no such directions are made, Project Co, the Authority and the third party who is a party to the Related Agreement shall bear the Consolidated Adjudication Costs in equal shares, and if Project Co, the Authority or the third party has paid more than such equal share, that party or third party shall be entitled to a contribution from the other party, parties or third party, as the case may be.
- 6.16 Notwithstanding anything to the contrary a Dispute under this Agreement may only be consolidated with a Related Adjudication, if the Related Adjudicator receives particulars of the Dispute within ten (10) days of the referral of the Related Adjudication to the Related Adjudicator under the Related Agreement.
- 6.17 Where Project Co requests that a Dispute under this Agreement be consolidated (in terms of paragraph 6.14) with a Related Adjudication and heard by the Related Adjudicator, the Dispute may only be consolidated where the Authority has previously consented in writing (or is deemed to have consented) to the identity of the Related Adjudicator appointed in respect of the Related Adjudication.
- 6.17.1 Where the Related Adjudicator is on the Construction and Operational Panel at the time of the Referral then the Authority shall be deemed to have consented to the appointment of the Related Adjudicator.
- 6.17.2 Subject to paragraph 6.18, the Authority's consent to such request shall not be unreasonably withheld and if the Authority refuses to consent, it

must give reasons in writing for its refusal. Should the Authority fail to respond within two (2) Business Days of receipt of such a request it shall be deemed to have consented to the appointment of the Related Adjudicator.

- 6.18 Project Co shall take all reasonable steps to procure that the Adjudicator appointed in respect of any dispute under a Related Agreement is an individual, who at that time is on the Construction and Operational Panel.

7. Court Proceedings

Subject to paragraph 6 (*Adjudication*) all Disputes, to the extent not finally resolved pursuant to the procedures set out in the foregoing provisions of this Schedule 20 (*Dispute Resolution Procedure*), shall be referred to the High Court of Justice of England and Wales.

8. Submissions in Relation to Adjudication

- 8.1 If any Dispute raises issues which relate to:

8.1.1 any dispute between Project Co and the Contractor arising under the Construction Contract or otherwise affects the relationship or rights of Project Co and/or the Contractor under the Construction Contract (the "**Construction Contract Dispute**"); or

8.1.2 any dispute between Project Co and the Service Provider arising under the Service Contract or otherwise affects the relationship or rights of Project Co and/or the Service Provider under the Service Contract (the "**Service Contract Dispute**"); or

8.1.3 any dispute between Project Co and the Independent Tester arising under the Independent Tester Contract or otherwise affects the relationship or rights of Project Co and/or the Independent Tester under the Independent Tester Contract (the "**Independent Tester Contract Dispute**"),

then Project Co may include as part of its submissions made to the Adjudicator submissions made by the Contractor or by the Service Provider or the Independent Tester as appropriate.

- 8.2 Any submissions made by the Contractor or the Service Provider or the Independent Tester shall:

8.2.1 be made within the time limits applicable to the delivery of submissions by Project Co to the Adjudicator; and

8.2.2 concern only those matters which relate to the Dispute between the Authority and Project Co arising out of this Agreement or in connection therewith.

- 8.3 Where the Contractor or the Service Provider or the Independent Tester makes submissions in any reference before the Adjudicator, the Adjudicator's costs of such reference shall be borne as the Adjudicator shall specify, or in default, one-third by the Authority and two-thirds by Project Co.
- 8.4 The Authority shall have no liability to the Contractor or the Service Provider or the Independent Tester arising out of or in connection with any decision of the Adjudicator or in respect of the costs of the Contractor or the Service Provider or the Independent Tester in participating in the resolution of any Dispute under this Agreement.
- 8.5 Project Co shall not allow the Contractor or the Service Provider or the Independent Tester access to any Confidential Information relevant to the issues in dispute between the Authority and Project Co save where:
- 8.5.1 the Confidential Information is relevant also to the issues relating to the Construction Contract Dispute or the Service Contract Dispute or the Independent Tester Contract Dispute as the case may be; and
- 8.5.2 Project Co has first delivered to the Authority a written undertaking from the Contractor and/or the Service Provider and/or the Independent Tester (as appropriate) addressed to the Authority that they shall not use any such Confidential Information otherwise than for the purpose of the dispute resolution proceedings under this Agreement and that they shall not disclose such Confidential Information to any third party other than the Adjudicator or the courts or any professional adviser engaged by the Contractor or the Service Provider or Independent Tester (as appropriate) to advise in connection with the Dispute.

9. **Panel Members**

The Construction and Operational Panel members referred to in paragraph 6 are, as at the date of this agreement, as follows:

[♦]

10. **Continuing Obligations**

Unless this Agreement has already been repudiated or terminated, the parties shall, (notwithstanding that any Dispute is subject to the Dispute Resolution Procedure set out in this Schedule 20 (*Dispute Resolution Procedure*)), continue to carry out their obligations in accordance with this Agreement.

SCHEDULE 21: ³²⁹

PROJECT CO INFORMATION

SECTION 1

PROJECT CO INFORMATION

Name :

Date of Incorporation :

Registered number :

Registered office :

Directors :

Name	Address

Secretary :

Subsidiary undertakings at the date of this Agreement :

Authorised and issued share capital at the date of this Agreement :

³²⁹ This has been included as an example only and the Authority should amend as appropriate to its individual project.

Name and address of registered holder	Number and class held	Amount paid up

Loan Stock at the date of this Agreement issued as follows:

Name and address of registered holder	Nominal value of Loan stock

Loan Stock Provisions :

SECTION 2

HOLD CO INFORMATION

Name :

Date of Incorporation :

Registered number :

Registered office :

Directors :

Name	Address

Secretary :

Subsidiary undertakings at the date of this Agreement :

Authorised and issued share capital at the date of this Agreement :

Name and address of registered holder	Number and class held	Amount paid up

Loan Stock at the date of this Agreement issued as follows:

Name and address of registered holder	Nominal value of Loan stock

Loan Stock Provisions :

**SCHEDULE 22:
CERTIFICATES**

Handback Certificate

Issued by: [insert name of Independent Surveyor]

Address: [INSERT ADDRESS]

Authority: [INSERT NAME]

Address: [INSERT ADDRESS]

Issued to:

Project Co: [INSERT NAME]

Address: [INSERT ADDRESS]

Issue date:

Works :

Situated at: *[insert name of Facility]*

MIM Project Agreement between *[insert name of the Authority]* and *[insert name of Project Co]* dated:

Under the terms of the above-mentioned MIM Project Agreement, *I/we certify that the condition of the Facility/ies referred to above is in accordance with paragraph 2 of Schedule 18 (*Handback Procedure*) of the above mentioned MIM Project Agreement.

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned MIM Project Agreement (except where they are defined specifically in this Certificate).

To be signed by or for the issuer named above.

Signed.....

[INSERT NAME OF INDEPENDENT SURVEYOR]

**delete as appropriate*

Certificate of Practical Completion

Issued by: Independent Tester – **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issued to:

Project Co: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Authority: **[INSERT NAME]**

Address: **[INSERT ADDRESS].**

Issue date:

***[[Main] Works]/ [Post Completion Works³³⁰] relating to the Facility named below**

Situated at:*[insert name of Facility]*

MIM Project Agreement between *[insert name of the Authority]* and *[insert name of Project Co]* dated:

Independent Tester Contract among *[insert name of the Authority]*, *[insert name of Project Co]*, *[insert name of Contractor]* and *[insert name of Senior Funder]* dated:

Under the terms of the above-mentioned MIM Project Agreement and Independent Tester Contract, *I/we certify that the Actual Completion Date of the ***[Main] Works** was achieved on [♦]/ [the Actual Post Completion Works Date in respect of the Post Completion Works was achieved on [♦] and that [building warrant/temporary occupation] approval was achieved on [♦], reference [♦], in respect of *[insert name of Facility]*.³³¹

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned MIM Project Agreement (except where they are defined specifically in this Certificate).

To be signed by or for the issuer named above.

Signed.....

[INSERT NAME OF INDEPENDENT TESTER]

**delete as appropriate*

³³⁰ Where there is more than one phase of Post Completion Works at a Facility, this drafting should be adjusted accordingly.

³³¹ As above.

Commissioning Completion Certificate

Issued by: Independent Tester – **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issued to:

Project Co: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Authority: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issue date:

***[[Main] Works]/ [Post Completion Works]³³² relating to the Facility named below**

Situated at:*[insert name of Facility]*

MIM Project Agreement between *[insert name of the Authority]* and *[insert name of Project Co]* dated:

Independent Tester Contract among *[insert name of the Authority]*, *[insert name of Project Co]*, *[insert name of Contractor]* and *[insert name of Senior Funder]* dated:

Under the terms of the above-mentioned MIM Project Agreement and Independent Tester Contract, *I/we certify that the Actual Commissioning End Date for the *[[Main] Works]/[Post Completion Works] at *[insert name of Facility]* was achieved on [♦].³³³

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned MIM Project Agreement (except where they are defined specifically in this Certificate).

To be signed by or for the issuer named above.

Signed.....

[INSERT NAME OF INDEPENDENT TESTER]

*delete as appropriate

³³² Where there is more than one phase of Post Completion Works at a Facility, this drafting should be adjusted accordingly.

³³³ As above.

Decant Completion Certificate

Issued by: Facility Representative [**INSERT NAME**]

Address: [INSERT ADDRESS]

Issued to:

Project Co's Migration Manager: [**INSERT NAME**]

Address: [INSERT ADDRESS]

Authority: [**INSERT NAME**]

Address: [INSERT ADDRESS]

Issue date:

Decant to the Facility named below

Situated at: [*insert name of Facility*]

MIM Project Agreement between [*insert name of the Authority*] and [*insert name of Project Co*]
dated:

Under the terms of the above-mentioned MIM Project Agreement I confirm that it is my opinion that Project Co has decanted all Authority Equipment [and ICT Assets] in accordance with the Decant Protocol [and that from inspections to date all items appear to have been decanted and without damages.]/ [with the exception of [*details of any loss or damage and agreed sum of compensation paid or replacement items procured to be set out here.*]]

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned MIM Project Agreement (except where they are defined specifically in this Certificate).

Signed.....

[**Facility Representative**]

Acknowledged and agreed

Signed.....

[**Project Co's Migration Manager**]

Snagging Items Completion Certificate

Issued by: Independent Tester – **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issued to:

Project Co: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Authority: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issue date:

***[[Main] Works]/ [Post Completion Works³³⁴] relating to the Facility named below** Situated at:*[insert name of Facility]*

MIM Project Agreement between *[insert name of the Authority]* and *[insert name of Project Co]* dated:

Independent Tester Contract among *[insert name of the Authority]*, *[insert name of Project Co]*, *[insert name of Contractor]* and *[insert name of Funder]* dated:

Under the terms of the above-mentioned MIM Project Agreement and Independent Tester Contract, *I/we certify that the Snagging Items included on *[Snagging List]/[PCW Snagging List] [Insert List Number.....] have been completed and that the Snagging Completion Date in respect of the Snagging Items identified on issue of the *[Certificate of Practical Completion] [for the Main Works] [Certificate of Practical Completion for the Post Completion Works³³⁵] [ICT Handover Acceptance Certificate] was achieved on [♦].

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned MIM Project Agreement (except where they are defined specifically in this Certificate).

To be signed by the issuer named above

Signed..... Date

³³⁴ Where there is more than one phase of Post Completion Works at a Facility this drafting should be adjusted accordingly.

³³⁵ As above.

[INSERT NAME OF INDEPENDENT TESTER]

Receipt of this Certificate must to be acknowledged by Project Co's Representative.

Signed..... Date

Name:

Receipt of this Certificate must be acknowledged by the Authority's Representative.

Signed..... Date

Name:

**delete as appropriate*

[Certificate of WiFi Completion

Issued by: Independent Tester – [INSERT NAME]

Address: [INSERT ADDRESS]

Issued to:

Project Co: [INSERT NAME]

Address: [INSERT ADDRESS]

Authority: [INSERT NAME]

Address: [INSERT ADDRESS]

Issue date:

Situated at: [insert name of Facility]

MIM Project Agreement between [insert name of the Authority] and [insert name of Project Co] dated:

Independent Tester Contract among [insert name of the Authority], [insert name of Project Co], [insert name of Contractor] and [insert name of Funder] dated:

Under the terms of the above-mentioned MIM Project Agreement and Independent Tester Contract, *I/we certify that the WiFi Actual Completion Date for [insert name of Facility] was achieved on [♦].

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned MIM Project Agreement (except where they are defined specifically in this Certificate).

To be signed by the issuer named above

Signed..... Date

[INSERT NAME OF INDEPENDENT TESTER]

*delete as appropriate]

ICT HANDOVER ACCEPTANCE CERTIFICATE

Issued by: Independent Tester – **[INSERT NAME]**

Address: [INSERT ADDRESS]

Issued to:

Project Co: **[INSERT NAME]**

Address: [INSERT ADDRESS]

Authority: **[INSERT NAME]**

Address: [INSERT ADDRESS]

Issue date:

Situated at: *[insert name of Facility]*

MIM Project Agreement between *[insert name of the Authority]* and *[insert name of Project Co]* dated:

Independent Tester Contract among *[insert name of the Authority]*, *[insert name of Project Co]*, *[insert name of Contractor]* and *[insert name of Funder]* dated:

Under the terms of the above-mentioned MIM Project Agreement and Independent Tester Contract, *I/we certify that the ICT Handover Requirements in respect of *[insert name of Facility]* have been met.

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned MIM Project Agreement (except where they are defined specifically in this Certificate).

To be signed by the issuer named above

Signed..... Date

[INSERT NAME OF INDEPENDENT TESTER]

Receipt of this Certificate must be acknowledged by Project Co's Representative.

Signed..... Date

Name:

Receipt of this Certificate must be acknowledged by Authority's Representative.

Signed..... Date

Name:

*[*delete as appropriate]*

SCHEDULE 23:

REFINANCING

Requirement for Authority Consent

1. Project Co shall obtain the Authority's prior written consent to any Qualifying Refinancing and both the Authority and Project Co shall at all times act in good faith with respect to any Refinancing.
2. The Authority shall be entitled to receive a one-third share of any Refinancing Gain arising from any Qualifying Refinancing.
3. The Authority shall not unreasonably withhold or delay its consent to a Qualifying Refinancing.

Project Co Details

4. Project Co shall promptly provide the Authority with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Authority shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with the Refinancing whether that Refinancing is a Qualifying Refinancing or not.

Receipt of Gain

5. The Authority shall receive its share of any Refinancing Gain as³³⁶:
 - 5.1 a single payment of the amount which, but for the provisions of this Schedule 23 (*Refinancing*), would otherwise be capable of being released as a Distribution on or about the date of the Refinancing;
 - 5.2 a reduction in the Annual Service Charges over the remaining term of this Agreement; or
 - 5.3 a combination of the above.

³³⁶ The Authority should take into account UK Accounting Standards in deciding whether to take its share of any Refinancing Gain by way of a reduction to the Annual Service Charge or lump sum payment.

Method of Calculation

6. The Authority and Project Co will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain and payment of the Authority's share of the Refinancing Gain. For the avoidance of doubt the calculation of the Authority's share of any Refinancing Gain pursuant to this Agreement shall be treated wholly separately from the calculation of Distributions which may be due and payable to the Authority as a Relevant Person. If the parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of the Authority's share, the dispute shall be determined in accordance with Schedule 20 (*Dispute Resolution Procedure*).

Costs

- 6.1 The Refinancing Gain shall be calculated after taking into account the reasonable and proper professional costs that each party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Authority will be paid to the Authority by Project Co within twenty-eight (28) days of any Qualifying Refinancing.
- 6.2 Without prejudice to the other provisions of this Schedule 23 (*Refinancing*), Project Co shall:
- 6.2.1 notify the Authority of all Notifiable Financings on becoming aware of the same and again when they are entered into and provide full details of the same; and
- 6.2.2 include a provision in the Funding Agreements (other than the Subordinated Funding Agreements) whereby it is entitled to be informed of any proposals which the Senior Funders may have to refinance the Funding Agreements (other than the Subordinated Funding Agreements).

Definitions

In this Schedule 23 (*Refinancing*) and elsewhere in this Agreement (save where Schedule 1 (*Definitions and Interpretation*) provides to the contrary) the following words and expressions shall have the following meanings:

"Distribution"

means:

- (a) whether in cash or in kind, any:
- (i) dividend or other distribution in respect of share capital (whether made validly in accordance with the Articles of Association or otherwise);
- (ii) reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;

- (iii) payments under the Subordinated Funding Agreements (whether of principal, interest, breakage costs or otherwise);
 - (iv) payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms;
 - (v) the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms; or
- (b) the early release of any Contingent Funding Liabilities, the amount of such release being deemed to be a gain for the purposes of any calculation of Refinancing Gain;

"EEA" means from time to time the European Economic Area as created by The Agreement on the European Economic Area 1992 or any successor or replacement body, association, entity or organisation which has assumed either or both the function and responsibilities of the European Economic Area;

"Equity IRR" means the projected blended rate of return to the Relevant Persons over the full term of the Contract, having regard to Distributions made and projected to be made;

"Exempt Refinancing" means:

- (a) any Refinancing that was fully taken into account in the calculation of the Annual Service Charges;
- (b) a change in taxation or change in accounting treatment;
- (c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of:
 - (i) breach of representations and warranties or undertakings;
 - (ii) movement of monies between the [Project Accounts] in accordance with the terms of the Senior Funding Agreements as at Financial Close;

- (iii) late or non-provision of information, consents or licences;
 - (iv) amendments to Sub-Contracts;
 - (v) approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Funding Agreements);
 - (vi) restrictions imposed by Senior Funders on the dates at which the Senior Debt can be advanced to Project Co under the Senior Funding Agreements [and/or amounts released from [Escrow Account] during the [Initial Availability Period], each as defined in the Senior Funding Agreements and which are given as a result of any failure by Project Co to ensure that the construction work is performed in accordance with the agreed construction programme and which is notified in writing by Project Co or the Senior Funders to the Authority prior to being given]³³⁷;
 - (vii) changes to milestones for drawdown [and/or amounts released from the [Escrow Account] during the [Initial Availability Period] set out in the Senior Funding Agreements and which are given as a result of any failure by Project Co to ensure that construction work is performed in accordance with the agreed construction programme and which is notified in writing by Project Co or the Senior Funders to the Authority prior to being given];
 - (viii) failure by Project Co to obtain any consent by statutory bodies required by the Senior Funding Agreements; or
 - (ix) voting by Senior Funders and the voting arrangements between the Senior Funders in respect of the levels of approval required by them under the Senior Funding Agreements;
- (d) any amendment, variation or supplement of any agreement approved by the Authority as part of any Qualifying Change under this Agreement;

³³⁷ The defined terms referred to in limb (c)(vi) should follow those contained in the Senior Funding Agreements –the Initial Availability Period being the construction phase drawdown period. These will need to be checked.

- (e) any sale of shares in Project Co [or Hold Co] by the Shareholders or securitisation of the existing rights and/or interests attaching to shares in Project Co [or Hold Co] provided that this paragraph (e) shall, in respect of shares in Hold Co, only apply for so long as Hold Co holds one hundred per cent (100%) of the issued share capital of Project Co];
- (f) any sale or transfer of the Subordinated Funders' existing rights and/or interests under the Subordinated Funding Agreements or securitisation of the Subordinated Funders' existing rights and/or interests under the Subordinated Funding Agreements; or
- (g) any Qualifying Bank Transaction;

"Insurance Undertaking" has the meaning given in the rules from time to time of the Financial Conduct Authority;

"Net Present Value" means the aggregate of the discounted values, calculated as at the estimated date of the Refinancing, of each of the relevant projected Distributions, in each case discounted using the Threshold Equity IRR;

"Notifiable Financings" means any Refinancing described in paragraphs (a) or (c) of the definition of Refinancing and any other arrangement which has or would have a similar effect or which has or would have the effect of limiting Project Co's or any Associated Company's ability to carry out any such refinancing or other arrangements that would have a similar effect;

"Project Accounts" means accounts referred to in and required to be established under the Senior Funding Agreements;

"Qualifying Transaction" **Bank** means:

- (a) the syndication by a Senior Funder, in the ordinary course of its business, of any of its rights or interests in the Senior Funding Agreements;
- (b) the grant by a Senior Funder of any rights of participation, or the disposition by Senior Funder of any of its rights or interests (other than as specified in paragraph (a) above in respect of the Senior Funding Agreements in favour of:
 - (i) any other Senior Funder;
 - (ii) any institution which is recognised or permitted under the law of any member state

of the EEA to carry on the business of a credit institution pursuant to Council Directive 2013/36/EU relating to the taking up and pursuit of business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EEA member state;

- (iii) a local authority or public authority;
 - (iv) a trustee of a charitable trust which has (or has had at any time during the previous two (2) years) assets of at least ten million pounds (£10 million) (or its equivalent in any other currency at the relevant time);
 - (v) a trustee of an occupational pension scheme or stakeholder pension scheme where the trust has (or has had at any time during the previous two (2) years) at least 50 members and assets under management of at least ten million pounds (£10 million) (or its equivalent in any other currency at the relevant time);
 - (vi) an EEA or Swiss Insurance Undertaking;
 - (vii) a Regulated Collective Investment Scheme;
 - (viii) any Qualifying Institution; or
 - (ix) any other institution in respect of which the prior written consent of the Authority has been given; and/or
- (c) the grant by a Senior Funder of any other form of benefit or interest in either the Senior Funding Agreements or the revenues or assets of Project Co [or Hold Co], whether by way of security or otherwise, in favour of:
- (i) any other Senior Funder;
 - (ii) any institution specified in paragraphs (b)(ii) to (b)(vii) above;
 - (iii) any Qualifying Institution; or

- (iv) any other institution in respect of which the prior written consent of the Authority has been given;

"Qualifying Institution" means [♦]³³⁸;

"Qualifying Refinancing" means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing;

"Refinancing" means:

- (a) any amendment, variation, novation, supplement or replacement of any Funding Agreement (other than any Subordinated Funding Agreement);
- (b) the exercise of any right, or the grant of any waiver or consent, under any Funding Agreement (other than any Subordinated Funding Agreement);
- (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Funding Agreements (other than the Subordinated Funding Agreements) or the creation or granting of any other form of benefit or interest in either the Funders' Agreements (other than the [Subordinated Funding Agreements]) or the contracts, revenues or assets of Project Co whether by way of security or otherwise; or
- (d) any other arrangement put in place by Project Co or another person which has an effect which is similar to any of (a) to (c) above or which has the effect of limiting Project Co's or any Associated Company's ability to carry out any of (a) to (c) above;

"Refinancing Gain" means an amount equal to the greater of zero and $(A - B)$, where:

A = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing but disregarding any Distribution that, but for the Refinancing, would not be made) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing; and

³³⁸ If there are particular institutions which, for particular reasons, do not come within the other heads of Qualifying Bank Transaction Project Co may propose to the Authority that such institutions be included as Qualifying Institutions. In the light of the broad drafting of the other provisions in the definition of Qualifying Bank Transaction, the Authority would expect any such proposal to be specific and limited. Broad group definitions will not be entertained.

B = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing;

"Regulated Collective Investment Scheme"	has the meaning given in the rules from time to time of the Financial Conduct Authority;
"Relevant Person"	means a Shareholder and any of its Affiliates;
"Shareholder"	means any person from time to time holding share capital in Project Co or [Hold Co]; and
"Threshold Equity IRR"	means [♦] ³³⁹ %.

³³⁹ This is the nominal post tax (i.e. post tax with respect to Project Co, pre-tax with respect to the shareholders in Project Co) Equity IRR set out in the Base Case, which excludes the effects of any anticipated refinancing.

SCHEDULE 24:

[LIAISON PROCEDURE]

1. [The Authority and Project Co shall establish and maintain throughout the Project Term a joint liaison committee (the "**Liaison Committee**"), consisting of [three (3)] representatives of the Authority (one of whom shall be appointed Chairman) and [three (3)] representatives of Project Co which shall have the functions described below.

2. The functions of the Liaison Committee shall be:
 - 2.1 to provide a means for the joint review of issues relating to all day to day aspects of the performance of this Agreement, including but not limited the Joint Operating Protocol;

 - 2.2 to provide a forum for joint strategic discussion, considering actual and anticipated changes in the market and business of the Authority, and possible variations of this Agreement to reflect those changes or for the more efficient performance of this Agreement; and

 - 2.3 in certain circumstances, pursuant to Schedule 20 (*Dispute Resolution Procedure*), to provide a means of resolving disputes or disagreements between the parties amicably.

3. The role of the Liaison Committee is to make recommendations to the parties, which they may accept or reject at their complete discretion. Neither the Liaison Committee itself, nor its members acting in that capacity, shall have any authority to vary any of the provisions of this Agreement or to make any decision which is binding on the parties. Neither party shall rely on any act or omission of the Liaison Committee, or any member of the Liaison Committee acting in that capacity, so as to give rise to any waiver or personal bar in respect of any right, benefit or obligation of either party.

4. The parties shall appoint and remove their representatives on the Liaison Committee by written notice delivered to the other at any time. A representative on the Liaison Committee may appoint and remove an alternate (who may be another representative of that party) in the same manner. If a representative is unavailable (and the other party's representatives may rely on the alternate's statement that the representative is unavailable) his alternate shall have the same rights and powers as the representative.

5. Subject to the provisions of this Agreement, the members of the Liaison Committee may adopt such procedures and practices for the conduct of the activities of the Liaison Committee as they consider appropriate from time to time and:
 - 5.1 may invite to any meeting of the Liaison Committee such other persons as its members may agree; and

 - 5.2 receive and review a report from any person agreed by its members.

6. Recommendations and other decisions of the Liaison Committee must have the affirmative vote of all those voting on the matter, which must include not less than one (1) representative of the Authority and not less than one (1) representative of Project Co.
7. Each member of the Liaison Committee shall have one (1) vote. The Chairman shall not have a right to a casting vote.
8. The Liaison Committee shall meet at least once each Term (unless otherwise agreed by its members) and from time to time as necessary.
9. Any member of the Liaison Committee may convene a meeting of the Liaison Committee at any time.
10. Meetings of the Liaison Committee shall be convened on not less than ten (10) Business Days' notice (identifying the agenda items to be discussed at the meeting) provided that in emergencies a meeting may be called at any time on such notice as may be reasonable in the circumstances.
11. Where the Liaison Committee decides it is appropriate, meetings may also be held by telephone or another form of telecommunication, by which each participant can hear and speak to all other participants at the same time.
12. Minutes of all recommendations (including those made by telephone or other form of telecommunication) and meetings of the Liaison Committee shall be kept by Project Co and copies circulated promptly to the parties, normally within five (5) Business Days of the making of the recommendation or the holding of the meeting. A full set of minutes shall be open to inspection by either party at any time, upon request.]

SCHEDULE 25:
INSURANCE PROCEEDS ACCOUNT AGREEMENT

AGREEMENT

AMONG:

- (1) [PROJECT CO] of [♦] (the "**Issuer**");
- (2) [AUTHORITY] (the "**Authority**");
- (3) [FUNDER] of [♦] (the "**Account Bank**"); and
- (4) [TRUSTEE] of [♦] (the "**Security Trustee**").

WHEREAS

- A The Issuer and the Authority have agreed to open an insurance proceeds account in their joint names.
- B The parties hereto have agreed to set out the terms on which payments may be made to or from that account in this Agreement.

IT IS AGREED as follows:

1. **[Definitions and Interpretation]**

"Account Holders"	has the meaning given to it in Clause 2 (<i>Insurance Proceeds Account</i>);
"Account"	has the meaning given to it in Clause 2.1 (<i>Insurance Proceeds Account</i>);
"Credit Provider"	means [♦];
"Event of Default"	has the meaning given in Clause 4.5 (<i>General Provisions for the Account</i>) of this Agreement;
"MIM Project Agreement"	means the agreement dated [♦] between the Issuer and the Authority in relation to [♦];

"Qualifying Bank"	means any institutions which are recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 2006/48EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EU member state;
"Senior Finance Documents"	means [♦];
"Security Documents"	means [♦].

Capitalised terms defined in the MIM Project Agreement shall have the same meaning in this Agreement.]

2. **Insurance Proceeds Account**

Each of the Issuer and the Authority (together the "**Account Holders**") hereby appoint [♦] as the Account Bank.

- 2.1 The Account Bank has opened on its books, at its office at [♦], an account in the joint names of the Account Holders designated the Authority Insurance Proceeds Account (the "**Account**").
- 2.2 The Account Bank shall, save as otherwise provided herein, maintain the Account in accordance with its usual practices, provided that, in the event of any conflict between the provisions of this Agreement and any applicable mandate, the provisions of this Agreement shall prevail.
- 2.3 Notwithstanding anything else in this Agreement, no person shall request or require that any withdrawal be made from the Account if it would cause the Account to become overdrawn and to the extent that any withdrawal (if made in full) would cause the Account to become so overdrawn, such withdrawal shall be made in part in as great an amount as possible as will not result in such Account becoming overdrawn.
- 2.4 Where any withdrawal required under this Agreement cannot be made in its entirety, the Account Bank shall promptly notify both of the Account Holders of that fact and provide details of the payment not made, the date on which it should have been made and the amount unpaid.
- 2.5 Each amount from time to time standing to the credit of the Account shall bear interest at the rate agreed between the Account Bank and the Account Holders from time to time, such interest to be credited to the Account in accordance with the relevant mandate.

- 2.6 Subject to and in accordance with the provisions of this Agreement, including without limitation Clause 4 (*General Provisions for the Account*) of this Agreement, the Account Bank agrees that it shall make such payments out of the amount standing to the credit of the Account as may from time to time be requested by the Account Holders jointly subject to the restrictions as contained in this Agreement. Save as otherwise provided in this Agreement, no party shall be entitled to require the Account Bank to make, and the Account Bank shall not make, any payment out of the amount standing to the credit of the Account.
- 2.7 Subject to Clause 8.6 (*The Account Bank*) of this Agreement, the Account Holders shall maintain the Account with the Account Bank until the termination of the MIM Project Agreement. If so instructed after the termination of the MIM Project Agreement, the Account Bank shall, at the sole cost and expense of the Issuer, terminate the Account in accordance with the relevant instructions and pay any amount standing to the credit of such accounts as the Account Holders may elect in accordance with Clause 4.1 (*General Provisions for the Account*) of this Agreement.

3. Receipts and Payments

- 3.1 The Account may only be used in accordance with the terms of and for the purposes set out in this Clause 3 (*Receipts and Payments*).
- 3.2 The Account shall be used for receiving, to the extent required by Clause 54 (*Insurance*) of the MIM Project Agreement, the proceeds of all Insurances (as defined in the MIM Project Agreement).
- 3.3 Subject to restrictions set out in this Agreement, the Account shall only be used for applying the proceeds of the Authority Insurances in accordance with Clause 54 (*Insurance*) of the MIM Project Agreement either directly or indirectly by way of the reimbursement to the Issuer of costs or expenses incurred or monies paid by it (or on its behalf) in or towards satisfaction of the reinstatement restoration or replacement requirements of that Clause 54 (*Insurance*). In the event that any amount standing to the credit of the Account is not so required to be applied, such amount shall (subject to Clause 4.3 and 4.5 (*General Provisions for the Account*) below) be paid by the Account Bank to the [Receipts Account]³⁴⁰, or as otherwise instructed by the Security Trustee pursuant to Clause 4.5 (*General Provisions for the Account*) below.

4. General Provisions for the Account

- 4.1 Subject to Clauses 4.3 and 4.5 (*General Provisions for the Account*) below, and provided that:
- 4.1.1 the Account Bank has received notice in writing from two (2) signatories, one of which shall be an authorised signatory of the Issuer and the other an authorised signatory of the Authority, as listed under the applicable mandate that such payment is authorised under this Agreement; and

³⁴⁰ To be defined on a project specific basis.

4.1.2 no notice has been given to the Account Bank by the Credit Provider prior to the making of such payment or transfer of an Event of Default which is subsisting and the Account Bank has no actual notice that an Event of Default will occur as a result of the making of any such payment or transfer,

the Account Bank agrees that it shall only make payments or transfers from the Account on the request of the Account Holders.

4.2 The Authority undertakes to provide notice to the Account Bank as prescribed in Clause 4.1.1 (*General Provisions for the Account*) for, the purposes of applying any part of the balance standing to the credit of the Account in accordance with Clause 3.3 (*Receipts and Payments*) of this Agreement. Each of the Account Bank and the Issuer shall be entitled to treat any act of the authorised signatory of the Authority as being expressly authorised by the Authority and neither the Account Bank nor the Issuer shall be required to determine whether an express authority has in fact been given.

4.3 No payments or transfers from the Account shall be made after an Event of Default which is continuing until the Credit Provider has confirmed to the Account Bank that such payment or transfer may be made except as expressly permitted under this Agreement. The Account Bank shall not be under any obligation to investigate the compliance of any payment with this Agreement.

4.4 All amounts withdrawn from the Account for transfer to another account or for application in or towards making a specific payment or meeting a specific liability shall be transferred to that account or applied in or towards making that payment or meeting that liability, and for no other purpose.

4.5 Notwithstanding any other provision of this Agreement, at any time following the occurrence of any Event of Default (as defined in Schedule 4 (*Funders' Direct Agreement*) of the MIM Project Agreement) which is continuing and has not been waived or remedied, the Security Trustee may at any time give notice to the Account Bank instructing it not to act on the instructions of or at the request of the Issuer in relation to any sums at any such time standing to the credit of the Account. Without prejudice to the foregoing, the Account Bank agrees that it shall pay any amount standing to the credit of the Account and payable to the Issuer in accordance with Clause 3.3 (*Receipts and Payments*) of this Agreement to such a bank account as the Security Trustee shall direct following the occurrence of any Event of Default. The Account Bank agrees that it shall not so act and shall act on the instructions of the Security Trustee in place of the Issuer.

4.6 In establishing the balance standing to the credit of the Account at any time, the Account Bank may take into account credits to and withdrawals from such Account which are to be made on such day.

5. **Qualifying Bank**

If at any time the Account Bank ceases to be a Qualifying Bank, the Account Holders shall promptly open or cause to be opened a new account with a Qualifying Bank on the same terms as the Account and the Account Holders shall take all such action as may be required to open the new account.

6. **Charges**

The charges of the Account Bank (if any) for the operation of the Account shall be for the account of the Account Holders in equal amounts and shall be debited from the balance standing to the credit of the Account as from time to time agreed between the Account Bank, the Authority and the Issuer.

7. **Mandates**

Each of the Account Holders will deliver to the Account Bank on or prior to the date hereof the applicable mandate together with authorised signature lists for both the Issuer and the Authority.

8. **The Account Bank**

8.1 The Account Bank may:

8.1.1 engage and pay reasonable fees for the advice or services of any lawyers, accountants or other experts whose advice or services may to it seem necessary, expedient or desirable and rely upon any advice so obtained;

8.1.2 rely upon any communication or document believed by it to be genuine and, in particular, rely upon any notice, request or other communication of the Account Holders for the purposes of this Agreement if such notice, request or other communication purports to be signed or sent by or on behalf of an authorised signatory of the Account Holders;

8.1.3 assume that no Event of Default has occurred unless it has actual notice to the contrary; and

8.1.4 assume that all conditions for the making of any payment out of the amount standing to the credit of the Account which is specified in the MIM Project Agreement or any of the Senior Finance Documents has been satisfied, unless it has actual notice to the contrary.

8.2 Notwithstanding anything to the contrary expressed or implied herein and subject to Clause 2 (*Insurance Proceeds Account*) of this Agreement, the Account Bank shall not:

8.2.1 be bound to enquire as to the occurrence or otherwise of an Event of Default or be affected by notice of any of the same except by reason of and to the extent expressly provided in this Agreement;

8.2.2 be bound to account to any other party hereto for any sum or the profit element of any sum received by it for its own account;

- 8.2.3 save as provided in this Agreement be bound to disclose to any other person any information relating to any other party hereto;
- 8.2.4 be under any fiduciary duty towards any other party hereto or under any obligations other than those for which express provision is made in this Agreement;
- 8.2.5 have any responsibility to ensure that the information set out in any instructions received by it hereunder are correct or to check or enquire as to or otherwise be affected by whether any condition has been or will be met or fulfilled or any instruction is properly given on behalf of the person from whom it purports to be given or any instruction is given properly other than to exercise the bankers duty of care; or
- 8.2.6 have any responsibility to any party if any instruction which should be given by the Account Holders to the Account Bank under or in connection with this Agreement is for any reason not received by the Account Bank or is not made at the time it should be made.
- 8.3 The Account Bank does not have and does not accept any responsibility for the accuracy and/or completeness of any information (other than statements provided in accordance with Clause 9.2 (*Acknowledgements by the Account Bank*) of this Agreement and the Account Bank shall not be under any liability as a result of taking or omitting to take any action in relation to the Account, save in the case of negligence or wilful misconduct or breach of its obligations under this Agreement.
- 8.4 Each of the other parties hereto agrees that it will not assert or seek to assert against any director, officer or employee of the Account Bank any claim it might have against the Account Bank in respect of the matters referred to in Clause 8.3 (*The Account Bank*) above.
- 8.5 The Account Bank may accept deposits from, lend money to, invest in and generally engage in any kind of banking or other business with the Account Holders, the Shareholders and any other party to any of the Project Documents.
- 8.6 The Account Bank may, at any time, (without assigning any reason therefor) notify the Account Holders in writing that it wishes to cease to be a party hereto as Account Bank (a "**cessation notice**"). Upon receipt of a cessation notice the Account Holders may nominate a Qualifying Bank as a successor to the Account Bank (a "**successor Account Bank**"). If no such nomination is made before the date specified in the cessation notice as being the date on which the Account Bank wishes to cease to be a party hereto (the "**cessation date**") (which date shall be a Business Day falling not less than thirty (30) days after the date of delivery of the cessation notice to the Account Holders) then the Account Bank may nominate a Qualifying Bank as successor Account Bank itself.

- 8.7 If a successor Account Bank is nominated under the provisions of Clause 8.6 (*The Account Bank*) above, then on the cessation date, provided the successor Account Bank has executed and delivered to the Account Holders a deed of novation in such form as the Account Holders may require undertaking to become a party to and bound by the terms and conditions of this Agreement and to become a party to such other documents as may be required by the Security Trustee in order to perfect the security created by the Senior Finance Documents:
- 8.7.1 the successor Account Bank shall open on its books at its principal office an account equivalent to that described in Clause 2 (*Insurance Proceeds Account*) of this Agreement and any amounts standing to the credit of the Account shall be transferred to the corresponding one of such account;
- 8.7.2 any reference in the MIM Project Agreement or any Senior Finance Document to the Account shall be deemed to refer to the corresponding account opened pursuant to Clause 8.7.1;
- 8.7.3 the Account Bank shall cease to be a party hereto as Account Bank and shall cease to have any obligation hereunder in such capacity (but without prejudice to any accrued liabilities under this Agreement and its obligations under this Clause 8 (*The Account Bank*)) (but shall remain entitled to the benefit of the provisions of this Clause 8 (*The Account Bank*)); and
- 8.7.4 the successor Account Bank and each of the other parties hereto shall have the same rights and obligations amongst themselves as they would have had if such successor Account Bank had been an original party hereto as Account Bank.

9. Acknowledgements by the Account Bank

- 9.1 Notwithstanding anything to the contrary in any applicable mandate, the Account Bank hereby waives so far as it may validly and lawfully do so any right it has or may hereafter acquire to combine, consolidate or merge the Account with any other account of the Account Bank, Account Holders or the Security Trustee or any other person or with any liabilities of Account Holders or the Security Trustee or any other person to the Account Bank. In addition, the Account Bank agrees so far as it may validly and lawfully do so that it may not set off, combine, withhold or transfer any sum standing to the credit of the Account in or towards satisfaction of any liabilities to the Account Bank of the Account Holders, the Security Trustee or any other person.
- 9.2 After the date hereof and until the Account Bank has been notified by the Account Holders of the termination of the MIM Project Agreement or until the Account Bank ceases to be a party to this Agreement pursuant to the provisions of Clause 8.7 (*The Account Bank*) above, the Account Bank shall provide each of the Account Holders and the Security Trustee with statements in respect of the Account, such statement to be supplied in accordance with any reasonable request therefore by the Account Holders.

10. **Assignment**

The Account Holders may not assign any of their rights under this Agreement or in relation to the Account otherwise than pursuant to the Security Documents or as permitted under the MIM Project Agreement. The Security Trustee may assign its rights under this Agreement to a successor Security Trustee appointed in accordance with the [Security Trustee and Intercreditor Deed] and shall promptly give notice of any such assignment to the Account Bank. The Account Bank shall not be entitled to novate (except in accordance with Clause 8.7 (*The Account Bank*) above) or assign all or any part of its rights under this Agreement.

11. **Security Trustee**

The Security Trustee is party hereto solely for the purpose of receiving the benefits and exercising the rights specifically allocated to it under the terms of this Agreement.

12. **Further Assurance**

The parties hereto agree that they will co-operate fully to do all such further acts and things and execute any further documents as may be necessary or reasonably desirable to give full effect to the arrangements contemplated by this Agreement, subject to any such party being reimbursed to its satisfaction for any costs, expenses (including VAT) liabilities or fees reasonably incurred by it in the negotiation, preparation or execution of any such further documents.

13. **Amendments**

The provisions of this Agreement may not be amended (otherwise than in accordance with the terms hereof) except by written agreement between all the parties hereto.

14. **Notices**

14.1 Each communication to be made hereunder shall be made in writing and, unless otherwise stated, may be made by [email or letter] delivered by first class registered post.

14.2 Subject to Clauses 14.3 and 14.4 (*Notices*) any communication or document to be made or delivered by one person to another pursuant to or in connection with this Agreement shall (unless that other person has by ten (10) days' written notice to the other specified another address) be made or delivered to that other person at the address set out in Clauses 14.5 to 14.8 (*Notices*) signed by an authorised signatory or signed by an authorised signatory in any deed of novation and shall be deemed to have been made or delivered:

14.2.1 (in the case of any communication made by letter) when delivered to that address provided that if such communication or document would otherwise be deemed to have been received on a day which is not a Business Day or after 5pm on a Business Day it shall be deemed to have been received on the next subsequent Business Day; or

14.2.2 (in the case of any communication by email):

- (a) at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the email address specified in Clauses 14.5 to 14.8 (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or
- (b) by 11am on the next following Business Day, if the email enters the intended recipient's relevant Information System after 4pm, on a Business Day but before 9am on that next following Business Day,

and provided no error message indicating failure has been received by the sender and provided that within twenty-four (24) hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by hand to the intended recipient in accordance with the provisions of this Clause 14 (*Notices*) and where such notice is addressed to the Authority, copied to [♦³⁴¹].

- 14.3 If any communication is made or document is delivered to the Security Trustee, such communication or document shall be effective only if the same is expressly marked for the attention of the officer identified by the Security Trustee, as the case may be, in Clause 14.8 (*Notices*) (or such other officer as the Credit Provider or the Security Trustee, as the case may be, shall from time to time specify for this purpose).
- 14.4 If any communication or document is made or delivered to the Account Bank or the Security Trustee, such communication or document shall be effective only when received by the Account Bank, or the Security Trustee.
- 14.5 Any notice to be given to the Authority should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing by the Authority.
- 14.6 Any notice to be given to the Issuer should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing by the Issuer.
- 14.7 Any notice to be given to the Account Bank should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing by the Account Bank.
- 14.8 Any notice to be given to the Security Trustee should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing by the Security Trustee.

³⁴¹ Insert Welsh Government details.

15. **Miscellaneous**

The parties hereto each acknowledge that the Security Trustee when acting hereunder shall be acting in accordance with and subject to the terms of the [Security Trustee and Intercreditor Deed].

16. **Counterparts**

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes

17. **Governing Law and Jurisdiction**

This Agreement is governed by, and shall be construed in accordance with, the laws of England and Wales.

18. **Third Party Rights**

It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that save to the extent expressly provided in this Agreement, it is expressly declared that no rights shall be conferred under and arising out of this Agreement upon any person who is not a party to this Agreement.

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

SCHEDULE 26:
COMMERCIALLY SENSITIVE INFORMATION³⁴²

Where information or material falls within more than one category identified in column 1 of the table below, it shall be deemed to fall within the category whose corresponding period of confidentiality identified in column 2 of the table below will expire the soonest.

Category of Information/Material	Period for which information is to be kept confidential
Financial Model (as at Financial Close)	From the Effective Date until the date falling two (2) years after the [first] Actual Completion Date
Financial Model (amended from time to time in accordance with this Agreement)	From the date of the relevant Financial Model until the date falling two (2) years after the later of: <ul style="list-style-type: none"> - the [first] Actual Completion Date; and - the date on which the amendments to Financial Model are agreed in accordance with this Agreement
Prices within the Catalogue of Small Works and Services	Period during which the relevant prices are applicable
Small Works and Services Rates	Period during which the relevant Small Works and Services Rates are applicable
Project Co bank account information	Project Term
[IRR]	<p>In the case of the [IRR] contained in the Financial Model as at Financial Close from the Effective Date until the date falling two (2) years after the [first] Actual Completion Date</p> <p>In the case of the [IRR] contained in the Financial Model as amended from time to time in accordance with this Agreement, from the date of the relevant Financial Model until the date falling two (2) years after the later of:</p>

³⁴² To be reviewed and developed on a project specific basis.

Category of Information/Material	Period for which information is to be kept confidential
	<ul style="list-style-type: none"> - the [first] Actual Completion Date; and - the date of the Financial Model containing the relevant information
Ancillary Documents	Project Term
Funding Agreements	Project Term
Information about Project Co's processes, methodologies, working methods and information relating to the development of new processes and methodologies which amounts to a trade secret or which, if disclosed, could reasonably be considered to provide a commercial advantage to Project Co's competitors	<p>Trade secrets – Project Term</p> <p>All other cases – five (5) years from the date on which the information is produced to the Authority</p>
Breakdown of prices within the overall contract price (to the extent not disclosed within the Financial Model)	Project Term
Information on Project Co's costing mechanisms including information obtained from Project Co relating to project risks and pricing of the same and cost information relating to third party contractors and the Sub-Contractors	Project Term
Financial term sheets and related funding information including any funder pricing	Two (2) years from the date on which the information is produced to the Authority
Information relating to the appointment of Project Co as the preferred bidder to the Project (including the preferred bidder letter and correspondence and minutes relating to the same)	Until the date falling two (2) years after the [first] Actual Completion Date
Information contained within or relating to Project Co's bid for the Project except as otherwise listed in this Schedule 26 (<i>Commercially Sensitive Information</i>) or otherwise provided in the Agreement	Until the date falling two (2) years after the [first] Actual Completion Date

SCHEDULE 27:

[PLANNING RESPONSIBILITIES MATRIX]³⁴³

Ref	Condition	Responsibility		Obligations
		Authority	Project Co	

³⁴³ To be developed on a project specific basis, where relevant.

SCHEDULE 28:
DISASTER PLAN³⁴⁴

³⁴⁴ The Authority and Project Co should develop and agree a planned course of action in the event of a disaster occurring, which should be set out in Schedule 28. To the extent a responsible and sensible plan can be put in place and then implemented should any disaster occur, it is likely to assist the Authority and Project Co in claiming under any relevant policies of insurance. The Disaster Plan should tie in with the Authority's major incident plan policies and should include the following:

- Project Co obligation to ensure Service continuity during any incident, such that Authority Services can continue with as little disruption as possible, together with detail of how this will be achieved (e.g. utility failure);
- Project Co obligation to ensure co-operation in the maintenance of any temporary accommodation;
- Project Co obligation to identify and provide a command room, incident command team and command management structure;
- Project Co obligation to participate in emergency planning;
- Project Co obligation to participate in training, where required by the Authority;
- Project Co obligation to participate in the preparation of Authority emergency planning policies; and
- Authority obligation to pay the proper cost incurred by Project Co for any additional/alternative services against Project Co's invoice in respect of each Contract Month during which the additional/alternative services are being provided.

The Authority should consult with its insurance advisers in developing the Disaster Plan.

**SCHEDULE 29:
COMMUNITY BENEFITS**

**SECTION 1
AUTHORITY'S COMMUNITY BENEFITS REQUIREMENTS**

Part 1 - Authority's Community Benefit Requirements³⁴⁵

³⁴⁵ To be completed by the Authority, in conjunction with the New Project Request.

Part 2 - Authority's Community Benefit Requirement KPIs³⁴⁶

Key Area of Performance to be reviewed	KPI Target (Construction Phase)	Lump Sum Payment	KPI Target (Operational Term)	Lump Sum Payment
Jobs Created (NEET/LT Unemployed)	<p>[Formula: Person weeks per £m invested based on 52/£m capex]</p> <p>Example: 1,820 person weeks for £35m capex]</p>	£500 (indexed) per 52 weeks where placement not provided in whole or in part.	<p>[Formula: Person weeks per annum, per £m invested based on 52/£m lifecycle value]</p> <p>Example: 104 person weeks for £2m lifecycle value, per annum]</p>	£500 (indexed) per 52 weeks where placement not provided in whole or in part.
[Training] [and] [apprentices] [(including graduates, work placements, pupil placements)]	<p>[Formula: Person weeks of training provided per £m invested based on 25/£m (included in overall jobs created).]</p> <p>Example: 875 person weeks for £35m capex]</p>	£500 (indexed) per 52 weeks where placement not provided in whole or in part.	<p>[Formula: Person weeks of training per annum, per £m invested based on 25/£m lifecycle value (included in overall jobs created)]</p> <p>Example: 50 person weeks for £2m lifecycle value, per annum]</p>	£500 (indexed) per annum in respect of required person weeks not provided in whole or in part.
School Engagement (STEM)	<p>[Formula: Number of one hour student interactions per £m invested based on 150/£m]</p> <p>Example: 5,250 one hour interactions for £35m capex]</p>	£5 (indexed) per one hour student interaction not provided.	<p>[Formula: Number of one hour student interactions per £m invested based on 150/£m lifecycle value per annum]</p> <p>Example: 300 interactions for £2m lifecycle value, per annum]</p>	£5 (indexed) per one hour student interaction not provided.

³⁴⁶ Table to be completed on a project specific basis with reference to the formulae set out in the table (which should be deleted once project specific values have been developed). KPI target drafting to be further developed during Dialogue to ensure the KPIs are clear and measurable.

Key Area of Performance to be reviewed	KPI Target (Construction Phase)	Lump Sum Payment	KPI Target (Operational Term)	Lump Sum Payment
School Engagement (STEM)	<p><i>[Formula: Hours donated per £m invested based on 10 hours/£m]</i></p> <p><i>Example: 350 hours for £35m capex]</i></p>	£40 (indexed) per hour not provided.	<p><i>[Formula: Hours donated per £m lifecycle value based on 10 hours/£m]</i></p> <p><i>Example: 20 hours for £2m lifecycle value, per annum]</i></p>	£40 (indexed) per hour not provided.
Community	20 community initiatives during the Construction Phase	£1,000 (indexed) per community initiative not provided in whole or in part.	1 initiative per annum during the Operational Term	£1,000 (indexed) per annum in respect of failure to provide in whole or in part.
Community	<p><i>[Formula: Community engagement/communications based on 1 every quarter of planned Construction Phase]</i></p> <p><i>Example: 10 engagements for 2.5 year build]</i></p>	£500 (indexed) per failure to engage/communicate.	Not required	N/A

SECTION 2

PROJECT CO'S COMMUNITY BENEFIT METHOD STATEMENTS

Part 1 - ACBR Enhancements and Additional Community Benefit Project Co Proposals

ACBR Enhancements³⁴⁷						
Target Area	Construction Phase KPI Target	Lump Sum Payment (indexed)	Operational Term KPI Target	Lump Sum Payment (indexed)	Validation Requirement	Measure for Reporting
Additional Community Benefit Project Co Proposals³⁴⁸						
Target Area	Construction Phase KPI Target	Lump Sum Payment (indexed)	Operational Term KPI Target	Lump Sum Payment (indexed)	Validation Requirement	Measure for Reporting

³⁴⁷ Table to be developed in accordance with WEPCo's Community Benefit Requirement KPIs, to reflect Project Co's proposals for New Projects following the Tendering Process under the SPA.

³⁴⁸ Table to be developed in accordance with WEPCo's Community Benefit Requirement KPIs, to reflect Project Co's proposals for New Projects following the Tendering Process under the SPA.

Part 2 - Project Co's Community Benefit Method Statements³⁴⁹

Section A - Authority's Community Benefit Requirement KPIs

Section B - ACBR Enhancements

Section C - Additional Community Benefit Project Co Proposals

³⁴⁹ To be developed in accordance with WEPCo's Community Benefit Requirement KPIs, to reflect Project Co's proposals for New Projects following the Tendering Process under the SPA.

Part 3 - Dashboard Template

**SCHEDULE 30:
[BIM PROTOCOL]**

**SCHEDULE 31:
EMPLOYMENT AND PENSIONS**

SECTION 1

Employee Information

SCHEDULE 32:

[RELEVANT DISCHARGE TERMS]³⁵⁰

1. The parties hereby acknowledge and agree that:
 - 1.1 where following an application for judicial review or an audit review (within the meaning of the Local Government (Contracts) Act 1997), a court of final appeal determines or orders that this Agreement or this Agreement and the Funders' Direct Agreement do not have effect or are otherwise unenforceable:
 - 1.1.1 Project Co shall be entitled to be paid by the Authority a sum equivalent to the amount calculated in accordance with Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of Schedule 17 (*Compensation on Termination*); and
 - 1.1.2 the relevant provisions of Clause 46 (*Compensation on Termination*) and Section 4 (*General*) of Schedule 17 (*Compensation on Termination*) shall apply mutatis mutandis, subject to compensation being deemed to be payable in a lump sum within six (6) months of the order of the court; and
 - 1.2 where following an application for judicial review or an audit review (within the meaning of the Local Government (Contracts) Act 1997) a court of final appeal determines or orders that the Funders' Direct Agreement does not have effect or is otherwise unenforceable but this Agreement remains in full force and effect then, without prejudice to the application of paragraph 1.1.1 of this Schedule [32] (*[Relevant Discharge Terms]*) at any time thereafter:
 - 1.2.1 the Monthly Service Payment shall be reduced by the amount payable by Project Co in respect of the Senior Debt; and
 - 1.2.2 the Authority shall pay Project Co a sum equal to the Revised Senior Debt Termination Amount (excluding, provided that the Senior Funders do not enforce any security over credit balances on any bank accounts held by or on behalf of Project Co, limb (b)(i) of the definition set out in Section 5 (*Definitions*) of Schedule 17 (*Compensation on Termination*)) and the relevant provisions of Clause 46 (*Compensation on Termination*) and Section 4 (*General*) of Schedule 17 (*Compensation on Termination*) shall apply mutatis mutandis subject to any reference to the Termination Date in this Agreement shall be deemed to be the date on which the Funders' Direct Agreement was declared not to have effect or otherwise to be unenforceable in accordance with the provisions of this paragraph 1; and,
 - 1.3 the parties agree that such provisions shall be deemed to be relevant discharge terms for the purposes of section 6(2) of the Local Government (Contracts) Act 1997 (the "**Relevant Discharge Terms**").

³⁵⁰ Drafting applicable to local authorities and therefore only to be included for schools projects.

2. The parties acknowledge and agree that:
 - 2.1 in the event that the circumstances envisaged by paragraph 1.2 occur prior to the circumstances envisaged by paragraph 1.1 then the amount calculated in accordance with Section 1 (*Compensation on Termination for Authority Default and Voluntary Termination*) of Schedule 17 (*Compensation on Termination*) shall be calculated to ensure no double counting between that amount and any sums paid to Project Co pursuant to paragraph 1.2.2; and
 - 2.2 where paragraph 1.1 applies the Authority shall have the option to require Project Co to transfer its right, title and interest in and to the Assets to the Authority or as directed by the Authority; and
 - 2.3 any payment of compensation in accordance with this Schedule [32] (*[Relevant Discharge Terms]*) shall be in full satisfaction of any claim of Project Co in relation to the termination of this Agreement and/ or the Funders' Direct Agreement and shall be the sole remedy of Project Co against the Authority in the circumstances contemplated by this Schedule [32] (*[Relevant Discharge Terms]*).

SCHEDULE 33:
INTERIM PROJECT REPORT

1. An Interim Report shall include:
 - 1.1 a detailed description of the circumstances leading to the occurrence of the relevant Funding Default;
 - 1.2 details of any action taken by Funders and it is anticipated will be taken by Funders under the [Senior Loan Agreement]³⁵¹;
 - 1.3 confirmation of whether it is known if Funders intend to issue a waiver in respect of the relevant Funding Default and/or any other action which Funders have advised may be taken;
 - 1.4 a programme of action which will, if performed, remedy or otherwise resolve the matters which gave rise to the relevant Funding Default;
 - 1.5 copies of all information reports or other documents that have been provided to Funders and details of such other information, reports and/or documents that will be provided to Funders pursuant to [◆] of the [Senior Loan Agreement];³⁵²
 - 1.6 details of any additional information and/or reports which have been requested by Funders; and
 - 1.7 all such other information or documentation pertaining to a Funding Default as the Authority in such form as the Authority (acting reasonably) may request.

³⁵² This will need to capture any information Project Co is required to provide Senior Funders on the occurrence of a Funding Default under the Senior Loan Agreement

SCHEDULE 34:
JOINT OPERATING PROTOCOL³⁵³

SECTION 1

GENERAL

1. Definitions

In this Schedule (save where Schedule 1 (*Definitions and Interpretation*) provides to the contrary) the following terms shall have the meanings given to them below:

"Damage"	means the loss or theft of or damage to any ICT Assets;
"Deployed"	means in respect of a Fixed ICT Asset that its installation and all associated installation tasks have been completed, and "Deployment" shall be construed accordingly;
"Deployment Protocol"	means the table set out in the Appendix to Section 2 (<i>Construction Phase Access Protocol</i>) of this Schedule 34 (<i>Joint Operating Protocol</i>);
"Fixed ICT Assets"	those types of ICT Assets indicated as "Fixed" in column 2 of the Deployment Protocol;
"ICT Asset Log"	has the meaning given to it in paragraph 5.2 of Section 2 (<i>Construction Phase Access Protocol</i>) of this Schedule 34 (<i>Joint Operating Protocol</i>);
"Portable ICT Assets"	those types of ICT Assets indicated as "Portable" in column 2 of the table set out at the Deployment Protocol;
"Project Co ICT Handover Period Activities"	has the meaning given in paragraph 6.1 of Section 2 (<i>Construction Phase Access Protocol</i>) of this Schedule 34 (<i>Joint Operating Protocol</i>);
"Secure Room"	a secure room (or rooms) provided by Project Co at [each/the] Facility [of approximately 100m ² (two classrooms) in Secondary Schools and 50m ² (one classroom) in Primary Schools] for the storage of the ICT Assets;

³⁵³ The Joint Operating Protocol has been developed primarily in the context of a Schools project and will require project specific review in the context of College projects.

2. **Compliance with the Joint Operating Protocol**

2.1 Both parties acknowledge that the purpose of the Joint Operating Protocol is to establish a structure and ongoing process that facilitates joint working and co-operation, pursuant to Clauses 5.4 and 5.5 of the Agreement. In particular, in relation to certain specific Project Operations that involve a high level of interface between the Authority and Project Co in the carrying out of such Project Operations alongside [Authority Commissioning and] the provision of Authority Services at the Facilities.

2.2 The parties agree that if there is any specific conflict, ambiguity, inconsistency or uncertainty in respect of the rights and/or obligations contained in the Joint Operating Protocol with those contained in any other provisions of the Agreement, such rights and obligations shall be additional to and not in substitution for those contained elsewhere in the Agreement and those contained in the Agreement shall, as far as necessary, prevail over those contained in the Joint Operating Protocol.

3. **Monitoring Arrangements**

The parties acknowledge and agree that the functions of the Liaison Committee set out in Schedule 24 (*Liaison Procedure*) shall include discussion on the effectiveness of the Joint Operating Protocol and any variations proposed by either party.

4. **Dispute Resolution**

Any disagreement relating to each party's rights or obligations under the Joint Operating Protocol shall be referred for resolution in accordance with Schedule 20 (*Dispute Resolution Procedure*).

SECTION 2

Construction Phase Access Protocol

1. Construction Phase Access

- 1.1 The Authority acknowledges and agrees that Project Co's Ancillary Rights allow for a degree of exclusive possession of the Site[s] by Project Co and Project Co Parties for the period from the Commencement Date until the [relevant] Actual Completion Date [and/or from the [relevant] Actual Completion Date until the corresponding [final] Actual Post Completion Works Date, in respect of the [final] Post Completion Works Areas]. Both parties acknowledge that these rights are subject to the Beneficial Access rights outlined in paragraph [6.1.1(a) of Appendix B of Schedule 10 (*Outline Commissioning Programme*), to facilitate Authority Commissioning prior to the Actual Completion Date in respect of [each]/[the] Facility.
- 1.2 The parties agree that the further arrangements set out in paragraphs 2 to 5 below shall apply in respect of the ICT Handover Period in respect of the installation, testing and integration of ICT Assets.
- 1.3 [The Authority agrees that in exercising its rights under this paragraph 1, the Authority and Authority Parties shall comply with all relevant health and safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and reasonable directions with regard to site safety, traffic management and security intimated by the Contractor's Site Manager from time to time. The parties shall ensure the activities each is responsible for carrying out during the ICT Handover Period are co-ordinated in light of this obligation, through the development of the [relevant] Final Commissioning Programme.]

2. Hours of Access

- 2.1 During the ICT Handover Period the Authority and/or any other Authority Party responsible for the installation and commissioning of ICT Assets (the "**ICT Installer**") may commission and install ICT Assets between 8am and 5pm on any Business Day. Without prejudice to Clause 17.1 (*Pre-Completion Commissioning*), if the ICT Installer requires additional access to the Site[s] beyond these hours on any given Business Day then the Authority shall provide not less than 24 hours' notice of such request to Project Co, specifying the nature of the access required and the activities proposed to be undertaken by the ICT Installer, and the Authority shall reimburse to Project Co all additional costs it reasonably and properly incurs as a direct result of providing such additional access. Project Co shall take all reasonable steps not to impede the ICT Installer(s) in the carrying out of such activities (having regard always to the interactive nature of the activities of the parties and the detailed terms of the [relevant] Final Commissioning Programme), provided that Project Co shall be deemed not to be in breach of this paragraph unless it has received notice from the ICT Installer that it is so impeding, and has failed to cease impeding the ICT Installer within one (1) hour of receiving such notice.

- 2.2 The Authority shall and shall ensure that Authority Parties (including the ICT Installer) shall during the ICT Handover Period comply with their obligations under this Section 2 (*Construction Phase Access Protocol*) of Schedule 34 (*Joint Operating Protocol*). Project Co shall, and shall ensure that Project Co Parties shall during the ICT Handover Period, comply with their obligations under this Section 2 (*Construction Phase Access Protocol*) of Schedule 34 (*Joint Operating Protocol*).

3. Access, Installation, Testing and Integration of the ICT Assets

- 3.1 The ICT Installers shall not be entitled to bring ICT Assets in to the Facilities at any time during the ICT Handover Period. All ICT Assets will be brought on to the Site[s] by Project Co in accordance with Section 2 (*Decant Protocol*) of Schedule 11 (*Equipment*) and the [relevant] Final Commissioning Programme. For the avoidance of doubt, any new ICT Assets (including any New Replacement ICT Equipment) to be procured by the Authority shall be delivered to the Existing Facility and not the Facilities and will be decanted in accordance with Section 2 (*Decant Protocol*) of Schedule 11 (*Equipment*).
- 3.2 The ICT Installers shall be permitted to use Project Co's onsite trolleys (or equivalent) where available and where required to install, test and/or integrate the ICT Assets.
- 3.3 The Authority shall keep Project Co informed of any Site security risks (or thefts or other similar incidents) and/or damage to the ICT Assets of which the Authority becomes aware.

4. Control of ICT Assets

- 4.1 In respect of an ICT Asset at the Site[s], such ICT Assets shall be deemed to be within the Authority's control in the following circumstances (the "**Authority Control Period**"):
- 4.1.1 at any time prior to Project Co commencing the Decant of the ICT Asset from the Existing Facility;
- 4.1.2 at any time after an ICT Asset is signed out of the Secure Room by the ICT Installer until it has been recorded in the ICT Asset Log as having been either:
- (a) placed back in the Secure Room; or
- (b) in the case of a Fixed ICT Asset, Deployed,
- and such placing back or Deployment has occurred;

- 4.1.3 at any other time when an ICT Asset is removed from the Secure Room by the ICT Installer; and
- 4.1.4 at any time after the [relevant] Actual Completion Date for the Facility in question.
- 4.1.5 The parties agree the following approach to ICT Assets Deployed at the Site[s]:
 - (a) Fixed ICT Assets - the ICT Installer may leave such ICT Assets in situ once Deployed (for the avoidance of doubt, the Authority shall procure that the ICT Installer shall return all Fixed ICT Assets that are not Deployed to the Secure Room at the end of each day);
 - (b) Portable ICT Assets - the Authority shall procure that the ICT Installer shall return all Portable ICT Assets to the Secure Room at the end of each day.
- 4.1.6 The Authority shall be responsible for Damage to any ICT Assets when such ICT Assets are in an Authority Control Period, save where and to the extent that the Damage is caused or contributed to by Project Co or a Project Co Party in which case Project Co shall be responsible for such Damage.

5. Deployment

- 5.1 Project Co shall ensure that when ICT Assets are decanted to [the]/[a] Site they are stored in a Secure Room.
- 5.2 Project Co shall provide and maintain a log recording and documenting the delivery of ICT Assets to the Site[s] and into the Secure Rooms so that at all times during the ICT Handover Period an accurate and up-to-date record of the contents of the Secure Room and ICT Asset location is maintained (the "**ICT Asset Log**"), provided the Authority shall, or shall procure that the ICT Installer shall, report to Project Co the ICT Assets being signed in and out of the Secure Room pursuant to paragraphs 4 and 5.3 of this Section 2 (*Construction Phase Access Protocol*) of Schedule 34 (*Joint Operating Protocol*) on such deposit/removal. The ICT Asset Log shall be made available to the Authority promptly on reasonable request.
- 5.3 Project Co shall ensure that the ICT Asset Log incorporates:
 - 5.3.1 a method of signing in and signing out each of the ICT Assets as such ICT Assets are placed in, removed from and/or returned to the Secure Room; and

- 5.3.2 the actual date/time of sign-off by Project Co or the ICT Installer (as applicable) of the completion of the installation or Deployment of the relevant ICT Asset into the relevant location.
- 5.4 Subject to paragraph 5.3 above, where an ICT Asset is shown in the ICT Asset Log as Deployed it shall for the purposes of this Agreement be taken to be "Deployed".
- 5.5 Nothing in paragraph 5.4 above, shall prevent it being agreed by the parties or determined in accordance with the Dispute Resolution Procedure, following receipt of an ICT Asset Log, that an ICT Asset which was shown in the ICT Asset Log as being Deployed was not in fact Deployed. Where such agreement or determination is made, for the purposes of this Schedule 34 (*Joint Operating Protocol*) the ICT Asset in question shall be treated as having been Deployed from the point at which it was actually Deployed, rather than from the point that the ICT Asset Log in question was received.

6. Non Interference by the ICT Installer

- 6.1 The Authority acknowledges that whilst it, or any other party being an ICT Installer, is taking delivery of and installing ICT Assets during the ICT Handover Period Project Co shall also be at the [relevant] Site for the purpose of:
- 6.1.1 undertaking Snagging Items and/or remedying Defects;
- 6.1.2 mobilising for the performance of the Services following the [relevant] Actual Completion Date;
- 6.1.3 [carrying out its obligations pursuant to the Decant Protocol, including the installation and recommissioning of Initial ICT Equipment;]
- 6.1.4 carrying out any other Project Co Pre-Completion Commissioning activities set out in and pursuant to the [relevant] Final Commissioning Programme, including (where applicable) carrying out training and handover 'sparkle' cleans; and
- 6.1.5 carrying out the balancing, testing and/or commissioning of the mechanical and electrical installations at the [relevant] Facility,
- (together the "**Project Co ICT Handover Period Activities**").
- 6.2 The Authority shall (and shall procure the relevant ICT Installer shall) take all reasonable steps not to impede Project Co or any Project Co Party from undertaking Project Co ICT Handover Period Activities (having regard always to the interactive nature of the activities of the parties and the detailed terms of the [relevant] Final Commissioning Programme).

**APPENDIX
DEPLOYMENT PROTOCOL³⁵⁴**

The types of ICT Assets relevant to this Section 2 (*Construction Phase Access Protocol*) of this Schedule 34 (*Joint Operating Protocol*) are classified as set out in the table below.

ICT Asset	Fixed or Portable
Learner Laptop	Portable
Learner Station	Fixed
Learner Station Monitor	Fixed
Learner Netbook	Portable
Apple iMac	Fixed
Teacher Laptop	Portable
Teaching Assistant Laptop	Portable
Tablet computers (Inc. Ipod devices) – Learner	Portable
Tablet computers (Inc. Ipod devices)- Staff	Portable
Display Station PC	Fixed
Admin Station	Fixed
Admin Station Monitor	Fixed
Visualiser	Portable
Digital Cameras (still and video)	Portable

³⁵⁴ To be reviewed and considered on a project specific basis.

ICT Asset	Fixed or Portable
Projector + mount + security	Fixed
Whole-Class Teaching Wall Speakers	Fixed
Interactive Whiteboard	Fixed
Integrated Whole Class Teaching system	Fixed
Laptop Trolley (e.g. Notebus 16+)	Portable
Teaching LED/LCD/Plasma display screen, speakers and bracket	Fixed
LED/LCD/Plasma Display for Streaming Media Set Top Box (e.g. OneLan NTB600)	Fixed
Desktop Printer	Fixed
MFD Printer	Fixed
Voting System	Portable
USB Headset	Portable
Rack Mounted Server	Fixed
Video Server	Fixed
Rack Mounted Keyboard/Video/Monitor Switch	Fixed
Disk to Disk to Tape Backup System	Fixed

SECTION 3

ACCESS TO WORK PROTOCOL³⁵⁵

1. Definitions

In this Section 3 (*Access To Work Protocol*) of Schedule 34 (*Joint Operating Protocol*) (save where Schedule 1 (*Definitions and Interpretation*) provides to the contrary) the following terms shall have the meanings given to them below:

"Facility Co-ordinator(s) Helpdesk"	has the meaning given to it in paragraph 6.1 of this Access to Work Protocol;
"Facility Liaison Person(s)"	has the meaning given in paragraph 6.2 of this Access to Work Protocol;
"Protocol for Key Holding"	means an agreement made from time to time with each Facility Representative setting out (as a minimum): the name(s) and contact details of the Facility Liaison Person(s) and any other authorised key holders, together with details of the Core Sessions for [each]/the] Facility and the escalation procedures for occasions when identified persons are not available to allow Project Co access to the [relevant] Facility;
"Unprogrammed Maintenance Request"	means a request initiated by an Authorised Caller to the Helpdesk, requiring Unprogrammed Maintenance Works.

2. Preamble

- 2.1 This Access to Work Protocol governs the arrangements which allow Project Co or any Project Co Party to gain access to the Facilities to carry out repairs and/or maintenance at the [relevant] Facilities following the Actual Completion Date for the [relevant] Facility.
- 2.2 The parties agree and acknowledge that the Authority (through the relevant appointed personnel) shall be responsible for the issue of Access to Work Permits to Project Co or a Project Co Party in respect of access to a Facility, in accordance with this Access to Work Protocol.

³⁵⁵ Protocol to be further developed on a project specific basis.

3. Operational Term Access

3.1 The Authority acknowledges and agrees that Project Co's Ancillary Rights allow for a non-exclusive licence to remain upon those parts of the Site[s] that Project Co and/or any Project Co Party requires access to in order to carry out the Project Operations pursuant to Clause 9.2 (*Access Following Construction*). Both parties acknowledge that these rights are subject to this Section 3 (*Access To Work Protocol*) of Schedule 34 (*Joint Operating Protocol*).

3.2 Without prejudice to paragraph 3.9 of Schedule 8 (*Review Procedure*), in preparing a Schedule of Programmed Maintenance, Project Co shall schedule:

3.2.1 Programmed Maintenance; and

3.2.2 Lifecycle Replacement,

outside of Term times, the Core Day (or the Core Sessions, in respect of Areas notified by the Authority as being used for an Additional Period in accordance with Clause 5.12.1(*Additional Periods*)), in each case wherever reasonably possible.

3.3 By exception, due to external constraints, Project Co may, with the consent of the Authority's Representative (not to be unreasonably withheld or delayed) schedule to carry out Programmed Maintenance and/or Lifecycle Replacement during the Core Day (or Core Sessions, in respect of Areas being used for an Additional Period in accordance with Clause 5.12.1(*Additional Periods*)), provided always that the Authority's Representative shall be deemed to be acting reasonably in refusing consent, on the following grounds:

3.3.1 on the balance of probabilities, such Programmed Maintenance and/or Lifecycle Replacement (as applicable) are likely to interfere with or disturb the [Authority/ School Entity] its staff or users and/or Authority Parties delivering Authority Services within the immediate area of where such works are to be undertaken;

3.3.2 on the balance of probabilities, such Programmed Maintenance and/or Lifecycle Replacement is likely to interfere with or disturb the [Authority/ School Entity] its staff or users and/or Authority Parties delivering Authority Services within the area(s) adjacent to where such works are to be undertaken; and

3.3.3 failure to comply with Law.

3.4 Where the Authority notifies Project Co of Additional Period use pursuant to Clause 5.12.2 (*Additional Periods*), following the approval of a Schedule of Programmed Maintenance, the Authority [(in conjunction with the [relevant] School Entity)] shall work together with Project Co in good faith to facilitate access to the [relevant] Facility to enable Project Co or any Project Co Party to carry out Programmed Maintenance and Lifecycle Replacement at the [relevant] Facility in accordance with

this Agreement in a way that does not unreasonably impact on such community or extended use.

- 3.5 It is acknowledged by the Authority that Project Co or a Project Co Party may request access to [the/a] Facilities at short notice to resolve any Unprogrammed Maintenance Work, such as an incident which has been logged with the Helpdesk, detected by the Building Management System ("**BMS**") or identified at the Facilities during routine visits in accordance with paragraph 4 below. Unprogrammed Maintenance Work should be carried out in accordance with the terms of Clause 23.8 (*Programmed and Unprogrammed Maintenance*) and/or 23.9 (*Programmed and Unprogrammed Maintenance*) (as appropriate) and the terms of paragraph 4 of this Section 3 (*Access To Work Protocol*) of Schedule 34 (*Joint Operating Protocol*).

4. **[Process for the Issue of an Access to Work Permit**

4.1 **Programmed Maintenance and Lifecycle Replacement**

- 4.1.1 When Project Co submits a Schedule of Programmed Maintenance to the Authority's Representative in accordance with Clause 23.4 (*Programmed Maintenance Works*), which for the avoidance of doubt shall include any proposed revision to the Schedule of Programmed Maintenance and/or amendment to the Schedule of Programmed Maintenance; Project Co shall at the same time provide a copy of such Schedule of Programmed Maintenance (including a proposed revision or amendment thereto), as applicable, to the [relevant] Facility Representative and Facility Liaison Persons. The Facility Representative, Facility Liaison Persons and the Authority's Representative shall liaise on the terms of the Submitted Item and the Authority's Representative shall approve, reject or comment on the Submitted Item as set out in Schedule 8 (*Review Procedure*).
- 4.1.2 [[Five (5) Business Days prior to the commencement of each Contract Month], Project Co shall notify the Authority's Representative, [the Facility's Representative and the Facility Liaison Persons] of the Programmed Maintenance and/or Lifecycle Replacement planned for that month and Project Co will submit an application for an Access to Work Permit(s) for the work scheduled in the month in question. Where Programmed Maintenance Work has been planned during school holiday periods or within the first five (5) Business Days of the subsequent new Term, Project Co shall contact the [Authority/[relevant] School Entity] to confirm the programme no later than five (5) Business Days prior to the end of the Term before the relevant school holiday period.]
- 4.1.3 [The [[relevant] Facility Representative and/or Facility Liaison Persons] shall be entitled either to issue an Access to Work Permit (in writing) to Project Co or (where required to avoid disruption to the Authority Services) to reject Project Co's application (either in whole or in part) in accordance with this Access to Work Protocol within two (2) Business Days. Where the [[relevant] Facility Representative and/or Facility Liaison Person] fails to respond to Project Co's application within two (2) Business Days, the [[relevant] Facility Representative and Facility Liaison Persons] will be deemed to have consented to Project Co's application in whole and to have issued an Access to Work Permit.]

- 4.1.4 [Where the [[relevant] Facility Representative and/or Facility Liaison Persons] do not consent to Project Co's application, they shall promptly advise Project Co of the earliest possible time when an Access to Work Permit may be issued and the provisions of Clause 52.2.14 (*Excusing Causes*) shall apply.]

4.2 Unprogrammed Maintenance Requests

- 4.2.1 Otherwise than in the case of an emergency, in which case Clause 23.9 (*Programmed and Unprogrammed Maintenance*) shall apply and the parties shall (in good faith) work together to co-ordinate access, for access required by Project Co or Project Co Party to the Facilities to respond to Unprogrammed Maintenance Requests logged during the Core Day (or the Core Sessions, in respect of Areas notified by the Authority as being used for an Additional Period in accordance with Clause 5.12.1 (*Additional Periods*)), the [[relevant] Facility Representative, Facility Liaison Persons] and the Authority's Representative shall liaise on the terms of the Submitted Item and the Authority's Representative shall approve, reject or comment on the Submitted Item as set out in Schedule 8 (*Review Procedure*). Approval of the Submitted Item shall be deemed to constitute an Access to Work Permit, provided:
- (a) Upon the logging of an issue with the Helpdesk by an Authorised Caller, Project Co and the [[relevant] Facility Liaison Person and/or Facility Representative] shall discuss (i) the access arrangements; and (ii) confirm the identity of the attending Project Co Party.
 - (b) The [[relevant] Facility Representative and/or Facility Liaison Person] may specify reasonable requirements or conditions in relation to Project Co's activities referred to in the application, which Project Co shall comply with and shall procure compliance with by any Project Co Party. Such conditions shall be incorporated as comments in the Authority Representative's response to the Submitted Item.
- 4.2.2 If attendance at a Facility by Project Co or Project Co Party falls outside of Core Sessions, Project Co shall or shall procure a Project Co Party shall arrange for access to the [relevant] Facility via the Protocol for Key Holding. Once Project Co or Project Co Party has completed its work, it shall notify the [[relevant] Facility Liaison Person] (or the person identified in the Protocol for Keyholding) and the [relevant] Facility Liaison Person (or the person identified in the Protocol for Keyholding) shall, as soon as reasonably practicable, procure that the [relevant] Facility is secured once Project Co or Project Co Party has completed its work. Project Co or a Project Co Party will leave the [relevant] Facility in a clean and tidy condition.
- 4.2.3 If the [[relevant] Facility Representative and/or Facility Liaison Person] fails to procure access in accordance with the Access to Work Permit, he/she shall promptly advise Project Co of the earliest possible time when a

further Access to Work Permit can be granted and the provisions of Clause 52.2.14 (*Excusing Causes*) shall apply.

4.3 Specific Instruction not to Attend

If the Authority's Representative, the [[relevant] Facility Representative or a Facility Liaison Person] does not wish for Project Co or the Project Co Party to attend the [relevant] Site to rectify any apparent Unavailability of an Area and/or a Performance Failure at the time requested by Project Co or the Project Co Party pursuant to this Access to Work Protocol, where Project Co or the Project Co Party has complied with the provisions of this Access to Work Protocol, then the Authority's Representative or the [[relevant] Facility Representative, or Facility Liaison Person] (as applicable) shall notify the Helpdesk in writing (which may be by e-mail) to specifically instruct Project Co and/or Project Co Parties not to attend the Site at that time and Clause 52.2.14 (*Excusing Causes*) shall be deemed to apply.

5. Access to/departure from the Site

- 5.1 During Core Sessions, Project Co or Project Co Party shall comply with [a/the] Facility's procedures for the registration of visitors/contractors when attending/leaving the Site[s].
- 5.2 Outside of Core Sessions, Project Co or Project Co Party shall comply with the Protocol for Key Holding.

6. Facility Helpdesk Co-ordinator and Facility Liaison Person

- 6.1 Project Co agrees and acknowledges that, no later than three (3) months prior to the Actual Completion Date for the [relevant] Facility, the Authority [(through consultation with the [relevant] School Entity)] shall appoint up to four (4) representatives who shall be authorised by the Authority [in respect of each Facility] (in addition to the Authority Representative and Facility Representative) to report issues in relation to the [relevant] Facilities to the Helpdesk (each a "**Facility Helpdesk Co-ordinator**") and shall notify Project Co (in writing) of the names, titles and contact details of all such Facility Helpdesk Co-ordinators, in order to give effect to such appointment for the purposes of this Agreement.
- 6.2 Project Co agrees and acknowledges that, no later than three (3) Months prior to the Actual Completion Date for the [relevant] Facility, the Authority [(through consultation with the [relevant] School Entity)] shall also appoint [◆] representatives (including the Facility Manager) who shall be authorised by the Authority to issue Access to Work Permits to Project Co or Project Co Party and take such other action as is described in the Service Level Specification [in respect of each Facility] (each a "**Facility Liaison Person**") and shall notify Project Co (in writing) of the names, titles and contact details of all such Facility Liaison Persons in order to give effect to such appointment for the purposes of this Agreement. The Authority will agree a protocol for escalation should the nominated Facility Liaison Person not attend the Site when requested. The Authority shall procure that either (i) a Facility Liaison Person or an authorised deputy is available to be contacted 24 hours a day 365/366 days of the year and available to attend the Facility within no more than [one (1)

hour] of any reasonable request; and/or (ii) Project Co is entitled to hold (and is given) a set of keys for the [relevant] Facilities which Project Co can use to access the [relevant] Facilities to respond to an Unprogrammed Maintenance Request outside of Core Sessions and as otherwise directed by the [Authority, the Authority Representative or the [relevant] Facility Representative or Facility Liaison Person], in accordance with the Protocol for Key Holding.

6.3 The Authority [(through consultation with the [relevant] School Entity)] shall be entitled from time to time to amend the identity of its appointed Facility Helpdesk Co-ordinators and/or Facility Liaison Persons in accordance with this paragraph 6:

6.3.1 any Facility Helpdesk Co-ordinator and/or Facility Liaison Person may be removed by the Authority [(through consultation with the [relevant] School Entity)] with immediate effect by the [relevant] Facility Representative giving verbal notice to the Helpdesk, confirmed in writing within one (1) Business Day in accordance with paragraphs 6.1 and 6.2 (as appropriate) of this Section 3 (*Access To Work Protocol*) of Schedule 34 (*Joint Operating Protocol*); and

6.3.2 subject to the maximum numbers set out in paragraphs 6.1 and 6.2 (as appropriate) of this Section 3 (*Access To Work Protocol*) of Schedule 34 (*Joint Operating Protocol*), any new or replacement Facility Helpdesk Co-ordinator and/or Facility Liaison Person may be appointed by the Authority [(through consultation with the [relevant] School Entity)] from time to time and shall notify Project Co (in writing) of the names, titles and contact details of all such Facility Helpdesk Co-ordinators and/or Facility Liaison Persons, in order to give effect to such appointment for the purposes of this Agreement,

always provided that at no point will there be less than two (2) Helpdesk Co-ordinators and there is a designated Facility Liaison Person at all times.

6.4 Project Co will agree with [each/the] Facility Representative a Protocol for Key Holding for the [relevant] Facility to establish the procedure for gaining access to the [relevant] Facility outside of Core Sessions.

6.5 Project Co shall provide or procure the provision of training in assessing and reporting Service Events, Unavailability and Performance Failures to the [School Entity's / Authority's] staff [and the teachers/lecturers] at the Facilities (including, without limitation, the Authorised Callers other than Project Co and the Service Provider), which training shall take place [on an annual basis in each Contract Year during the Operational Term [for the relevant Facility]] at such times as reasonably specified during Term time. The first training session shall take place in accordance with the [relevant] Final Commissioning Programme, upon [♦] Business Days' notice by the Authority, the Authority's Representative or the Facility Representative of the proposed date within the window of time provided for such training within the

[relevant] Final Commissioning Programme. The [relevant] [School Entity]/[Authority] shall:

- 6.5.1 make its staff and teachers at the Facilities available to undertake such training and shall procure that the Authorised Callers (save for Project Co and the Service Provider) attend such training; and
 - 6.5.2 procure that, as part of their induction, any new Authorised Callers (save for Project Co and the Service Provider) that do not attend the annual training provided by Project Co shall be trained in assessing and reporting Service Events, Unavailability and Performance Failures by the existing Authorised Callers that have attended the training provided by Project Co.
- 6.6 Unless specifically provided for in terms of this Agreement, the Facility Liaison Persons and Facility Helpdesk Co-ordinators shall have no power or authority to bind the Authority or vary the terms of this Agreement in any way and Project Co acknowledges that it shall not act on the instructions of or as a consequence of or otherwise rely upon any act or omission of the Facility Liaison Persons or Facility Helpdesk Co-ordinators for the purposes of this Agreement unless under specifically provided for in this Agreement.

7. Safeguarding and Appearance

- 7.1 [Project Co shall procure that any individual required by Project Co or a Project Co Party to attend [any of] the Site[s] for any purpose during the Operational Term will:
- 7.1.1 either:
 - (a) have successfully completed the appropriate level of clearance from Disclosure and Barring Service check carried out in accordance with Clause 28.8.2 (*Convictions and Disciplinary Action*); or
 - (b) [where the relevant individual has disclosed any Convictions or Anti-social Behaviour Orders or is found to have any Convictions or Anti-social Behaviour Orders following the results of a Disclosure and Barring Service check and the Authority has consented to such individual's engagement or employment in accordance with Clause 28.9 (*Convictions and Disciplinary Action*) of the Agreement, Project Co shall, provided it has the individual's consent, so inform the [relevant] [School Entity and] the Authority;]
 - 7.1.2 be properly equipped to undertake the relevant task in a safe and professional manner;
 - 7.1.3 have undergone specific induction training;

- 7.1.4 be trained and appropriately qualified to undertake the relevant task;
- 7.1.5 have a photo identification badge clearly displayed at all times while at the Facilities;
- 7.1.6 at all times while at the Facilities be dressed in such a manner as to be easily identified as a Project Co Party.

In the event that any individual required by Project Co or a Project Co Party to attend on Site does not meet the requirements of paragraph 7.1, Project Co shall procure that, unless the Authority has consented to such individual's engagement or employment in accordance with Clause 28.9 (*Convictions and Disciplinary Action*) and the individual has provided evidence of such consent upon attending the Facility, they are accompanied at all times while on Site by a member of the Project Co 's or a Project Co Party's staff who has been properly employed or engaged in accordance with Clauses 28.8 to 28.9 (*Convictions and Disciplinary Action*).

SCHEDULE 35: ³⁵⁶
[DEED OF RELIANCE]

³⁵⁶ WG will provide a form of Deed of Reliance acceptable to funders for use on further education college projects.

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol



Llywodraeth Cymru
Welsh Government

Payment Mechanism

Schedule 14¹ of the Template MIM Education Project Agreement

**(WEP Strategic Partnering Delivery
Model)**

ITPDSB March 2020

¹ The Payment Mechanism has been developed in the context of a Schools project and will require project specific review in the context of College projects. Please see further guidance in the Important Notice attached to the Template MIM Education Project Agreement.

**SCHEDULE 14
PAYMENT MECHANISM**

SECTION 1

INTERPRETATION

In this Schedule 14 (*Payment Mechanism*) and elsewhere in this Agreement (save where Schedule 1 (*Definitions and Interpretation*) provides to the contrary) the following words shall have the following meanings:

"Additional Period"	means such additional five (5) hour block periods outside of the Core Day which the Authority can request in accordance with Clauses 5.10 to 5.13 (<i>Additional Periods</i>) and during which the Services must be provided at the [specified] Facility;
"Alternative Accommodation"	means the alternative accommodation offered by Project Co to the Authority in accordance with paragraph 4.7 of Section 3 (<i>Deductions from Monthly Service Payments</i>) of this Schedule 14 (<i>Payment Mechanism</i>);
"Annual Energy Adjustment" or "AEA"	means the sum in Pounds Sterling calculated in accordance with paragraph 4 (Annual Energy Adjustment) of Section 7 (Utilities Management) of this Schedule 14 (<i>Payment Mechanism</i>);
"Annual Service Charge" or "ASC"	means the sum in Pounds Sterling calculated in accordance with paragraph 3 (<i>Annual Service Charge</i>) of Section 2 (<i>Calculation of Service Payments</i>) of this Schedule 14 (<i>Payment Mechanism</i>);
"Annual Shared Risk Core Energy Service Consumption Target" or "ASRCET"	(a) for the Initial Period, the figures set out in the table in paragraph 3.1 of Section 7 of this Schedule 14 (<i>Payment Mechanism</i>); and (b) following the Initial Period, the figures calculated in accordance with paragraphs 3.3 to 3.5 of Section 7 of this Schedule 14 (<i>Payment Mechanism</i>);
"Annual Shared Risk Core Energy Service Consumption Strategy"	means [◆];
"Annual Shared Risk Core Energy Service Consumption Table"	means the table set out at paragraph 3.1 of Section 7 of this Schedule 14 (<i>Payment Mechanism</i>);
"Area"	means an area of [the]/[each] Facility, identified as such on the Area Data Sheets;

“Area Data Sheet” or “ADS”	means the area data sheets set out in Section 6 of Schedule 6 (<i>Construction Matters</i>);
“Area Failure Deduction”	means an amount deducted per Core Session following an Availability Failure, as set out Section 10 (<i>Availability Priority Categories</i>) of this Schedule 14 (<i>Payment Mechanism</i>) and adjusted in accordance with this Agreement;
"Available"	means any Area which is not Unavailable, and Availability shall be construed accordingly;
“Availability Deduction” or “AD”	means an amount calculated in accordance with paragraph 4.2 of Section 3 (<i>Deductions from Monthly Service Payments</i>) of this Schedule 14 (<i>Payment Mechanism</i>) adjusted in accordance with this Agreement;
"Availability Failure"	means subject to paragraph 3 of Section 4 (<i>Notice of Service Events, Monthly Service Reports and Temporary Repairs</i>) of Schedule 14 (<i>Payment Mechanism</i>) a Service Event which has not been Rectified within the relevant Rectification Period and which causes an Area to be Unavailable;
“Availability Priority Category”	means the categories set out in Section 10 (<i>Availability Priority Categories</i>) of this Schedule 14 (<i>Payment Mechanism</i>) and identified on the Area Data Sheets;
"Availability Standards"	means the minimum requirements to be met by Project Co under this Agreement so as to ensure that an Area is Available, identified as such in Section 9 (<i>Availability Standards and Response and Rectification Periods for Unavailability</i>) of this Schedule 14 (<i>Payment Mechanism</i>), [together with any such criteria specific to an Area which are identified on the Area Data Sheet for that Area];
“Building Load”	means the consumption of Energy Services in respect of: <ul style="list-style-type: none"> (a) space heating; (b) space cooling; (c) internal lighting and emergency lighting excluding security lighting; (d) [swimming pool and hydrotherapy pool heating;]

	<p>(e) fans and pumps; and</p> <p>(f) building related services and lifts,</p> <p>as set out in paragraph [2.10.27.21] of the Authority's Construction Requirements [in respect of the relevant Facility];</p>
“Catering Areas”	means the Areas identified as necessary for the provision of meals in accordance with paragraph [◆] of the [Authority's Construction Requirements];
“Change Protocol Deductions” or “CPD”	means the deductions arising pursuant to paragraph 2 of Section 8 (<i>Performance Failure Effective Deductions, Change Protocol Deductions and Critical Academic Function Increment Deductions</i>) of this Schedule 14 (<i>Payment Mechanism</i>)
“Close / Closed / Closure”	means a Facility will be considered as Closed where the Authority Representative or head teacher or deputy head teacher, acting reasonably, decides that all of the Students or visitors to the Facility are requested to leave the Facility, or not to attend the Facility, because of an Escalation Event;
“Consequential Unavailability” or “Consequentially Unavailable”	means an Area that would otherwise be Available but which is rendered Unavailable because its principal use or access thereto is dependent on an adjacent Area that has become Unavailable in accordance with paragraph 7 of Section 3 (<i>Recording Service Events</i>) of Schedule 14 (<i>Payment Mechanism</i>);
"Consequential Unavailability Table"	means [the table contained in the Area Data Sheets for the [relevant] Facility, with columns headed 'Full Space Name' or 'Generic Space Name' and 'CU'];
“Core Energy Hours”	means the aggregate of all Core Days during each Contract Year and each period of seven (7) hours between the hours of 12:00 a.m. midnight to 07:00 a.m. on each Core Day of each Contract Year.
“Core Day”	means each day, itself comprising a Core Day Morning and Core Day Afternoon, that the Authority requires use of the [relevant] Facility to deliver Educational Services to the Students during the Academic Year;
“Core Day Afternoon”	has the meaning given to it in Appendix 1 (<i>Core Sessions and Additional Periods</i>) of this Schedule 14 (<i>Payment Mechanism</i>);
“Core Day Morning”	has the meaning given to it in Appendix 1 (<i>Core Sessions and</i>

	<i>Additional Periods</i>) of this Schedule 14 (<i>Payment Mechanism</i>);
“Core Sessions”	<p>means those periods, set out in Appendix 1 (<i>Core Sessions and Additional Periods</i>) of this Schedule 14 (<i>Payment Mechanism</i>), during which the Facilities (or relevant parts of them) are required to be made Available to the Authority during the Academic Year, which shall more particularly comprise:</p> <p>(a) a Core Day Morning or Core Day Afternoon during the Core Day; and/or</p> <p>(b) any Additional Period requested by the Authority in accordance with Clause 5.10 to 5.13 (<i>Additional Periods</i>);</p>
“Critical Academic Function”	means National Examinations and mock examinations for National Examinations, as conducted from time to time by each College or School;
“Critical Academic Function increment” or “CAFI”	shall be an amount equal to [] pounds (£[]) (indexed) per learner affected and a minimum of [] pounds (£[]) (indexed) in respect of colleges; or [] pounds (£[]) (indexed) in respect of secondary schools; or [] pounds (£[]) (indexed) in respect of all-through schools; or [] pounds (£[]) (indexed) in respect of primary schools.
"Deduction Period" or "DP"	<p>means:</p> <p>(a) where the relevant Performance Failure arises following a Service Event in respect of which a Rectification Period is specified in the Performance Standards, as applicable, means the number of periods equivalent to the Rectification Period that elapse during Core Sessions only from the point at which the Service Failure Time occurs to the point at which the Logged Rectification Time occurs;</p> <p>(b) where, in accordance with this Schedule 14, the relevant Performance Failure arises following a Service Event in respect of which no Rectification Period is specified in the Performance Standards, means 1;</p> <p>(c) where it is deemed that a Performance Failure has occurred which is not related to a specific Performance Standard set out in the Service Level Specification, means 1;</p> <p>(d) where the relevant Availability Failure arises following a Service Event in respect of which a Rectification Period is specified in the Availability Standards, means the number of Core Sessions that elapse from and including the Core</p>

	<p>Session in which the Service Failure Time occurs to, and including, the Core Session on which the Logged Rectification Time occurs; or</p> <p>(e) as otherwise set out in paragraph 8.2 of Section 3 of this Schedule 14 (<i>Payment Mechanism</i>);</p>
"Energy Report"	means [◆];
"Energy Service"	means each of [biofuel,] natural gas, fuel oils and electricity supplies;
"Escalation Event"	<p>means [in respect of each Facility] any of the following:</p> <p>(a) where, in any Core Session, the aggregate number of all Areas which are Unavailable or Unavailable but Used (disregarding those Areas where no Availability Deductions may be made pursuant to paragraph 4.5 of Section 3 (Deductions from Monthly Service Payments) of this Schedule 14 (<i>Payment Mechanism</i>)) within a Facility exceeds thirty percent (30%) of the aggregate number of all the Areas (disregarding those Areas where no Availability Deductions may be made pursuant to paragraph 4.5 of Section 3 (Deductions from Monthly Service Payments) of this Schedule 14 (<i>Payment Mechanism</i>)) within the relevant Facility; or</p> <p>(b) where, in any Core Session, the number of sanitary fittings or washbasins Unavailable to Students in a Facility for reasons other than those excused under paragraph 4.5 of Section 3 (Deductions from Monthly Service Payments) of this Schedule 14 (<i>Payment Mechanism</i>) is more than thirty per cent (30%) of the number contained in Project Co's Proposals; or</p> <p>(c) where, in any Core Session, the aggregate number of all Relevant Teaching Areas which are Unavailable or Unavailable but Used in a Facility (disregarding those Areas where no Availability Deductions may be made pursuant to paragraph 4.5 of Section 3 (Deductions from Monthly Service Payments) of this Schedule 14 (<i>Payment Mechanism</i>)) exceeds twenty five per cent (25%) of the aggregate number of all the Relevant Teaching Areas within the relevant Facility; or</p> <p>(d) where the Catering Areas are Unavailable at any point between 7 a.m. and 2 p.m. during the Core Day,</p>

	save in each case to the extent directly caused by a Relief Event or event of Force Majeure. ²
"Helpdesk"	means the helpdesk facilities established by Project Co pursuant to the Service Level Specification;
"Indexation Base Month"	means April 20[xx ³];
"Indexation Review Date"	shall be 1 April twelve (12) months immediately following the Indexation Base Month, and every 1 April thereafter;
"Initial Period"	means the period from the [relevant] Actual Completion Date to four years after the [relevant] Actual Completion Date in respect of [each/the] Facility;
"Kilowatt Hour Electrical Equivalents" or "kWh"	means the electrical energy equivalents of other Energy Services; this is a notional unit of energy to allow the consumption of different energy sources to be combined in a single figure. These will be calculated by multiplying actual consumption in kWh by the conversion factors of 1.0 for electricity, 0.5 for thermal energy and 0.4 for all other fuels;
"Logged Rectification Time"	means the time which is shown in the Helpdesk records maintained by Project Co in accordance with the Service Level Specification as being the time when a Service Event was Rectified or Remedied, as the case may be, or, in the event that a failure affecting the Helpdesk occurs, as shown on the manual Helpdesk records maintained by Project Co;
"Logged Report Time"	means the date and time which is shown in the Helpdesk records maintained by Project Co in accordance with the Service Level Specification as being the date and time at which a Service Report was received by the Helpdesk or, if a failure affecting the Helpdesk occurs, as shown on the manual Helpdesk records maintained by Project Co;
"Make Safe"	means to ensure that any immediate risk of injury or incident that might impinge on the health and safety and/or security of users of the Facilities or immediate risk of damage to property is removed by means of temporary or permanent Rectification, notification and/or obstruction;
"Minimum Agreed Availability"	means the minimum standards with which the Area must comply, as agreed between the Authority and Project Co, for the

² To be considered on a project specific basis.

³ This the April in the year that immediately precedes Financial Close and should be consistent with the base month used in the Financial Model

Standards"	period until a Permanent Repair can be undertaken;
"Monthly Energy Report"	means [◆];
"Monthly Service Charge"	means the sum in Pounds Sterling calculated in accordance with paragraph 2 of Section 2 (<i>Calculation of Service Payments</i>) of this Schedule 14 (<i>Payment Mechanism</i>);
"Monthly Service Payment"	means the sum in Pounds Sterling calculated in accordance with paragraph 1 of Section 2 (<i>Calculation of Service Payments</i>) of this Schedule 14 (<i>Payment Mechanism</i>);
"National Examinations"	means all types of assessments taken by learners as conducted from time to time by each College or School; ⁴
"Other Costs" or "OC"	means those costs set out in Section 6 (<i>Other Costs</i>) of this Schedule 14 (<i>Payment Mechanism</i>);
"Partial Period"	has the meaning given to it in paragraph 4.1 of Section 7 of this Schedule 14 (<i>Payment Mechanism</i>);
"Performance Failure"	means, subject to paragraph 3 of Section 4 of this Schedule 14 (<i>Payment Mechanism</i>), a Service Event relating to a Performance Standard which has not been Rectified within the relevant Rectification Period (if any), or as otherwise deemed to be a Performance Failure in accordance with the terms of this Schedule 14 (<i>Payment Mechanism</i>);
"Performance Failure Deductions"	means an amount calculated in accordance with paragraph 2.1 of Section 3 (<i>Deductions from Monthly Service Payments</i>) of this Schedule 14 (<i>Payment Mechanism</i>), adjusted in accordance with this Agreement;
"Performance Failure Effective Deduction"	means the financial deduction specified in paragraph 1 of Section 8 (<i>Performance Failure Effective Deductions, Change Protocol Deductions and Critical Academic Function Increment Deductions</i>) of this Schedule 14 (<i>Payment Mechanism</i>) and adjusted in accordance with this Agreement;
"Performance Standards"	means the service requirements identified as such, set out in the

⁴ This definition is only intended to capture SAT/GCSE/A Level equivalent examinations and associated mock examinations. As the National Curriculum in Wales has recently been changed significantly this definition will be updated to reflect Welsh specifics on a project specific basis.

	Service Level Specification;
"Permanent Repair"	means Rectification following the agreement of a Temporary Repair;
"Permanent Repair Deadline"	has the meaning given in paragraph 1.2 of Section 4 of this Schedule 14 (<i>Payment Mechanism</i>);
"Project Co Factors"	means [◆];
"Rectification"	means, following the occurrence of a Service Event, making good the Service Event so that the subject matter of the Service Event complies with the levels of Service required pursuant to this Agreement which shall, without prejudice to the generality of the foregoing, include (a) restoring all functional capability and (b) ensuring that any Area which has been affected by the relevant Service Event complies with the Availability Standards and the Performance Standards, as applicable, and "Rectify" and "Rectifying" shall be construed accordingly;
"Rectification Period"	<p>means, where applicable, the period of time specified in the Availability Standards or the Performance Standards, as the case may be, allowed for the Rectification of the relevant Service Event, which period:</p> <p>(a) shall commence at the Logged Report Time (if the Logged Report Time occurs during a Core Session [for the relevant Area]); or</p> <p>(b) if the Logged Report Time occurs outwith a Core Session [for the relevant Area], shall commence at the commencement of the immediately following Core Session [for the relevant Area];</p> <p>provided that:</p> <p>(i) subject to Project Co having promptly notified the Authority's Representative of the fact and having recorded the same on the Helpdesk system, the Rectification Period shall be extended by any period during which Project Co was prevented or interrupted by the Authority and any Authority Party from Rectifying any failure to meet the Availability Standards or Performance Standards; and</p> <p>(ii) if the Rectification Period would otherwise expire outside a Core Session [for the relevant Area], it shall be extended so as to expire immediately prior to the</p>

	start of the next Core Session for the relevant Area;
“Relevant Teaching Areas”	means those Areas used for the purposes of teaching identified as such in the Area Data Sheets;
“Relocation Date”	means the date and time, notified by Project Co to the Authority in accordance with paragraph 4.7.1 of Section 3 (<i>Deductions from Monthly Service Payments</i>) of this Schedule 14 (<i>Payment Mechanism</i>), on which it is intended by the parties that the Authority may resume occupation of the Area or Areas for which any Alternative Accommodation is a replacement;
“Relocation Plan”	means a plan, in relation to Alternative Accommodation, provided by Project Co to the Authority in accordance with paragraph 4.7.1 of Section 3 (<i>Deductions from Monthly Service Payments</i>) of this Schedule 14 (<i>Payment Mechanism</i>);
"Remedial Period"	means, where applicable, the period of time specified in the Performance Standards within which Project Co must Remedy a Service Event;
"Remedy"	means the actions or tasks, detailed in the column headed [Remedial Period/Remedy] in the Performance Standards, required to remedy a Performance Failure and "Remedied" shall be construed accordingly;
“Routine”	means, in relation to a Service Event, a fault that is not categorised as Urgent;
"Service Event"	means an incident or state of affairs which does not meet or comply with the Performance Standards and/or does not satisfy the Availability Standards;
"Service Failure Time"	means the date and time when a Service Event becomes a Performance Failure or an Availability Failure, as the case may be;
“Service Priority Category”	means the categories set out in paragraph 1 of Section 8 (<i>Performance Failure Effective Deductions, Change Protocol Deductions, and Critical Academic Function Increment Deductions</i>) of this Schedule 14 (<i>Payment Mechanism</i>) as applied to the requirements in Schedule 12 (<i>Service Level Specification</i>);
"Service Report"	has the meaning given in paragraph 1.1 of Section 4 of this Schedule 14 (<i>Payment Mechanism</i>);

<p>"Temporary Repair"</p>	<p>means, in respect of the occurrence of a Service Event, works of a temporary nature that do not constitute Rectification but satisfy the Minimum Agreed Availability Standards and substantially make good the relevant Service Event for the period until a Permanent Repair can be undertaken;</p>
<p>"Total Availability Deduction" or "TAD"</p>	<p>means an amount calculated in accordance with paragraph 4.1 of Section 3 (<i>Deductions from Monthly Service Payments</i>) of this Schedule 14 (<i>Payment Mechanism</i>) adjusted in accordance with this Agreement;</p>
<p>"Unavailable"</p>	<p>means in relation to an Area, that such Area is in a state or condition which does not comply with any one or more of the Availability Standards or is Consequentially Unavailable, or is otherwise deemed to be Unavailable in accordance with this Schedule 14 (<i>Payment Mechanism</i>), and Unavailability shall be construed accordingly;</p>
<p>"Unavailable but Used"</p>	<p>means, in relation to any Area, that it is Unavailable but is used by the Authority for its normal purpose at any time (apart from the purposes of evacuating the Areas and the time taken for such evacuation) during the Core Sessions including for the avoidance of doubt, for the provision of Authority Services during which it would otherwise be Unavailable;</p>
<p>"Unavailable but Used Deduction" or "UUD"</p>	<p>means an amount calculated in accordance with paragraph 4.3 of Section 3 (<i>Deductions from Monthly Service Payments</i>) of this Schedule 14 (<i>Payment Mechanism</i>) adjusted in accordance with this Agreement; and</p>
<p>"Urgent"</p>	<p>means a Service Event that gives rise to an immediate threat to the health and safety of any person and/or security of the Facilities, but does not render any Area Unavailable.</p>

SECTION 2

CALCULATION OF SERVICE PAYMENTS

1 MONTHLY SERVICE PAYMENT

1.1 The Monthly Service Payment in respect of Contract Month “n”, shall be calculated by adding to the Monthly Service Charge for Contract Month “n” the Other Costs for Contract Month “n”, by deducting the Total Availability Deductions and Performance Failure Deductions relating to Contract Month “n-2” and by applying the Annual Energy Adjustment in respect of the previous Contract Year, all in accordance with the following formula:

$$1.2 \quad \text{MSP}_n = \text{MSC}_n - \text{TAD}_{n-2} - \text{PFD}_{n-2} + \text{OC}_n - \text{AEA}$$

where:

MSP_n = the Monthly Service Payment for Contract Month “n”;

MSC_n = the Monthly Service Charge in respect of Contract Month “n” calculated in accordance with paragraph 2.2 of Section 2 (*Calculation of Service Payments*) of this Schedule 14 (*Payment Mechanism*);

TAD_{n-2} = the Total Availability Deductions for Contract Month “n-2”;

PFD_{n-2} = the Performance Failure Deductions for Contract Month “n-2”;

OC_n = means any Other Costs due for Contract Month “n”, which in the case of premiums are supported by appropriate premium notices from Project Co’s insurer and as set out in Section 6 (*Other Costs*) of this Schedule 14 (*Payment Mechanism*); and

AEA = any Annual Energy Adjustment as may be applicable in respect of the previous Contract Year as set out in Section 7 (*Utilities Management*) of this Schedule 14 (*Payment Mechanism*).

2 MONTHLY SERVICE CHARGE⁵

2.1 The Monthly Service Payment (and underlying Monthly Service Charge) shall commence on the [Payment Commencement Date]/[Payment Commencement Date 1].

⁵ Phased step up for snagging retention and/or any Phasing of the Works and/or batching of Schools to be developed as necessary on a project by project basis and aligned with the approach in Clause 35.1.

2.2 The Monthly Service Charge payable in respect of a Contract Month "n" shall be calculated using the following formula:

$$MSC_n = (ASC_n / 12) * F$$

where:

MSC_n = the Monthly Service Charge for the Contract Month "n";

ASC_n = the Annual Service Charge for the Contract Year in which Contract Month "n" occurs, calculated in accordance with paragraph 3.1 of Section 2 (*Calculation of Service Payments*) of this Schedule 14 (*Payment Mechanism*) below;

F = the Annual Service Charge Step-Up Factor which shall be calculated as follows:

$$F = \sum \text{All Facilities } (FP_x \times C_x)$$

where:

FP_x = the percentage of the Annual Service Charge attributable to each Facility 'x' from the Actual Completion Date [of that Facility], as set out in the table below:

Facility	FP_x^6
From the Actual Completion Date [for Facility 1]	[■]%
From the Snagging Completion Date [relating to the Main Works for] [Facility 1]	[■]%
[From the Actual Post Completion Works Date [relating to Facility 1]]	[■]%
[Repeat as necessary for Facility 2, Facility 3 etc]	[■]%
TOTAL	100.00%

$$C_x = dr_n / dm_n$$

where:

⁶ Approach to Annual Service Charge Step Up post-completion may be different if there is more than one Facility

dr_n = total number of days in Contract Month "n" or, if the Actual Completion Date[,] [or] Snagging Completion Date [or Actual Post Completion Works Date] [for the relevant Facility] occurs part way through a Contract Month, the number of days remaining in Contract Month "n" at the relevant date or, as the case may be, number of days in the Contract Month up to and including the last day of the Project Term; and

dm_n = total number of days in Contract Month "n".

3 ANNUAL SERVICE CHARGE

3.1 The Annual Service Charge for Contract Year "n" shall be calculated using the following formula:

$$ASC_n = ASC_0 \times (1 - IF) + \left[(ASC_0 \times IF) \times \left[1 + \frac{(RPI(X)_n - RPI(X)_0)}{RPI(X)_0} \right] \right]$$

where:

ASC_n = the Annual Service Charge for the relevant Contract Year;

ASC_0 = the value for ASC_0 stated in Appendix 2 (*Annual Service Charge at Base Date*) to this Schedule 14 (*Payment Mechanism*) (being the Annual Service Charge at the Base Date), subject to any adjustments made from time to time in accordance with any express provision of this Agreement;

IF = the Indexation Factor being [♦]%;

$RPI(X)_n$ = the value of the RPI(X) published or determined with respect to the month of February which most recently precedes the relevant Contract Year⁷; and

$RPI(X)_0$ = the value of the RPI(X) published or determined with respect to the Base Date.

⁷ Note this provision requires the Base Date month to be the same month as the Contract Year commences, with indexation taking place at commencement of the Contract Year. The month for RPI(X)_n would then be that being 2 months prior to the month of Contract Year commencement.

SECTION 3

DEDUCTIONS FROM MONTHLY SERVICE PAYMENTS

1 ENTITLEMENT TO MAKE DEDUCTIONS

- 1.1 If at any time after the [Payment Commencement Date]/[Payment Commencement Date 1] an Availability Failure or a Performance Failure occurs the Authority will be entitled, subject to paragraphs 1.3 and 1.5 of this Section 3 (*Deductions from Monthly Service Payments*), paragraph 3 of Section 4 and Section 5 of this Schedule 14 (*Payment Mechanism*), to make Deductions in calculating the Monthly Service Payment in respect of that Availability Failure or Performance Failure, calculated in accordance with this Section 3 (*Deductions from Monthly Service Payments*) of Schedule 14 (*Payment Mechanism*).
- 1.2 If at any time following the initial period, where the Authority is entitled to make an Annual Energy Adjustment in accordance with paragraph 4 (*Annual Energy Adjustment*) of Section 7 (*Utilities Management*) of this Schedule 14 (*Payment Mechanism*), the Authority shall be entitled to make Deductions in calculating the Monthly Service Payment in respect of any Annual Energy Adjustment, calculated in accordance with paragraphs 4.7 to 4.9 of Section 7 of Schedule 14 (*Payment Mechanism*).
- 1.3 In calculating the Monthly Service Payment for Contract Month "n", the maximum aggregate of all Deductions that the Authority may make in respect of Contract Month "n-2" is the Monthly Service Charge⁸ for Contract Month "n-2".
- 1.4 In any Contract Month where the value of all Deductions to be applied in that Contract Month exceeds the value of the Monthly Service Charge, the Monthly Service Payment due by the Authority shall be an amount equal to the Other Costs for that Contract Month but the Authority shall, in calculating the Monthly Service Payment in respect of the following and (to the extent necessary) any subsequent Contract Months, be entitled to carry forward and set off the amount of such excess against the amount by which the value of the Monthly Service Charge exceeds the aggregate of all Deductions (as such values are calculated in the following Contract Month and (to the extent necessary) any subsequent Contract Months) in the relevant Contract Month for a period of up to twelve Contract Months, or, if earlier, until the amount of such excess has been set-off in full.
- 1.5 To the extent that an Availability Failure or a Performance Failure is the result of an Excusing Cause, the Authority shall not be entitled to make Deductions.

⁸ To comply with EPEC guidance on classification the Availability Deductions will be calibrated such that the proportionality principle of zero availability / zero payment is met.

1.6 To the extent that an Availability Failure or a Performance Failure is the result of:

1.6.1 a Relief Event; or

1.6.2 an event of Force Majeure,

the Authority shall be entitled to make Deductions but any such Deductions shall be disregarded for the purposes of Clause 26.3 (*Grounds for Warning Notices*) and Clause 40.1.8 (*Deductions*).

2 DEDUCTIONS FOR PERFORMANCE FAILURES

2.1 Subject to paragraphs 1 (*Entitlement to make Deductions*), 2.3 (*Deductions for Performance Failures*), 5 (*Repeated Failures*) and 7 (*Effect of Unavailability on Other Deduction*) of this Section 3 (*Deductions from Monthly Service Payments*), the amount of the Deduction in respect of Performance Failures is calculated using the following formula:

$$PFD_n = \sum (PFED \times DP) + \sum CPD$$

where:

PFD_n = Performance Failure Deductions for Contract Month "n" (in Pounds Sterling) in respect of Performance Failures in Contract Month "n";

$PFED$ = Performance Failure Effective Deductions (indexed) for each instance of Performance Failure in Contract Month "n-2", in Pounds Sterling, as set out in paragraph 1 of Section 8 (*Performance Failure Effective Deductions, Change Protocol Deductions and Critical Academic Function Increment Deductions*) of this Schedule 14 (*Payment Mechanism*)

CPD = Change Protocol Deductions in Contract Month "n-2", in Pounds Sterling, as set out in paragraph 2 of Section 8 (*Performance Failure Effective Deductions, Change Protocol Deductions and Critical Academic Function Increment Deductions*) of this Schedule 14 (*Payment Mechanism*);

2.2 In the case of a Service Event relating to a Performance Standard for which no Rectification Period is specified in the Performance Standard, a Performance Failure occurs immediately upon the occurrence of the Logged Report Time for the Service Event and, if it is not Remedied within the relevant Remedial Period, it will reoccur at the expiry of the Remedial Period and the Remedial Period will be deemed, for the purposes of making Deductions, to reoccur again, until such time as the Performance Failure has been Rectified.

- 2.3 Where two (2) or more Performance Failures occur in an Area during a Core Session, only the Performance Failure that results in the highest Deduction will apply.

3 DEEMED PERFORMANCE FAILURES

- 3.1 If Project Co fails to monitor or accurately report a Service Event, a Performance Failure and/or an Availability Failure, without prejudice to the Deduction to be made in respect of the relevant Performance Failure or Availability Failure (if any), the failure to monitor or report the Service Event, Performance Failure and/or Availability Failure will be deemed to be a new Service Priority Category "Medium" Performance Failure, unless the circumstances set out in paragraph 1.7 of Section 5 (*Failure by Project Co to Monitor or Report*) apply, in which case there shall be deemed to be a new Service Priority Category "High" Performance Failure.

- 3.2 For the purpose of paragraph 3.1 above and without prejudice to any deemed Service Priority Category "Medium" or "High" Performance Failure pursuant thereto, in determining whether an Availability Failure and/or Performance Failure has occurred, where a Service Report is not received by the Helpdesk and/or a Service Event is not logged to the Helpdesk records [in accordance with the Service Level Specification], the Logged Report Time shall be deemed to be the earlier of the time that Project Co:

3.2.1 became aware of the Service Event; or

3.2.2 ought reasonably to have been aware of the Service Event.

- 3.3 Where paragraph 3.1 applies and without prejudice to the Deductions to be made in respect of the relevant Performance Failure or Availability Failure, where Project Co has failed to log both a Service Event and the corresponding Performance Failure and/or Availability Failure, the deemed Performance Failure, shall apply in respect of the failure to log the corresponding Performance Failure and/or Availability Failure and not the failure to report the Service Event.

4 DEDUCTIONS FOR AVAILABILITY FAILURES

- 4.1 Subject to paragraphs 1 (*Entitlement to make Deductions*), 4.2 to 4.7 (*Deductions for Availability Failures*) and 5 (*Repeated Failures*) of this Section 3 (*Deductions from Monthly Service Payments*), the amount of Deductions in respect of Availability Failures shall be calculated in accordance with the following formula:

$$TAD = \sum (AD + UUD) \text{ (for all Areas [of the Facilities])}$$

where:

- TAD = the Total Availability Deductions (in Pounds Sterling) for all Areas [of the Facilities] during the Core Sessions in the relevant Contract Month;
- AD = the aggregate of the Availability Deductions for each Area [in each Facility] in the relevant Contract Month; and
- UUD = the aggregate of the Unavailable but Used Deductions for each Area [in each Facility] in the relevant Contract Month.

4.2 The Availability Deduction in respect of each Unavailable Area which is not used during the period in which it is Unavailable shall be calculated as follows:

$$AD = (AFD \times DP) + CAFI$$

Where:

- AD = the Availability Deduction for an Area that is Unavailable; and
- AFD = the Area Failure Deduction for that Area [for the relevant Facility] as set out in Section 10 (*Availability Priority Categories*) of this Schedule 14 (*Payment Mechanism*) and indexed in accordance with paragraph 4.4 (*Deductions for Availability Failures*) below.
- CAFI = the Critical Academic Function Increment, which may be applied pursuant to paragraph 3 of Section 8 (*Performance Failure Effective Deductions, Change protocol Deduction, and Critical Academic Function Increment Deductions*) of this Schedule 14 (*Payment Mechanism*).

4.3 The Unavailable but Used Deduction in respect of each Unavailable Area which is Unavailable but Used during the period in which it is Unavailable shall be calculated as follows:

$$UUD = 50\% \times ((AFD \times DP) + CAFI)$$

where:

- UUD = the Unavailable but Used Deduction for an Area that is Unavailable but Used; and
- AFD = the Area Failure Deduction for that Area [for the relevant Facility] as set out in Section 10 (*Availability Priority Categories*) of this Schedule 14 (*Payment Mechanism*) and

indexed in accordance with paragraph 4.4 (*Deductions for Availability Failures*) below.

CAFI = the Critical Academic Function Increment, which may be applied pursuant to paragraph 3 of Section 8 (*Performance Failure Effective Deductions, Change protocol Deduction, and Critical Academic Function Increment Deductions*) of this Schedule 14 (*Payment Mechanism*).

4.4 On each Indexation Review Date the Area Failure Deductions shall be indexed in accordance with the following:

$$AFD_y = [AFD_{y-1} \times (1 - IF)] + \left[(AFD_{y-1} \times IF) \times \left[1 + \frac{(RPI(X)_n - RPI(X)_0)}{RPI(X)_0} \right] \right]$$

where:

AFD_y = the Area Failure Deduction applicable from the relevant Indexation Review Date;

AFD_{y-1} = the Area Failure Deduction applicable immediately before the relevant Indexation;

IF = the Indexation Factor being [♦]%;

$RPI(X)_n$ = the value of the RPI(X) published or determined with respect to the month of February which most recently precedes the relevant Contract Year; and

$RPI(X)_0$ = the value of the RPI(X) published or determined with respect to the Base Date.

4.5 Subject to paragraph 1.5 of Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*), an Area shall not be deemed to be Unavailable and consequently no Availability Deductions may be made in respect of an Area if, and to the extent that, the Authority is using Alternative Accommodation provided by Project Co in place of the affected Area pursuant to paragraph 4.7 of Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*), that does not form part of the then existing Buildings (or External Areas) at the [relevant] Facility.

4.6 Facility Closure

4.6.1 Project Co shall notify the Authority's Representative of an anticipated or actual Escalation Event as soon as reasonably practical, regardless of whether or not this time is within a Core Session.

- 4.6.2 Where, in any Core Session an Escalation Event subsists, the Authority's Representative or head teacher of the relevant Facility may decide to Close the Facility.
- 4.6.3 If in any Core Session the Authority's Representative advises the Helpdesk that a Facility will be entirely Closed for the remainder of that day due to Unavailability (the summation of all Unavailability within the relevant Facility being in excess of the threshold set out in the relevant Escalation Event), then Project Co shall inform the Authority whether or not it believes that the Unavailability can be Rectified within that Core Session to an extent sufficient that the Escalation Event no longer subsists.
- 4.6.4 If Project Co does inform the Authority's Representative, within one (1) hour of the Authority's Representative advising the Helpdesk of the proposed Closure, that the Unavailability can be so Rectified, then paragraph 4.6.5 of Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*) shall (provided that Project Co acts reasonably in so informing the Authority's Representative) only apply if Project Co fails to Rectify the Unavailability within that Core Session to an extent sufficient that the Escalation Event no longer subsists.
- 4.6.5 If a Facility is Closed in accordance with paragraph 4.6.2 of Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*), then every Area will be deemed to be Unavailable for that Core Session and all subsequent Core Sessions on the same day, irrespective of the time at which the relevant Unavailability is Rectified. Availability Deductions may therefore be made in respect of all relevant Core Sessions during that Core Day irrespective of the time at which the relevant Areas cease to be Unavailable (save in respect of any relevant Core Sessions occurring after the Core Day on the relevant day where the relevant Unavailability has been Rectified and the relevant Area is used for its intended purpose).
- 4.6.6 In circumstances where the Facility could have been closed pursuant to paragraph 4.6.2 of Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*) but the Authority has not closed the Facility and Project Co either fails to inform the Authority's Representative in accordance with paragraph 4.6.4 of Section 3 (*Deductions from Monthly Service Payments*) that the Unavailability can be Rectified or fails to Rectify the Unavailability within that Core Session to an extent sufficient that the Escalation Event no longer subsists, then;
- 4.6.6.1 Every Area that the Authority does not use will be Unavailable for that Core Session and all subsequent Core Sessions on the same day irrespective of the time at which the relevant Unavailability is Rectified. Availability Deductions shall be made in respect of all relevant Core Sessions during that Core Day for such Areas irrespective of the time at which the relevant Areas cease to be Unavailable (save in respect of any relevant Core Sessions occurring after the Core Day on the relevant day where the relevant Unavailability has been Rectified and the relevant Area is used for its intended purpose). All Availability Deductions to be applied in accordance with this paragraph shall be calculated in line with paragraph 4.2 of Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*).

4.6.6.2 Every Area that the Authority continues to use shall be Unavailable but Used for that Core Session and all subsequent Core Sessions on the same day irrespective of the time at which the relevant Unavailability is Rectified. Unavailable but Used Deductions shall be made in respect of all relevant Core Sessions during that Core Day for such Areas irrespective of the time at which the relevant Areas cease to be Unavailable (save in respect of any relevant Core Sessions occurring after the Core Day on the relevant day where the relevant Unavailability has been Rectified and the relevant Area is used for its intended purpose). All Unavailable but Used Deductions to be applied in accordance with this paragraph shall be calculated in line with paragraph of 4.3 of Section 3 (Deductions from Monthly Service Payments) of this Schedule 14 (Payment Mechanism).

4.7 **Alternative Accommodation**

4.7.1 In order to offer Alternative Accommodation to the Authority, Project Co shall deliver to the Authority a Relocation Plan setting out:

- i. full details of the proposed Alternative Accommodation (including, without limitation, its location, the extent to which it complies with the Authority's Construction Requirements for the relevant Area and any logistical or other arrangements which Project Co proposes to be put in place in order to facilitate the Authority's occupation of the proposed Alternative Accommodation); and
- ii. the relevant Relocation Date.

For the avoidance of doubt, if the Relocation Plan is not delivered within the relevant Rectification Period, the Area will be considered to be Unavailable until such time as the Relocation Plan has been provided and agreed by the Authority.

4.7.2 The Authority's Representative shall not be obliged to accept any Alternative Accommodation but shall act reasonably in considering the proposals for Alternative Accommodation and will notify Project Co promptly of its decision whether or not such proposed Alternative Accommodation is acceptable. For the avoidance of doubt, an Area or Areas that Project Co is otherwise required to make Available during the relevant Core Sessions shall not be counted as Alternative Accommodation.

4.7.3 The performance regime under this Schedule 14 (*Payment Mechanism*) will apply to any Alternative Accommodation accepted by the Authority so that the Authority shall be entitled to make Deductions in respect of that Alternative Accommodation in accordance with this Schedule 14 (*Payment Mechanism*) at the same level as for the Area for which the Alternative Accommodation is a replacement.

- 4.7.4 Project Co shall bear any costs incurred by it, and all reasonable costs incurred by the Authority arising as a result of the provision or occupation of any such Alternative Accommodation and the Authority shall be entitled to recover such costs as a debt.
- 4.7.5 If Project Co has not made available to the Authority the Area for which Alternative Accommodation is a replacement (such Area being in compliance with all applicable Availability Standards) by the Relocation Date, Availability Deductions shall apply in respect of the Area which is Unavailable (for which Alternative Accommodation is a replacement) from the Relocation Date until such Area ceases to be Unavailable.
- 4.7.6 If at any time such Alternative Accommodation falls below the standard which was acceptable to the Authority under paragraph 4.7.2 of Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*) the Authority may reject such Alternative Accommodation and shall notify Project Co of its decision to do so.
- 4.7.7 If the Alternative Accommodation is rejected by the Authority under paragraph 4.7.6 of Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*), then the Authority may:
- i. vacate some or all of the Alternative Accommodation, and make Availability Deductions in respect of the Area for which the Alternative Accommodation so vacated is a replacement; or
 - ii. remain in occupation of the Alternative Accommodation and make Unavailable but Used Deductions in respect of the Area for which the Alternative Accommodation is a replacement.

In each case, such Deductions may be made by the Authority in respect of each relevant Core Session from (and including) the relevant Core Session during which Project Co's failure to make the relevant Area(s) Available by the Relocation Date occurred.

- 4.7.8 The Authority, having elected to remain in occupation of Alternative Accommodation pursuant to paragraph 4.7.7(ii) of Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*), may elect at any later time (on giving reasonable notice to Project Co) to vacate the Alternative Accommodation and make Availability Deductions in accordance with paragraph 4.7.7(i) of Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*) in respect of each relevant Core Session from (and including) the relevant Core Session during which such reasonable notice expires (but only, for the avoidance of doubt, if the Areas for which the Alternative Accommodation are a replacement fail to comply with the relevant Availability Standards).

4.7.9 Project Co and the Authority may, for the avoidance of doubt, agree to any new Relocation Date (suggested by either party) in which case the provisions of this paragraph 4.7 of Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*) shall apply mutatis mutandis to such revised Relocation Date.

4.7.10 If there is any dispute relating to the provision of Alternative Accommodation under this paragraph 4.7 of Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*), either party may refer the matter to the Dispute Resolution Procedure and until the resolution of such dispute the decision of the Authority shall prevail.

5 REPEATED FAILURES

5.1 Subject to paragraph 1 (*Entitlement to make Deductions*) of this Section 3 (*Deductions from Monthly Service Payments*) if:

5.1.1 Other than a Performance Failure in respect of Performance Standard FM 44 relating to Service Events that are [Routine], a Performance Failure in respect of the same Performance Standard; or

5.1.2 an Availability Failure in respect of the same Availability Standard,

occurs [◆] or more times in a rolling period of [◆] consecutive Contract Months, then the Deduction calculated pursuant to paragraph 2 (*Deductions for Performance Failures*) or paragraph 4 (*Deductions for Availability Failures*) of this Section 3 (*Deductions from Monthly Service Payments*) for the [◆] and each subsequent such Performance Failure and/or the [◆] and each subsequent such Availability Failure during the relevant period of [◆] consecutive Contract Months shall be multiplied by [1.5].

5.2 If a Performance Failure in respect of a Performance Standard FM 44 occurs, [◆] or more times, in respect of Service Events that are [Routine], and/or [◆] or more times, in respect of Service Events that are [Urgent], in a rolling period of three (3) consecutive Contract Months then the Deduction calculated pursuant to paragraph 2 (*Deduction for Performance Failures*) of this Section 3 (*Deductions from Monthly Service Payments*) for the [◆] and each subsequent such Performance Failure, and/or the [◆] and each subsequent such Performance Failure (respectively) during the relevant period of [◆] consecutive Contract Months shall be multiplied by [1.5].

6 REPEATED RECTIFICATION

6.1 If four (4) or more Service Events occur in any rolling seven (7) day period and:

6.1.1 each such Service Event is in connection with the same Performance Standard or Availability Standard;

6.1.2 each such Service Event affects the same Area; and

6.1.3 there is good reason to believe that the root cause of each such Service Event is the same,

then, notwithstanding that Project Co achieves Rectification of the Service Events within the relevant Rectification Period, there will be deemed to be a Performance Failures with a Service Priority Category of "High".

7 EFFECT OF UNAVAILABILITY ON OTHER DEDUCTIONS

7.1 Subject to paragraphs 7.2 and 7.3, if a Performance Failure occurs affecting an Area and the Service Event giving rise to the Performance Failure also gives rise to an Availability Failure affecting that Area, only the Deductions for the Availability Failure apply.

7.2 If an Availability Failure affects an Area and the Authority does not continue to use that Area, the Authority shall not, until Rectification of that Availability Failure, be entitled to make further Deductions in respect of that Area other than in respect of the Availability Failure.

7.3 If an Area is Unavailable but Used, the Authority will be entitled to make Deductions in respect of any Performance Failures affecting that Area. Where an Area is Unavailable but Used, the total Deductions made for that Area in any Session, being the sum of the Unavailable but Used Deductions and any Performance Failure Deductions shall not exceed the Availability Deductions that would otherwise have been made had the Area not been used.

8 RESPONSE PERIOD

8.1 Project Co shall respond to and Make Safe any Service Event raised within any required Response Period specified for the relevant Performance Standards or Availability Standards as set out in Schedule 12 (*Service Level Specification*). Such Response Period shall commence at the Logged Report Time.

8.2 If Project Co does not respond to and Make Safe the Service Event within the Response Period specified then, where the Service Event relates to a(n):

8.2.1 Performance Standard, a Performance Failure of the relevant Performance Standard shall immediately apply with a Deduction Period of one (1); or

8.2.2 Availability Standard, then a Performance Failure with a Service Priority Category of "High" shall apply with a Deduction Period of one (1).

9 CONSEQUENTIAL UNAVAILABILITY

- 9.1 Where, an Area specified in the column headed ['Full Space Name' or 'Generic Space Name'] of the Consequential Unavailability Table is or at any time becomes Unavailable, and as a direct consequence of such Unavailability the Authority, Authority Party or Students of the [relevant] Facility are unable (acting reasonably) to access or use or occupy for its intended purpose any other Area identified and appearing opposite in the column headed ['CU'] of the Consequential Unavailability Table (the "**Consequentially Unavailable Area**"), then the Consequentially Unavailable Area shall be deemed to be Unavailable for any Core Session during which it was intended to be, but was not, used. For the avoidance of doubt, the Logged Report Time in respect of the Consequentially Unavailable Area will be deemed to be the same as that for the original Area that caused the Consequential Unavailability.

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SECTION 4

NOTICE OF SERVICE EVENTS, MONTHLY SERVICE REPORTS AND TEMPORARY REPAIRS

1 NOTICE OF SERVICE EVENTS

- 1.1 If an Authorised Caller, notified to Project Co from time to time pursuant to the Joint Operating Protocol believes that an Area may be or may have been the subject of a Service Event, then that party may give notice to the Helpdesk, such notice (an "**Authority Service Event Notice**" or "**Service Report**") to contain the information required pursuant to the Performance Standards for the Helpdesk.
- 1.2 Project Co shall log the details of the Authority Service Event Notice as provided under paragraph 1.1 above on the Helpdesk within [ten (10) minutes] of receipt of the Authority Service Event Notice and the time of such notification to the Helpdesk shall constitute the Logged Report Time in relation to such Service Event.
- 1.3 Where the same Service Event is recorded by the Authority and also by Project Co, the earlier time will constitute the Logged Report Time.
- 1.4 If Project Co believes that any Area is subject to a Service Event and Project Co has not received an Authority Service Event Notice then Project Co shall give notice (containing the information referred to in paragraph 1.1 of Section 4 (*Recording Service Events*) of this Schedule 14 (*Payment Mechanism*)), being the "**Project Co Service Event Notice**" to the Helpdesk. The time of such notification will constitute the Logged Report Time in relation to such Service Event.

2 MONTHLY SERVICE REPORTS AND ANNUAL SERVICE REPORTS

- 2.1 Without prejudice to Clause 35.2.4, the Monthly Service Report shall set out, as a minimum[, in respect of each Facility]: [■]
- 2.2 Within ten (10) Business Days of the end of each Contract Year following the [Payment Commencement Date], Project Co shall submit to the Authority an Annual Service Report, including as a minimum the following[, in respect of each Facility]: [■]

3 TEMPORARY REPAIRS

- 3.1 If Project Co informs the Authority that it is unable to Rectify a Service Event within the specified Rectification Period due to the need for specialised materials or personnel that are not, and cannot reasonably be expected to be, immediately available at the Facilities but that a Temporary Repair can be effected:
 - 3.1.1 Project Co may carry out the Temporary Repair proposed by Project Co unless the Authority, acting reasonably, considers that, if the Temporary

Repair proposed by Project Co is carried out, the relevant Area will not be fit for use for the Authority Services for which it is normally used or there have been [five (5)] or more Temporary Repairs in a rolling period of twelve (12) consecutive Contract Months in respect of the [relevant] Facility; and

3.1.2 where a Temporary Repair is permitted pursuant to paragraph 3.1.1 above, the Authority and Project Co must act reasonably to agree a date and time (the "**Permanent Repair Deadline**") by which a Permanent Repair must be made, giving Project Co a reasonable period within which to carry out the Permanent Repair.

3.2 During any period beginning at the time when a Temporary Repair has been approved by the Authority and ending at the earlier of:

3.2.1 the time at which a Permanent Repair is successfully completed; or

3.2.2 the Permanent Repair Deadline,

the Availability Standards will be replaced by the Minimum Agreed Availability Standards.

3.3 If an agreed Temporary Repair is completed by Project Co before the Permanent Repair Deadline and results in the Area affected by the relevant Service Event satisfying the Minimum Agreed Availability Standards, the date and time shown in the Helpdesk records maintained by Project Co in accordance with the Service Level Specification as being the date and time when the Temporary Repair was completed (or, in the event that a failure affecting the Helpdesk occurs, as shown on the manual Helpdesk records maintained by Project Co as being the date and time when the Temporary Repair was completed) shall be deemed to be the Logged Rectification Time for that Service Event for the purpose of determining the value of DP in the formula in paragraph 4 (*Deductions for Availability Failures*) in Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*).

3.4 If the Permanent Repair is not carried out by the Permanent Repair Deadline, a Performance Failure or, as the case may be, an Availability Failure, will occur at that date and time and the provisions of paragraph 2 (*Deductions for Performance Failures*), paragraph 4 (*Deductions for Availability Failures*) and, if applicable, paragraph 5 (*Repeated Failures*) of Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*) shall apply.

SECTION 5

FAILURE BY PROJECT CO TO MONITOR OR REPORT

1 REPORTING FAILURES

- 1.1 The Monthly Service Report produced by Project Co for any Contract Month shall be the source of the factual information regarding the performance of the Services for the relevant Contract Month for the purposes of calculating the Deductions pursuant to Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*).
- 1.2 Either party may give written notice to the other if it believes there is an error or omission in the calculation of a Deduction or the reporting of a Performance Failure or Availability Failure, in a Monthly Service Report provided that, save in the circumstances referred to in paragraph 1.6 below, such notice must be given before the end of the Contract Month that falls two (2) Contract Months after the Contract Month in which the relevant Monthly Service Report was submitted by Project Co. The parties shall endeavour to agree the amendments required to rectify the error or omission (if any) within ten (10) Business Days of notice being given in accordance with this paragraph 1.2, failing which either party may, on giving written notice to the other, refer the matter to the Dispute Resolution Procedure.
- 1.3 Where Project Co fails to monitor or accurately to report a Service Event, Performance Failure or an Availability Failure, for the purposes of paragraph 1 of Section 1 (*General Requirements*) of Schedule 19 (*Record Provision*) the Authority shall be deemed to have reasonable cause to require that Project Co shall make available to the Authority for inspection such of the records referred to in paragraphs 11 and 12 of Section 2 (*Records to be Kept*) of Schedule 19 (*Record Provision*) as the Authority may specify.
- 1.4 Project Co shall upon submission of a valid invoice pay to the Authority a sum equal to the costs reasonably incurred by the Authority in carrying out any inspection and investigation of records made available pursuant to paragraph 1.3 above.
- 1.5 In the event that Project Co fails to accurately monitor or report a Service Event, the matter shall be dealt with in accordance with paragraphs 1.2, 1.6 or 1.7 of this Section 5 (*Failure by Project Co to Monitor or Report*) as appropriate and the Authority shall, in addition, be entitled to make Deductions in respect of any Performance Failures or Availability Failures in the manner prescribed in Section 3 (*Deductions from Monthly Service Payments*) of this Schedule 14 (*Payment Mechanism*). The Monthly Service Payment for the Contract Month in which any such Deduction would (but for the error or omission in the Monthly Service Report) have been made shall be re-calculated to take account of such Deduction and the amount of such Deduction shall be immediately due and payable by Project Co to the Authority together with interest at the Default Interest Rate from the date on which the Authority paid the Monthly Invoice for the relevant Contract Month until the date on which payment is made by Project Co.

1.6 Except where paragraph 1.7 of this Section 5 (*Failure by Project Co to monitor or Report*) applies, where Project Co fails to accurately notify the Helpdesk of a Service Event and/or report such Service Event in a Monthly Service Report, the Authority may give written notice of the error or omission, provided that such notice must be given before the end of the Contract Month that falls [twelve (12)] Contract Months after the Contract Month in which the relevant Monthly Service Report was submitted by Project Co. The parties shall endeavour to agree the amendments required to the relevant Monthly Service Report, rectify the relevant error or omission (if any) within thirty (30) Business Days of notice being given in accordance with this paragraph 1.6, failing which either party may, on giving written notice to the other, refer the matter to the Dispute Resolution Procedure.

1.7 For the purposes of paragraphs 1.2, 1.5 and 1.6 of this Section 5 (*Failure by Project Co to Monitor or Report*) in circumstances where the error or omission in the calculation of a Deduction or the reporting of a Service Event, Performance Failure or Availability Failure occurs as a result of:

1.7.1 fraudulent action or inaction;

1.7.2 deliberate misrepresentation; or

1.7.3 gross misconduct or gross incompetence,

in each case on the part of Project Co or a Project Co Party, there shall be no notice limitations.

1.8 The provisions of this Section 5 (*Failure by Project Co to Monitor or Report*) shall be without prejudice to any rights of the Authority in this Agreement pursuant to Clause 26 (*Monitoring of Performance*), Clause 40 (*Project Co Event of Default*) and Clause 45 (*Corrupt Gifts and Payments*).

SECTION 6
OTHER COSTS

1 OPERATIONAL INSURANCE PREMIUMS

- 1.1 Subject to paragraph 1.2 below, Project Co may include the premiums paid by Project Co to take out and maintain the Operational Insurances in accordance with Clause 54 (*Insurance*) in the Monthly Service Payment in accordance with paragraph 1 (*Monthly Service Payment*) of Section 2 (*Calculation of Service Payments*) of this Schedule 14 (*Payment Mechanism*) on the basis of the cost incurred by Project Co and supported by appropriate premium notices from the relevant insurer and an invoice from the relevant broker where paragraph 1.3 applies.
- 1.2 There shall be excluded from the premiums treated as an Other Cost, a sum equal to any portion of the premiums (referred to in paragraph 1.1) reasonably considered by the Authority, having taken into account the information in the Joint Insurance Cost Report, to be Project Co Factors.
- 1.3 Where the main source of remuneration of Project Co's insurance broker in respect of services provided to Project Co in connection with the placing of Operational Insurances is by way of a fee, instead of commission, and provided that the fee is reasonable and acceptable to the Authority and no commission is being received by the broker in addition to such fee, the amount of any fee charged, to the extent reasonably and properly attributable to the Operational Insurances, shall be treated in the same manner as the relevant premiums pursuant to paragraph 1.1 above.

2 MALICIOUS DAMAGE COSTS

- 2.1 Project Co may include any costs of Rectifying Malicious Damage incurred in accordance with Clause 50.4 (Costs of Rectifying Malicious Damage) of the Agreement in the Monthly Service Payment in accordance with paragraph 1 (*Monthly Service Payment*) of Section 2 (*Calculation of Service Payments*) of this Schedule 14 (*Payment Mechanism*) on the basis of the cost incurred by Project Co and supported by appropriate receipts or other reasonable evidence.

SECTION 7

UTILITIES MANAGEMENT

1 Energy Services: General Obligation to Supply and Costs

1.1 Throughout the Operational Term Energy Services will be purchased by the Authority [(or the [relevant] School Entity)].

2 Rates and Telecoms

2.1 Rates, water supply charges and unmetered charges for surface water drainage for a Facility shall be paid by the Authority [(or the [relevant] School Entity)] which shall also pay the cost of the telephone and data connection at the [relevant] Facility save to the extent attributable to the use of the telephone and data connection by Project Co or a Project Co Party.

3 Annual Shared Risk Core Energy Service Consumption Target

3.1 A purchased consumption target for the Building Load during Core Energy Hours for [each/the] Facility will be set for each Energy Service (the Annual Shared Risk Core Energy Service Consumption Target) as contained in the Annual Shared Risk Core Energy Service Consumption Target Table. The Annual Shared Risk Core Energy Service Consumption Targets will apply for the Initial Period [in respect of each Facility].

Annual Shared Risk Core Energy Service Consumption Target Table for Purchased Energy During Core Energy Hours ⁹

Name of Facility	Purchased Electricity Consumption (kWh)	Purchased Thermal Energy Consumption (kWh)	Purchased Consumption of Other Fuels (kWh)

⁹Shared Risk Core Energy Service Consumption Target for Purchased Energy During Core Energy Hours to be developed as necessary on a project by project basis.

- 3.2 The Annual Shared Risk Core Energy Service Consumption Target for each Energy Service for the Initial Period shall be as described in paragraph 3.1 above [in respect of each Facility]. Paragraphs 3.3 to 3.5 below will apply to the setting of all Annual Shared Risk Core Energy Service Consumption Targets for Contract Years following the Initial Period [in respect of each Facility].
- 3.3 Not less than three (3) Contract Months prior to the end of the Initial Period and each Contract Year following the Initial Period, Project Co shall submit to the Authority its proposed new Annual Shared Risk Core Energy Service Consumption Targets for each Energy Service for the next Contract Year, together with documentation supporting its proposals. The documentation shall include:
- (a) logs of consumption, on-site generation and off-site sales in the previous rolling twelve month period for which such data is available;
 - (b) calculations on which the new targets are based; and
 - (c) details of how these targets relate to the information contained in the relevant Monthly Energy Reports and Energy Reports.
- 3.4 Not more than one (1) Contract Month following receipt by the Authority of Project Co's proposals for the new Annual Shared Risk Core Energy Service Consumption Targets, the Parties shall meet to discuss those proposals and agree the Annual Shared Risk Core Energy Service Consumption Targets pursuant to paragraph 3.5 below for the next Contract Year. Any failure to agree the Annual Shared Risk Core Energy Service Consumption Targets shall be referred to the Dispute Resolution Procedure.
- 3.5 The Annual Shared Risk Core Energy Service Consumption Target for an Energy Service shall be derived from the lower of:
- (a) average annual recorded purchased consumption of that Energy Service over the three years ended on the last day of the previous Contract Year, [except that the first twelve (12) months of full operations shall be ignored after two years of operations]¹⁰; and
 - (b) For all Energy Services, consumption to achieve a Building Load energy cap of [thirty eight (38)]¹¹ **kilowatt hour electrical equivalents, or kWhe** / [seventy (70)] **kilowatt hour electrical equivalents, or kWhe**, per square metre adjusted in accordance with paragraph [◆] of the Authority's Construction Requirements during Core Energy Hours. This kWhe per square metre adjusted in accordance with paragraph [◆] of the Authority's Construction Requirements should be multiplied by the Gross Area of the [relevant] Facility. Where the total energy use during Core Energy Hours would otherwise exceed this figure, each ASRCET will be reduced pro rata, so that:

¹⁰ Adjustment may be required dependent on seasonal commissioning period.

¹¹ These are deemed to be a minimum requirement to be considered on a project specific basis. Schools should be set at 38 kWhe and Colleges at 70 kWhe.

$$ASRCET_{elec, CEH} = A_{elec, CEH} \frac{C_{buildingCEH}}{A_{buildingCEH}}$$

and

$$ASRCET_{therm, CEH} = A_{therm, CEH} \frac{C_{buildingCEH}}{A_{buildingCEH}}$$

and

$$ASRCET_{other, CEH} = A_{other, CEH} \frac{C_{buildingCEH}}{A_{buildingCEH}}$$

where

$ASRCET_{elec,CEH}$ = total Annual Shared Risk Core Energy Service Consumption Target during Core Energy Hours for electricity in kWh;

$ASRCET_{therm,CEH}$ = total Annual Shared Risk Core Energy Service Consumption Target during Core Energy Hours for thermal energy in kWh;

$ASRCET_{other,CEH}$ = total Annual Shared Risk Core Energy Service Consumption Target during Core Energy Hours for all other fuels in kWh;

$A_{elec,CEH}$ = actual Building Load consumption of electricity during Core Energy Hours (in kWh) calculated using the methodology as in the agreed In Use Energy Model as defined in paragraph [◆] of the Authority's Construction Requirements once this has been agreed between the Parties or, prior to such agreement, the agreed Final Baseline Energy Model in Project Co's Proposals, in each case adjusted for the factors identified in paragraph [◆] of the Authority's Construction Requirements;

$A_{therm,CEH}$ = actual Building Load consumption of thermal energy during Core Energy Hours (in kWh) calculated as in the agreed In Use Energy Model as defined in paragraph [◆] of the Authority's Construction Requirements once this has been agreed between the Parties or, prior to such agreement, the agreed Final Baseline Energy Model in Project Co's Proposal, in each case adjusted for the factors identified in paragraph [◆] of the Authority's Construction Requirements;

$A_{other,CEH}$ = actual Building Load consumption of other fuels during Core Energy Hours (in kWh) calculated as in the agreed In Use Energy Model as defined in paragraph [◆] of the Authority's Construction Requirements once this has been agreed between the Parties or, prior to such agreement, the agreed Final Baseline Energy Model in Project Co's

Proposal, in each case adjusted for the factors identified in paragraph [◆] of the Authority's Construction Requirements;

$A_{\text{building,CEH}}$ = actual Building Load per square metre during Core Energy Hours (in kWhe) arrived at by adding together the weighted consumption of $A_{\text{elec,CEH}}$ during Core Energy Hours to the weighted consumption of $A_{\text{therm,CEH}}$ during Core Energy Hours to the weighted consumption of $A_{\text{other,CEH}}$ during Core Energy Hours. These weighted consumptions will be calculated by multiplying actual consumption in kWh by the conversion factors of 1.0 for electricity, 0.5 for thermal energy and 0.4 for all other fuels; and

$C_{\text{building,CEH}}$ = the maximum permitted consumption of Energy Services in respect of Building Load during Core Energy Hours. This is [forty six (46) kWhe]/ [eighty five (85) kWhe]¹² multiplied by the Gross Area but may be adjusted for the factors identified in paragraph [◆] of the Authority's Construction Requirements.

[in each case adjusted if necessary to allow for the factors identified in paragraph [◆] of the Authority's Construction Requirements which are not already taken into account of in the Annual Shared Risk Core Energy Service Consumption Strategy and which are expected to apply in the following year]

4 Annual Energy Adjustment

4.1 Within two (2) weeks of the start of each Contract Year following the Initial Period, the actual consumption of each Energy Service over the previous Contract Year (or part of a Contract Year where relevant (the "**Partial Period**")) will be calculated and an Energy Report sent to the Authority as set out in paragraphs [◆] and [◆] of the Service Level Specification. The values calculated for the Building Load will be compared to the relevant Annual Shared Risk Core Energy Service Consumption Target (or, in the case of any Partial Period, an agreed target for the relevant months in the Partial Period, allowance having been made for normal seasonal energy usage for the Partial Period in question). The Annual Shared Risk Core Energy Service Consumption Target for the Contract Year just ended will be recalculated if necessary to allow for the factors identified in paragraph [◆] of the Authority's Construction Requirements.

4.2 The actual Building Load during Core Energy Hours over the previous Contract Year (or part of a Contract Year where relevant (the Partial Period)) will be calculated as follows [in respect of each Facility]:

$$A_{\text{building,CEH}} = (A_{\text{elec,CEH}} \times 1.0) + (A_{\text{therm,CEH}} \times 0.5) + (A_{\text{other,CEH}})$$

¹² To be adjusted on a project specific basis. Schools should be set at 46 and Colleges set at 85.

x 0.4) where:

- $A_{\text{building,CEH}}$ = total actual Building Load during Core Energy Hours (in kWhe);
- $A_{\text{elec,CEH}}$ = as defined in paragraph 3.5 limb (b) of this Section 7 of Schedule 14 (*Payment Mechanism*);
- $A_{\text{therm,CEH}}$ = as defined in paragraph 3.5 limb (b) of this Section 7 of Schedule 14 (*Payment Mechanism*); and
- $A_{\text{other,CEH}}$ = as defined in paragraph 3.5 limb (b) of this Section 7 of Schedule 14 (*Payment Mechanism*).

4.3 The target Building Load during Core Energy Hours over the previous Contract Year (or part of a Contract Year where relevant (the Partial Period)) [in respect of each Facility] will be calculated as:

$$T_{\text{building,CEH}} = (\text{ASRCET}_{\text{elec,CEH}} \times 1.0) + (\text{ASRCET}_{\text{therm,CEH}} \times 0.5) + (\text{ASRCET}_{\text{other,CEH}} \times 0.4)$$

where:

- $T_{\text{building,CEH}}$ = total target Building Load during Core Energy Hours (kWhe);
- $\text{ASRCET}_{\text{elec,CEH}}$ = as defined in paragraph 3.5(b) of this Section 7 of Schedule 14 (*Payment Mechanism*);
- $\text{ASRCET}_{\text{therm,CEH}}$ = as defined in paragraph 3.5(b) of this Section 7 of Schedule 14 (*Payment Mechanism*); and
- $\text{ASRCET}_{\text{other,CEH}}$ = as defined in paragraph 3.5(b) of this Section 7 of Schedule 14 (*Payment Mechanism*).

4.4 The cap on Building Load during Core Energy Hours, $C_{\text{building,CEH}}$, over the previous Contract Year (or part of a Contract Year where relevant (the Partial Period)) will be calculated as [forty six (46) kWhe] [eighty five (85) kWhe]¹³ per square metre per annum adjusted for the factors identified in paragraph [◆] of the Authority's Construction Requirements and multiplied by the Gross Area in square metres.

4.5 Where actual consumption in respect of Building Load during Core Energy Hours in the previous Contract Year is different to the total target Building Load during Core Energy Hours (or, in the case of any Partial Period, an agreed target for the relevant months in the Partial Period, allowance having been made for normal

¹³ Insert as appropriate. The cap should be set at 46 kWhe for Schools and 85 kWhe for Colleges.

seasonal energy usage for the Partial Period in question) the Annual Energy Adjustment shall be calculated as:

$$AEA = EAUC \times AEVA$$

where:

AEA = the Annual Energy Adjustment in £;

EAUC = the Energy Average Unit Cost per kWh as set out in paragraph 4.6 of this Section 7 of Schedule 14 (*Payment Mechanism*); and

AEVA = the Annual Energy Volume Adjustment as set out in paragraphs 4.7 to 4.10 this Section 7 of Schedule 14 (*Payment Mechanism*).

4.6 The Energy Average Unit Cost in respect of a Contract Year will be calculated as:

$$\frac{V}{W}$$

Where

EAUC = the Energy Average Unit Cost (£ per kWh)

V

$$= (A_{elec,CEH} \times 1.0 \times U_{elec}) + (A_{therm,CEH} \times 0.5 \times U_{therm}) + (A_{other,CEH} \times 0.4 \times U_{other})$$

W

$$= ((A_{elec,CEH} \times 1.0) + (A_{therm,CEH} \times 0.5) + (A_{other,CEH} \times 0.4))$$

where:

$A_{elec,CEH}$ = as defined in paragraph 3.5 of this Section 7 of Schedule 14 (*Payment Mechanism*);

$A_{therm,CEH}$ = as defined in paragraph 3.5 of this Section 7 of Schedule 14 (*Payment Mechanism*);

$A_{other,CEH}$ = as defined in paragraph 3.5 of this Section 7 of Schedule 14 (*Payment Mechanism*);

U_{elec} = the average price for electricity identified for the appropriate size of consumer in the reports published by BEIS "Prices of fuels purchased by non-domestic consumers in the United Kingdom (QEP 3.4.1 and 3.4.2)" in £ per kWh for electricity during that

Contract Year;

U_{therm} = the average price paid in £ per kWh for thermal energy during that Contract Year; and

U_{other}¹⁴ = the average price of gas identified for the appropriate size of consumer in the reports published by BEIS “Prices of fuels purchased by non-domestic consumers in the United Kingdom (QEP 3.4.1 and 3.4.2)” or for other fuels the average price paid in £ per kWh during that Contract Year.

4.7 Where actual consumption in kWh_e in respect of Building Load during Core Energy Hours in the previous Contract Year (or part of a Contract Year in the case of any Partial Period) was equal to or lower than the cap on Building Load during Core Energy Hours and was higher than the total target Building Load during Core Energy Hours (or, in the case of any Partial Period, an agreed target for the relevant months in the Partial Period, allowance having been made for normal seasonal energy usage for the Partial Period in question) (T_{building,CEH}) the Annual Energy Volume Adjustment shall be calculated as:

$$AEVA = \frac{X_a + Y_a - T_{\text{building,CEH}}}{2}$$

where:

AEVA = the Annual Energy Volume Adjustment (kWh_e);

X_a = the greater of:
0; and
A_{building,CEH} - (1.2 x T_{building,CEH});

Y_a = the lower of:
1.2 x T_{building,CEH}
and
A_{building,CEH};

A_{building,CEH} = as defined in paragraph 3.5 of this Section 7 of Schedule 14 (*Payment Mechanism*); and

T_{building,CEH} = as defined in paragraph 4.3 of this Section 7 of Schedule 14 (*Payment Mechanism*); and

4.8 Where actual consumption in kWh_e in respect of Building Load during Core Energy Hours in the previous Contract Year (or part of a Contract Year in the case of any Partial Period) (A_{building,CEH}) was higher than the cap on Building Load during Core Energy Hours (C_{building,CEH}) and was also higher than the total target Building Load during Core Energy Hours (or, in the case of any Partial Period, an agreed target for the relevant months in the Partial Period, allowance having been made

¹⁴ For thermal energy and fuels other than gas, the unit cost will be based on the actual average cost paid by the Authority.

for normal seasonal energy usage for the Partial Period in question) ($T_{\text{building,CEH}}$) the Annual Energy Volume Adjustment shall be calculated as:

$$\text{AEVA} = A_{\text{building,CEH}} - C_{\text{building,CEH}} + X_b + \frac{Y_b - T_{\text{building,CEH}}}{2}$$

where:

AEVA = the Annual Energy Volume Adjustment (kWhe);

X_b = the greater of:
0
and
 $C_{\text{building,CEH}} - (1.2 \times T_{\text{building,CEH}})$;

Y_b = the lower of:
 $C_{\text{building,CEH}}$
and
 $1.2 \times T_{\text{building,CEH}}$;

$C_{\text{building,CEH}}$ = as defined in paragraph 3.5 of this Section 7 of Schedule 14 (*Payment Mechanism*); and

$T_{\text{building,CEH}}$ = as defined in paragraph 4.3 of this Section 7 of Schedule 14 (*Payment Mechanism*).

4.9 Where actual consumption in kWhe in respect of Building Load during Core Energy Hours in the previous Contract Year (or part of a Contract Year in the case of any Partial Period) ($A_{\text{building,CEH}}$) was lower than the target Building Load during Core Energy Hours (or, in the case of any Partial Period, an agreed target for the relevant months in the Partial Period, allowance having been made for normal seasonal energy usage for the Partial Period in question) ($T_{\text{building,CEH}}$) the Annual Energy Volume Adjustment shall be calculated as:

$$\text{AEVA} = \frac{A_{\text{building,CEH}} - T_{\text{building,CEH}}}{2}$$

where:

AEVA = the Annual Energy Volume Adjustment (kWhe);

$A_{\text{building,CEH}}$ = as defined in paragraph 3.5 of this Section 7 of Schedule 14 (*Payment Mechanism*); and

$T_{\text{building,CEH}}$ = as defined in paragraph 4.3 of this Section 7 of Schedule 14 (*Payment Mechanism*).

4.10 Where none of paragraphs 4.7 to 4.9 of this Section 7 of Schedule 14 (*Payment Mechanism*) applies the Annual Energy Volume Adjustment shall be zero.

4.11 The Annual Energy Adjustment shall only be made once in a Contract Year. The Annual Energy Adjustment shall be made to the Monthly Service Payment, in accordance with paragraph 1.2 of Section 2 (*Calculation of Service Payments*) of Schedule 14, for the Contract Month immediately following agreement of the

Annual Energy Adjustment, in accordance with paragraph 4.5 of this Section 7 (*Utilities Management*) of Schedule 14.

SECTION 8

PERFORMANCE FAILURE EFFECTIVE DEDUCTIONS, CHANGE PROTOCOL DEDUCTIONS AND CRITICAL ACADEMIC FUNCTION INCREMENT DEDUCTIONS

1 Service Priority Categories and Performance Failure Effective Deductions

Service Priority Category	Performance Failure Effective Deduction (£ per Deduction Period) for Performance Standards
Low	[£♦]
Medium	[£♦]
High	[£♦]
Super	[£♦]

2 Change Protocol Deductions

2.1 Change Protocol Deductions shall be calculated in accordance with paragraph 2.2 of Section 8 (*Performance Failure Effective Deductions, Change Protocol Deductions, and Critical Academic Function Increment Deductions*) of this Schedule 14 (*Payment Mechanism*) where Project Co is in breach of Schedule 16 (*Change Protocol*) to this Agreement (the Change Protocol Schedule) during the Operational Term. Where Change Protocol Deductions arise they shall, other than in respect of their calculation and indexation, be treated as Performance Failure Deductions. Terms defined in this paragraph 2 of Section 8 of Schedule 14 (*Payment Mechanism*) shall have the meaning given to them in Section 1 of Schedule 16 (*Change Protocol*) where not otherwise defined in Schedule 1 (*Definitions and Interpretation*) or Section 1 of this Schedule 14 (*Payment Mechanism*).

2.2

	Low Value Change	Medium Value Change	High Value Change
Failure to provide a response to a request for a	[£♦] (indexed) for each Business	[£♦] (indexed) for each Business Day	In respect of the High Value Change Proposal

	Low Value Change	Medium Value Change	High Value Change
Change	Day over [five (5)] Business Days following the submission by the Authority of an Authority Change Notice for a Low Value Change in accordance with paragraph 2 of Section 2 (<i>Low Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>).	over [fifteen (15)] Business Days following the submission by the Authority of a Medium Value Change Notice in accordance with paragraph 2.2 of Section 3 (<i>Medium Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>). This deduction shall not apply where Project Co refuses a Medium Value Change in accordance with paragraph 2.3 of Section 3 (<i>Medium Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>). [£♦] (indexed) for each Business Day over the period notified by Project Co under paragraph 2.2.2 of Section 3 (<i>Medium Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>), or otherwise agreed or determined pursuant to paragraph 2.4 of Section 3 (<i>Medium Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>) in respect of the Estimate.	[£♦] (indexed) for each Business Day over [thirty (30)] Business Days following the submission by the Authority of a High Value Change Notice in accordance with paragraph 2 of Section 4 (<i>High Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>), or such longer period as is agreed or determined pursuant to paragraph 3.3 of Section 4 (<i>High Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>). In respect of the High Value Change Stage 2 Submission, [£♦] (indexed) for each Business Day over the period agreed or determined for submission of the High Value Change Stage 2 Submission pursuant to paragraph 4.1.1 of Section 4 of Schedule 16 (<i>Change Protocol</i>).

	Low Value Change	Medium Value Change	High Value Change
Failure to provide a response of the required standard	Not applicable ¹⁵	<p>[£♦] (indexed) for each Business Day over [fifteen (15)] Business Days in respect of the response required to paragraph 2.2 of Section 3 (<i>Medium Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>).</p> <p>[£♦] (indexed) for each Business Day over the period notified by Project Co under paragraph 2.2.2 of Section 3 (<i>Medium Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>), or otherwise agreed or determined pursuant to paragraph 2.4 of Section 3 (<i>Medium Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>) that Project Co's Estimate does not represent a fair and reasonable approach to the Medium Value Change Notice.</p>	<p>[£♦] (indexed) (i) in the case of a High Value Change Proposal, for each Business Day over [thirty (30)] Business Days following the submission by the Authority of a High Value Change Notice in accordance with paragraph 2 of Section 4 (<i>High Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>), or such longer period as is agreed or determined pursuant to paragraph 3.3 of Section 4 (<i>High Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>), or (ii) in the case of a High Value Change Stage 2 Submission, for each Business Day over the period agreed or determined for submission of the High Value Change Stage 2 Submission pursuant to paragraph 4.1.1 of Section 4 of Schedule 16 (<i>Change Protocol</i>) that the High Value Change Stage 2 Submission did not include the content required by paragraph 4.3 of Section 4 of Schedule 16 (<i>Change Protocol</i>).</p>

¹⁵ There is no deduction proposed in these circumstances on the basis that if Project Co cannot provide an acceptable proposal the Authority can carry out the Low Value Change itself.

	Low Value Change	Medium Value Change	High Value Change
Failure to implement the agreed changes to the agreed standard by the agreed date	[£♦] (indexed) for each Business Day following the date specified in the notice given by Project Co in accordance with paragraph 3 of Section 2 (<i>Low Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>), or such date as is agreed by the parties pursuant to paragraph 5 of Section 2 of Schedule 16 (<i>Change Protocol</i>)..	[£♦] (indexed) for each Business Day following the date specified for completion in the Estimate as confirmed by the Authority in accordance with paragraph 7.1 of Section 3 (<i>Medium Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>), where such Medium Value Change is not completed as evidenced in accordance with paragraph 8 of Section 3 (<i>Medium Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>).	[£♦] (Indexed) for each Business Day following the date specified for completion in the High Value Change Stage 2 Submission as agreed by the parties pursuant to paragraph 4.3 of Section 4 (<i>High Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>), where such High Value Change is not completed as evidenced in accordance with paragraph 11 of Section 4 (<i>High Value Changes</i>) of Schedule 16 (<i>Change Protocol</i>).

2.3 Change Protocol Deductions shall cease to apply where:

- 2.3.1 the Authority notifies Project Co, pursuant to paragraph 6.3 of Section 2 (*Low Value Changes*) of Schedule 16 (*Change Protocol*) or paragraph 8.3 of Section 3 of Schedule 16 (*Change Protocol*) to this Agreement that it is exercising its rights to carry out or procure the carrying out of the relevant Change;
- 2.3.2 (in relation to Deductions for a failure to provide a response) Project Co submits a response;
- 2.3.3 (in relation to Deductions for a failure to submit a response of the required standard for a Medium Value Change) Project Co submits a revised response to the required standard; and
- 2.3.4 (in relation to Deductions for a failure to implement the Change) Project Co implements the Change in accordance with the terms of this Agreement (and any related deed of variation).

3 Critical Academic Function Increment Deductions

- 3.1 Where an Area was due to be utilised for a Critical Academic Function in the applicable Core Session and such Critical Academic Function could not be performed in the Area due to Unavailability, for each Core Session so affected Project Co shall pay the Critical Academic Function Increment by way of a deduction from the MSP or, if higher, the reasonable costs incurred by the Authority in procuring and using alternative accommodation provided always that:
- 3.1.1 a minimum of [four] ([4]) weeks' notice (which, if given verbally, must be confirmed in writing within [five] ([5]) Business Days of such verbal notice) has been given to the Helpdesk that the Area is to be used for the purpose of a Critical Academic Function; and
 - 3.1.2 the Area was not subject to Unavailability or was not Unavailable but Used at the time the notice referred to in paragraph 3.1.1 above was given; and
 - 3.1.3 the Area was not utilised for the Critical Academic Function
- 3.2 Where a Critical Academic Function Increment deduction would otherwise have been made, but the Area was utilised for the Critical Academic Function, the deduction to be applied shall be adjusted in accordance with Paragraph 4.3 of Section 3 of this Schedule 14.

SECTION 9

AVAILABILITY STANDARDS AND RESPONSE AND RECTIFICATION PERIODS FOR UNAVAILABILITY

1 Availability Standards

- 1.1 Additional Availability Standards are set out in the Area Data Sheets in respect of each Area. The Rectification Period and Response Periods set out in paragraph 2 of this Section 9 of Schedule 14 (*Payment Mechanism*) shall apply to the Availability Standards set out in the Area Data Sheets.
- 1.2 To classify as Available, the Area (other than Areas which are sports pitches, hard play areas, multi-use games areas, artificial grass pitches, pathways, roads, car parking or other outdoor areas) must:
- 1.2.1 exist;
 - 1.2.2 be accessible (including by lifts where the building is more than single storey) by means that accord with the Authority's Construction Requirements with access being safe and free from obstruction;
 - 1.2.3 not demonstrate failure of or damage to its structure or fabric which materially and adversely affects use of the Area, the Services or the long-term condition of the [relevant] [Facility] / [Facilities] or the health and safety of the users;
 - 1.2.4 be maintained at a temperature above the minimum maintained air temperature specified in paragraph [♦] of the Authority's Construction Requirements and:
 - i. during the period from October to April inclusive, below the maximum air temperature specified in paragraph [♦] of the Authority's Construction Requirements; and
 - ii. during the period from May to September inclusive, with a Daily Weighted Exceedance (Criterion 2, calculated as specified in paragraph [♦] of the Authority's Construction Requirements) below six degrees (6°) Celsius and with a maximum Exceedance (the Upper Temperature Criterion 3, described in paragraph [♦] of the Authority's Construction Requirements) below four degrees (4°) Celsius;
 - 1.2.5 have a vertical air temperature difference not exceeding six degrees (6°) Celsius in Areas with a clear floor to ceiling height not exceeding three (3) metres;

- 1.2.6 for ICT server and hub rooms be maintained within the parameters specified in paragraph [◆] of the Authority's Construction Requirements;
- 1.2.7 be free of draughts from ventilation systems as defined in paragraph [◆] of the Authority's Construction Requirements;
- 1.2.8 be capable of illumination at lux levels at or above the minimum levels required by the Authority's Construction Requirements, Service Level Specification and Area Data Sheets for that Area (with all of the lighting infrastructure and at least 75% of the lamps operational);
- 1.2.9 have sufficient and safe electrical supplies where required by the Area Data Sheets and the Authority's Construction Requirements;
- 1.2.10 maintain the level of ventilation as required in the Area Data Sheets, Service Level Specification and the Authority's Construction Requirements;
- 1.2.11 have a sufficient, constant and safe hot water supply in accordance with the Area Data Sheets and the Authority's Construction Requirements;
- 1.2.12 have a sufficient, constant and safe cold water supply in accordance with the Area Data Sheets and the Authority's Construction Requirements;
- 1.2.13 be compliant with all relevant Law, including fire, health and safety, safeguarding and security legislation;
- 1.2.14 have permanent structural elements and building fabric present and in sufficiently good order to enable the delivery of Educational Services in the Area;
- 1.2.15 be free from leaks, flood, weather penetration and damp affecting the structure of the building;
- 1.2.16 be served at all times by an operational security system in accordance with the Area Data Sheets and the Authority's Construction Requirements (as applicable);
- 1.2.17 be served at all times by operational alarm/emergency communication systems;
- 1.2.18 be clear of waste, with a safe and constant sewage and drainage system;

- 1.2.19 have constant and safe supply of gas and compressed air where required under the Area Data Sheets, Service Level Specification and the Authority's Construction Requirements (as applicable);
 - 1.2.20 be maintained within the range of noise and acoustic levels outlined in the Area Data Sheets and the Authority's Construction Requirements;
 - 1.2.21 have the Group 1 Equipment necessary for the use of that Area as required by the Area Data Sheets and the Authority's Construction Requirements and in a safe and functional condition;
 - 1.2.22 where an information technology or telecommunications supply is required pursuant to the Authority's Construction Requirements, Service Level Specification or Area Data Sheets for the Area, there is a secure supply with all of the cabling infrastructure and less than fifteen per cent (15%) failure of the network outlets in that Area;
 - 1.2.23 have access to drinking water as specified in the Area Data Sheets and the Authority's Construction Requirements;
 - 1.2.24 have emergency lighting in a safe and functional condition;
 - 1.2.25 have exhaust and extraction (including dust) systems in a safe and functional condition;
 - 1.2.26 have lightning protection in a safe and functional condition;
 - 1.2.27 have sprinkler and fire detection and alarm systems in a safe and functional condition; and
 - 1.2.28 have maintained fire safety, fire escape, fire protection, fire-stopping and fire-proofing and associated systems in a safe and functional condition.
- 1.3 For Areas which are sports pitches, hard play areas, multi-use games areas, artificial grass pitches or other outdoor areas to be deemed Available, such Areas must:
- 1.3.1 exist;
 - 1.3.2 be surfaced in accordance with the Authority's Construction Requirements;
 - 1.3.3 have a drainage system which is functional (where applicable);

- 1.3.4 have pitch markings which are visible (where applicable in accordance with the requirements of Section 3 of Schedule 6 (Authority's Construction Requirements) and Section 1 of Schedule 12 (Service Level Specification));
 - 1.3.5 have functional flood lights where required by the Area Data Sheets;
 - 1.3.6 include equipment as per the relevant Area Data Sheet which Project Co is required to provide and which is necessary for the use of that Area;
 - 1.3.7 be compliant with all relevant Law, including health and safety and security legislation;
 - 1.3.8 have functional external lighting and electrical services where required by the Area Data Sheets; and
 - 1.3.9 be accessible.
- 1.4 For car parking Areas to be deemed Available, such Areas must:
- 1.4.1 exist;
 - 1.4.2 be surfaced in accordance with the Authority's Construction Requirements;
 - 1.4.3 have a drainage system which is functional;
 - 1.4.4 have markings which are clearly visible in the absence of snow and ice;
 - 1.4.5 be compliant with all relevant Law, including health and safety and security legislation;
 - 1.4.6 have functional lighting and electrical services where required by the Area Data Sheets; and
 - 1.4.7 be accessible.

2 Response and Rectification Periods for Unavailability

- 2.1 The Response Period and Rectification Period for each of the Availability Standard is as follows:

Response Period	Rectification Period
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Within two (2) hours	Within the shorter of two Business Days and four (4) Core Sessions
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- 2.2 References to Core Sessions in paragraph 2.1 above shall include the Core Session in which the Rectification Period is deemed to commence pursuant Section 1 of Schedule 14 (*Payment Mechanism*).
- 2.3 Where a failure to meet the Availability Standards still allows the affected Area(s) to be used without increased risk to the health and safety of users there shall be no requirement on Project Co to Make Safe the Area(s) within the Response Period.
- 2.4 Where an Unavailability is recorded during the Core Day, any subsequent Core Sessions arising from Additional Periods shall only be included in the Core Sessions referenced in paragraph 2.1 above if the Unavailability impacts directly or indirectly on the Areas required for the Additional Periods.

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SECTION 10

AVAILABILITY PRIORITY CATEGORIES

1 Area Failure Deductions

- 1.1 The Base Date Area Failure Deductions for each Availability Priority Category are set out below.

Availability Priority Category	Area Failure Deduction (£ per Core Session) for [Facility 1]	Area Failure Deduction (£ per Core Session) for [Facility n]
1	[£♦]	[£♦]
2	[£♦]	[£♦]
3	[£♦]	[£♦]
4	[£♦]	[£♦]
5	[£♦]	[£♦]
6	[£♦]	[£♦]
7 or unspecified	[£♦]	[£♦]
[ICT Server Room (Secondary School)]	[£♦]	[£♦]
[ICT Server Room (Primary School)]	[£♦]	[£♦]
[ICT Server Room (College)]	[£♦]	[£♦]

2 Recalibration

- 2.1 Area Failure Deductions shall be recalibrated upon a change in Annual Service Charge resulting from an Authority Change or Project Co Change (as defined in Section 1 of Schedule 16 (*Change Protocol*)) being implemented which results in the cumulative un-recalibrated change in the Monthly Service Charge due to such changes exceeding [five per cent (5%)].

APPENDIX 1

CORE DAYS, CORE SESSIONS AND ADDITIONAL PERIODS

1

1.1 Core Sessions within a Core Day

Core Sessions		
Description	Core Day Morning	Core Day Afternoon
<i>[Insert Name of Facility]</i>	[07:00 to 11:59:59, Monday to Friday during a Term]	[12:00 to 17:00, Monday to Friday during a Term]

1.2 Additional Period Core Sessions

Category of Use	Number of Additional Periods per Academic Year which can be booked by the Authority for use over and beyond the Core Day (above).¹⁶
At [each]/[the] Facility	60

When the Authority notifies Project Co in accordance with Clauses 5.10 to 5.13 (*Additional Periods*) of this Agreement that it requires the utilisation of Additional Periods, each Additional Period shall comprise one (1) Core Session. Each subsequent Additional Period, whether or not on the same day, shall comprise a separate Core Session.

¹⁶ Each Additional Period is block period of 5 hours, with each Facility able to book up to 60 Additional Periods per Academic Year (300 hours).

APPENDIX 2¹⁷
ANNUAL SERVICE CHARGE AT BASE DATE

Contract Year	[Facility 1] Annual Service Charge at Base Date	[Facility n] Annual Service Charge at Base Date	Total Annual Service Charge at Base Date
1	[£♦]	[£♦]	[£♦]
[...]	[£♦]	[£♦]	[£♦]

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¹⁷ Table to be completed on a project specific basis

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol



Llywodraeth Cymru
Welsh Government

Service Level Specification

Section 1 of

Schedule 12 of the

Standard Form Education MIM Project

Agreement

(WEP Strategic Partnering Framework

Version)

October 2019

**SCHEDULE 12
SERVICE REQUIREMENTS**

SECTION 1

SERVICE LEVEL SPECIFICATION

- 1 Definitions and Status of this document**
 - 1.1 Definitions
 - 1.2 Status of this document
 - 1.3 Service Level Specification
 - 1.4 Authority Responsibility
 - 1.5 Compliance
 - 1.6 Overarching Requirements (summary)
 - 1.7 Management and Resourcing of the Services
 - 1.8 Services Delivery Proposals
 - 1.9 Project Co's Staff and Training and Development
 - 1.10 Integration of the Services with Authority Policies and Authority Services
 - 1.11 Quality Assurance
 - 1.12 Health & Safety
 - 1.13 Environmental Management Services
 - 1.14 Design Integration
 - 1.15 Interface Services
 - 1.16 Soft Landings
 - 1.17 SEN and Disabilities
 - 1.18 Specific SEN Requirements
- 2 Specific Services Requirements**
 - 2.1 Helpdesk
 - 2.2 Supporting Documentation
 - 2.3 Communication Plan
 - 2.4 Performance Monitoring, Reporting and Record Keeping
 - 2.5 Performance Evaluation and Performance in Use
 - 2.6 Thermal Efficiency of Domestic Hot Water systems
 - 2.7 Annual tests of boiler plant and direct fired hot water generators and their flue systems
 - 2.8 Interface Services
 - 2.9 Access and Building Security
 - 2.10 Asset Maintenance Service – General
 - 2.11 Statutory Inspection and Testing
 - 2.12 Maintenance
 - 2.13 Schedule of Programmed Maintenance
 - 2.14 Lifecycle Survey Requirements
 - 2.15 Replacement Materials
 - 2.16 Handback Requirements
 - 2.17 Energy and Utilities Management Plan
 - 2.18 Energy and water efficiency
 - 2.19 Energy and utilities management
 - 2.20 Energy and utilities modelling
 - 2.21 The Final Baseline Energy Model
 - 2.22 Operational Hours
 - 2.23 The In-Use Energy Model and Energy Reporting

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- 2.24 Energy Payment Mechanism – Consumption Risk
- 2.25 Obligation to produce and agree the In-Use Energy Model
- 2.26 ProjectCo Predicted Loads
- 2.27 Energy and Utilities Monitoring and Reporting
- 2.28 Weather Data
- 2.29 Invest to save measures
- 2.30 Initial Grounds Maintenance Service
- 2.31 General Grounds Maintenance Service
- 2.32 Grassed Areas
- 2.33 Planting trees, perennial plants and shrubs
- 2.34 All hard and all-weather surfaces

Annex 1: PIU Targets

Annex 2: Service Quality Standards

Appendix A: Performance Standards

Appendix B: Interface Protocol

Section 1: Principles

Section 2: Responsibility Matrix

Section 3: Helpdesk

Section 4: Soft Services Training Plan

Section 5: Project Co FM Team Structure

Appendix C: Statutory Inspection Testing and Maintenance Requirements

Appendix D: Minimum Life and Residual Life Expectancy

1. Definitions and Status of this Section 1 of Schedule 12 (Service Level Specification)

1.1. Definitions

Unless expressly defined otherwise within this Section 1 of Schedule 12 (*Service Level Specification*) any defined terms expressed in this Section 1 of Schedule 12 (*Service Level Specification*) shall have the same meaning given in Schedule 1 (*Definitions and Interpretations*) of this Agreement. This paragraph identifies and explains the defined terms and acronyms used throughout this Section 1 of Schedule 12 (*Service Level Specification*):

[Additional Period has the meaning given to that term in Section 1 of Schedule 14 (*Payment Mechanism*) of this Agreement;]

Annual Services Review means the annual meeting to review the Annual Service Report;

Annual Shared Risk Core Energy Service Consumption Target or "ASRCET" has the meaning given in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of this Agreement;

ASHRAE means The American Society of Heating, Refrigerating and Air-Conditioning Engineers;

[Authority's Accessibility Plan means [◆];]

Automated Energy Data Collection Portal means the Automated Energy Data Collection Portal for each scheme for ongoing energy monitoring, targeting, and benchmarking¹.

Availability Standards mean the standards set out in Section 9 (*Availability Standards and Response and Rectification Periods for Unavailability*) of Schedule 14 (*Payment Mechanism*) of this Agreement;

BEIS means the Department for Business, Energy and Industrial Strategy and any superseding government department that publishes the energy tables referenced at paragraph Error! Reference source not found. [◆];

BSRIA means The Building Services Research and Information Association;

Building has the meaning given to it in the Authority's Construction Requirements;

Building Elements has the meaning given to it in the Authority's Construction Requirements;

Building Load has the meaning given to it in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of this Agreement;

Building Performance Evaluation comprises the technical performance review which includes energy, carbon and water use assessment against benchmarks; the environmental comfort of the users, including ventilation, heating, lighting and acoustics. The functional performance includes User Satisfaction Surveys questionnaires and building walk-through. The evaluation is to form part of the on-going reporting process and includes actions in response to the POE[◆];

Building Regulations has the meaning given to that term in the Authority's Construction Requirements;

¹ Details of the requirements for the Automated Energy Data Collection Portal are set out at paragraph 2.27.4

Building Services means gas and water services, heating, ventilation, air conditioning, controls, access, security and alarm systems, electrical plant and installations including pipework, ductwork and cabling;

Building User Guide is a simple to use non-technical guide for the Facilities Premises Team about how their Building operates and how the local room controls work;

College has the meaning given to that term in the Authority's Construction Requirements;

Communication Plan has the meaning given to it in paragraph 2.3.1 (*Communications Plan*) of this Service Level Specification;

Controls Assurance Procedures means procedures that capture the day to day operation of the Facility and maintain its operation including issues such as fire and evacuation plans, the Disaster Plan and service specific risk assessments;

Core Day has the meaning given to it in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of this Agreement;

Core Energy Hours has the meaning given to it in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of this Agreement;

Core Sessions has the meaning given to it in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of this Agreement;

Curriculum has the meaning given to it in the Authority Construction Requirements;

Display Energy Certificate/ DEC means the energy certificates required for public buildings required by The Energy Performance of Buildings (England and Wales) Regulations 2012;

Energy and Utilities Management Plan means the plan set out in [◆] of the Method Statements as may be updated from time to time in accordance with Schedule 8 (*Review Procedure*) of this Agreement;

Energy and Water Efficiency Plan means the plan with that name forming part of the Energy and Utilities Management Plan as may be updated from time to time in accordance with Schedule 8 (*Review Procedure*) of this Agreement;

Automated Energy Data Collection Portal – means the automated energy data collection portal to be provided by ProjectCo;

Facility Management Team or **FMT** means the Facility Representative, head teacher/principal of the [relevant] Facility, the business manager and/or any other person designated by the Facility as having overall responsibility for the management of the Facility where such persons are appointed as a Facility Liaison Person;

Facility Premises Team means the team of Facility Liaison Persons;

[**Facility's Accessibility Plan** means [◆];]

Facility User(s) means any person who works in, attends or uses the [relevant] Facility;

Fire Safety Management Plan has the meaning given in paragraph 1.14.1 (*Fire Safety Management*) of this Section 1 of Schedule 12 (*Service Level Specification*);

Grounds Maintenance Service means the services detailed under paragraphs 2.30 to 2.34 of this Service Level Specification to be provided for a three-year period following the Payment Commencement Date/[Payment Commencement Date 1] to ensure that landscaped and planted areas are fully established;

Grounds Maintenance Plan means the Grounds maintenance plan to be agreed pursuant to [2.30, 2.31, 2.32, 2.33, and 2.34] of this Services Level Specification (where details of the timing and process for agreement/requirements are set out)

Health and Safety File means the health and safety file prepared by Project Co pursuant to the CDM Regulations [◆];

Health and Safety Management Plan means the plan referenced in paragraph 1.12 (Health and Safety) of this Section 1 of Schedule 12 (*Service Level Specification*); [◆];

Helpdesk has the meaning given in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of the Project Agreement;

ICT means Information and Communication Technology [◆];

Initial Baseline Energy Model has the meaning given to it in the Authority's Construction Requirements;

Initial Grounds Maintenance Period has the meaning given in paragraph 2.30.1 of this Service Level Specification;

Initial Period has the meaning given in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of this Agreement;

IPMVP has the meaning given to it at paragraph 2.25.13 of this Service Level Specification;

Interface Services means the services provided by Project Co to ensure the integration of the Services and the Soft Services and the management of communications as between Project Co, the Project Co Representative and Project Co Parties, on the one hand, and the Authority, Authority Representative, Facility Representative, Facility Premises Team and Authorised Callers on the other, to ensure an integrated Services solution for the Facilities. This service extends for the Project Term in that Project Co shall remain responsible for assisting in the management of the interface between those Services provided by Project Co and the Soft Services provided by the Authority (or an Authority Party). This will include, but is not limited to, training, Soft Landings Framework, re-commissioning after three (3) months, and ICT interface;

Legacy has the meaning given in the Authority's Construction Requirements;

Legacy Equipment has the meaning given in the Authority's Construction Requirements;

Make Safe has the meaning given in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of this Agreement;

Measurement and Verification Plan means the plan referenced in paragraph 2.19 (Energy and Utilities Management) of this Section 1 of Schedule 12 (*Service Level Specification*) [◆];

Minimum Residual Life Expectancy Requirements has the meaning given in paragraph 1 (Definitions) of Schedule 18 (*Handback Procedure*) of this Agreement;

Monthly Review means the monthly meeting to review the Monthly Service Report and other operational issues;

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Performance in Use (PIU) Targets means the targets set out at Annex 1 (*Performance in Use (PIU) Targets*) of this Service Level Specification to which the Building is required to perform;

Performance Failures has the meaning given in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of this Agreement;

Performance Standards are the key performance standards for the Services as set out at Appendix A (*Performance Standards*) of this Service Level Specification;

Post Occupancy Evaluation (POE)² means the evaluation of [each of/the] Facilities monitoring both quantitative measures i.e. the technical criteria covered in the (PIU) Targets and the satisfaction of the Facility Users through User Satisfaction Surveys and Building Performance Evaluation to the functional performance criteria³. [**Primary School** has the meaning given to that term in the Authority's Construction Requirements;

Rectification has the meaning given in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of this Agreement;

Rectification Period has the meaning given in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of this Agreement;

Remedial Period has the meaning given in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of this Agreement;

Remedy has the meaning given in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of this Agreement;

Response Period means, in relation to each Performance Standard and Availability Standard, the period of time within which Project Co must respond to a Service Event and (if relevant) Make Safe, as detailed in the column headed Response Period in the Availability Standards or Performance Standards (as the case may be);

Room User Guide is a simple to use non-technical guide that introduces Facility Users to how their room operates and how the local room controls work

Routine has the meaning given in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of this Agreement;

Secondary School has the meaning given to that term in the Authority's Construction Requirements;

SEN(D) has the meaning given in the Authority Construction Requirements;

Service Delivery Proposals or SDPs means the Method Statements and Services Quality Plans that set out Project Co's solution for providing the Services in accordance with the requirements of this Service Level Specification;

² The POE is used to assess the technical and functional performance of the Facilities and includes users' satisfaction; environmental comfort of users in both winter and summer; functionality of learning and non-learning spaces. It is used as part of continuous improvement along with the assessment of the PIU Targets and energy monitoring

³ The technical performance review includes energy, carbon and water use assessment against benchmarks; the environmental comfort of the users, including ventilation, heating, lighting and acoustics. The functional performance includes User Satisfaction Surveys and building walk-through. The evaluation is to form part of the on-going reporting process and includes actions in response to the POE.

Service Quality Standards (SQS) means the service quality standards set out in Annex 2 (*Service Quality Standards*) of this Section 1 of Schedule 12 (*Service Level Specification*);

Soft Landings Framework has the meaning given in Appendix B (*Interface Protocol*) of this Service Level Specification;

Soft Services means Grounds Maintenance, caretaking and portering, cleaning, resource and waste management and pest control; catering; health and safety; fire safety management and security; and management of the Soft Services;

Soft Services Training Plan means the soft services training plan to be prepared by Project Co and that is required to meet the requirements of this Service Level Specification, including paragraph 2.8.3;

Statutory Inspection means inspections (including servicing, maintenance, and testing) that building owners are required to undertake to comply with the Law and specifically health and safety legislation to ensure the health, safety and welfare of the Facility Users as provided for in paragraph 2.11.1 (*Statutory Inspection and Testing*) and Appendix C (*Statutory Inspection, Testing and Maintenance Requirements*)) of this Section 1 of this Schedule 12 (*Service Level Specification*);

Statutory Testing means the tests provided for in paragraph 2.11.1 (*Statutory Inspection and Testing*) and Appendix C (*Statutory Inspection, Testing and Maintenance Requirements*)) of this Section 1 of this Schedule 12 (*Service Level Specification*);

Student means a student of the [relevant] Facility;

Unavailable has the meaning given in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of this Agreement and **Unavailability** shall have the same meaning;

Urgent has the meaning given in Section 1 (*Interpretation*) of Schedule 14 (*Payment Mechanism*) of this Agreement;

User Satisfaction Surveys means a survey to be undertaken with Facility Users as part of the post occupancy evaluation and annually thereafter to measure their satisfaction with Project Co's performance;

Water Quality and Efficiency Plan means the plan with that name forming part of the Energy and Utilities Management Plan as may be updated from time to time in accordance with Schedule 8 (*Review Procedure*) of this Agreement.

1.2. **Status of this document**

Design guidance is included in the Authority's Construction Requirements. Where any incidental design guidance is included in this Service Level Specification in the event of any contradiction in relation to design, the Authority's Construction Requirements will take precedence.

1.3. **Services Specification**

Project Co shall provide the Services in order to comply with this Service Level Specification and this Agreement.

1.4. **Authority Responsibilities**

For the avoidance of doubt the Authority will be responsible for providing and/or procuring the provision of its own Soft Services and ICT services.

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1.5. Compliance

Project Co shall deliver the Services in accordance with this Service Level Specification. Project Co shall ensure that the Services meet all relevant statutory requirements, are compliant with health and safety regulations, all Law and local and national policies. All Buildings and spaces within Buildings shall be maintained in a state of readiness. Project Co shall prepare Service Delivery Proposals that meet this Service Level Specification and put Disaster Plan solutions in place to avoid Unavailability and Performance Failures.

1.6. Overarching Service Requirements

- 1.6.1. Project Co shall deliver the Services as required pursuant to this Agreement for the Facilities throughout the Operational Term.
- 1.6.2. Project Co shall ensure that the Services solution is efficient, sustainable, and capable of being effectively monitored and measured (in accordance with this Service Level Specification).
- 1.6.3. Project Co shall deliver the Services in accordance with all Law, Consents and Good Industry Practice.
- 1.6.4. Project Co shall prepare Service Delivery Proposals for each of the Services that comply with this Service Level Specification, detailing how the Services will be ramped up and delivered at [each of/the] Facilities.
- 1.6.5. Project Co shall ensure that the Services are carried out using proper materials of suitable and sufficient quality (of relevant British Standard or equivalent) and not using any deleterious materials.
- 1.6.6. Project Co shall adopt a continuous improvement approach to the provision of all Services and work with the Authority to identify opportunities for improving the performance, efficiency and effectiveness of the Facilities and the Services. Project Co shall carry out Biennial Reviews in accordance with Clause 25.1 (*Biennial Reviews*) of this Agreement. These shall be in addition to the regular Monthly Service Reports and the Annual Service Reports.

1.7. Management and Resourcing of the Services

Project Co shall resource the Services with suitable personnel with the relevant skills to deliver each Service, in accordance with this Service Level Specification. Project Co shall provide a resource organogram, clearly setting out the management hierarchy and organisation of the Service provision (using both on Site and remote resources (as applicable) with relevant personnel identified (including roles and responsibilities) and shall update such organogram throughout the Operational Term at the request of the Authority, the Authority Representative and/or a Facility Representative.

1.8. Service Delivery Proposals

- 1.8.1. Without prejudice to paragraph 1.8.2 below, Project Co shall prepare Service Delivery Proposals which shall include as a minimum the approach and proposed methodology for the provision and delivery of the Services comprising:
 - a. Helpdesk;

- b. quality assurance and continuous improvement pursuant to this Service Level Specification and Clause [20] (*Quality Assurance*) of this Agreement);
- c. health and safety management including fire safety management;
- d. environmental management;
- e. performance monitoring and reporting;
- f. Interface Services;
- g. asset maintenance service including:
 - Maintenance and Statutory Testing;
 - equipment management services including procedures for audit, storage and deployment of Equipment; and
 - indoor environmental conditions: to include the scope and services objectives to sustain PIU Targets as set out at Annex 1 to this Service Level Specification and monitored through the Performance Standards; and
- h. energy and utilities supply and management services including energy and water efficiency.

1.8.2. The Service Delivery Proposals shall include the approach and proposed methodology for meeting this Service Level Specification.

1.8.3. Project Co's Service Delivery Proposals shall include details of:

- a. overall management structure, both for the Project overall and the individual Facilities, detailing organisation charts, management roles, responsibilities and reporting structures;
- b. job descriptions;
- c. numbers of staff required to deliver the Services;
- d. regular working hours and availability of managers and employees;
- e. training of all stakeholders;
- f. details as to which Services will be carried out in-house and which will be subcontracted with details of Sub-Contractors;
- g. contract monitoring procedures;
- h. management of Sub-Contractors;
- i. Helpdesk and overall management procedures;

- j. management information systems and report production;
- k. self-monitoring procedures;
- l. meeting details including level of attendees;
- m. user satisfaction and complaints procedures;
- n. quality assurance procedures; and
- o. inspections including condition surveys and records.

1.8.4. The Service Delivery Proposals shall set out:

- a. the proposals for delivering the full range of maintenance requirements including Programmed Maintenance, Lifecycle Replacement, Statutory Inspection and Testing and Unprogrammed Maintenance Work. Details to include flow charts for Unprogrammed Maintenance Work both general and as a result of Malicious Damage, Change and any requests for additional work; and
- b. mechanisms for communicating specific plans and operational structures, with clear responsibilities, accountability and effective exchange of data between multiple parties (including the Authority, Authority Representative, Facility Representative, Facility Premises Team, Authorised Callers, design team, Project Co, Service Provider, Facility Users, FMT and governance).

1.9. Project Co's Staff and Training and Development

1.9.1. In respect of Project Co's staff and training and development issues Project Co shall:

- a. maintain appropriate records;
- b. liaise with and report to the Authority, Authority's Representative, Facility Representative, Facility Premises Team, Authorised Callers and/or the Facility's Management Team, as required throughout this Agreement;
- c. carry out all necessary safety and security checks; and
- d. instigate up to date and appropriate training courses and development opportunities including where required by Law.

1.9.2. In keeping with the current statutory guidance for the [Authority/School Entity], all Project Co and Project Co Party staff who may reasonably be expected in the course of their employment or engagement to have access to children and/or vulnerable adults must demonstrate that they are not barred from such work by the Disclosure and Barring Service in accordance with Clauses 28.8 and 28.9 (*Convictions and Disciplinary Action*) of this Agreement. Project Co must confirm that all such staff are not barred by use of an enhanced level Disclosure and Barring Service, which will also reveal any relevant spent or unspent cautions or convictions. For immigrant workers Project Co must also obtain a certificate of good conduct from the country of origin,

(<http://www.fco.gov.uk/en/about-us/what-we-do/services-we-deliver/legal-services/local-document-search/010-certificate-of-good-conduct/>). The cost of obtaining clearances shall remain with Project Co.

- 1.9.3. In the event that Project Co brings personnel to Site and Project Co has been unable to demonstrate that they are not barred from such work by the Independent safeguarding authority, Project Co shall ensure that such personnel are to be accompanied and supervised at all times by an individual who has the appropriate level of clearance.
- 1.9.4. Project Co shall participate in Facility induction programmes as agreed with the Authority and/or nominated Facility Representative(s). Programmes will be reviewed and agreed through the Final Commissioning Programme and in accordance with the Access to Work Protocol.
- 1.9.5. Project Co shall maintain appropriate personal training records for every Project Co Party and for Project Co-trained Facility Users. Records for Project Co trained Facility Users shall be for Facility specific requirements identified in the Interface Protocol.
- 1.9.6. Project Co shall develop, maintain and operate an appropriate induction programme for Project Co Parties.
- 1.9.7. In carrying out the duties described in this Service Level Specification, Project Co shall ensure all Project Co Parties:
 - a. are properly and presentably dressed in appropriate identifiable clothes and work wear (including protective clothing and footwear where required), with any uniform policies agreed with the Authority Representative;
 - b. maintain an appropriate standard of personal hygiene commensurate with their allocated tasks while working in the Facilities;
 - c. comply with all Authority Policies such as non-smoking and safeguarding policies;
 - d. behave in an appropriate manner at all times when on Site;
 - e. have access to canteen and other facilities at times and as agreed with the Authority; and
 - f. if more than one substantiated complaint is made against any individual member of Project Co's staff (including Helpdesk operators) within each Contract Month, Project Co shall investigate and action the complaint to mitigate future reoccurrence and report the complaint and action taken to the Authority Representative.
- 1.9.8. Project Co shall undertake all response requirements to complaints at its own cost.
- 1.9.9. Project Co shall undertake the training identified in Section 4 (*Soft Services Training Plan*) of Appendix B (*Interface Protocol*) of this Service Level Specification.

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1.9.10. Project Co shall prepare the following plans to be incorporated into their Method Statements:

Name of category	Plans	Cross reference to requirement in Service Level Specification (or as stated)	Key Performance Standard links
Quality Management	Services Quality Plans	[1.11.1]	PS22 and PS23
	Health and Safety (including water quality management)	[1.12.1]	PS16 and PS17
	Fire Safety Management	[1.14]	PS18 and PS19 (PS20)
	Environmental management	[1.15.1]	PS24 and PS25
	Energy and Utilities Management Plan	[1.11.6 and 2.2.6]	PS51 (PS52)
Soft Landings Framework, Interface and Contract Management	Handover and Mobilisation Plan	the Authority's Construction Requirements [2.13.4.5.c]	(PS1)
	Disaster Plan	[2.2.3]	PS14 and PS15
	Building Users' Guide	[2.2.5]	PS28
	Communications Plan	[2.3]	PS13
	POE and Building Performance Evaluation	[2.5.4 to 2.5.6 (inclusive)]	PS1
	Soft Services Training Plan	[2.8.3]	PS7
Maintenance and Lifecycle	5 Year Maintenance Plan	[2.13.2 and clauses 23.11 and 23.12 of this Agreement]	PS38
	Schedule of Programmed Maintenance (including Lifecycle Schedule and Lifecycle Profile)	[2.13 and clause 23.1 of this Agreement]	PS39, PS40, PS41, PS42 and PS43
Energy Efficiency (see also Quality Management)	Energy and Water Efficiency Plan	[362.17.2,2.17.3,2.18,2.26.1]	PS52
	Energy and Utilities Management Plan	[2.2.6, 2.4.21, 2.4.23, 0, 2.17 and 2.19]	PS51
Initial Grounds Maintenance	Grounds Maintenance Plan	[2.30, 2.32, 2.33 and 2.34]	PS60 and PS61

1.9.11. Project Co and the Authority shall review such plans contained within their Method Statements and identify the need for revisions to reflect performance, changes in

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occupancy and use patterns and the availability of new technologies and upgrades to improve component and system efficiency.

- 1.9.12. Without prejudice to Clause 22.4 (*Project Co Service Changes*) of this Agreement, Project Co shall update each of the plans contained within the Method Statements in accordance with the frequency specified in this Agreement. Each updated Method Statement shall be submitted for approval by the Authority's Representative not less than twenty (20) Business Days prior to the commencement of each Contract Year. In the case of the 5 Year Maintenance Plan and Schedule of Programmed Maintenance (which include the Lifecycle Schedule and Lifecycle Profile), Project Co shall review and submit updated versions as specified in Clauses 23.1 (*Programmed Maintenance Works*) and 23.11 (*5 Year Maintenance Plan*) of this Agreement.

1.10. Integration of the Services with Authority Policies and Facility operations

- 1.10.1. In developing the Services Delivery Proposals Project Co shall ensure that they integrate with Authority Policies, concerning the following issues:

- a. quality assurance (as required under Clause 20 (*Quality Assurance*) of this Agreement;
- b. health and safety;
- c. fire safety management;
- d. environmental management; and
- e. energy management.

1.10.2. Co-operation with [Authority/School Entities]

Project Co shall:

- a. support FMT and [Authority/School Entity] governing bodies with their statutory duties e.g. each governing body usually has a premises committee and Project Co is expected to attend such meetings or prepare relevant reports unless deemed unnecessary by the FMT;
- b. cooperate with and provide information for [School Entity/ Authority]-related inspections [such as Estyn inspections] as far as these relate to the Services provided or are seen by the Authority as contributing to raising standards;
- c. consult with the Authority Representative and Facility Representative regarding proposals for all new working practices, or working practices that have changed from those already agreed with the Authority, before any such new or revised working practices are implemented; and
- d. in connection with the provision of the Services, consult with the following parties where applicable regarding service delivery timings, [Authority/ School Entity] employee involvement (including Soft Services providers) and local working practices:

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- 1.10.2.d.1. [Authority/ School Entity] departments in undertaking or preparing for the delivery of any aspect of the Services which may impact upon their delivery or upon the comfort and or well-being of school related parties;
- 1.10.2.d.2. [Authority/ School Entity] Representatives including union health and safety representatives;
- 1.10.2.d.3. Statutory bodies in respect of any aspect of the Services; and
- 1.10.2.d.4. Soft Services providers via the Authority Representative [Facility Representative] /FMT as specified by the Authority.

1.10.3. Project Co shall:

- a. discuss and agree the proposed Services (including how Project Co Parties will liaise with the Authority, Authority's Representative, Facility Representative, Facility Premises Team, Authorised Callers and/or the Facility's Management Team, as required under this Agreement) and seek agreement;
- b. provide all information on the performance of the Facilities as required by the Authority Representative;
- c. ensure that any reasonable requirements of the Authority are taken into account in the proposed Services;
- d. carry out Facility related risk assessments for and on behalf of and in consultation with the [Authority/School Entity] as required by Law;
- e. ensure that the operations of the [relevant] Authority/School Entity] can continue unhindered, but the extent of maintenance is at the discretion of Project Co unless governed by statutory requirements;
- f. confirm the start and completion dates and hours of working in advance with the Authority for all Services and Works, as required in accordance with the Access to Work Protocol;
- g. comply with the Access to Work Protocol and propose updates in accordance with Law and Good Industry Practice. Provide supporting information with the application for an Access to Work Permit to allow the Authority's Representative to understand the impact of works proposed to the Authority Services and review the proposed risk assessment and method statement, particularly for work permits involving hot work and asbestos;
- h. maintain a safe environment for all Facility Users and their belongings during such Services or Works;

- i. provide advice and instructions on the use of any new equipment and/or installation;
- j. provide advice on maintenance access equipment for use by Facility staff particularly for roof work and working at height where identified in the Interface Protocol;
- k. liaise with the FMT on access issues, such as restrictions to areas that may be out of use including agreeing an Access to Work Permit;
- l. maintain and make good any incidental damage caused and remove all rubbish and clean up after completing tasks at the end of each day;
- m. carry out all Services in accordance with statutory requirements, insurance requirements, health and safety requirements, British Standards, manufacturers' instructions and otherwise in compliance with Good Industry Practice;
- n. undertake all Statutory Testing, (e.g. Portable Appliance Testing (PAT) for Project Co's portable appliances) in accordance with, HSE and Statutory Authority guidance and all Law; and
- o. test and service all plant and equipment within the responsibility of Project Co, as required by recognised Good Industry Practice and Law.

1.11. Quality Management, Health and Safety, Energy Management and Environmental Management

- 1.11.1. Project Co shall develop, maintain and implement a Services Quality Plan that shall meet the requirements of current applicable standards and includes quality assurance and continuous improvement.
- 1.11.2. Project Co shall achieve ISO 9001 accreditation within 18 months of the [relevant] Actual Completion Date. ISO 9001 accreditation, or subsequent applicable accreditation, shall be maintained throughout the Operational Term and copies of certificates shall be provided to the Authority.
- 1.11.3. Project Co shall produce with inputs from the Authority a documented process based on the following suite of standards that are integrated into the ISO 9001 quality management system.
- 1.11.4. The ISO standards listed at [1.11.6] below will be used as a framework to:
 - a. establish an agreed responsibility matrix at an appropriate level of detail reflecting the skill base of the Facilities Premises Team and its Soft Services providers; and
 - b. demonstrate best practice management systems are in place and are subject to a documented continuous improvement process.
- 1.11.5. The management and continuous improvement approach described shall be adopted for all Services and Soft Services.

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- 1.11.6. The intention is that there shall be consistent documented processes in place across both the Services and the Soft Services; that are agreed with the Authority; recorded by Project Co; and are based on the ISO standards. The Plan should cover:
- a. Energy and Utilities Management ref: ISO 50001;
 - b. Occupational Health and Safety BS OHSAS 18001:2007;
 - c. Fire Safety Management ref: RRO (Fire Services) 2005; and
 - d. Environmental Management ref ISO 14001 (including waste and water) (see paragraph 1.15).

1.12. **Health & Safety**

- 1.12.1. Project Co shall maintain and implement a Health and Safety Management Plan for the Services that meets the requirements of BS OHSAS 18001:2007 Occupational health and safety management systems: requirements, or its applicable successor.
- 1.12.2. Project Co shall maintain the Health and Safety Management Plan throughout the Operational Term.
- 1.12.3. Project Co's Health and Safety Management Plan shall contain the approach to:
- a. providing the Services in a safe manner; and
 - b. co-ordinating health and safety policies and processes with the [Authority/School Entity].
- 1.12.4. Project Co shall implement and maintain the Health and Safety Management Plan with the Authority to demonstrate compliance with all statutory, regulatory and relevant health and safety instruction affecting the management and operation of the Facility, the scope and content of which is agreed with the Authority and included within the Service Delivery Proposals. The plan shall integrate fully with all of the Authority Policies relating to health and safety.
- 1.12.5. Project Co shall have a duty of care to notify the [Authority/School Entity] of any matters in relation to the Services which Project Co considers a hazard;
- 1.12.6. Project Co shall establish systems that acknowledge the receipt from the Authority, and dissemination to the FMT and all relevant Project Co Parties, all warnings and safety action bulletin notices published by [Welsh Government] or HSE and ensure appropriate action is taken and recorded centrally at Project Co's expense;
- 1.12.7. Project Co shall act in accordance with the CDM Regulations, including the preparation of the Health and Safety File.

1.13. **Hot and cold-water services**

Project Co shall:

- 1.13.1. Produce a water quality policy document setting out the guidance and strategy for control of legionella and maintenance of wholesome water quality that will be followed to protect employees and others who may be affected by its business operations against the risk of legionella infection arising from plant, equipment, Facilities, work or work-related activities. It shall include the framework of the procedures designed to achieve this aim and set out the stages and objectives relevant at each stage. It shall specify the management, operational and specialist responsibilities and lay down a clear management and communication structure to ensure that it fails safe. It will clearly set out which tasks are part of the Authority's day to day monitoring and maintenance responsibilities to be included in Soft Services provided by the Authority or Authority Parties and which maintenance tasks will be carried out by Project Co;
- 1.13.2. Provide water service to outlet points of the correct type, sufficient rate and suitable temperature to meet the prescribed standards;
- 1.13.3. Supply mains water or tanked potable water direct to internal areas, including kitchens, staff/rest rooms, technology rooms, vending machines and medical rooms, as detailed in the Authority's Construction Requirements and ADS;
- 1.13.4. Provide water service to outlet points designed to operate in a safe condition appropriate to the process, function and specific areas being served; and
- 1.13.5. Provide water service to outlet points that comply with the current Water Fittings Regulations BS6700 and BS6465 and are installed and commissioned in accordance with the provisions of the Health and Safety Commission Code of Practice for the Prevention and Control of Legionellosis and disinfected to comply with current standards.

1.14. **Fire Safety Management**

- 1.14.1. Project Co shall develop and maintain a plan, incorporating a fire and evacuation plan that shall include as a minimum:
 - a. Fire risk assessment;
 - b. fire evacuation plans; and
 - c. approach to fire safety including:
 - maintenance and testing of alarms, sprinkler systems, and any other fire suppression systems;
 - roles and responsibilities;
 - staff training and awareness;
 - evacuation plan testing; and
 - post implementation review process.

(the "**Fire Safety Management Plan**")

- 1.14.2. Project Co shall coordinate the Fire Safety Management Plan with the relevant Facility Representative, the local fire and rescue service, the emergency services, and utilities providers.

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- 1.14.3. Project Co shall provide an initial Fire Safety Management Plan before the [relevant] [Payment Commencement Date/Payment Commencement Day 1] and update annually thereafter, or more frequently to reflect changes in the Building design, use and occupancy.
- 1.14.4. Project Co shall provide and maintain external monitoring of fire alarm and site security systems by a dedicated BT Redcare service and phone line link.
- 1.14.5. Project Co shall provide and maintain fire extinguishers and other fire equipment (including fire blankets and hoses) required or recommended by the Fire Safety Management Plan and the local fire and rescue service. Project Co shall also provide and maintain evacuation chairs and other such evacuation equipment similarly required or recommended.

1.15. Environmental Management Services

- 1.15.1. Project Co shall develop, maintain and implement an Environmental Management Plan for the Services that shall meet the requirements of ISO 14001.
- 1.15.2. Project Co shall achieve ISO 14001 accreditation within 18 months of the [relevant] Actual Completion Date. ISO 14001 accreditation, or subsequent applicable accreditation, shall be maintained throughout the Operational Term and copies of certificates shall be provided to the Authority.
- 1.15.3. Project Co's Environmental Management Plan shall contain the approach to:
 - a. Providing the Services in a sustainable manner;
 - b. Minimising waste during maintenance and operation; and
 - c. Co-ordinating and recording sustainable and environmental policies with the Authority.

1.16. Waste Management

- 1.16.1. To the extent related to the provision of the Services, Project Co shall be responsible, and carry out appropriate risk assessments including compliance with statutory requirements, for the safe disposal of effluent and hazardous waste including, but not limited to, sewage, surface water run-off, etc.
- 1.16.2. Project Co shall advise the [relevant] [Authority/School Entity] on the reduction of sewage and surface water drainage charges.
- 1.16.3. Project Co will record waste-arising from the activities it undertakes at the Facility in the Environmental Management Plan.
- 1.16.4. Project Co shall include maintenance materials and waste efficiency in the Environmental Management Plan. Project Co shall take into account DEFRA's waste hierarchy when undertaking all Programmed Maintenance and Unprogrammed Maintenance Work.⁴

⁴ <http://www.defra.gov.uk/environment/waste/legislation/waste-hierarchy/>

- 1.16.5. Project Co shall ensure that its waste information covers the level of waste materials segregation, and allocation of waste destination – especially those of a hazardous nature such as waste electrical and electronic equipment.
- 1.16.6. Project Co and the [relevant] [Authority/School Entity] shall work together to identify cost effective waste efficiency measures and to implement actions and investment and include agreed actions in the Environmental Management Plan.
- 1.16.7. Project Co shall agree with the Authority annual targets for its activities based upon applicable benchmarks if available, if not Good Industry Practice for:
 - a. maintenance waste arising; and
 - b. maintenance waste to landfill.
- 1.16.8. Project Co and the [relevant] [Authority/School Entity] shall work together to identify cost effective measures to implement and increase the sustainability of products procured – for example moving to suppliers with accredited Environmental Management Systems or certified materials such as Forest Stewardship Council (FSC) woods.
- 1.16.9. Project Co shall establish effective systems for data monitoring of materials procured and materials disposed of in the course of the provision of the Services – especially where materials are disposed of on Site and managed through another party or sub-contractor.

1.17. Design Integration

Project Co confirms that the Services provision is fully integrated across the Building design, space functionality and purpose, PIU Targets, lifecycle, material selection, room fit out and layout requirements as specified in the Authority's Construction Requirements. Project Co shall demonstrate this in the Services Delivery Proposals.

1.18. Interface Services

Project Co shall support the Authority by providing the Interface Services. Project Co shall work with the Authority to tailor the Services to the specific needs of the Facility. See paragraph 2.8 (*Interface Services*) of this Section 1 of Schedule 12 (*Service Level Specification*).

1.19. Soft Landings

Project Co shall comply with the Soft Landings Framework as required by the Authority's Construction Requirements and this Service Level Specification.

1.20. Special Educational Needs SEN(D) and Disabilities

- 1.20.1. Project Co shall ensure that the Services solution satisfies the requirements of the Equalities Act 2010. Project Co, working in partnership with the Authority, shall:
 - a. meet the General Equality Duty;

- b. take account of any information published by the [School Entity], Local Authority or Authority under the Specific Equality Duties;
- c. satisfy the duty to make reasonable adjustments and improvements for disabled people;
- d. implement the [Facility's Accessibility Plan and the Authority's Accessibility Plan].

1.21. Specific SEN(D) Services Requirements

1.21.1. Project Co shall:

- a. provide for any specific requirements in relation to SEN(D) at a particular Facility as required in the Site Specific Brief and the ADS;
- b. provide information when required or as appropriate to enable the [Authority/School Entities] to be better informed of the accessibility features on Site; and
- c. assist the [Authority/School Entities] in preparing personal emergency egress plans (PEEPs) for all individuals who cannot make their own way out of the Buildings in the event of a fire.

2. The Specific Services Requirements

2.1. Helpdesk

2.1.1. Project Co shall provide a Helpdesk during the Core Day to allow the Authorised Callers to report Building faults and requests for Services.

2.1.2. Project Co shall make [the/each] [Authority/School Entity] aware of the Helpdesk and shall provide comprehensive instructions to Authorised Callers as to how to report issues to the Helpdesk, including the level of detail required and the categorisation of priority of request. Project Co shall also provide a flowchart detailing the operation of the Helpdesk and call out Facilities including how potential reactive issues are to be managed. As a minimum such notice shall contain details of:

- a. the relevant incident or state of affairs believed to constitute a Service Event, including whether the Service Event relates to a failure:
 - to meet or comply with Performance Standards; or
 - to satisfy the Availability Standards; or
 - to meet or comply with Performance standards and to satisfy the Availability Standards;
- b. the Area or Areas which are believed to be subject to the Service Event;
- c. the reasons why such Area or Areas are believed to be subject to the Service Event;

- d. requester's/reporter's name;
 - e. date and time of Service Report;
 - f. location of Service Event (if applicable);
 - g. asset reference;
 - h. nature of the Service Report;
 - i. categorisation (priority);
 - j. Response Period and Remedial Period/Rectification Period assigned to the Service Report;
 - k. unique report/request reference;
 - l. Service Provider and contact name to which the request/report was passed;
 - m. date and time that the request/report was passed to the relevant Service Provider;
 - n. action taken to rectify or remedy including regular progress updates;
 - o. actual times that response and rectification were achieved; and
 - p. progress updates to requester/reporter.
- 2.1.3. Project Co shall provide an emergency Helpdesk service outside the Core Day for urgent issues requiring immediate action. A protocol for dealing with such urgent matters will be set out in the Interface Protocol.
- 2.1.4. Project Co shall ensure that the Helpdesk responds to Service Events within the time specified in this Service Level Specification and the Payment Mechanism. Project Co shall respond to all Service Reports through deployment of the correct level of support to resolve all matters in accordance with this Service Level Specification and the Payment Mechanism.
- 2.1.5. Project Co may allow for notifications to the Helpdesk to be achieved via additional communication methods such as SMS and e-mail communications, but these shall not remove the requirement to provide a telephone helpdesk that responds to calls and communications within 20 seconds within the Core Day and within 1 minute outside of the Core Day.
- 2.1.6. Project Co shall acknowledge SMS, e-mail and telephone voice recorded messages during the Core Day to comply with the Rectification Periods as specified in the Payment Mechanism or this Service Level Specification, as appropriate. In the case of SMS this needs to be a mobile number held by the Helpdesk operator.
- 2.1.7. Project Co shall comply with all notification and reporting procedures set out in the Payment Mechanism and the Joint Operating Protocol.

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- 2.1.8. Project Co shall make telephone access to the Helpdesk at local call rate charges.
- 2.1.9. Project Co shall undertake a monthly random audit of calls to demonstrate that the requirements of this paragraph [2.1] are complied with and report findings to the [relevant] [School Entity and] Authority.
- 2.1.10. Project Co shall provide Authorised Callers with remote access “read only” facility to access Helpdesk requests, notifications, actions and task completions. This should allow the [relevant] [School Entity and] the Authority to download copies of information for manipulation and analysis.
- 2.1.11. Project Co shall deal with all Building related complaints from third parties relating to the operation of the Facility in consultation with the Authority Representative as appropriate.

2.2. Supporting Documentation

- 2.2.1. Project Co shall be responsible for providing on Site to the relevant Facility Users all technical guidance relating to the Facility including operation and maintenance manuals, logbooks, risk assessments, building management plans, Method Statements, and other guidance as required by this Service Level Specification and Law. Project Co shall be responsible for ensuring that these documents are kept up-to-date as part of the Interface Services and the Quality Plans. Where there are any changes to the Services Delivery Proposals affecting any of the related guidance, Project Co shall revise and reissue the respective guidance and provide induction training for the Facility Premises Team.
- 2.2.2. Project Co shall take a proactive approach to resolving problems by preparing solutions for discussion with the Authority Representative and the Facility Premises Team and Soft Services provider as necessary.
- 2.2.3. Project Co shall develop, maintain and update the Disaster Plan each year in accordance with Schedule 8 (*Review Procedure*) of this Agreement, or as may be needed by changing circumstances, such as changes in Authority Policies, new technology and changes in Law etc. to ensure continued compliance with the Facilities Controls Assurance Procedures. The Controls Assurance Procedures will include, for example, handing over responsibility to third parties outside of the Core Day, and will have regard to issues such as fire and evacuation plans, the Disaster Plan and service specific risk assessments. The Disaster Plan, including in relation to for example boiler failure or power failure, shall be agreed with the Authority Representative and shall be referenced in the Service Delivery Proposals for each separate Service. Project Co shall implement the Disaster Plan as and when required.
- 2.2.4. Project Co shall comment on and help draft and maintain the Facility's Building related management policies and include these in relevant management plans e.g. The Health and Safety Management Plan, and Fire Safety Management Plan.
- 2.2.5. Project Co shall produce a Building Users' Guide. The Building Users' Guide shall be updated to reflect any changes or updates to the Building's systems or local controls which have an impact on the ability of Facility Users to control their local environment. Project Co shall provide additional training to support the Building Users' Guide, when updated.

- 2.2.6. Project Co shall develop the Energy and Utilities Management Plan with the Authority and record the agreed plan in accordance with ISO 50001 and current standards.
- 2.2.7. The Authority is responsible for reuse, recycling and disposal of all waste generated by day to day Facility activities. Project Co is responsible for the waste streams arising from its maintenance activities. In addition, Project Co shall assist the [relevant] [Authority/School Entity] to develop and document Maintenance Materials and Waste Management as part of the ISO 14001 Environmental Management Plan (in accordance with paragraph [1.15.3] (*Environmental Management Services*) of this Service Level Specification for the Facility. The aim is to operate efficient maintenance regimes and to assist the [relevant] [Authority/School Entity] to manage its waste streams in accordance with Good Industry Practice.
- 2.2.8. Project Co shall update and maintain Area Data Sheets for all spaces within the Buildings and grounds as part of its Method Statements. Project Co shall make these available to the [relevant] [Authority/School Entity] so that Facility Users may understand what is provided for in each space, environmental comfort criteria and means of control.

2.3. **Communications Plan**

- 2.3.1. Project Co shall develop and maintain on an annual basis a plan (the "**Communications Plan**"), which shall include as a minimum:
 - a. approach to daily, planned and ad hoc communications;
 - b. agenda and attendees for Monthly Review;
 - c. agenda and attendees for Annual Services Review;
 - d. agenda and attendees for Biennial Review meeting;
 - e. meetings schedule;
 - f. escalation plan for emergencies and significant issues;
 - g. out-of-hours communications;
 - h. complaints handling; and
 - i. methodology for implementation of User Satisfaction Surveys, including Building Performance Evaluation and POE.

2.4. **Performance Monitoring, Reporting and Record Keeping**

- 2.4.1. Project Co shall monitor the Services in a diligent and consistent way to ensure that the Building consistently meets this Service Level Specification and the Authority's Construction Requirements.
- 2.4.2. Project Co shall ensure that through consistent performance monitoring, service Performance Failures and Unavailability are minimised and where they do occur are

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rectified quickly and efficiently with minimal disruption to the [relevant] [Authority/School Entity] and the Facility Users and in accordance with the Rectification Periods set out in the Payment Mechanism.

- 2.4.3. Project Co shall prepare a Monthly Service Report containing all of the reporting information required by this Agreement, in the Agreed Form and as required pursuant to Section 4 of Schedule 14 (*Payment Mechanism*), where reports are quarterly, to include the relevant quarterly reporting information. Project Co shall also prepare Project Co's Annual Service Report summarising the reports and providing any additional reporting required on an annual basis.
- 2.4.4. The Annual Service Report will be reviewed at the Annual Service Review which shall take place annually within 20 (twenty) working days of the end of the Contract Year.
- 2.4.5. Project Co shall respond to ad-hoc requests to prepare and supply all information relating to the Services reasonably required by the Authority.
- 2.4.6. Project Co shall monitor the Services regularly and at a minimum at the intervals specified in the Performance Standards and the reporting table as set out in the Payment Mechanism.
- 2.4.7. Project Co shall monitor the Services in accordance with the requirements of this Service Level Specification and the Payment Mechanism to determine whether Performance Failures and/or Unavailability has occurred and whether Deductions are due and shall report Service Events to the Helpdesk and ensure that these are recorded, actioned and remedied.
- 2.4.8. Project Co shall carry out its own compliance checking in relation to the Building and this shall be demonstrated in the Services Delivery Proposal.
- 2.4.9. Project Co shall produce a Services Delivery Proposal setting out how effective performance monitoring and reporting will be achieved for each of the Services. This is to include a summary page highlighting key performance issues in a form of exception reporting supported by the detailed Monthly Service Report.
- 2.4.10. Project Co shall prepare a Services Delivery Proposal in relation to the reporting requirements as required by this Service Level Specification and Schedule 14 (Payment Mechanism) of the Agreement.
- 2.4.11. Project Co shall notify the Authority, the Authority's Representative and the Facility Representative of any changes to management structure, staffing levels, roles and responsibilities, working practices or service delivery timings not less than five (5) Business Days prior to the change being implemented.
- 2.4.12. Project Co shall ensure that all information and records are maintained in accordance with this Agreement and are up to date, accurate, in the agreed format and available for inspection by the Authority's Representative.
- 2.4.13. Project Co shall make summary reports available to the Authority on request and/or in accordance with a pre-agreed programme.

- 2.4.14. Project Co shall ensure that it employs appropriate standards of data maintenance and access in the storing of all data including compliance with the Data Protection Laws, such that any documentation or computer records shall be made available for inspection by the Authority as required. Such information shall be provided within agreed timescales and managed as part of the Interface Services.
- 2.4.15. Project Co shall provide such other information as is reasonably required by the Authority. This may include the provision of statistical information to allow the Authority to undertake its reporting requirements to Welsh Government and reports and supporting records reasonably required for the [relevant] [Authority/School Entity] to undertake its audit requirements. All information, documentation and records to be shared with and become the property of the [relevant] [Authority/School Entity] on termination or expiry of this Agreement.
- 2.4.16. Project Co shall attend quarterly meetings with the Authority's Representative and Facility Representative and provide summary reports in a format suitable for discussion with the Authority Representative and Facility Representative. For the first six (6) months of the Operational Term (as part of the Soft Landings Framework) and whenever the Authority has concerns over performance, these meetings shall be held on a monthly rather than quarterly basis. Project Co shall also attend termly premises committee meetings, where relevant.
- 2.4.17. Project Co shall provide information to assist the [relevant] [Authority/School Entity] in complying with any financial reporting obligations.
- 2.4.18. Project Co shall produce quarterly reports on performance against the Quality Plans.
- 2.4.19. Project Co shall keep up to date records of all Programmed Maintenance, Lifecycle Replacement and Unprogrammed Maintenance Work undertaken in relation to the Facility. These records should be made available via a form of shared electronic database or any other format agreed with the Authority's Representative.
- 2.4.20. Project Co shall keep an up to date list of all Statutory Inspections carried out and shall include a summary in a quarterly report to the Authority and the Authority Representative. Project Co shall maintain full reports and certification in relation to Statutory Inspections to be made available on demand and included in the Fire Safety Management Plan and other Building management plans as required by Law and Good Industry Practice.
- 2.4.21. Project Co shall monitor the performance of the Building as against the Energy and Utilities Management Plan on at least a monthly basis. The automated Energy Management System (EMS) should be central to this process. This shall be formally reported quarterly to inform the [relevant] [Authority/School Entity] of any excessive energy use so that corrective action can be considered and taken.
- 2.4.22. The automated EMS shall be set up to monitor and log energy consumption and utility usage for the following distinct occupied Core Day profile periods:
- a. 12am to start of Core Day occupancy (breakfast clubs, staff arrival, etc)
 - b. start of Core Day to close of Core Day.
 - c. Post Core Day, through Additional Period occupancy (after school/ clubs, staff on site, community use, [evening classes] etc)
 - d. end of post-Core Day, Additional Period occupancy, to 11:59:59pm

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And for the following weekend, term holiday, bank holiday, or inset days Facility profile periods:

- a. 12am to start of any Additional Period ([school clubs], staff on Site, community use, etc)
- b. end of any Additional Period to 11:59:59pm

All Core Session periods, whether for normal Facility use, or out of hours use, or any plant-extension function, are as set up or recorded by the BMS as part of the Building controls system time-clock channels and must be available to the EMS as part of the EMS/BMS functionality.

- 2.4.23. The EMS shall be configured to calculate and report heating degree day values for each Facility using the Building external ambient temperature sensor and use this for heating energy monitoring and targeting and benchmarking in line with the requirements of this Service Specification.
- 2.4.24. In day to day operation the EMS should automatically report to the user and to Project Co any significant increases in energy consumption, utilities consumption, or any other 'out of normal range' values.
- 2.4.25. Project Co shall produce monthly on-line feedback and quarterly reports on the energy consumptions of the separate energy end uses.
- 2.4.26. Project Co shall produce quarterly reports of the total water consumption and percentages which are provided by rainwater harvesting and greywater recycling (if present).
- 2.4.27. Project Co shall measure and report performance in relation to end use water analysis on a quarterly basis.
- 2.4.28. Following the [relevant] [Actual Completion Date] Project Co shall monitor energy and water using continuous monitoring, benchmarking, and reporting protocols based on best practice tools, methodologies and reporting procedures in accordance with the Energy and Utility Management Plan. The Energy and Utilities Management Plan⁵ as updated from time to time in accordance with Schedule 8 (*Review Procedure*) shall document changes to these protocols through the Operational Term.
- 2.4.29. Energy and water usage shall be monitored using the installed meters using EMS to automatically upload data to the Automated Energy Data Collection Portal. The portal should use an interface and methodology as developed for the iSERV programme, now operated at k2energy, or k2n (<http://www.k2energy.com/>) and which will be used for the duration of the MIM programme. Alternative and similar systems may be used, such as CarbonBuzz (<https://www.carbonbuzz.org/>), or other industry available proprietary EMS or M&T applications and systems, but they must be agreed with and approved by the Authority before commencement of any services. Project Co shall ensure that the portal provided shall remain consistent across the Project Facilities throughout the Agreement and consistent with the other Projects delivered through the MIM

⁵ The Energy and Utilities Management Plan will initially form part of the Environmental Strategy Report and typically the Authority will require (as part of their New Project request under the SPA) that this is submitted as part of the WEP Co's Stage 1 proposal.

programme to allow the performance of facilities to be compared across both the Project and the MIM programme.

- 2.4.30. Annually, Project Co shall report actual energy end use on the Carbon Buzz and iSERVcmb/k2n websites or similar on-line systems approved by the Authority in order to benchmark the Facilities' energy profile. The data can be anonymised with agreement from the Authority. However, the Authority will expect good practice Facilities to be named and case studies produced.
- 2.4.31. Project Co shall work with the FMT and the Authority using benchmark data to agree annual performance targets to achieve continuous improvement in energy efficiency related to energy end uses. This information shall be used to inform the Biennial Reviews under Clause 25] (*Biennial Reviews and Reporting*) of this Agreement.
- 2.4.32. Project Co shall provide monthly exception reporting to identify and isolate incidences of avoidable utilities consumption for Target Building Load and End User Load. Project Co shall identify instances where consumption exceeds the predicted end use or established benchmarks, e.g. by more than 15% and additional utilities payments are likely to be incurred. Examples would be if Project Co noticed that: all lights in corridors are left on all night; loads are left on during holiday periods, or there is high consumption overnight or during holiday periods.

2.5. **Building Performance Evaluation and Performance in Use**

- 2.5.1. As part of the Soft Landings Framework Project Co shall carry out Site walkabouts to observe occupation patterns and to spot emerging issues which impact on the performance of the Building. As a minimum, these should be undertaken following the surveys and evaluation detailed in [2.5.4] during month one (1) and month nine (9) following the [relevant] Actual Completion Date. These walkabouts shall include members of Project Co's professional design team (where relevant but at a minimum to include the Building designer and M&E systems designer) to inform the assessment. Project Co shall discuss findings with the [relevant] [Authority/School Entity] through [the Facility Representative and] the Authority's Representative and agree whether any actions are required to improve the performance of the Building. Project Co shall draft and draft minutes recording the findings of the walk about and the actions agreed with the [Authority/ School Entity] and shall provide a copy of such minutes to the Authority School Entity no later than [◆] Business Days after the relevant walkabout.
- 2.5.2. Project Co shall carry out testing of Building controls, metering and monitoring, and Energy Management Systems to check that settings are correct in order to inform the programmed recalibration and re-commissioning of controls and the Building controls and Energy Management System to ensure that the Building meets the PIU Targets. (Performance Standards PS55 and PS56 at Appendix A of this Service Level Specification for frequency of such tests.
- 2.5.3. Project Co shall comply with the testing requirements set out in the PIU Targets at Annex 1 of this Service Level Specification and the Performance Standards at Appendix A of this Service Level Specification;
- 2.5.4. Project Co shall carry out User Satisfaction Surveys and Building Performance Evaluations as part of the POE [in the format as agreed with the Authority and the Authority Representative] and as required by this Service Level Specification. Project Co shall carry out the first User Satisfaction Survey and Building Performance

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Evaluation at prior to the 1 month walk around and again at 8 months to inform the 9 month walk around. The User Satisfaction Survey and Building Performance Evaluation shall be repeated annually by Project Co (or as agreed with the Authority).

2.5.5. Project Co shall make the POE data available to the Authority Representative and Facility Representative, including the results of the User Satisfaction Survey and Building Performance Evaluations.

2.5.6. Project Co shall upload the POE energy data in accordance with the procedures for annual monitoring and reporting of energy and water consumption set out in paragraph [2.26 (*Project Co predicted loads*)] of this Service Level Specification.

2.6. Thermal Efficiency of Domestic Hot Water systems

2.6.1. Project Co shall provide calculations of the annual efficiency in use of hot water systems and present these in the Annual Service Report for discussion at the Annual Service Review. These should compare the energy in the hot water used to the fuel input. Project Co shall measure by flow metering and providing temperature records of domestic hot water supplies and metering of fuel consumption.

2.6.2. Project Co shall ensure that the overall hot water service operating efficiency (defined as energy contained in the hot water exiting from outlets such as taps and shower heads, related to the supply side energy used for hot water generation) shall not be less than 45% in any 12 month period.

2.7. Annual tests of boiler plant and direct fired hot water generators and their flue systems

2.7.1. For all boiler plant and direct fired hot water generators of output greater than 4kW Project Co shall carry out annual performance tests for emissions and combustion efficiency in accordance with the following requirements to provide an independent check on the system's efficiency and its emissions.

2.7.2. Project Co shall test the boiler/flue system once the boiler has been brought up to full fire for a sustained period as follows:

- a. by Flue Gas Analysis with an EN 50379:2 compliant instrument;
- b. at full fire and at low fire;
- c. for O₂, CO, CO₂, HC measured in mg/m³;
- d. to record the temperature of the incoming combustion air and of the flue gases;
- e. for pressure differential to verify the performance of the flue. The flue system must be tested to ensure that its leakage rate does not exceed that designated according to EN1443 for the particular flue type; and
- f. the flue gas loss % (i.e. - % energy loss up flue [Siegert Formula]), lambda (the degree to which the fuel air mix approaches the ideal); boiler efficiency and dew point shall be recorded.

- 2.7.3. Project Co shall record the results from the annual performance tests alongside the results from initial commissioning and present these in the Annual Service Report for discussion at the Annual Service Review.

2.8. Interface Services

- 2.8.1. Project Co shall provide help and assistance to the Authority and Authority Parties to ensure that the Services are fully integrated with the Soft Services and ICT solution that is adopted by the Authority for the [relevant] Facility. This Service shall include training, attendance at Site meetings and provision of interface support to the Authority and Authority Parties to manage its operations.
- 2.8.2. Using the principles of the Soft Landings Framework, Project Co shall provide the following:
- a. general training to the Facility Users;
 - b. training of the Facility Users to ensure optimisation of the Building's performance following the [relevant] Actual Completion Date; and
 - c. post-occupancy checks and controls adjustment to optimise the performance, energy efficiency and occupant satisfaction in the Facility.
- 2.8.3. Project Co shall provide a Soft Services Training Plan which will include:
- a. details of the training to be given by Project Co to [each individual/the] Facility (and its relevant Soft Services providers) prior and following the [relevant] Actual Completion Date, including as a minimum the training requirements set out in Section 4 (*Soft Services Training Plan*) of Appendix B (*Interface Protocol*) of this Service Level Specification;
 - b. frequency and timing of training;
 - c. details of how the Soft Services Training Plan complies with the requirements of the Soft Landings Framework and the requirements of paragraph 2.8.2; and
 - d. details of how the training will assist the [Authority/School Entity] and Facility Users to optimise the Building's Performance in Use.
- 2.8.4. Project Co's training shall explain all controls and where there is lack of clarity additional user-friendly guidance (such as podcasts) and labelling of the controls shall be provided by Project Co. Additional training shall be provided when any refinements to the Building's systems and local controls are made.
- 2.8.5. The Authority and Project Co have prepared an Interface Protocol which sets out the allocation of responsibilities as between the Authority (and Authority Parties) and Project Co (and Project Co Parties). Starting at least one month prior to and to be completed one month after the [relevant] Actual Completion Date (or as agreed with the Authority in connection the Final Commissioning Programme), Project Co shall provide training for the Facility staff on all relevant aspects of the Building to enable the Facilities Premises Team to effectively manage the elements of operation and

maintenance which it is the Authority's responsibility to fulfil. Refresher training shall be provided at around 8 months co-ordinated with the User Satisfaction Survey and the 9 month walk-around described in paragraph 2.13.3.3 of the Authority's Construction Requirements.

- 2.8.6. Project Co shall prepare a Services Delivery Proposal for the Interface Services which shall include the Soft Services Training Plan and the Interface Protocol.

2.9. Access and Building Security

- 2.9.1. The operation of the access and security system will be the responsibility of the Authority and will be operated by the [Authority/[relevant] School Entity]. Project Co shall provide and maintain the access and security system. Project Co shall provide training, a user guide and a logbook to the relevant Facility Users to ensure that the security system is understood.
- 2.9.2. Project Co shall provide and maintain external monitoring of fire alarm and site security systems by a dedicated BT Redcare service and phone line link as per [1.14.4].
- 2.9.3. Project Co shall provide updates to security systems for reasonably foreseeable needs.
- 2.9.4. For deliveries and collections from Site, appertaining to the execution of Services, Project Co shall, as part of the Access to Work Protocol [see paragraph 1.10.3.g of this Service Level Specification], comply with a monitored process of entry and exit agreed with the [relevant] [Authority/School Entity], either through security or physical barriers to entry or exit with acknowledgement and authorisation processes. Project Co deliveries to Site and collections from Site must be managed so as not to interfere with the delivery of education at the Facility or the movement of Facility Users about the Site.

2.10. Asset Maintenance Service - General

- 2.10.1. Project Co shall develop and implement an integrated solution for both Programmed Maintenance and Unprogrammed Maintenance Work and which demonstrates that the Building design and component selection supports Project Co's Lifecycle Replacement strategy.
- 2.10.2. Project Co shall maintain and ensure visibility of signs on internal rooms and annually update for staff changes.
- 2.10.3. Project Co shall ensure that internal spaces and engineering systems shall meet the Availability Standards and Performance Standards including the PIU requirements for light levels, temperatures, ventilation and indoor air quality, acoustics, described in Annex 1 of this Service Level Specification, energy efficiency and functionality so that all spaces are available.
- 2.10.4. Project Co shall produce comprehensive maintenance solutions for specialist all weather pitches (where provided) within the Service Delivery Proposal as required pursuant to the Site Specific Brief.
- 2.10.5. As part of its obligations under paragraph [2.29] of this Service Level Specification , Project Co shall provide 'invest to save measures' to reduce utilities consumption,

materials use and associated waste production based on estimated capital and Lifecycle Replacement costs of the recommended works, with the allocation of costs and benefits between all parties.

2.11. Statutory Inspection and Testing

- 2.11.1. Project Co shall carry out Statutory Inspection and Testing as required by Law, Good Industry Practice and as expressly required by this Agreement.

2.12. Maintenance

- 2.12.1. Project Co shall be responsible for maintenance, service contracts, repairs, replacements & preventative regimes to the Facilities. Where there is an overlap in responsibility for certain systems and installations inspections, monitoring and adjustments between Project Co and the Authority the responsibilities of each party will be clearly set out by Project Co in the Interface Protocol and agreed with the Authority.
- 2.12.2. Project Co shall carry out Programmed Maintenance, Lifecycle Replacement and Unprogrammed Maintenance Work in accordance with Good Industry Practice, such that at the end of the Operational Term, the remaining life of each element is in line with its anticipated life from new, running from the date of actual replacement.
- 2.12.3. Project Co shall provide maintenance to, all elements of the Buildings and grounds structure, fabric, mechanical and electrical services, as well as fixtures, fittings signage and specialist installations and educational equipment including ICT Infrastructure, specifically:
- a. Building's external fabric, including roofing, walls/external envelope, window, door and ventilation opening mechanisms and seals, glass and glazing, services penetrations;
 - b. Building superstructure, including structural floors, walls;
 - c. lifts;
 - d. environmental systems, including mechanical services, electrical services, water and drainage systems, environmental controls, Building Management Systems;
 - e. ICT wired infrastructure (See paragraph 4 (*ICT Design Requirements*) and table 45 (*ICT Responsibility Matrix*) of the Authority's Construction Requirements);
 - f. communication systems, including Public Address audio systems, TV and telephones etc;
 - g. internal finishes and decoration including walls, ceilings, doors, glazed screens, flooring, ceilings;
 - h. finishes/decorations including Internal fixtures, acoustic absorption and signage;

- i. specialist installations (e.g., hoists, aerials, sprinklers, and lightning protection);
- j. safety and security and systems and equipment;
- k. Group 1 Equipment including catering equipment (to include annual deep clean of catering equipment);
- l. testing including periodic re-commissioning of systems and statutory testing;
- m. maintenance and upkeep of play equipment, e.g. swings, climbing frames, etc;
- n. artificial synthetic grass or rubberised surfaces;
- o. walls, fences, cycle storage and shelters retaining structures and similar;
- p. internal roads, car park surfaces and marking and paths;
- q. hard surfacing, paths, roadways, steps, ramps, general paving, kerbs;
- r. lifecycle maintenance of drainage features including gullies, grating, frames and covers;
- s. balustrades and all external furniture including seating; and
- t. sheltered provision;

2.12.4. Project Co shall carry out the Buildings service and grounds asset management service to ensure:

- a. that the Buildings and grounds are Available;
- b. the efficient delivery of the Curriculum in line with the [relevant] [Authority/School Entity's] objectives;
- c. the Buildings and grounds provide full operational functionality and meet the operational requirements of the Facility Users, staff and Students;
- d. all Buildings, services and controls equipment meet the PIU Targets;
- e. the Building Elements are kept in good repair;
- f. the Buildings and grounds do not deteriorate beyond that required to ensure Availability and compliance with the Service Quality Standards and that Programmed Maintenance, Lifecycle Replacement and Unprogrammed Maintenance Work are performed and Statutory Requirements are adhered to in order to achieve resource, energy and water efficiencies;

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- g. avoidance of pollutants, both internally and externally, which are known to have a long term negative impact on occupants or the natural environment; and
 - h. the Facilities are maintained in a reasonable decorative standard throughout the Facility for the Operational Term.
- 2.12.5. Project Co shall ensure that maintenance is carried out by appropriately qualified and/or skilled staff and in accordance with any relevant codes of practice or statutory provisions.
- 2.12.6. Project Co shall respond to breakdowns and ad hoc repairs in order to ensure Availability, compliance with performance and Service Quality Standards, manufacturer's requirements and warranties, Law and Good Industry Practice.
- 2.12.7. Project Co shall ensure that Lifecycle Replacement is carried out at times and in a manner, which minimises the impact on the delivery of Educational Services and any extra curricula activities whilst still meeting Project Co's obligations in respect of Programmed Maintenance as set out in this Service Level Specification.
- 2.12.8. Project Co shall provide details of how it intends to manage the provision of and where necessary storage of spare parts for each Facility.

2.13. **Schedule of Programmed Maintenance**

- 2.13.1. Project Co shall prepare and agree an annual plan of maintenance activities with the Authority.
- 2.13.2. Project Co shall produce a 5 Year Maintenance Plan for each Facility. The plan will be a five-year rolling plan and shall include all Programmed Maintenance activities and acknowledge Unprogrammed Maintenance Work to the extent that it has affected future Programmed Maintenance. Project Co shall update the 5 Year Maintenance Plan on a regular basis as maintenance is undertaken, and as Lifecycle Replacement items are brought forward or delayed due to worse or better than expected performance. Project Co shall comply with the provisions of Clause 25 (*Biennial Review and Reporting*) of this Agreement;
- 2.13.3. Project Co shall prepare a Schedule of Programmed Maintenance in accordance with the provisions of Clause 23 (*Maintenance*) of this Agreement, to be agreed with the Authority.
- 2.13.4. Project Co shall submit any modifications to the Schedule of Programmed Maintenance to the Authority's Representative for approval, providing at least four weeks term time notice;
- 2.13.5. Project Co shall adopt a proactive approach to maintenance and inspections such that breakdowns and failures are minimised.
- 2.13.6. Project Co shall set out in the 5 Year Maintenance Plan and Schedule of Programmed Maintenance details of the maximum period between redecoration cycles for internal and external elements ensuring that the final redecoration occurs within the two (2)

years prior to the Expiry Date, which shall be implemented regardless of the condition of the decorations except with the express agreement of the Authority.

2.14. Lifecycle Survey Requirements

- 2.14.1. In accordance with the Agreement, Project Co shall survey the condition of the Building no less than sixty (60) Business Days prior to the Lifecycle Review Date to allow reporting on the following information:
 - a. Building condition;
 - b. hazards;
 - c. remaining elemental life of Building Elements; and
 - d. status of the Building Services.
- 2.14.2. All surveys should be conducted prior to the preparation of the 5 Year Maintenance Plan in order that the findings can inform the Schedule of Programmed Maintenance and the Lifecycle Report;
- 2.14.3. Project Co shall be responsible for carrying out a Lifecycle Review and producing the Lifecycle Report in accordance with Clause 24.8 (*Lifecycle Profile and Spend*) of this Agreement and for keeping records of Lifecycle Spend and for monitoring the actual Lifecycle Replacement and comparing this against the Lifecycle Profile and Lifecycle Schedule.
- 2.14.4. Project Co shall endeavour to carry out Programmed Maintenance outside of Term where performing such activities within the Term would have an adverse impact on the delivery of Educational Services.

2.15. Replacement materials

- 2.15.1. Project Co shall ensure that replacement materials used must be of the same quality as the specification for new Buildings with an equivalent life span, taking into account advancements in materials development and Good Industry Practice at the time of replacement.
- 2.15.2. Where Project Co can demonstrate that re-used or reconditioned parts or replacements have at least equivalent life expectancy and performance capability of a new replacement item, Project Co shall endeavour to use re-used or reconditioned parts or replacements.

2.16. Handback Requirements

- 2.16.1. At the end of the Project Term, Project Co shall hand back to the Authority, the Facilities in a state of good repair, in accordance with Schedule 18 (*Handback Procedure*) of this Agreement. Under Schedule 18 (*Handback Procedure*) of this Agreement, the Authority will arrange for an independent condition survey (Handback Survey) to be carried out prior to the Expiry Date, which will identify any rectification or maintenance work to be undertaken. The rectification or maintenance work shall be such that the Facility meets the Minimum Residual Life Expectancy Requirements as set out in the fourth column

of the table at Appendix D (*Minimum Life and Residual Life Expectancy*) of this Service Level Specification and the design life requirements set out in paragraph [1.4.5] of the Authority's Construction Requirements.

- 2.16.2. Without prejudice to Clause 47.2 (*Transfer to Authority of Assets, Contracts etc*) to 47.4 (*Transitional Arrangements*) and Schedule 18 (*Handback Procedure*) of this Agreement, Project Co shall ensure that prior to the Expiry Date or Termination Date the Authority is in receipt of all effective operation and maintenance manuals, 'As-built' drawings, Energy and Water Efficiency Plan supporting models, simulations and data, supplier and Project Co details, the Independent Tester reports, building performance evaluation reports and the Building test results.

2.17. Energy and Utilities Management Plan

- 2.17.1. Project Co shall develop an Energy and Utilities Management Plan⁶. It is a tool to measure and benchmark the energy and water efficiency of the as-built installations and to compare energy performance and consumption in use with the Final Baseline Energy Model. It shall form part of the Method Statements and may be updated from time to time in accordance with Schedule 8 (*Review Procedure*) of this Agreement.
- 2.17.2. The Energy and Water Efficiency Plan will form part of the Energy and Utilities Management Plan.
- 2.17.3. The Energy and Water Efficiency Plan may be updated from time to time in accordance with Schedule 8 (*Review Procedure*) of this Agreement and be developed and implemented from early design stage and be a tool to continuously monitor and benchmark the energy and water efficiency of the as-built installations.
- 2.17.4. The Energy and Water Efficiency Plan will include effective monitoring of energy and water to influence user behaviour and ensure efficient operation over time.
- 2.17.5. Project Co shall ensure that the Energy and Utilities Management Plan includes energy and water end use analyses and shall measure and report performance on a quarterly basis. Reports should include energy and water consumption data based on meter readings split by readily identifiable zones to the full range of sub-metered areas, including major uses and lettable areas, e.g. catering.
- 2.17.6. Project Co shall ensure the efficient, effective, safe and timely supply of energy and utilities (electricity, gas and water, etc.) in order to ensure continued operation of the Facility.
- 2.17.7. Project Co shall prepare options within the Services Delivery Proposals for the management of this risk. These options shall prioritise the maintenance of utility supplies to kitchen and dining areas, toilets, ICT servers and essential hygiene facilities.
- 2.17.8. Project Co shall ensure constant supplies of:

⁶ The Energy and Utilities Management Plan will initially form part of the Environmental Strategy Report and typically Authority's will require (as part of their New Project Request under the SPA) that this is submitted as part of WEP Co's Stage 1 proposal.

- a. water;
- b. gas to boilers, hot water generators, outlets and equipment; and
- c. mains electricity to all power outlet sockets and equipment,

are provided to the Facilities (subject to Clause 31.1.3 and 31.1.4 (*Relief Event*) of the Agreement)

- 2.17.9. Project Co shall make arrangements for the removal of all mains, storm and foul water from the premises, including the emptying of interceptors. The arrangements may vary for each Facility and Project Co should establish how the cost will be calculated for each Facility.
- 2.17.10. Project Co shall maintain sanitary appliances, plumbing, fittings and associated drainage systems.
- 2.17.11. Project Co shall maintain electric distribution systems within the Site and Buildings.
- 2.17.12. In line with the Lifecycle Schedule within the Schedule of Programmed Maintenance Project Co shall ensure that all utilities services consuming plant is maintained to operate at optimum efficiency and every effort is made to ensure that all fuels, gas, electricity and water are used economically, in accordance with any operational policies issued by the Authority [or the [relevant] School Entity].
- 2.17.13. Project Co shall ensure that combustion equipment complies with Law with regard to emission of the products of combustion including particulates, NOx and other pollutants.
- 2.17.14. Project Co shall:
 - a. maintain the meters to enable effective metering of energy and water consumption throughout the Facility;
 - b. carry out analyses of separate energy end uses;
 - c. monitor energy meters and energy end uses, compare them with the Final Baseline Energy Model and In Use Energy Model and provide exception reporting on them to the Authority on a monthly and annual basis;
 - d. provide effective management of energy and water consumption (including giving support to the [relevant] [Authority/School Entity] in respect of the energy end uses the [relevant] [Authority/School Entity] is responsible for), and payment of utility bills and all statutory charges;
 - e. provide advice to the [relevant] [Authority/School Entity] on ways to reduce utility charges including standing charges; and
 - f. provide and maintain emergency/back up supplies and surge protection where required to ensure services continuity including uninterruptible power supplies (UPS) for alarms. The UPS for ICT servers shall be provided by the Authority as part of the server equipment.

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2.17.15. Project Co shall undertake an air tightness test on the Building two years following the Payment Commencement Date in respect of the relevant Facility and every five (5) years thereafter (or at the specific request of the Authority) to assess any degradation of the air tightness of the Building due to uncontrolled infiltration and control the air entering and leaving the Building, which will affect energy consumption. Should the test show a reduction in excess of the acceptable level of reduction detailed in the table below compared with the original test undertaken as part of Project Co's [Pre-Completion] Commissioning Project Co shall undertake remedial works to restore the air tightness of the Building back to achieve the same level as shown to be achieved in the tests undertaken as part of Project Co's Pre-Completion Commissioning.

Acceptable level of reduction

Test no.	Time (years)	Acceptable reduction in performance as compared to original test
1	0	N/A
2	2	+5%
3	7	+5%
4	12	+10%
5	17	+10%
6	22	+10%

2.18. Energy and water efficiency

2.18.1. Project Co shall work with the Authority to reduce the energy and water consumption and carbon emissions of the Facilities.

2.18.2. The Energy and Water Efficiency Plan will include key design parameters by which the water consumption target will be achieved, e.g. by reducing the risk of uncontrolled water use, minimising the risk of leakage and by minimising the energy associated with the generation, storage and supply of hot water.

2.18.3. Project Co shall ensure that the design allows for the predicted water use (in the Building and grounds) to be less than 2.8m³/person per annum total use for a Facility without a pool. A cost-effective project specific target for water consumption shall be developed by Project Co which should be compared with national benchmarks⁷.

⁷ 2.8 m³/person/annum(2800L) is regarded as 'Good Practice' for Schools (without pools) based on the Watermark Project

- 2.18.4. Water meters shall be provided to measure the annual water consumption and, if applicable, the amount of rainwater harvested.
- 2.18.5. Project Co shall compare annual water consumption with the project specific target referenced at 2.18.3 in the Annual Service Report for discussion at the Annual Service Review. To the extent that the target is being exceeded, Project Co shall investigate the reasons for the increased consumption exceeding the project specific target and put in place measures to achieve the project specific target unless otherwise agreed with the Authority.
- 2.18.6. Project Co shall ensure that any on-site energy generation, water recycling and harvesting included in the solution is appropriate and proportionate to the needs of the Facility. Any on-site energy generation shall ensure energy efficiency and low carbon output.
- 2.18.7. Project Co shall ensure that the overall hot water service operating efficiency (defined as energy contained in the hot water exiting from the tap or shower head, related to the supply side energy used for hot water generation) shall not be less than 65% on an annual basis for the Annual Service Report. Annual calculations shall be provided to the Authority comparing energy in hot water used compared to fuel input for hot water adjusted for efficiency.
- 2.18.8. Project Co shall ensure that standing losses for electrically heated hot water services for hand washing must not exceed 10W/basin and that heating of hot water by trace heating of pipework must not be used for legionella prevention.

2.19. Energy and utilities management

- 2.19.1. Project Co and the Authority will annually review the Energy and Utilities Management Plan and identify the need for revisions to reflect performance, changes in occupancy and use patterns and the availability of new technologies and upgrades to improve component and system efficiency.
- 2.19.2. The Energy and Utilities Management Plan shall include the:
 - a. design stage energy and water end use analyses;
 - b. A Measurement and Verification Plan⁸ which includes details of all sub-meters, a meter and loads schematic diagram, commissioning, data collection, storage and transmission of data and the mechanisms for dealing with any loss of data, e.g., assumptions or interpolations made in the case of missing or incomplete data. The plan and its contents shall comply with the requirement in the IPMVP;
 - c. Initial Baseline Energy Model - this energy model will accurately reflect the proposed design and will include system simulation. This must include detailed representations of each system in the building; including for but not limited to individual fans, pumps, system circuits, boilers, chillers, air handling units (AHU's), heat pumps, etc. the control systems, strategies including outside air optimisation, dead bands and proportional bands. Project Co must demonstrate the level of detail that the controls

⁸ See Chapter 3.2 of IPMVP Volume III

have been incorporated within the model and that simple standardised controls templates have not been solely used. The treatment of thermal bridging must be either designed out or a separate calculation showing what impact this is having on the overall U-Values. An arbitrary percentage allowance within the software used to create the model will not be accepted; and

- d. actions to be taken in design, specification, construction, commissioning and occupancy to reduce water and energy consumption and carbon emissions and ensure effective implementation, with clearly identified responsibilities of relevant parties.

2.19.3. At [the Commencement Date] the Energy and Water Efficiency Plan will be updated to include the:

- a. Final Baseline Energy Model to at least the same level of detail as the Initial Baseline Energy Model updated to represent the developed and finalised design;
- b. upload energy data to the Automated Energy Data Collection Portal;
- c. as built record drawings showing all meters and connected loads and details of means of data storage and transmission to the Automated Energy Data Collection Portal;
- d. predicted operational water use and energy use and associated carbon emissions for the school site in a format similar to a DEC rating (including regulated and unregulated emissions);and
- e. actions to be taken to reduce water and energy consumption and carbon emissions and ensure effective implementation, with clearly identified responsibilities of relevant parties.

2.19.4. Project Co shall maintain the Building logbooks as required by AD L of the Building Regulations and its associated guidance 'Non-Domestic Building Services Compliance Guide'. Project Co shall supply Display Energy Certificates as required by the Energy Performance of Buildings Directive for regulated and unregulated emissions. It is acknowledged that this can only be done after a year's worth of meter readings. Project Co shall also provide energy reports as required by the Energy Performance of Buildings Directive and then discuss with the Authority means to implement the recommendations including as part of 'invest to save' measures.

2.19.5. Project Co shall produce and continue to develop integrated continuous benchmarking, measurement and verification, and reporting protocols based on best practice tools, methodologies and reporting procedures. The Energy and Water Efficiency Plan shall document changes to these protocols through the life of this Agreement.

2.20. Energy and Utilities Modelling

Summary of approach to energy modelling

2.20.1. At the end of each year the target energy consumption figures for the Building Load during Core Energy Hours predicted by the Final Baseline Energy Model initially and the In Use Energy Model once it has been agreed with the Authority, will be compared

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against the actual energy figures for these end uses (once allowable adjustments have been made) and Section 7 (*Utilities Management*) of the Payment Mechanism will be applied.

2.21. The Final Baseline Energy Model

- 2.21.1. Project Co has developed the Initial Baseline Energy Model throughout the development of the design to produce the Final Baseline Energy Model that includes all the design information for the Authority [and School Entity] including actual profiles, predicted equipment performance and management factors for [the]/ [each] Facility. Project Co has provided the Final Baseline Energy Model to the Authority (as part of the Project Co’s Proposals) on the [Commencement Date]. Project Co's supporting design simulation assumptions and results shall be included in the Energy and Water Efficiency Plan.
- 2.21.2. The Final Baseline Energy Model includes an energy analysis of all of the equipment to be installed, based on predictions and equipment surveys. Before the Actual Completion Date, Project Co will use the Final Baseline Energy Model to confirm that the design meets the energy cap and the design energy targets subject to allowable adjustments to the Initial Baseline Energy Model and to predict the total energy consumption and carbon emissions of the Facility in the format of a DEC rating. This predicted DEC shall be exported to the Automated Energy Data Collection Portal.
- 2.21.3. Project Co shall aim for this rating to be equivalent or better than a DEC Rating of C. Where this is not possible Project Co should identify means to achieve the equivalent of a C rating in future by implementation of efficiency measures, for example by procuring replacement equipment (where it is the Project Co’s responsibility to supply) or recommending replacement items to the [Authority]/ [School Entity] to replace inefficient Legacy Equipment.

2.22. Operational Hours

- 2.22.1. The operational hours are based on a National Calculation Methodology (NCM) typical school year and the hours detailed in Appendix 1 of Schedule 18 (*Payment Mechanism*) and provide the details of HVAC operational hours throughout the year. Outwith Core Sessions and Additional Periods when the Facility is closed, systems will be set to the setback temperatures.

TABLE 1 WORKING WEEK

Timetable	Detail
Opening timetable	07:00 – 17:00
Dining timetable	12:00 – 14:00
Working week*	Monday – Friday
Additional Periods per Academic Year (in blocks of 5 hours)	60 (300 hours)

TABLE 2 SCHOOL/ COLLEGE CALENDAR

From (inclusive)	To (inclusive)	Status
January 01	January 08	Closed
January 09	February 12	Open
February 13	February 19	Closed
February 20	March 19	Open

March 20	April 02	Closed
April 03	May 28	Open
May 29	June 04	Closed
June 05	July 23	Open
July 24	September 03	Closed
September 04	October 22	Open
October 23	October 29	Closed
October 30	December 21	Open
December 22	December 31	Closed

2.23. The In-Use Energy Model and Energy Reporting

- 2.23.1. Project Co shall produce the In-Use Energy Model from the Final Baseline Energy Model in accordance with this Service Level Specification and the Authority's Construction Requirements.
- 2.23.2. Project Co shall provide the Measurement and Verification Plan which has been used to calibrate the Final Baseline Energy Model. This will include the metering strategy, the completed Automated Energy Data Collection Portal facilities and services spreadsheet, and the as built drawings showing all meters and connected loads.
- 2.23.3. Pre-Handover checks: Project Co shall endeavour to ensure that the energy targets will be met from the first day of operation. A list of energy related items is to be prepared for the Independent Tester to check⁹. There should also be an energy focussed section on the Snagging List. The Independent Tester, [in conjunction with the Commissioning Manager], should in particular be checking that the BMS and EMS are correctly set up and calibrated properly, that the core hours and term dates have been inserted properly, and that all energy metering systems are in place and functioning correctly.
- 2.23.4. For the first twelve (12) month period after the Actual Completion Date [in respect of the relevant Facility], Project Co will monitor energy consumption. After six (6) months Project Co will compare the actual energy consumption of the Building with the predicted energy consumption by the Final Baseline Energy Model on a system by system basis. . Project Co will use obtained weather data from the BMS as part of this appraisal and make allowable corrections if found to be required. If there is a significant discrepancy¹⁰, Project Co will determine the cause of the differences. At the end of the initial twelve (12) months, Project Co will again compare the actual energy consumption with that predicted by the Final Baseline Energy Model to demonstrate that the energy targets are being achieved.
- 2.23.5. In subsequent years, Project Co shall refine the In Use Energy Model to achieve greater accuracy and better energy management and to reflect benchmarks and agreed energy reductions for example through invest to save measures for energy efficiency improvements.

⁹ I and Schedules 10 and 13 of the Project Agreement should be updated accordingly.

¹⁰ie greater than 10%

- 2.23.6. Allowable adjustments that can be made to the In-Use Baseline Model, include: changes to Buildings, plant and equipment, weather, and hours of use. For example: excess lighting energy consumption due to operation of blinds, e.g. due to poor visibility of Legacy data projectors; requests from the School Entity/ Authority to increase temperature set points above the normal maintained air temperatures detailed in the Authority's Construction Requirements; and changes to equipment loads and length of the Core Day.
- 2.23.7. The predicted end use consumptions are compared with actual metered consumption figures and benchmarks or other school/ College end use benchmarks where possible to identify areas where energy is being wasted and to apportion payments in a fair and transparent way.
- 2.23.8. In order to claim weather adjustments, Project Co's baseline projections for heating energy consumption must accurately reflect actual consumptions with a reasonable statistical confidence. Project Co shall use IPMVP Volume I, Appendix B which summarizes basic uncertainty quantification techniques to guide decisions about the level of rigour suitable for each M&V process. Project Co shall also follow ASHRAE Guideline 14 on monitoring.¹¹
- 2.23.9. The metering, monitoring and reporting of the data must be independent of the [Authority's]/ [School Entity's] IT system.
- 2.23.10. Project Co will provide a screen in a readily accessible location within the Facility which will continuously display the energy data from the EMS.

2.24. Energy Payment Mechanism – Consumption Risk

- 2.24.1. Project Co shall take the volume risk on the actual consumption of the Building Load during Core Energy Hours $A_{\text{buildingCEH}}$ to the extent that it is greater than Project Co's predicted target energy consumption for the target Building Load during Core Energy Hours $T_{\text{buildingCEH}}$. Project Co's predicted consumption $T_{\text{buildingCEH}}$ shall initially be based on the Final Baseline Energy Model and on the In Use Energy Model once it has been agreed with the Authority, after allowable adjustments have been made, e.g., for weather or changes to Core Energy Hours.

2.25. Obligation to produce and agree the In Use Energy Model

- 2.25.1. As soon as practicably possible following the Payment Commencement Date, but in any event by the end of the second (2nd) year following the Payment Commencement Date, Project Co shall use recorded data including actual metered energy consumption data to calibrate the In Use Energy Model used to predict the target Building Load during Core Energy Hours ($T_{\text{buildingCEH}}$), which takes into account allowable adjustments. Calibration and allowable adjustments shall be in accordance with best practice for measuring and reporting on energy and water consumption based on actual weather patterns, and the hours that the Facility is open. Adjustments to the In Use Model that affect the target Building Load during Core Energy Hours ($T_{\text{buildingCEH}}$) must be agreed with the Authority as they will form the basis of energy payments throughout the Contract Period.

¹¹ The IPMVP and ASHRAE 14 are complementary documents that provide guidance and instruction to those interested in quantifying the results from energy savings projects. .

- 2.25.2. Project Co's Initial Energy Model prediction of the Target Building Load during Core Energy Hours $T_{\text{building CEH}}$ must be less than of **38 KWhe** for both Primary and Secondary Schools and **70 KWhe** for Colleges without pools as in [3.5] of Section 7 (*Utilities Management*) of Schedule 14 (*Payment Mechanism*) of this Agreement.
- 2.25.3. Where kWhe is the equivalent electrical kWh calculated by multiplying the different fuel kWh consumptions for different energy sources by the following standard energy weighting factors:

Standard Energy Weighting Factors

Category	Description	Energy Weighting Factor
Electricity	includes mains electricity, electricity from combined heat and power and renewable energy	1.0
All Fuels	includes, gas, oil, and biofuels	0.4
Thermal Energy	includes geothermal, district heat and heat from combined heat and power and solar thermal	0.5

- 2.25.4. At a Facility in which the Core Sessions commence at 07:00 the Core Energy Hours are
- a. all School/ College Day Mornings and all School/ College Day Afternoons on School/ College Days only; and
 - b. the hours of 12:00 a.m. midnight to 07:00 a.m. every day of the year.
- 2.25.5. Throughout the Operational Term Energy Services will be purchased by the Authority [(or the [relevant] School Entity)]
- 2.25.6. As required by of Section 7 (*Utilities Management*) of Schedule 14 (*Payment Mechanism*) of this Agreement, each year, following the Initial Period [on and from the date falling 4 years after the Actual Completion Date], Project Co will propose the Annual Shared Risk Core Energy Service Consumption Target for the forthcoming year, which shall be the lower of
- a. the average consumption for the previous three years and
 - b. the energy target proposed by WEPCo for the [relevant] Facility
- 2.25.7. Actual consumption for the year will be recorded and compared with the Annual Energy Target at the end of the year.
- 2.25.8. To the extent that actual consumption $A_{\text{buildingCEH}}$ exceeds the target Building Load $T_{\text{buildingCEH}}$, the cost of any consumption up to 120% shall be shared between the Authority and Project Co. The cost of any consumption above 120% of the target shall be met entirely by Project Co in accordance with Schedule 14 (*Payment Mechanism*).
- 2.25.9. To the extent that actual consumption $A_{\text{buildingCEH}}$ exceeds the Energy Cap $C_{\text{buildingCEH}}$, Project Co shall be liable for an amount equal to 100% of the additional utilities used.
- 2.25.10. To the extent that actual consumption $A_{\text{buildingCEH}}$ falls below the Energy Cap $C_{\text{buildingCEH}}$ and also below 120% of the target Building Load $T_{\text{buildingCEH}}$ the cost of the consumption is to be shared between the Authority and Project Co equally.

- 2.25.11. To the extent that actual consumption $A_{\text{buildingCEH}}$ is lower than the target Building Load $T_{\text{buildingCEH}}$, the Authority shall be liable for an amount equal to 50% of the utilities saved.
- 2.25.12. At the Annual Review Meeting the Authority and Project Co shall agree that the In Use Energy Model end use systems targets are achievable and realistic for the [relevant] Facility's operation. During the meeting, Project Co shall document, so that the Authority can understand, the discrepancies, if any, between the Final Baseline Energy Model, the In Use Energy Model, Automated Energy Data Collection Portal benchmarks and the actual energy consumption figures of the Facility so that the energy consumption may be improved the following year as incorporated into the Energy and Utilities Management Plan. Project Co shall report annually to the Authority on the total fuel consumption figures. At the Annual Review Meeting Project Co shall report on the actual energy consumption figures as compared with the target predicted consumption figures in accordance with Section 7 (*Utilities Management*) of the Payment Mechanism.
- 2.25.13. Where Project Co and the Authority cannot agree Project Co's proposed adjustments to produce the target Building Load during Core Energy Hours, $T_{\text{building,CEH}}$ that determines the energy payments, the Authority will employ a suitably qualified independent third party energy assessor, to be agreed with Project Co, to review the Project Co's proposals, the Automated Energy Data Collection Portal benchmarks and the energy and weather data to determine payments. The International Performance and Measurement Protocol ("**IPMVP**") and ASHRAE Guideline 14¹² will be used to opine on any disputes about adjustments to energy payments. Project Co shall subject to Clause 57 (*Dispute Resolution Procedure*) of this Agreement be bound by the findings of such independent third party.
- 2.25.14. Project Co shall not obstruct the Authority and/or such independent third party energy assessor to inspect any part of the Buildings and on written request shall promptly provide access to all the Project Co's records, receipts, invoices, reports, drawings, technical specifications and performance logs relating to the target Building Load $T_{\text{building,CEH}}$ and energy consumption figures, so as to enable the Authority and/or such independent third party energy assessor to obtain an accurate assessment of any of the figures quoted. Project Co shall provide all reasonable co-operation and assistance to the Authority and any independent third party energy assessor and shall allow them access to such documents and information and shall in a bona fide manner respond promptly to all reasonable requests for further documents and information made by the Authority and/or any independent third party energy assessor in respect of the target Building Load $T_{\text{buildingCEH}}$, energy consumption figures, Project Co's Proposals and the projected energy payments.
- 2.25.15. The **Building Load** on which Project Co and the Authority shall share the volume risk during Core Energy Hours comprises:
- a. **space heating and cooling-** The temperatures to be used for predicting the initial baseline heating consumption are the normal maintained air temperatures given in Table 27 of Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*) of this Agreement.

¹² See the International Performance and Measurement Protocol (IPMVP) published by the Efficiency Valuation Organization and freely available from www.evo-world.org. Volume I, 2012 Edition describes the methodology and Volume III Part I gives examples of some current applications of IPMVP to new build construction projects.

The minimum room temperature in any serviced area shall be 12°C at which temperature the heating system will be automatically switched on for a minimum of thirty (30) minutes for fabric protection. Adjustments can be made where the Authority [or School Entity] chooses to run parts of the building at higher temperatures. This energy end use shall be separately metered;

- b. **internal lighting and emergency lighting excluding external lighting -** This energy end use shall be separately metered. Hours of use are those in the input parameter data set for the type of Facility but can be adjusted for actual hours of use where the Authority [or School Entity] chooses to use the lighting out of hours, for example, they may leave all the corridor lights on all night for security purposes;
- c. **[swimming pool heating - including pump and water treatment, and pool related ventilation and air conditioning loads]; and**
- d. **Building related services:** including protection systems, fire alarms, sprinkler systems and intruder alarms – lifts - ventilation plant including that serving changing rooms, toilets and Kitchen, boiler plant and pumps and other plant and any air conditioning loads, i.e. to server room or teaching areas. – Project Co shall meter the total electrical load/s for these energy end uses.

2.25.16. The **End User Loads**, on **which** are not counted as part of the Building Load for the purposes of the Payment Mechanism are:

- a. **external sports and flood lighting** – This energy end use shall be separately metered;
- b. **external security and amenity lighting** – This energy end use shall be separately metered;
- c. **hot water** consumption – The domestic hot water loads shall be metered;
- d. **catering gas, electricity and water** consumptions – These end uses shall be separately metered;
- e. **server and hub room loads** including all ICT equipment but excluding internal lighting and heating, ventilation and any air conditioning equipment required to achieve the conditions specified in Table 27 at Section 3 (*Authority's Construction Requirements*) of Schedule 6 (*Construction Matters*) of this Agreement. Electrical loads to server rooms shall be separately metered; and
- f. **miscellaneous power loads** - including local extract ventilation such as dust and fume extract (including fume cupboards), ICT equipment outside server rooms and power and equipment loads such as hand driers, kilns, and theatre lighting including small power, Legacy Equipment and Equipment provided by Project Co.

2.25.17. The Authority is permitted to bring additional power consuming equipment into the Facility. The changes must be notified to Project Co who may need to adjust the In Use Energy Model end uses accordingly.

2.25.18. Project Co and the Authority shall work together to achieve:

- a. an Initial Baseline Energy Model design target in electricity equivalent kilowatt hours, KWhe for $T_{\text{buildingCEH}} + \text{Hot Water consumption} + \text{Small Power Consumption during Core Energy Hours}$ of less than the following figures depending on the type of Facility;

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- b. Secondary School with no pool 66 KWhe;
- c. Primary School with no pool 52 KWhe; and
- d. Colleges with no pool 108kWe; and
- e. a carbon rating for the [relevant] Facility's total energy consumption equivalent to a DEC rating of C.

2.25.19. Project Co and the Authority shall also work together to limit all energy end uses to best practice benchmarks. These benchmarks for large (>10,000m²) Secondary Schools and are currently:

- a. lighting 12 kWh/m²/annum;
- b. external Lighting 2 -12 kWh/m²/annum;
- c. heating 34.5 kWh/m²/annum;
- d. hot water 9 kWh/m²/annum;
- e. fans and pumps (depends massively on extent of HVAC, figures normalised across school/ College total floor area, however range is) 6-15 kWh/m²;
- f. server rooms 8 kWh/m²;
- g. lifts 1 kWh/m²;
- h. IT circa 8-10 kWh/m² (although depends on pupil to PC/laptop ratio and charging method)
- i. miscellaneous and small power 5-10 kWh/m²;
- j. catering 7-14kWh/m²; and
- k. current similar industry benchmarks for the various energy end uses should be used, where available.

2.25.20. Project Co and the Authority shall also work together to limit all energy end uses to best practice benchmarks. These benchmarks for large (>10,000m²) Colleges and are currently:

- a. lighting 15- 30 kWh/m²/annum;
- b. external Lighting 2 -12 kWh/m²/annum;
- c. heating 45 kWh/m²/annum;
- d. hot water 13 kWh/m²/annum;
- e. fans and pumps (depends massively on extent of HVAC, figures normalised across school/ College total floor area, however range is) 6-16 kWh/m²;
- f. server rooms 8 kWh/m²;
- g. lifts 3 kWh/m²;
- h. IT circa 8-10 kWh/m² (although depends on pupil to PC/laptop ratio and charging method)
- i. miscellaneous and small power 15-30 kWh/m²;
- j. catering 7-14kWh/m²; and
- k. current similar industry benchmarks for the various energy end uses should be used, where available.

2.26. Project Co predicted loads

2.26.1. Project Co shall predict] the annual energy and utilities consumptions of the following Service Infrastructure and report on them annually in accordance with the Energy and Water Efficiency Plan. Project Co shall report on the:

- a. Building Load end uses identified in this Service Level Specification and the ACRs;
 - b. end user load end uses identified in this Service Level Specification and the ACRs;
 - c. total hot and cold-water consumption; and
 - d. catering hot and cold-water consumption.
- 2.26.2. The energy and water consumption of legacy Facilities and Buildings or parts of Buildings which may be let out to the community on a commercial basis, may be used out of the Core Days for community use such as sports or leisure facilities and shall be separately accounted for in energy and water prediction calculations and may be separately zoned and metered.

2.27. Energy and Utilities Monitoring and Reporting

- 2.27.1. Metering and sub meters shall be provided as described below and in the ACRs.
- 2.27.2. Project Co shall ensure that Building Services systems are effectively zoned and sub-metered to reflect the operational use of the different areas of the Facility development to ensure effective control and in order to minimise energy consumption.
- 2.27.3. Project Co will provide an Energy (and Environmental) Monitoring System EMS which will automatically collect, store energy data, room temperature, CO₂ data as well as data from the site weather station. This is to be capable of transmitting the data offsite independently of the [Authority's]/ [School Entity's] IT system.
- 2.27.4. Project Co shall use the Automated Energy Data Collection Portal, to monitor and report on Facility's energy, water, CO₂ and temperature, via the Building's EMS. Project Co shall train the Facility's Premises Team how to use the EMS and the Automated Energy Data Collection Portal monitoring system as part of the building performance evaluation and Soft Landings phases, taking account of any requirements in this Service Level Specification and the Authority's Construction Requirements about the way in which the training is delivered.
- 2.27.5. The Automated Energy Data Collection Portal must comprise an automated cloud based data collection and management system, either as part of or separate from the BMS/EMS, but intrinsically linked to it for information and data collection purposes. It must be able to gather the following information from the BMS/EMS:
- a. all meter and sub-meter readings (1/2 hourly collection)
 - b. all external and internal space (room) temperature sensor logs (1/2 hourly collection)
 - c. all internal space (room) CO₂ sensor logs (1/2 hourly collection)
 - d. all corresponding building/service/zone timeclock start and end periods
 - e. LTHW system all flow and return temperature sensor logs (1/2 hourly collections)
 - f. DHWS system all temperature sensor logs (1/2 hourly collections)
 - g. any other sensor logs relevant to energy use (1/2 hourly collections)

All data collection should be in an industry standard .xls file format. It must be able to provide automated reports (at least monthly) with easy to understand graphical reporting and KPI's to enable the layperson end user to easy review, understand, and digest appropriate building energy performance data for the entire Facility;

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- 2.27.6. Following the commencement of the Operational Term [Payment Commencement Date/Payment Commencement Date 1], the Project Co shall monitor the energy use against the installed meters and will provide the Authority via the Automated Energy Data Collection Portal with on line data and benchmark information on at least a monthly basis and a daily basis when required by the Authority, by means of data exchange with the Automated Energy Data Collection Portal.
- 2.27.7. The Automated Energy Data Collection Portal reports should be used to provide the feedback interface for the Facility Users by means of the monthly reporting templates. Providing these monthly reports to the Authority will enable them to provide appropriate control over those energy consumers which they influence, helping the overall energy targets to be achieved. Alternatively, with the Authority's prior written approval, Project Co can choose to use other energy management reporting software to produce similar feedback reports for the Authority [and the School Entity].
- 2.27.8. Project Co shall also commence reporting to the Authority on energy use from the Actual Completion Date using the Monthly Energy Report and Energy Report required under Schedule 14 (*Payment Mechanism*) of this Agreement. The Monthly Energy Report will be set out to report progress monthly against a designated end of year month. This enables progress against contractual targets to be assessed as part of Building Performance Evaluation, and early corrective action to be taken if needed.
- 2.27.9. To enable the Authority to participate in benchmarking the data from each Facility shall be submitted to the Automated Energy Data Collection Portal by Project Co in a compatible format. Project Co shall also fully describe each Facility with the data requested by the Automated Energy Data Collection Portal.
- 2.27.10. The operational data required for the meters and sensors described in the asset spreadsheet shall be automatically exported via the Building's EMS system to the Automated Energy Data Collection Portal, to enable inclusion on the automated reports which will be sent to Project Co and the Authority (and School Entity if required). Accessing this data must be independent of the Building's own ICT system. Manual transmission of the data will not be acceptable.
- 2.27.11. The minimum level of sensor data required is space temperature, carbon dioxide and lux light level sensor data for each heating zone (in an occupied space, not circulation), and data from an outside weather station. This allows energy performance and building systems performance to be evaluated. Project Co may choose to include additional sensor data, e.g. room temperature and CO₂ sensor data for each room, in order that further insights into the effectiveness of the Building Services HVAC systems can be provided to the Authority and Project Co. The Automated Energy Data Collection Portal shall be capable of assessing energy use per space by these appropriate sensors being in place.
- 2.27.12. Correlating the internal conditions with energy consumption enables the identification of avoidable energy use, building performance issues and sensors or meters that are likely to be out of calibration. This is a powerful means of remote system diagnosis. Project Co can use this data to aid seasonal commissioning adjustments during the twelve (12) month period following [the relevant] Actual Completion Date and thereafter as needed.

- 2.27.13. Project Co shall provide monthly exception reporting to identify and isolate incidences of avoidable utilities consumption regardless of who is responsible for the cost of utilities. Project Co shall identify instances where consumption exceeds the predicted end use or established benchmarks, e.g., by more than 15% and additional utilities payments are likely to be incurred. Examples would be if Project Co noticed that: all lights in corridors are left on all night; loads are left on during holiday periods, or there is high consumption overnight or during holiday periods.
- 2.27.14. The actual against anticipated use and previous years' data when available will be reported quarterly by Project Co.
- 2.27.15. At the end of each Contract Year the actual energy end use consumption figures shall be compared with the predictions from the In Use Energy Model and the Automated Energy Data Collection Portal benchmarks for other Facilities.
- 2.27.16. Project Co shall provide the Authority and their agents with full access with unrestricted use of and rights to energy, heating, hot water, lighting and water consumption metering data. At least the last three years' historic data shall be available in a suitable on-line format designed to be understood by Students and school/ College staff. Project Co shall agree with the Authority the level and type of real time data, including weather data, to be provided for Curriculum use.
- 2.27.17. Energy and utility use data shall be acquired and stored on the local EMS every thirty (30) minutes. All meters and sub-meters will report at the same time every 30mins, typically on the hour and on the half hour. For collected data to be useful when collated and compared it must be taken at the same time as well as for the same interval. The data shall be uploaded at least every month and preferably every day, to the Automated Energy Data Collection Portal for energy management purposes.
- 2.27.18. Project Co shall ensure that Facilities are metered separately for all utilities in line with Approved Document L (AD L) in support of the Building Regulations and CIBSE TM39. Automatic Meter Readings (AMR) must be provided on all incoming service installations and sub-metering to report energy end use consumptions.
- 2.27.19. Project Co shall ensure that the energy use data has separate data streams (usually meters) for all the meters identified above and for each of the following HVAC components that are installed:
- a. fixed building services meters:
- heating plant energy use (electrical and fossil fuel separated);
 - hot water pumps;
 - domestic hot water pumps and temperature maintenance tapes;
 - any separate heat rejection fans;
 - individual Air Handling Units (if applicable);
 - cooling systems: e.g., packaged a/c systems and split systems (if applicable);
 - heat pumps; (if applicable);
 - lighting distribution boards;

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- Water meters to heating system break tank pressurisation units
- main electrical incomer
- HVAC/Motor control panel/BMS control panels
- any LZC or Renewables
- Sprinkler pump and ancillaries power supplies
- Lift power supplies
- Vehicle charging point power supplies
- any life safety systems

b. additional meters:

- domestic Hot water supplies cold feed;
- general cold water consumption;
- Electrical Distribution Boards. (internal lighting, internal small power, external lighting, external small power, HVAC DB's, etc, all separately sub-metered).

c. specialist meters:

- catering facilities (gas, domestic hot water, and electricity);
- server room equipment, including UPS;
- multi-surface sports facilities and external sports lighting; and
- swimming pools (process and lighting loads)

2.27.20. Theoretical corrections to end use consumptions where individual metering of that end use is required will not be permitted.

2.27.21. The data is usually provided by meters but many HVAC components, e.g., pumps are now fitted with in-built sensors and meters which can be connected to the internet and data collected from them directly. Use of in-built meters will be acceptable to the Authority where they meet the requirements detailed in the Authority's Construction Requirements for meters. Duplicate metering and data collection systems should be avoided where the components can already provide the required data.

2.27.22. Project Co shall monitor the individual energy end uses. Project Co shall produce a metering schematic and upload the data to the Automated Energy Data Collection Portal. This will be fully completed by the commencement of the Operational Term. End use data and meter readings will subsequently be uploaded to the Automated Energy Data Collection Portal continuous monitoring and benchmarking website. Project Co shall provide commissioning records for the metering and monitoring system including test data uploads and reports from the Automated Energy Data Collection Portal database. Project Co shall provide as built meter schematic record drawings showing all the meters and the loads connected to each meter. Project Co shall monitor the individual energy end uses.

2.27.23. Project Co may meter any item of equipment where they would like to determine the actual energy or water use.

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- 2.27.24. Project Co shall ensure that data from the AMR system and headline output data from the Building Controls and Energy Management Systems, for example room temperatures and heating and hot water flow/return temperatures, is uploaded to the Automated Energy Data Collection Portal and available to the Authority (and School Entity) via the web for use in energy management and monitoring energy performance and consumption.
- 2.27.25. The Authority will have responsibility for day to day energy management at the Facility and Project Co will have overall responsibility for energy monitoring at the Facility and shall report findings to the Authority. Project Co and the Authority shall work together to overcome any inefficiencies in system operation identified by the Project Co or the Authority.
- 2.27.26. The Authority may appoint a person with overall responsibility for energy management at the Facility. This person shall report his findings to the Authority and Project Co. Project Co and the Authority shall work together to overcome any inefficiencies in system operation identified by the relevant person responsible for energy management.
- 2.27.27. Renewable energy contracts, payments and incentives must be agreed by the Authority.
- 2.27.28. The energy consumption in run and standby conditions for all equipment shall be estimated by Project Co for the purposes of calculation of energy end use loads. For this purpose, Project Co shall obtain information on Legacy equipment, including name plate loads, manufacturer's names and serial numbers and shall provide the information to the Authority.
- 2.27.29. Annually, the Contractor shall report actual consumption figures and DEC ratings on the Carbon Buzz and iSERVcmb websites or similar on-line systems approved by the Authority in order to benchmark the Facility's energy profile.

2.28. Weather data

- 2.28.1. Project Co shall:
 - a. provide and monitor a weather station at [the]/ [each] Facility that will be in a location regarded as suitable for collecting weather data; and
 - b. where available may reference local Met Office data; and
- 2.28.2. Project Co shall specify the type and location of weather station to be used. Sensor data resolution as recorded and reported will be to one decimal place, and it must be accurate to within 1% for temperature (in the range of 0°C to 50°C), and 3% for humidity (in the range of 5% to 95% RH). The weather station to be finally calibrated on site during the commissioning stage, and re-calibrated at regular intervals thereafter by Project Co. in accordance with manufacturers recommendations.
- 2.28.3. Project Co shall use the weather data:
 - a. to calibrate the Final Baseline Energy Model after the first year of operation;
 - b. to make adjustments to energy consumption figures for comparison with the In Use Energy Model;
 - c. to record and report weather variations; and

- d. to provide to parties, that require this information, as part of a dispute resolution regarding adjustments to the target Building Load, $T_{\text{buildingCEH}}$.
- 2.28.4. As a minimum the following weather data is required;
- a. Outdoor Dry Bulb Temperature,
 - b. Outdoor Humidity, Wind Speed,
 - c. Wind Direction,
 - d. Dew Point
 - e. Rain-fall intensity, and
 - f. Solar Radiation
- over a maximum of 1-hour averages.
- 2.28.5. The weather data shall be available for Curriculum use by the Authority [and the School Entity].
- 2.28.6. Where required the weather data will be utilised automatically by the BMS to control ventilation devices and openings.

2.29. Invest to save measures

- 2.29.1. The Contractor shall provide 'invest to save' measures to reduce energy and water use as a minimum as part of their annual report.
- 2.29.2. Following the Payment Commencement Date[/Payment Commencement Date 1] the Contractor and energy manager are encouraged to identify any energy conservation measures that will reduce energy and utilities consumption. Where these have economic paybacks, typically with simple paybacks of less than eight (8) years after the Payment Commencement Date[/Payment Commencement Date 1], the Contractor or Authority may propose these as a change under Schedule 16 (*Change Protocol*) of this Agreement.
- 2.29.3. It is the responsibility of both Project Co and the Authority to identify areas for energy improvements and to implement those improvements where they are agreed to be both technically and financially viable.

2.30. Initial Grounds Maintenance Service

- 2.30.1. Project Co shall undertake the Grounds Maintenance Service in respect of each [External Area] from the date of issue of a Certificate of Practical Completion in respect of the corresponding [Post completion Works Area] until [in each case] the date falling [three (3)] years after [the Payment Commencement Date [[Payment Commencement Date 1] (the "**Initial Grounds Maintenance Period**")].
- 2.30.2. Project Co shall develop a Grounds Maintenance Management Plan which provides method statements and maintenance programmes detailing how Project Co will deliver the Initial Grounds Maintenance Service.
- 2.30.3. Project Co will be responsible for providing a specific maintenance regime designed to meet the Performance Standards applicable to all of the following elements:

- a. All grassed areas within the Site, including general amenity and wildflower or other habitat areas;
 - b. Pitches excluding synthetic grass or rubberised surfaces but including marking out of pitches and erection of posts;
 - c. All planted areas including shrubs and hedges;
 - d. All boundary planting where provided;
 - e. Any horticultural features, e.g. sensory garden; habitat area etc;
 - f. Trees, including pruning and managing overhanging of adjacent properties, roads and walkways etc; and
 - g. Water features including ponds and swales; and
- 2.30.4. The Authority will remain responsible for Winter tidiness, leaf collection and road/path sweeping
- 2.30.5. Maintenance must be carried to a high aesthetic standard, must ensure the grounds are safe for all users throughout the year and should be sensitive to the needs of those using the external environment.
- 2.30.6. ProjectCo will be required to adopt environmentally friendly products, substances and practices, such as:
- a. the conservation of water; and
 - b. the minimal use of chemicals such as pesticides and insecticides.
- 2.30.7. The Service should be responsive to curriculum needs such the timely preparation of sports areas for teaching and the establishment of ecological and wildlife areas.
- 2.30.8. Programmes and timings for maintenance work such as grass cutting and planting are to be agreed annually with [the Authority] or School Entity].
- 2.30.9. All equipment and consumables necessary to comply with the requirements of this Service are the responsibility of Project Co.

2.31. **General Grounds Maintenance Service**

- 2.31.1. All replacement planting is to be carried out at the recorded planting time of year.
- 2.31.2. Landscaping works should be robust and of a high aesthetic standard, comply with the appropriate British Standards and remain in accordance with any planning authority requirements.
- 2.31.3. Works should preferably be undertaken whilst external areas are not in use. In particular, works on or adjacent to pitches and playground whilst in use by pupils shall be avoided.
- 2.31.4. A programme of cleaning will be implemented by Project Co to ensure that there is no accumulation of silt and other matter on site roads, car parking, paths and pedestrian areas.
- 2.31.5. All products used in connection with Grounds Maintenance must be used and stored in accordance with the manufacturer's instructions and Clauses 29.1 to 29.8 (*Stocks, Consumables, Material and Equipment*) of this Agreement.

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- 2.31.6. The Contractor shall ensure that it adheres to the Control of Substances Hazardous to Health (COSHH) Regulations.
- 2.31.7. Surface water drainage systems shall be kept free of blockages at all times.
- 2.31.8. All work must be carried out in accordance with the appropriate British Standards and codes of practice.
- 2.31.9. Project Co must liaise with adjoining owners when carrying out any work to boundaries.
- 2.31.10. Planting schemes should recognise the nature of a Facility's environment by avoiding planting of a non-user friendly nature.
- 2.31.11. Project Co shall provide a reactive service to undertake analysis of and resolve persistent problems with water quality and problems affecting aquatic and plant life around all water features.
- 2.31.12. The Authority shall remain responsible to ensure all external areas are maintained substantially free from leaf accumulation.
- 2.31.13. All external areas shall be maintained free from foreign matter such as stones, brick, glass and animal faeces.
- 2.31.14. No pesticides shall be applied during periods of occupation and no unsafe, poisonous or hazardous residue shall be present during periods of use.
- 2.31.15. Particular attention should be paid to the condition of sports pitches and planted areas. Project Co shall be required to monitor the presence of animal faeces and foreign objects in all areas and will be required to undertake a prompt clear up process. Should these be found with regular occurrence and repeatedly cause disruption to the functioning of the Authority or School Entity or community use or third party use or cause any instances of Unavailability then Project Co will be required to take measures to prevent occurrences;
- 2.31.16. Project Co will produce and implement their Service proposals for Grounds Maintenance during drought conditions, with specific reference to the maintenance of grassed and planted areas during these periods.
- 2.31.17. All works are to be carried out in accordance with the following:
 - a. in a safe manner;
 - b. in accordance with regimes and programme identified in the service delivery plan; and
 - c. following completion of maintenance work, external areas shall be left in a tidy condition.

2.32. Grassed areas

- 2.32.1. Maintenance should be appropriate to ensure surfaces are:

- a. in a condition with regard to the agreed levels and types of usage as agreed with the Authority in accordance with the requirements of the ACRs;
- b. substantially free of weeds, moss or other extraneous growth;
- c. remain well drained to ensure standing water does not affect the availability of any area/facility;
- d. be free from ruts or other disruption to the normal contour of the surface;
- e. neatly cut to the edge of any borders;
- f. kept at the specified length; and
- g. in healthy growth with no bare patches;

2.32.2. Project Co shall ensure grassed areas are regularly maintained in a maintenance plan that encompasses the following actions:

- a. cutting and tending of grass;
- b. removal of stones and material that come to the surface as the area settles;
- c. repair and re-turfing/re-seeding of damaged areas;
- d. control of weeds;
- e. treated (if required) with fertiliser and weed killer which is non-toxic and not readily absorbed into the ground. Hazard signs must be displayed when undertaking such operations. Such operations should not be undertaken during periods of occupation and no unsafe, poisonous or hazardous residue shall be present during periods of use.
- f. ensuring that the proposed grass mix has been established, reseeding where necessary.

2.32.3. In addition to the above Project Co shall ensure that wild flower meadows and other habitat planting:

- a. shall be cut at the frequency required to maintain the habitat areas specifically with regard to flowering and seed setting; and
- b. shall be the mix, quantity, quality and size of plants, flowers and species shall be as originally specified unless otherwise agreed by the Authority.

2.33. **Planting trees, perennial plants and shrubs**

2.33.1. Maintenance should be appropriate to comply with the following:

- a. they should be healthy with vibrant growth such that dead or dying trees, perennial plants or shrubs are replaced without detriment to the overall quality of the landscaping;
- b. to be kept to an appropriate height as identified in the service delivery plan;
- c. plants or shrubs do not overhang, or otherwise obstruct, pedestrian or vehicular traffic routes;
- d. herbaceous borders and shrub beds are kept reasonably free of weeds, with no gaps in the planting;
- e. tree management plan to be established. Trees will be inspected, mapped and recorded at the Site (including retained trees). Records should be maintained during the progress of any works at the Site and provided to the Authority on completion of the service;

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- f. have appropriate drainage;
- g. weed killing and the application of chemicals in accordance with the requirements outlined elsewhere in this Service Level Specification; and
- h. planting and tending of trees/hedges/shrubs including a programme of pruning and thinning as required.

2.33.2. Pitches, formal sports areas and outfields

2.33.3. In accordance with the Authority's Construction Requirements and this Service Level Specification, Project Co will be required to develop in conjunction with the Authority a strategy for the development and use of the sports pitches. This will include type of use, minimum durations, pitch rotation, limitation of informal usage etc.

2.33.4. Maintenance should be appropriate to comply with the following:

- a. shall remain of a reasonably level surface across their area (gradients being appropriate to allow intended sports to be played on them), areas of uneven settlement shall be addressed to allow for a regular cut and to ensure that the surface does not present a health and safety risk for users (such as a sprained ankle);
- b. be free from ruts or disruptions to the normal contour of the surface;
- c. be substantially free from the accumulation of weeds, moss, lichen, and other extraneous growth;
- d. be consistent with the seed mix and proposed quality as originally specified unless otherwise agreed by the Authority
- e. maintain the safety and functionality of the pitch;
- f. maintained in a suitable standard for the provision of the Curriculum and extra-curricular activities;
- g. grass sports pitches should be maintained in line with Good Industry Practice including a maintenance and establishment routine to include stone picking, cutting, feeding, scarifying and spiking and ensuring drainage is maintained to support proposed usage;
- h. lines marked with a non-toxic hard-wearing substance in accordance with the Area Data Sheets;
- i. remain suitably drained to ensure standing water does not affect the availability of that area;
- j. weed killing and the application of chemicals in accordance with the requirements outlined in this Service Level Specification; and
- k. comply with Good Industry Practice, Sport England's 'Natural Turf for Sport' and guidance from the relevant sport's national governing body for establishing and maintaining a pitch.

2.33.5. ProjectCo shall ensure all cutting of pitches is to be undertaken at times to suit the [Authority] [or School Entity, the timetable and any variations due to weather conditions is to be agreed with the Authority and/or School Entity.

2.33.6. ProjectCo shall ensure all pitches must have a continuous grass covering and the length of grass is to comply with the table below which defines the maximum and minimum length of grass required for each pitch:

Start of Academic Year to Easter Season
--

	Max length of grass	Min length of grass
Football	50	25
Hockey	25	15
Rugby		
– pitch	100	50
– lines (300mm wide)	50	25
Easter to End of Academic Year Season		
	Max length of grass	Min length of grass
Cricket Table	18	12
Outfield	25	12

2.33.7. Cricket tables and hockey pitches shall be rolled prior to a season's use with an appropriately sized roller;

2.33.8. At the end of each season Project Co shall repair, fill in holes, re-seed, scarify and spike as necessary to ensure a full covering of grass to the playing surface for the start of the next season. If this is not possible, Project Co will have to repair the affected areas.

2.34. All hard and all-weather surfaces

2.34.1. Maintenance should be appropriate to comply with the following:

- a. remain of a level surface across their area and a gradient appropriate to allow intended sports to be played on them;
- b. maintained to a standard to allow the provision of the Curriculum and extra-curricular activities and in accordance with manufacturers guidance;
- c. lines marked with a non-toxic hard-wearing substance in accordance with the Area Data Sheets;
- d. incorporate sufficient and appropriate drainage drained to ensure standing water does not affect the availability of that area;
- e. be free the accumulation of weeds, moss, lichen, other extraneous growth and litter;
- f. be free from ruts or disruptions to the normal contour of the surface;
- g. be of continuous materials, free from trip hazards and not friable;
- h. free from silt and soil build up;
- i. maintain the safety and functionality; and
- j. maintain gullies and gutters so that they remain free-flowing.

Annex 1 - Performance in Use (PIU) Targets

1. Project Co shall ensure that the Building meets or improves upon the following PIU Targets and shall report for each Facility which includes details of compliance for each relevant Area annually:

1.1. Indoor air quality:

- 1.1.1. Concentration of CO₂ shall not exceed the maximum levels of 1,200 parts per million (ppm) for mechanical ventilation and 1,600ppm for natural ventilation under any conditions for more than 20 minutes during the Core Day. Measurement shall be by monitoring of extract air by CO₂ sensors (which are provided in every occupied room) or spot-checks using a CO₂ meter. The BMS may be used to log data from the installed room CO₂ sensor, but must be verified by an independent calibrated handheld meter.
- 1.1.2. The operational targets shall be 800ppm for mechanical ventilation and 1,200ppm for natural ventilation.
- 1.1.3. The required maximum CO₂ levels shall not be exceeded during room dim-out / blackout, and shall not be impaired by security or safety requirements.
- 1.1.4. Cold draughts from incoming ventilation air in cold weather shall not cause thermal discomfort to occupants.

1.2. Acoustics:

- 1.2.1. Upper limits for the Design Indoor Ambient Noise level (IANL) shall all be in accordance with the stated criteria of Table 1 of BB93. Background noise level in each teaching and learning spaces shall not exceed the IANL by more than 5 dBA when the windows are open for ventilation as defined in Table 2 of BB93 and equipment that is normally continuously in use during teaching and learning activities including data projectors and ICT Equipment is in use. The ventilation openings shall be open so as to satisfy the 1,200ppm CO₂ air quality operational target.

1.3. Lighting Quality:

- 1.3.1. When measured with a calibrated light meter the lux levels shall be greater than or equal to the horizontal/task-maintained illuminance levels and the cylindrical illuminance levels and less than the maximum maintained illuminance levels given on the Area Data Sheets. Each room with daylight availability and corresponding daylight dimming controls will be provided with a single lux level sensor in the centre of the room and monitored by the BMS to log the room lux levels every 30 minutes.
- 1.3.2. The teaching spaces shall be free from disabling glare when blinds are deployed, and any designed natural ventilation openings are in the fully open position.

2. Room temperature:

- 2.1. All room temperature sensors used to control room temperatures shall at all times measure a temperature that does not deviate from the air temperature by more than 3°C. Verification of accuracy shall be by six monthly spot-checks with a handheld thermometer.
- 2.2. PIU requirements for internal air temperatures:
 - 2.2.1. to prevent summertime overheating: summertime temperatures shall be reported to the FMT, Facility Representative and the Authority Representative. Under the Payment Mechanism Project Co is required to meet the following performance standards:

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- a. for the defined occupied period in a Core Day an acceptable standard of thermal comfort shall be achieved over the year in each teaching space in new Buildings. When the spaces are occupied for a period of more than 30 minutes the following shall be observed:
- when the external air temperature is 20°C, or higher, and the diurnal temperature range¹³ (lowest temperature from the previous night to the maximum daytime temperature the following day) exceeds 4°C, the internal air temperature shall not exceed the external air temperature by more than 5 °C;
 - the temperatures shall be achieved when windows, fans and ventilation systems are operated to reduce summertime temperatures and the space has the intended number of occupants and the internal heat gains from, teaching equipment, including computers and data projectors does not exceed 15 W/m²;
 - the preferred method of measurement is continuous monitoring of inside and external air temperatures but spot measurements during peak summertime conditions are acceptable; and
 - diurnal temperature ranges will require measurement of external air temperature at the Facility using a screened thermostat such that the reading is not unduly affected by direct solar radiation or indirect radiation.

2.2.2. Room temperatures in winter time

The heating system shall be capable of maintaining the air temperatures given in the ADS and the following table, in winter time, measured at 1m from the floor in the centre of the room:

	Normal maintained air temperature to be achieved by the heating system in less than 20 minutes after closing any external doors - °C¹⁴	Minimum maintained air temperature provided by heating system during occupancy at the CIBSE outside design conditions - °C	Maximum air temperature during wintertime at maximum occupancy - °C
Stores	5°C	N/A	N/A

¹³ The diurnal temperature range is typically 7°C and is > 4°C on approximately 2/3rds of nights, i.e., except when there are anti-cyclonic conditions.

¹⁴ This temperature is to be used for energy consumption calculations

	Normal maintained air temperature to be achieved by the heating system in less than 20 minutes after closing any external doors - °C¹⁴	Minimum maintained air temperature provided by heating system during occupancy at the CIBSE outside design conditions - °C	Maximum air temperature during wintertime at maximum occupancy - °C
Areas where there is a higher than normal level of physical activity (such as sports halls) and sleeping accommodation	17°C	15°C	23°C
Toilets, circulation spaces and store rooms that are normally occupied	17°C	15°C	26°C
Kitchen preparation areas	20°C	15°C	N/A
Spaces with normal level of activity, teaching, study, exams, admin and staff areas, prep rooms	20°C	18°C	26°C
Spaces with less than normal level of activity or clothing, including sick, isolation rooms, changing rooms; and gymnasias and dance and movement studios	21°C	19°C	26°C
Specially resourced provision, where needs of Students tend to be complex and varied, including Students with physical difficulties or profound and multiple learning difficulties.	23°C	21°C	25°C
Where Students or adults may be wet and partially clothed for a significant length of time, such as swimming pools	23°C in changing rooms and no more than 1°C above or below that of the water temperature in pool halls subject to a maximum of 30°C	21°C in changing rooms and no more than 1°C below that of the water temperature in pool halls	28°C in changing rooms and no more than 1°C above that of the water temperature subject to a maximum of 30°C in pool halls

	Normal maintained air temperature to be achieved by the heating system in less than 20 minutes after closing any external doors - °C¹⁴	Minimum maintained air temperature provided by heating system during occupancy at the CIBSE outside design conditions - °C	Maximum air temperature during wintertime at maximum occupancy - °C
Where young children or those with SEN(D) or physical disabilities may be wet or partially clothed for a significant length of time rapidity of air movement can lead to chilling by evaporation and to compensate, a higher design temperature may be required.	25°C The air speed in these environments should not exceed 0.1 m/s at 25°C	23°C	30°C

2.2.3. Monitoring temperatures

The preferred method of measurement is continuous monitoring of inside air temperatures but spot measurements during winter time and mid-season conditions is acceptable. The BMS may be used to log data from the installed room temperature sensor but must be verified by an independent calibrated handheld meter.

The iSERVcmb/k2n application or similar on-line reporting and monitoring systems shall be used where possible to report on Performance in Use to the Facility and the Authority.

Annex 2 - Service Quality Standards

These **Service Quality Standards** cover the continual expected performance of the Building, its grounds and its related plumbing, drainage, mechanical and electrical services which are not covered by the Performance and Availability regimes but provide protection to the end users enjoyment of its Facilities.

The Building, including its mechanical & electrical and internal plumbing and drainage systems:

- shall be structurally sound, secure or fixed to their intended point of anchorage and weatherproof where appropriate;
- shall be free from damp penetration or spalling, free from debris (especially where it can harbour vermin and/or pests), corrosion, organic growth and blockages;
- external surfaces shall be free from cracks and/or deflection or any other surface degradation inconsistent with a Building maintained in accordance with Law and Good Industry Practice; and
- internal surfaces shall be free from all but minor surface blemishes or shrinkage cracks, subject to due wear and tear;

Project Co will have additional responsibility to maintain the following elements to a quality standard described

Doors, windows, hatches, vents and cupboards:

- shall operate as intended, in a safe way, without making undue noise and without including observable strains on hinges, locks, catches and handles, and without binding, rubbing or catching in any way; and
- luminescent strips, signs, notices, warning signs provided by Project Co shall be intact, legible and illuminated as appropriate in accordance with Law and Good Industry Practice;

Internal finishing's and coverings (including paintwork and floor coverings):

- shall be free from tears, scoring or any other damage that is unsightly and/or could cause a health and safety hazard; and
- flooring shall facilitate adequate drainage where necessary;

Mechanical & electrical and internal plumbing & drainage systems:

- shall function without leaks, drips, undue noise or vibration;
- shall function without discharges from overflow pipes or similar warning systems;
- lifts will have a fully functioning emergency communication system;

- labelling, signs, notices, warning signs provided by Project Co are maintained intact, legible and illuminated as appropriate in accordance with Law and Good Industry Practice; and
- drainage shall be free from persistent odour and be free-flowing (unless as a result of a lack of cleaning); and

External Site Elements including lighting, barriers, fencing, storage, furniture and equipment:

- shall be structurally sound, safe, secure or fixed to their intended point of anchorage;
- external surfaces shall be free from cracks and/or deflection or any other surface degradation inconsistent with being maintained in accordance with Law and Good Industry Practice;
- where appropriate have even surfaces or otherwise facilitate drainage with no potholes or sinking's;
- shall be free from standing water; and
- drainage shall be free from persistent odour and shall be free-flowing (unless as a result of a lack of cleaning).

Appendix A - Performance Standards

Introduction

The Performance Standards set out below are to be applied with reference to the following guidance:

PS Ref: The unique identifier for each Performance Standard.

Performance Standard: The short description of the Performance Standard.

Performance Requirement: A description of the standard that Project Co is expected to achieve.

Service Priority Category: The category used to determine the level of Deduction and (where rectification applies) the Rectification Period applicable to the failure.

Response Period: Sets out the period of time within which Project Co must respond to a Service Event and (if relevant) make safe.

Rectification Period: Sets out the period of time within which Project Co must Rectify a Service Event.

Monitoring Frequency: Where relevant, the frequency of monitoring/reporting to be applied to the standard, (daily, monthly, annually etc.) all Event Standards should be measured “per event” or “per valid request”.

Monitoring Methods: identifies which of the following monitoring methods should be used to monitor and report the occurrence of a failure. Project Co shall describe the approach to monitoring failures in the Service Delivery Proposals.

Remedial Period / Remedy: Sets out the period of time within which Project Co must complete the actions/tasks specified to Remedy a Service Event related to a Performance Standard.

Performance Standards: PS[59] to PS [68] shall only apply in respect of the Initial Grounds Maintenance Period [relevant to each Facility].

Monitoring Method Codes Table:

Monitoring Method Code	Description/Source
1	Helpdesk Records: records of Authority & Project Co reports to the Helpdesk

Monitoring Method Code	Description/Source
2	Method Statements: Comparison with the Service Delivery Proposals
3	Service Quality Standards: Comparison against Service Quality Standards
4	Statutory Obligations: Comparison against Statutory obligations, including insurance requirements
5	Project Co Self-Monitoring: Identified through Project Co's own monitoring methods, as described in the Service Delivery Proposals Plans, including the analysis of complaints.
6	Authority Audit: Identified through the Authority's audit - validation checks of Project Co's data, random visits and deliberate testing (including Audit by an independent technical advisor).

1.1. Performance Failures¹⁵

Deductions for Performance Failures shall be calculated in accordance with the Payment Mechanism, the table below has been extracted from the Payment Mechanism for ease of reference.

Service Priority Category	Performance Failure Effective Deduction (£ per Deduction Period) for Performance Standards
Low	[£♦]
Medium	[£♦]
High	[£♦]
Super	[£♦]

¹⁵Deduction Levels to be completed following calibration.

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
Post Occupancy Evaluation									
1	Post Occupancy Evaluation	Project Co shall carry out all the activities identified in the Soft Landings Framework, Post Occupancy Evaluation and Building Performance Evaluation requirements in accordance with [2.5] and paragraph [2.8] of this Service Level Specification.	High	None	None	Daily per Facility	2, 5	Failure to carry out any one or more of the activities identified in Soft Landings, Post Occupancy Evaluation and Building Performance Evaluation requirements.	[10] Business Days To commence from the expiry of the due date Remedy: All requirements of the Soft Landings Framework, Post Occupancy Evaluation and Building Performance Evaluation met.
2	Post Occupancy Evaluation report	Project Co shall provide the Post Occupancy Evaluation report compliant with the requirements of [2.5] of this Service Level Specification.	High	None	None	Daily per Facility	2, 5	Failure to provide the Post Occupancy Evaluation report within thirty (30) Business Days of relevant Survey Date.	[10] Business Days To commence from the expiry of the due date Remedy: Post Occupancy Evaluation report provided.
3	Performance In Use Standards	Project Co shall provide a report to evidence whether every Area within each Facility has met all the appropriate Performance in Use (PIU) Standards within 3 months of the [relevant] Actual Completion Date and annually thereafter.	High	None	None	Daily per Facility	2, 5	Failure to provide a complete report within ninety (90) Business Days of [relevant] Actual Completion Date and annually thereafter.	[5] Business Days To commence from the date ninety (90) Business Days from the [relevant] Actual Completion Date Remedy: Complete report provided.
Management									

¹⁶ See Section 3, Part 2.2 of Schedule 14 (Payment Mechanism) for details of how associated, repeat deductions would be calculated

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method(s)	Definition of Failure	Remedial Period / Remedy ¹⁶
4	Service Delivery Proposals and associated Plans	Project Co shall update its Service Delivery Proposals (including any associated Plans pursuant to paragraph [1.9.10] of this Service Level Specification) as required by this Service Level Specification and provide this to the Authority's Representative for review not less than thirty (30) Business Days prior to the commencement of each Contract Year.	High	None	None	Daily per Facility	2, 5	Failure to provide updated Service Delivery Proposals or Plans for the relevant Contract Year or confirm no such updates required.	[10] Business Days To commence from the date thirty (30) Business Days prior to the commencement of the [relevant] Contract Year Remedy: Any updated Service Proposals or confirmation of existing Service Proposals provided.
5	Changes to Service Delivery Proposals	Notification of any change to Service Delivery Proposals including changes required by paragraph [2.4.11] of this Service Level Specification.	Medium	None	None	Per event	2, 5	Failure to provide the Authority with notice of any changes at least five (5) Business Days prior to the change taking effect.	[10] Business Days To commence from the date five (5) Business Days prior to the commencement of any change to the Service Delivery Proposals Remedy: Notice of any change to Service delivery Proposals provided
Staff & Training									
6	Staff Checks	Project Co's Staff checks as required by paragraph [1.9.1] and paragraph [1.9.2] of this Service Level Specification.	Medium	None	None	Per event	5, 6	Each incidence of a member of Project Co's Staff being at the Facility who has not undergone the required checks.	[5] Business Days To commence from the date of the incidence of a member of Project Co's Staff not

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
									having undergone the required checks Remedy: Written confirmation provided to the Authority that all Project Co Staff have undergone and passed the required checks.
7	Soft Services Training Plan	Training to be carried out pursuant to the Soft Services Training Plan as required by paragraph [2.8.3] of this Service Level Specification.	Medium	None	None	Per event	2, 5	Each failure to carry out training activities within five (5) Business Days of the time scheduled in the Soft Services Training Plan.	[5] Business Days To commence from the date five (5) Business Days from the time scheduled for that training in the Soft Services Training Plan Remedy: Written confirmation provided to the Authority that the relevant training has been carried out.
8	Staff Induction	Maintenance and update of induction programme as required by paragraph [1.9.6] of this Service Level Specification.	Medium	None	None	Daily per Facility	5	Failure to produce up to date induction programme within five (5) Business Days of a valid request from the Authority Representative.	[5] Business Days To commence from the date five (5) Business Days from a valid request from the Authority Representative Remedy: Production of an up to date Written

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
									induction programme
9	Staff behaviour & appearance	All Project Co Staff and Project Co Parties to comply with the requirements of paragraph [1.9.7] of this Service Level Specification.	Low	None	None	Per Event	5, 6	Each incidence of non-compliance with the requirements of paragraph 1.9.7 of this Service Level Specification.	[5] Business Days To commence from the incidence of the non-compliance Remedy: Written confirmation of the steps having been taken to ensure the requirements of paragraph 1.9.7 are met to prevent a repeat of the specific incident.
Communications Disaster Planning									
10	Disruption	Project Co shall obtain written consent from the Facility Representative (copied to the Authority Representative) prior to carrying out any Services that may cause disruption to the Facility.	High	None	None	Per Event	5	Each incidence of causing disruption to the Facility without pre-agreed written consent.	None
11	Access to Work System	Compliance with provisions of paragraph [1.10.3.g] and [1.10.3.k] of this Service Level Specification.	High	None	None	Per Event	1, 5	Each incidence of work being carried out in contravention of the appropriate Access to Work Protocol.	None
12	Meeting Attendance	Attending meetings with the Facility Representative and the Authority's Representative as agreed under paragraphs	Medium	None	None	Monthly per Meeting	5, 6	Each instance of failure to attend agreed meetings.	None

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
		1.10.2.a], [2.4.16], [2.8.1] of this Service Level Specification							
13	Communications Plan	Provide Communications Plan and annual update of the Communications Plan in accordance with paragraph [2.3] of this Service Level Specification.	Medium	None	None	Daily per Plan	2, 5	Failure to provide the updated Communications Plan within three (3) Business Days of the due date.	[5] Business Days To commence from the date three (3) Business Days from the due date Remedy: Updated Communications Plan (or written confirmation of the existing version).
14	Disaster Plan	Provide Disaster Plan and annual update of Disaster Plan (or as required) in accordance with paragraph [2.2.3] of this Service Level Specification.	Medium	None	None	Daily per Plan	2, 5	Failure to provide the Disaster Plan within three (3) Business Days of the annual due date or a valid request from the Authority Representative.	[5] Business Days To commence from the date three (3) Business Days from the annual due date or valid request from the Authority Representative Remedy: Updated Disaster Plan (or written confirmation of the existing version.)
15	Disaster Plan Implementation	Implementation of Disaster Plan as and when required in accordance with this Service Level Specification.	Medium	None	None	Per Event	2, 5	Each failure to implement the Disaster Plan when necessary.	[5] Business Days To commence from the date of notification of the failure to implement the Disaster Plan Remedy: Written confirmation of the remedial steps taken to ensure

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
									implementation of the Disaster Plan
Health & Safety, Quality & Environment									
16	Health & Safety Management Plan	Develop and maintain Health and Safety Management Plan in accordance with paragraph [1.12] of this Service Level Specification.	High	None	None	Daily per Plan	2, 5	Failure to provide an up to date and compliant Health and Safety Management Plan within three (3) Business Days of a valid request from the Authority Representative.	[5] Business Days To commence from the date three (3) Business Days from a valid request for an up to date and compliant Health and Safety Management Plan Remedy: Issuance of an up to date and compliant Health & Safety Plan.
17	Health & Safety Implementation	Implementation of Health and Safety Management Plan in accordance with paragraph [1.12] of this Service Level Specification.	High	None	None	Per Event	4, 5, 6	Each failure to implement the Health and Safety Management Plan.	None.
18	Fire Safety Management Plan	Project Co shall develop and maintain a Fire Safety Management Plan compliant with the requirements set out at paragraph [1.14] of this Service Level Specification.	High	None	None	Daily per Plan	2, 5	Failure to provide an up to date and compliant Fire Safety Management Plan within three (3) Business Days of a valid request from the Authority Representative.	[5] Business Days To commence from the date three (3) Business Days from a valid request for an up to date and compliant Fire Safety Management Plan Remedy: Issuance of an up to date and compliant Fire

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
									Safety Management Plan.
19	Fire Safety Management	Compliance with Fire Safety Management requirements as set out at paragraph [1.14] of this Service Level Specification.	High	None	None	Per Event	1, 4, 5, 6	Each failure of fire safety systems to comply with Law, Good Industry Practice, the Service Quality Standards and the Fire Safety Policy.	None
20	Fire Drills	Project Co shall assist the Facility in carrying out fire drills in accordance with the requirements of the Fire Safety Policy and agreed with the fire authority or as may be directed by the Authority's nominated officer (fire) (Authority's Representative) for each Facility	Medium	None	None	Per Event	5, 6	Failure to provide assistance when requested by the Authority's Representative given five (5) Business Days' notice.	None
21	Redcare Service	Project Co shall provide and maintain external monitoring of fire alarm and site security systems by a dedicated BT Redcare service and phone line link.	High	None	None	Continuous	2,3,4,5	Failure of Redcare service other than where line service failure is due to BT	None
22	Services Quality Plans	Develop and maintain Services Quality Plans in accordance with paragraph [1.11] of this Service Level Specification.	High	None	None	Daily per Plan	2, 5	Failure to provide an up to date Quality Plan within three (3) Business Days of a valid request from the Authority's Representative.	[5] Business Days To commence from the date three (3) Business Days from a valid request from an up to date and

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
									compliant Quality Plan Remedy: Issuance of an up to date and compliant Quality Plan.
23	Quality Plans Implementation	Implementation of Services Quality Plans in relation to all aspects of the Services in accordance with paragraph [1.11] of this Service Level Specification.	Medium	None	None	Per Event	5, 6	Each failure to deliver the Services in accordance with Quality Plan.	None.
24	Environmental Management Plan	Develop and Maintain an Environmental Management Plan in accordance with paragraph [1.15] of this Service Level Specification.	High	None	None	Daily per Plan	2, 5	Failure to provide an up to date Environmental Management Plan within three (3) Business Days of a valid request from the Authority Representative.	[5] Business Days To commence from the date three (3) Business Days from a valid request for an up to date and compliant Environmental Management Plan Remedy: Issuance of an up to date and compliant Environmental Management Plan.
25	Environmental Management Plan Implementation	Implementation of the Environmental Management Plan in all aspects of the Services in accordance with paragraph [1.15] of this Service Level Specification.	Medium	None	None	Per Event	5, 6	Each failure to deliver the Services in accordance with Environmental Management Plan.	None
26	Water Quality & Efficiency Plan	Project Co shall develop and maintain a Water Quality and Efficiency Plan compliant with	High	None	None	Daily per Plan	2, 5	Failure to provide an up to date water quality and efficiency	[5] Business Days To commence from the date three (3)

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
		the Service Level Specification including paragraph [1.13] of this Service Level Specification.						plan within three (3) Business Days of a valid request from the Authority Representative.	Business Days from a valid request for an up to date and compliant water quality and efficiency plan Remedy: Issuance of an up to date and compliant water quality and efficiency plan.
27	Water Quality & Efficiency Plan Implementation	Implementation of the Water Quality and Efficiency Plan compliant with the Service Level Specification including paragraph [1.13] of this Service Level Specification.	Medium	None	None	Per Event	5, 6	Each failure to deliver the Services in accordance with the Water Quality and Efficiency Plan.	None.
28	Building Users' Guide and Room Users' Guide	Develop and Maintain Building Users' Guide in accordance with paragraph [2.2.5] of this Service Level Specification and the Room User Guide.	Medium	None	None	Daily per Facility	2, 5	Failure to produce an up to date Building Users' Guide and a Room User Guide within five (5) Business Days of the requirement pursuant to paragraph [2.2.5] of this Service Level Specification.	[5] Business Days To commence from the date five (5) business days from the due date Remedy: Issuance of an up to date and compliant Building Users Guide or written confirmation of the existing version.
Helpdesk Services									
29	Helpdesk Availability	Availability of Helpdesk during the Core Day in accordance with paragraph [2.1.1] of this Service Level Specification.	Medium	None	None	Daily per Helpdesk	1, 2, 5	Failure to provide the Helpdesk during a Core Day	None.

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method(s)	Definition of Failure	Remedial Period / Remedy ¹⁶
30	Out of Hours Helpdesk	Availability of an emergency Helpdesk for notification out of Core Day (including Additional Periods) in accordance with paragraph [2.1.3] of this Service Level Specification.	Medium	None	None	Daily per Helpdesk	1, 2, 5	Failure to provide out of hours Helpdesk as required by paragraph [2.1.3] of this Service Level Specification.	None.
31	Helpdesk Operating Procedures	Helpdesk to operate as required under paragraph [2.1] of this Service Level Specification.	Low	None	None	Per Event	1, 5	Each failure to handle Helpdesk calls and/or maintain Helpdesk records in accordance with the requirements.	None.
32	Helpdesk Response Times	Helpdesk telephone calls answered within timescales specified under paragraph [2.1.5] of this Service Level Specification.	Low	None	None	Monthly per Helpdesk	1, 5, 6	Failure to demonstrate on a monthly basis that 90% of Helpdesk calls have been answered within timescales specified in paragraph [2.1.5] of this Service Level Specification.	None.
33	Helpdesk "Read Only" Access	Provision of "read only" access to Helpdesk records in accordance with paragraph [2.1.10] of this Service Level Specification.	Medium	None	None	Daily per Authority and Facility	1, 5, 6	Failure to provide "read only" access to helpdesk records within two (2) Business Days of a valid request from the Authority or Facility Representative	[5] Business Days To commence from the date two (2) Business Days from a valid request to access helpdesk records Remedy: Issuance of helpdesk records
Performance Monitoring, Reporting & Record Keeping									

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
34	Monthly Service Report	The report required under paragraph [2.4.3] of this Service Level Specification.	Medium	None	None	Daily per Facility	2, 5, 6	Failure of Project Co to provide the Monthly Service Report within five (5) Business Days of the end of each Contract Month	[5] Business Days To commence from the date five (5) Business Days from the end of the Contract Month Remedy: Issuance of the Monthly Service Report
35	Project Co's Annual Service Report	Project Co's Annual Service Report as required under paragraph 2.4.3 of this Service Level Specification.	High	None	None	Daily	2, 5, 6	Failure of Project Co to provide Project Co's Annual Service Report within ten (10) Business Days of the end of each Contract Year following the [Payment Commencement Date]	[5] Business Days To commence from the date ten (10) Business Days from the end of the Contract Year Remedy: Issuance of the Annual Service Report

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method(s)	Definition of Failure	Remedial Period / Remedy ¹⁶
36	Record Keeping	Records to be kept as required by paragraph 2.4 of this Service Level Specification other than the Monthly and Annual Service reports detailed above in Performance Standards [34 and 35].	High	None	None	Daily or per request as appropriate	2, 5, 6	Each failure of Project Co to produce any reports within the periods detailed in 2.4 or provide any relevant information or compliant records within five (5) Business Days of a valid request from the Authority Representative	[5] Business Days To commence from the date five (5) Business Days from the required reporting period or a valid request to produce relevant information or compliant records Remedy: Issuance of requested information
37	Ad Hoc Information Requests and reports	Respond to ad hoc information requests and reports in accordance with the provisions of paragraph 2.4.5] of this Service Level Specification.	Medium	None	None	Per request	5, 6	Each failure of Project Co produce any required information or reports within five (5) Business Days of a valid request from the Authority Representative	[2] Business Days To commence from the date five (5) Business Days from a valid request to produce required information Remedy: Issuance of requested information
Maintenance and Lifecycle									
38	5 Year Maintenance Plan	Producing, maintaining and updating the 5 Year Maintenance Plan in accordance with Clause 23.11 (5 Year Maintenance Plan) of this Agreement and paragraph [2.13.2] of this Service Level Specification.	High	None	None	Daily per Plan	2, 5	Failure to provide the updated 5 Year Maintenance Plan within three (3) Business Days of the due date	[5] Business Days To commence from the date three (3) Business Days from the due date Remedy: Issuance of the 5 Year Maintenance Plan

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method(s)	Definition of Failure	Remedial Period / Remedy ¹⁶
39	Schedule of Programmed Maintenance	Producing, maintaining and updating the Schedule of Programmed Maintenance in accordance with Clause 23 (<i>Maintenance</i>) of this Agreement and paragraph [2.13.3] of this Service Level Specification.	High	None	None	Daily per Plan	2, 5	Failure to provide the updated Schedule of Programmed Maintenance or written confirmation of the existing Programme within three (3) Business Days of the due date	[5] Business Days To commence from the date three (3) Business Days from the due date Remedy: Issuance of the updated Schedule of Programmed Maintenance or written confirmation of the existing Schedule of Programmed Maintenance
40	Programmed Maintenance	Project Co shall carry out and complete all Programmed Maintenance tasks in accordance with the Schedule of Programmed Maintenance.	High	None	None	Per Event	1, 2, 5	Each failure to complete a Programmed Maintenance task within thirty (30) Business Days of the date identified in the Schedule of Programmed Maintenance	[5] Business Days To commence from the date thirty (30) Business Days from date identified in the Schedule of Programmed Maintenance Remedy: Written confirmation of the completion of the Programmed Maintenance task

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method(s)	Definition of Failure	Remedial Period / Remedy ¹⁶
41	Lifecycle Schedule	Update the Lifecycle Schedule in accordance with the provisions of Clause [24] (<i>Lifecycle Replacement</i>) of this Agreement	High	None	None	Daily per Plan	2, 5	Failure to provide the updated Lifecycle Schedule within three (3) Business Days of the due date	[5] Business Days To commence from the date three (3) Business Days from the due date Remedy: Issuance of the updated Lifecycle Schedule or written confirmation of the existing Lifecycle Schedule
42	Lifecycle Replacement Tasks	Carry out Lifecycle Replacement in accordance with Clause 24 (<i>Lifecycle Replacement</i>) of this Agreement.	High	None	None	Per Event	2, 5	Each failure to complete a Lifecycle replacement task within thirty (30) Business Days of the date identified in the Lifecycle Schedule	[5] Business Days To commence from the date thirty (30) Business Days from date identified in the Lifecycle Schedule Remedy: Written confirmation of the completion of the Lifecycle Replacement task
43	Statutory Testing & Inspection	Carry out Statutory Testing and Inspection in accordance with paragraph [2.11] of this Service Level Specification.	High	None	None	Per Event	4, 2	Each failure to complete a Statutory Testing task within five (5) Business Days of the date identified on the Schedule of Programmed Maintenance.	[5] Business Days To commence from the date five (5) Business Days from date identified on Schedule of Programmed Maintenance Remedy: Written confirmation of the completion of the

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
									Statutory Inspection and Testing task
44	Unprogrammed Maintenance Work	Providing Unprogrammed Maintenance Work in accordance with Clause 23.8 (<i>Programmed and Unprogrammed Maintenance</i>) of this Agreement and paragraph [2.12] of this Service Level Specification.	Where the Service Event is Urgent, the Service Priority Category will be High	[x] hours	[x] hours	Per Service Event	1, 2, 5	Each failure to Make Safe within the Response Period. Each failure to Rectify the fault within the Rectification Period.	None
			Where the Service Event is Routine, the Service Priority Category will be Low	[x] hours	[x] hours				
45	Compliance with Service Quality Standard (SQS) as set out in Annex 2 of this Service Level Specification	Project Co investigates SQS and issues an initial report on remedial action or course of actions to be taken in a fair and reasonable timescale	High	[x] hours	[x] hours	Per Event	1,3, 5	Failure to respond to SQS failure, issue a report on course of action or failure to carry out proposed course of action.	[2] Business Days To commence two (2) Business Days from the SQS failure being notified to Project Co (or, if self reported, notified to the Authority)

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
									Remedy: Issuance of the required initial report
46	Actions implemented as set out in the initial report to rectify SQS failure	Project Co undertakes work to the appropriate Service Quality Standard which rectifies failure and in the agreed timescale or on discovery of new cause of failure issues an updated report setting out the remedial action to be taken in a fair and reasonable timescale	High	[x] hours	[x] hours	Per Event	2, 5	Failure to implement action to rectify SQS failure as set out in initial report or provide updated report setting out remedial action.	[5] Business Days or as otherwise identified in the initial report, to commence from the due date of the initial report (see Performance Standard 45 above) Remedy: Implementation of the action as described in the initial report or an updated report agreed by the Authority
47	Develop and comply with the Interface Protocol	Develop and comply with the Interface Protocol	High	None	None	Per Event	5, 6	Failure to comply with the Interface Protocol	None
Energy & Utilities									
48	Energy Reporting	Ensure that energy data is being uploaded to the Automated Energy Data Collection Portal	High	None	None	Monthly	3,5,6	Failure to upload the required energy data within five (5) Business Days of the end of each Contract Month.	[2] Business Days To commence from the date five (5) Business Days from the end of the Contract Month Remedy: Upload of the monthly energy data

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method(s)	Definition of Failure	Remedial Period / Remedy ¹⁶
49	Energy Reporting	Monitor and report on energy and utilities consumption as required by paragraphs [2.26] of this Service Level Specification including comparison of actual consumption of energy use against In-Use energy model	High	None	None	Monthly	2,3,5,6	Failure to provide the monitoring and reporting of energy and water consumption to the Authority Representative including monthly and quarterly reports within five (5) Business Days of the end of the Contract Month	[2] Business Days To commence from the date five (5) Business Days from the end of the Contract Month Remedy: Issuance of the energy reports in the required form
50	Energy Reporting	Undertake detailed analysis of actual consumption of energy use against In-Use energy model to assess how each of the systems is performing and identifying cause where there is a significant difference	High	None	None	To be reviewed annually if consumption below Target Base Load, otherwise monthly	3, 5, 6	Failure to undertake the required analysis within twenty (20) Business Days of the end of each Contract Month or the end of the reporting year.	[2] Business Days To commence from the date twenty (20) Business Days from the end of the Contract Month or reporting year Remedy: Issuance of the required analysis
51	Energy and Utilities Management Plan (including efficiency)	Updating the Energy and Utilities Management Plan as required under paragraphs [2.2.6 and 2.17] of this Service Level Specification.	High	None	None	Daily per plan	2,5,6	Failure to provide the updated Energy and Utilities Management Plan within three (3) Business Days of the due date.	[2] Business Days To commence from the date three (3) Business Days from the due date Remedy: Issuance of the updated Energy and Utilities Management Plan Lifecycle Schedule or written

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
									confirmation of the existing Plan
52	Operating Efficiently	Operating the Building to minimise energy and utilities consumption in accordance with Paragraph[2.26.1] of this Service Level Specification.	Medium	None	None	Daily per Facility	2,5,6	Failure to demonstrate that Operational inefficiencies identified in the Energy and Water Efficiency Plan have been rectified.	[10] Business Days To commence from the target date agreed within the Energy and Water Efficiency Plan to rectify the inefficiency Remedy: Rectification of the inefficiency or reissue of the updated Energy and Water Efficiency Plan amending action where agreed with the Authority
53	Energy Efficiency Assistance	Project Co shall provide assistance to the [Authority/ School Entity] to improve energy efficiency including participation in [Authority/ School Entity] energy forums and providing input into [Authority/School Entity] decisions relating to energy consumption	Medium	None	None	Per request	5,6	Each failure to attend energy forums and/or provide assistance to the [Authority/ School Entity] within five (5) Business Days of a request from the Authority's Representative	None
54	Utilities Interruptions	Project Co shall obtain written consent from the Authority's Representative prior to arranging/agreeing to	Medium	None	None	Per event	1,5	Each incidence of arranging or agreeing to utilities interruptions without receiving prior	None

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
		interruptions in the supply of utilities to the Facility.						consent from the Authority's Representative.	
55	Building Controls and Energy Management Systems	Manage Building controls and Energy Management System in accordance with paragraph 2.5.1 to this Service Level Specification.	Medium	None	None	Daily per Facility	2,5,6	Failure to provide meeting minutes of month six(6) and month twelve (12) site walkabout, recording attendees, and agreeing any changes to systems and/or behaviour patterns.	None
56	Building Controls and Energy Management Systems	Manage Building controls and Energy Management System in accordance with paragraph [2.5.2	Medium	None	None	Every six months	2,5,6	Failure to provide evidence of testing of Building controls, metering and monitoring and EMS to check settings are correct.	[Twenty] [(20)] Business Days of programmed monitoring period
57	Utilities Invoice Verification	On receipt of utilities invoices from the Authority, Project Co shall verify the consumption data against meter readings and confirm their accuracy.	Low	None	None	Daily per invoice	2,5,6	Failure to take meter readings or verify utilities invoices against meter readings and confirm their accuracy to the Authority Representative within 5 Business Days of receipt of Utilities invoices.	None
58	Display Energy	To supply DEC for each Facility in	Low	None	None	Daily per DEC	5,6	Each failure to produce and display	[10] Business Days

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
	Certificate (DEC)	accordance with paragraph [2.27.29] of this Service Level Specification.						a valid up to date Display Energy Certificate.	To commence from the date a [request to produce a DEC is made by the Authority] Remedy: Production and display of a current and valid DEC in the required form
59	Water run-off and sewage	To remove sewage and run-off water from each Site in accordance with paragraph [1.16.1] of this Service Level Specification.	High	None	None	Per Event		Failure to ensure removal of effluent and hazardous waste.	None
Grounds Maintenance¹⁷									
60	Grounds Maintenance Plan	Providing and updating the annual Grounds Maintenance Plan and programme in accordance with [2.30.2] of this Service Level Specification.	High	None	None	Daily per plan	2,5,6	Failure to provide the agreed Grounds Maintenance Plan and programme four (4) weeks prior to the Annual Services Review.	[10] Business Days To commence from the date three (3) Business Days from the due date Remedy: Issuance of the updated Grounds Maintenance plan and programme meeting the requirements of paragraph [] of this Service Level Specification.

¹⁷ Note the grounds maintenance service is to be provided for the first three years following the [Payment Commencement Date]/[Payment Commencement Date 1] and the relevant performance standards will apply for the same period only

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method(s)	Definition of Failure	Remedial Period / Remedy ¹⁶
61	Programme of Maintenance	All grounds maintenance works (including mowing) to be carried out in accordance with the Grounds Maintenance Plan, [maintenance regime and programme] together with additional works as may be necessary to ensure compliance with the requirements detailed in [paragraphs []] this Service Level Specification and Good Industry Practice	High	None	None	Per Event	2,3,5,6	Each failure to complete a Grounds Maintenance task within five (5) Business Days of the date identified in the programme.	[5] Business Days To commence from the date five (5) Business Days from date identified in the programme Remedy: Written confirmation of the completion of the Grounds Maintenance task
62	Maintain Grass Surfaces	Maintain grassed areas and grass pitch surfaces such that they are even (no bare patches), kept neat at all edges and maintain areas such that they are substantially free of weeds, moss or other extraneous growth, silt and soil build up, litter and foreign matter (in accordance with paragraph 2.31.13 of this Service Level Specification), ruts or other disruption to the normal contour of the surface.	High	None	None	Per Event	1,2,3,5,6	Each failure to achieve the requirements to maintain grassed areas and grass pitches in accordance with paragraphs [] this Service Level Specification.	[5] Business Days To commence from the date five (5) Business Days from the notification of the failure Remedy: Written confirmation of the rectification of the failure
63	Maintain Hard and All-	Maintain hard and all-weather surfaces in accordance with	High	None	None	Per Event	1,2,3,5,6	Each failure to achieve the	[5] Business Days To commence from the date five (5)

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
	Weather Pitch Surfaces	the manufacturer's instructions and such that they are continuous, even, kept neat at all edges and maintain areas such that they are free of weeds, moss or other extraneous growth, silt and soil build up, litter and foreign matter, ruts or other disruption to the normal contour of the surface.						requirements to hard and all-weather surfaces in accordance with this Service Level Specification.	Business Days from the notification of the failure Remedy: Written confirmation of the rectification of the failure
64	Sports Pitch Line Markings	Keep all lines and pitch markings on all surfaces clear, visible and within tolerances and marked with suitable materials in accordance with [] of this Service Level Specification.	High	None	None	Per Event	1,2,3,5 6	Each failure to provide visible line marking.	[5] Business Days To commence from the date five (5) Business Days from the notification of the failure Remedy: Written confirmation of the rectification of the failure
65	Surface Water Drainage	Maintain gullies, ¹⁸ gutters and drainage so that they remain free-flowing and ensure hard and grass pitches not waterlogged and are free from standing water.	High	None	None	Per Event	1,2,3,5	Each incidence of standing water or waterlogged pitch due to failure to maintain gullies, gutters and drainage	[5] Business Days To commence from the date two (2) Business Days from the notification of the failure Remedy: Written confirmation of the

¹⁸ Note that the Facility Premises Team is responsible for the removal of leaves and litter from gullies

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
									rectification of the failure
66	Use of Pesticides	No pesticides shall be applied or be apparent in any quantity during periods of occupation of the Facilities.	High	None	None	Per Event	1,5,6	Each failure to comply with the use of pesticides during periods of occupation.	None Remedy: None
67	Maintenance of Habitat Areas	Maintain habitat areas including wild flower meadows with the mix and quantity of plants and species detailed in the landscape design set out in [] of this Service Level Specification	Medium	None	None	Per Event	1,2,3,5,6	Failure to reseed or replant (as per design) to achieve the design intent.	[5] Business Days To commence from the date five (5) Business Days from the notification of the failure Remedy: Written confirmation of the rectification of the failure
68	Maintenance of Trees, Shrubs, Herbaceous Borders and Perennial Plants	Ensure plants are in healthy and vibrant growth and that dead or dying trees, perennial plants or shrubs are replaced in the mix, density, size and quality detailed in the landscape design set out in [] of this Service Level Specification.	Medium	None	None	Per Event	1,2,3,5,6	Failure to maintain or replace plants where needed to comply with paragraph [] of this Service Level Specification	[5] Business Days To commence from the date five (5) Business Days from the notification of the failure Remedy: Written confirmation of the rectification of the failure
69	Maintenance of Trees, Shrubs, Herbaceous Borders and	Trees, shrubs and perennial plants are kept to an appropriate height and depth [to be agreed with the	Medium	None	None	Per Event	1,2,3,5,6	Failure to maintain and cut back plants due to height, depth, overhang or	[5] Business Days To commence from the date five (5) Business Days from

	Performance Standard	Performance Requirement	Service Priority Category	Response Period	Rectification Period	Monitoring Frequency	Monitoring Method (s)	Definition of Failure	Remedial Period / Remedy ¹⁶
	Perennial Plants	Authority]. Plants or shrubs shall not overhang or obstruct pedestrian or vehicular traffic routes.						obstruction to satisfy the requirements [Agreed with the Authority]	the notification of the failure Remedy: Written confirmation of the rectification of the failure
70	Maintenance of Trees	Tree management plan to be established. Trees will be inspected, mapped and recorded at each Site. Records shall be maintained during the progress of any works at the Site.	Medium	None	None	Per Event	2,5,6	Failure to provide the [agreed] tree management plan four (4) weeks prior to the Annual Services Review.	[5] Business Days To commence from the date five (5) Business Days from the notification of the failure Remedy: Issuance of the updated Tree Maintenance Plan and programme

Appendix B - Interface Protocol ¹⁹

Section 1: Preliminary

1. DEFINITIONS

In this Appendix unless the context requires otherwise the following terms shall have the meanings given to them below:

Responsibility Matrix means the matrix set out in Section 1 (*Preliminary*) of this Appendix B (*Interface Protocol*);

Soft Landings Framework means the BSRIA-led process designed to assist the construction industry and its clients deliver better buildings;

2. PURPOSE

- 2.1 Project Co and the Authority have developed this Interface Protocol to identify and set out how interface issues will be managed. This Interface Protocol contains details of how Project Co will maintain a co-operative working relationship with the Authority given the interface that will arise as a result of the Authority retaining responsibility for other services.
- 2.2 This Interface Protocol sets out the roles and responsibilities of the [School Entity/(ies),] the Authority and Project Co for those areas where Project Co's provision of the Services under the Project Agreement and the [School Entity's and] the Authority's provision of the Soft Services interact.
- 2.3 The Authority and Project Co recognise the need for an interface protocol that:
 - 2.3.1 reflects the reality of changing responsibilities and the need to make the interface between the [School Entity/(ies),] the Authority and Project Co staff and its Sub-Contractors work effectively;
 - 2.3.2 is flexible to meet the changing needs of each [School Entity and] the Authority; and
 - 2.3.3 facilitates the development of a relationship that endures and encourages operational efficiency.
- 2.4 The success of this Interface Protocol issue will be dependent on effective communication between both parties.
- 2.5 Project Co and the Authority should work together to deliver a best practice resource efficient procurement and operation of ICT, seeking innovative approaches to reduce energy consumption of servers, server rooms, and other equipment, and sustainable disposal of equipment, saving costs and reducing resource consumption.

3. PRINCIPLES

- 3.1 The overarching allocation of risk between the Authority and Project Co as set out in the Project Agreement shall be unchanged by this Interface Protocol and to the extent that there is any conflict with other provisions of the Project Agreement and this Interface Protocol, such other provisions shall take precedence.

¹⁹ Table to be further developed/finalised during Stage 2 of the New Project Approval Process.

- 3.2 This Interface Protocol recognises that:
- 3.2.1 the Facility Premises Team will remain in the employment of its current employer and will not transfer to Project Co or its sub-contractors;
 - 3.2.2 although the Services are Project Co's responsibility, they will generally be provided through a Sub-Contractor, referred to as the Service Provider; and
 - 3.2.3 some of the responsibilities undertaken by a Facility Premises Team will switch to Project Co from the Payment Commencement Date at each individual Facility.

4. RESPONSIBILITIES OF STAFF

- 4.1 The Project Agreement requires Project Co to provide a minimum standard of accommodation in accordance with the Service Level Specification. This includes, amongst other matters maintaining the fabric of the building, maintaining the mechanical and electrical systems, providing training and carrying out the other Services.
- 4.2 Specific interface responsibilities of each party to this Interface Protocol are detailed in the Responsibility Matrix provided at Section 1 (*Preliminary*) of this Appendix B (*Interface Protocol*).
- 4.3 Project Co recognises that where the appropriate skills and level of knowledge is present within the Facility Premises Team it may well be best placed to carry out some tasks on behalf of Project Co (albeit where matters are Project Co's responsibility, it shall remain responsible for those tasks). The following tasks may well be capable of being carried out by the Facility Premises Team where they are available to do so and with an appropriate level of support from Project Co:
- 4.3.1 general visual site safety checks;
 - 4.3.2 prescribed fire alarm tests;
 - 4.3.3 provision of a first line response to make safe and carry out temporary minor repairs (whether in the case of an emergency or not) including responding to general day-to-day items that can be completed using a basic toolkit specified and provided by Project Co;
 - 4.3.4 to deliver the tasks sets out in and designated as being for the Authority and Project Co and more specifically identified in Section 2 (*Section 2 Services/ Soft Services Responsibility Matrix*) to this Appendix B (*Interface Protocol*).

5. ACCESS TO WORK

- 5.1 Project Co shall comply with the Access to Work Protocol in respect of its attendance at any Site. The Access to Work Protocol is set out in Section 3 (of Schedule 34 (*Joint Operating Protocol*) of this Agreement.
- 5.2 The Access to Work Protocol deals with Project Co's access to the Site in different circumstances including for Unprogrammed Maintenance.

6. SITE SECURITY

- 6.1 The security of the Sites and the Facilities is paramount and all Project Co employees and their sub-contractors will be issued with identification that will be

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presented for inspection by the [relevant] Facility's staff on arrival. Clause 28 (*Site Security and Personnel Issues*) of this Agreement, this Service Level Specification and the Access to Work Protocol set out requirements that Project Co must be familiar with and comply with such as wearing identification and completion of relevant Disclosure and Barring Service checks.

7. TRAINING

- 7.1 In accordance with the Soft Landings Framework, this Service Level Specification and the Soft Services Training Plan, Project Co team will provide induction/familiarisation training on each Site to ensure the Facility Premises Team are fully aware of the operational requirements of the new equipment and systems that have been installed. A key element of this training will be locating and understanding the operation and isolation of all mains utility supply equipment and other key health and safety equipment. Project Co will provide the training detailed in Section 4 (*Soft Services Training Plan*) of this Interface Protocol to the Facility Premises Team and other Facility staff predominantly during the ICT Handover Period. The [Authority/ School Entity] will be required to release staff for such training during the ICT Handover Period.
- 7.2 Following assessment of the individual Facility Premises Team staff as described above at paragraph 4.3 (*Responsibility of Staff*) of this Appendix B (*Interface Protocol*), Project Co will provide the further training appropriate for the r Routine Maintenance Tasks agreed that the Facility Premises Team will undertake to enhance the capabilities of staff and ensure a minimum level of health and safety awareness.

8. INTERFACE

- 8.1 A clear interface between Project Co and the Authority [(and the School Entity, where appropriate)] is necessary to ensure responsibilities are discharged and health and safety at the Facility is maintained. The following interface guidelines are to be adhered to, and additional guidelines may be agreed with the Authority and/or the [relevant School Entity]:
- 8.1.1 Project Co will undertake briefings of the Facility Premises Team to ensure that the Facility Premises Team has a full understanding of the [relevant] Facility;
- 8.1.2 Project Co will undertake training/briefings with the Authority [(and/or the School Entity where appropriate)] to ensure understanding of newly-installed equipment; and
- 8.1.3 there will be a clear system for recording faults and/or seeking advice. (Helpdesk system to be established by Project Co, see Section 3 (*Helpdesk*)) and Project Co should be informed of any fault that relates to its responsibilities.
- 8.2 An example of the interface working in practice is, on opening up a Facility, a Facility Premises Team member discovers a burst pipe. In such circumstances [Authority/ School Entity Staff] should:
- 8.2.1 isolate the water supply;
- 8.2.2 call the Helpdesk;
- 8.2.3 facilitate access by Project Co, who will rectify the problem;
- 8.2.4 inform the Head-teacher or other designated person of the incident; and

- 8.2.5 organise the emergency health and safety clear up. Note that consequential rectification, repairs and clean-up (and the costs of) is the responsibility of Project Co.

9. HEALTH AND SAFETY ISSUES / SAFE WORKING PRACTICES

- 9.1 To illustrate the limitations of tasks to be carried out by the Facility Premises Team it is reiterated that only tasks within their personal level of competence and experience should be attempted. The allocation of responsibilities as between Project Co and the Authority [(as may be discharged by the School Entity where appropriate)] (as set out in Section 2 (*Responsibility Matrix*) to this Interface Protocol) takes account of the level of competence and experience of the Facility Premises Teams.
- 9.2 No attempts should be made by Facility Premises Team to carry out tasks using systems or equipment they have not been assessed competent to deal with. To this end, Project Co will during mobilisation meet each of the Facility Premises Team to discuss their particular areas of expertise and agree these areas of expertise and where relevant provide appropriate training.
- 9.3 Project Co considers health and safety to be of paramount importance and will take all reasonable measures to ensure the health, safety and welfare at work of its employees and all Facility Users where they come into contact with Project Co's work.
- 9.4 The Facility Premises Team staff will be invited to attend safety briefings and training as detailed in Section 4 (*Soft Services Training Plan*) of this Appendix B (*Interface Protocol*) (and will be required to operate in accordance with Project Co's own safe methods of working. To that end Project Co will meet the Authority's safety advisers and trade union safety representatives to take account of those policies and write a project-specific Health and Safety Management Plan. This will include the interface with the Facility Premises Team.
- 9.5 Project Co shall during the ICT Handover Period provide to the Authority, [the School Entity and] any Authority Party providing Soft Services instructions and requirements in respect of the Facility (including its materials and components) relevant to the provision of Soft Services, to include details of applicable manufacturers warranties and component care recommendations. The Authority shall and shall procure that [the School Entity and] the Authority and any Authority Party carrying out Soft Services shall comply with such instructions and requirements provided that the instructions and requirements provided by Project Co shall:
- 9.5.1 be reasonable and not unduly onerous;
 - 9.5.2 not have an adverse effect on any Authority's or any Sub-Contractor's (that is carrying out Soft Services) ability to provide the Soft Services; and
 - 9.5.3 not require any Authority or any Sub-Contractor carrying out Soft Services to incur unreasonable additional expense,
 - 9.5.4 in each case having regard to the Service Level Specification and Good Industry Practice.

10. LOGGING OF WORK

- 10.1 Project Co will supply a record system for the Facility Premises Team to complete when they carry out work on behalf of Project Co. This means work involving only use of consumables or extra time, eg. as a result of a call out. These will record the following:

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- 10.1.1 date, time and reference number;
 - 10.1.2 nature of task; and
 - 10.1.3 materials used.
- 10.2 These sheets will be provided in a method that will allow a copy to be kept on Site, with the originals passed to the Helpdesk at regular intervals. To speed up the transfer of sheets to the Helpdesk these can be emailed or faxed with the original hard copy following later.

11. PROBLEM RESOLUTION

- 11.1 It is the intention of all parties to avoid problems arising, if at all possible. A problem resolution system is to be established and used as follows:
- 11.1.1 informal resolution: between the Facility Premises Team the Authority and Project Co.
 - 11.1.2 line manager: between the parties' relevant line managers (e.g Facility Management Team with relevant Project Co staff member).
 - 11.1.3 [Authority's Representative] and [Service Provider's manager].
 - 11.1.4 formal Dispute Resolution Procedure: through the formal arrangements set out in Schedule 20 (*Dispute Resolution Procedure*) of this Agreement.

12. REVIEW

- 12.1 The relationships outlined in this Interface Protocol will be subject to periodic review six months following the last occurring Payment Commencement Date [/Payment Commencement Date 1] and thereafter at no more than (5) five-yearly intervals and the parties may agree changes in writing provided no such changes to the Interface Protocol shall alter the parties' responsibilities or the risk profile under the Service Level Specification or the remainder of this Agreement.

Section 2 Services/ Soft Services Responsibility Matrix

Project Co has responsibility for all Services (i.e. 'hard' FM services) and will act as the main interface for the Authority's representatives as notified to Project Co from time to time, and all other key stakeholders. As Project Co will not be based on Site, the Facility Premises Team will be the point of contact for all Services-related visitors and tradesmen to Site. The Facility Premises Team will operate an "access to work" system in accordance with the Access to Work Protocol to ensure they know and can communicate with who is working on site, the nature of their work and will ensure that the appropriate surveys and risk assessments have taken place.

A comprehensive understanding of the interface between Services and Soft Services is a fundamental requirement from a health and safety perspective due to the need for test and inspections of statutory equipment such as fire alarms and the need for management plans to cover fire evacuation, fire warden training, logbook record keeping and emergency light tests, etc.

The following matrix details the allocation of responsibility for the provision of Services/Soft Services activities between the Authority and Project Co. [Project Co acknowledges that where reference has been made to the Authority, the Authority may be represented or its obligations discharged by an Authority Party including a School Entity (or its staff).]

Task/ Responsibility	Interface Issues	Proposed Approach
Over-arching management service and co-ordination of Services	Both parties have an equal responsibility to ensure effective communication in relation to planned events, service delivery arrangements, Unprogrammed Maintenance Work, Programmed Maintenance and Lifecycle Replacement. The key objective of the Services and Soft Services is to support Facilities that provide learning and failure to communicate appropriately may ultimately have a detrimental effect on the delivery of the educational curriculum. In addition to this critical objective, the provision of these services in a resource efficient manner is also necessary, to reduce costs and wastage in respect of the operation of the Facilities. Operations which consume less energy, water, and materials, and produce less waste will	<p>Development of a communication strategy by Project Co that clearly outlines the levels and responsibility for communication by both the Authority and Project Co, methods of communication, and planned frequency. This strategy will cover but not be restricted to:</p> <ul style="list-style-type: none"> • Communication matrix identifying key interfaces; • Soft landings responsibilities matrix (see BSRIA guidance); • Frequency of meetings/format of meetings/key objectives; • Communication route to Students; and • Escalation procedures, etc. <p>Both parties shall comply with the agreed communication strategy.</p>

Task/ Responsibility	Interface Issues	Proposed Approach
	help to ensure more budget is available to deliver education.	
	Health and safety requirements must be developed and agreed with the Authority, [in conjunction with the School Entities and Soft Services provider] and plans should include co-ordinated responses to Fire evacuation and disaster management.	Joint Health and Safety Management Plan to be agreed and signed by Project Co and the Authority.
	<p>The Facility Premises Team will need to understand the requirement for control of persons on Site and operate an Access to work system implemented by Project Co with suitable training.</p> <p>Access during Core Day and outside of the Core Day shall be in accordance with the Access to Work Protocol.</p>	Agree access protocol for Project Co's staff and Sub-Contractors, that are compatible with the Access to Work Protocol.
Helpdesk	Project Co is responsible for providing the Helpdesk. The Helpdesk should be used to report all maintenance faults in order that the Rectification Period can be recorded. There will be a number of options for contacting the Helpdesk i.e. phone, e-mail, SMS, etc.	<p>A Helpdesk guide will be produced explaining the services the Helpdesk will provide and the information required from Authorised Callers to ensure that asset history is maintained.</p> <p>Project Co will discuss and agree the appropriate reporting procedures with the Facility Representative. This will include a feedback loop to ensure that all outcomes are captured and included in future asset management.</p> <p>Where maintenance tasks are undertaken by the Authority or an Authority Party (including the Facility Premises Team)</p>

Task/ Responsibility	Interface Issues	Proposed Approach
		the Facility Representative must complete a task sheet and submit this to the Helpdesk.
Cleaning	<p>The management of cleaning services will be retained by the Authority. Project Co will require liaison with the Facility Premises Team on cleaning methodology for some key Building fabric and fittings, to ensure optimum lifecycle performance i.e. if carpet and vinyl is not cleaned in line with manufacturers' instructions, its life can be greatly reduced, also scuffs to wall finishes may need first line attendance by cleaners and Facility Premises Team.</p> <p>Cleaning should also be planned to be sustainable and resource efficient, using chemicals of the lowest possible toxicity, and planning regimes to reduce water consumption and reduce the need for extended hours of Building operation (having the lights on for longer whilst cleaning takes place uses energy).</p>	<p>The standard of cleaning conducted by the Authority or Authority Parties shall in line with the manufacturers' operation and maintenance manuals. Project Co is not responsible for the performance of the cleaning service but will need to identify where this service is affecting the proposed Lifecycle Replacement of hard fabric and fittings for which they are responsible.</p> <p>Project Co and the Authority shall work together to deliver a best practice resource efficient operation, seeking innovative approaches to reduce costs and save resource consumption.</p> <p>The Facility Premises Team and Project Co will conduct regular Site inspections covering general maintenance and health and safety matters. Any issue relating to concern over cleaning performance or associated services should be identified as part of this process.</p>
Waste	The management of waste (excluding effluent and hazardous waste disposal) will be retained by the Authority. Project Co will require liaison with the Facility Premises Team on removal of waste to ensure no waste is permitted	The standard of waste management conducted by the Authority shall be in line with Good Industry Practice. This will involve the use of industry guidance to provide a best practice resource efficient operation, seeking innovative

Task/ Responsibility	Interface Issues	Proposed Approach
	<p>to accumulate. Neither general storage nor waste is to be stored in plant rooms, etc.</p> <p>Project Co will operate a Maintenance Waste Efficiency Management Plan for waste produced by their activities on Site. This will use best practice innovative solutions to reduce waste produced and follow the Defra waste hierarchy (reducing materials used, reducing waste, increasing recycling, and ultimately reducing waste sent to landfill). Waste weight data will be collected by Project Co for their waste, and this data will be combined with waste data produced by the Facility Representative.</p>	<p>approaches to reduce costs and save resource consumption.</p> <p>The Authority waste management process will use Defra's waste hierarchy.</p> <p>Data of weight in Kg will be collected for different waste streams collected by the Authority. The Authority will aim to increase the segregation of waste on Site (e.g. different types of bins and recycling).</p> <p>Project Co will be set Performance Standards and targets for waste reduction by the Authority. Project Co will then work with these parties to contribute wherever possible to achieving these targets – contributing to data collection and offering innovative solutions to waste reduction.</p>
Pest Control	<p>The management of pest control will be retained by the Authority.</p> <p>Project Co will require liaison with the Facility Premises Team on pest control methodology for Building fabric and grounds i.e. pest control is proactive, so pests are less likely to chew through cables or dig up plants and grass.</p> <p>Project Co is responsible for maintenance and if the Building is not properly maintained this could give pests the opportunity to enter the Buildings through gaps left, causing the Facility Premises Team an issue.</p>	<p>The standard of pest control conducted by the Authority shall be in line with Good Industry Practice.</p> <p>The Facility Premises Team and Project Co will conduct regular Site inspections covering general maintenance and health and safety matters. Any issue relating to pest control should be identified as part of this process.</p>

Task/ Responsibility	Interface Issues	Proposed Approach
	<p>Project Co will be required to liaise with the Facility Premises Team on maintenance methodology to ensure areas are not left exposed to pest invasion.</p>	
<p>Maintenance</p>	<p>Project Co will be responsible for the delivery of Unprogrammed Maintenance Work, Programmed Maintenance and Lifecycle Replacement.</p> <p>The Facility Premises Team may be able to carry out certain Hard FM duties and provide first line attendance on reactive calls, such as the replacement of lamps or a heating failure.</p> <p>The Facility Premises Team will need to understand the basis of the performance management system and their role in not obstructing Project Co in meeting the required rectification times.</p> <p>Project Co to record all Unprogrammed Maintenance Work tasks onto the Helpdesk.</p> <p>Project Co undertaking repairs but not reporting back to the Helpdesk result in this information not being logged against the asset history and hence the asset records will not provide a true reflection of condition, history or life expectancy.</p> <p>Project Co and the Authority will be working together to deliver a best practice resource efficient operation, seeking innovative approaches to reduce costs and save resource consumption in maintenance.</p>	<p>Asset register of items will be produced and logged onto the Helpdesk. Out of this a Schedule of Programmed Maintenance will be produced. The Schedule of Programmed Maintenance will detail the tasks to be undertaken and details of these tasks will be shared with the Facility Premises Team.</p> <p>When works are complete a worksheet will be completed by Project Co and a signature obtained. Details will be fed back to the Helpdesk and the Schedule of Programmed Maintenance updated.</p> <p>The Facility Premises Team will be given training to undertake these tasks and provided with the necessary risk assessments and Method Statements.</p> <p>The Authority and Project Co will work together to create the maintenance materials and waste efficiency management plan – to ensure cost efficient maintenance, and the reduction in materials (and energy) consumed and waste produced in maintenance.</p> <p>Liaison with waste management at the Facilities will likely be necessary to ensure that maintenance waste data is properly collated, and more significant waste quantities produced in cyclical replacement is managed in an efficient way (sending as much as possible to re-use or recycling).</p>

Task/ Responsibility	Interface Issues	Proposed Approach
		Project Co will provide training on the performance management system.
		The Facility Premises Team will be able to contact the Helpdesk via email, phone, SMS and facsimile. They will chase any outstanding tasks until completed. Regular reports will be provided to the Facility Representative and the Authority's Representative (for onward distribution to the Facility Premises Team) on the levels of tasks and completion times. These statistics will be benchmarked to determine if a lower number of reactive tasks are being recorded and the probable reasons why.
Loose Equipment	<p>The repair and replacement of Loose Equipment not classified as Group 1 will be retained by the Authority. Project Co will be required to liaise with the Facility Representative (and the Facility Premises Team where this is facilitated by the Facility Representative) on repair and replace methodology to ensure optimum lifecycle performance of items it impacts on i.e. if rubber feet are worn and damaging carpet and vinyl its life can be greatly reduced.</p> <p>To this end, Project Co and the Authority should work together to deliver a best practice resource efficient provision, maintenance, and disposal of Equipment, seeking innovative approaches to reduce costs and save resource consumption. In particular, ad-hoc replacement of furniture (e.g. occasional broken chair) creates complications for sustainable disposal (for re-use or recycling). The composition of some Equipment (made of</p>	<p>The standard and frequency of repair conducted by the Authority shall be in line with the manufacturers O&M manuals. This will ensure that maintenance and lifecycle are not adversely affected.</p> <p>Project Co and the Authority should work together to deliver a best-practice, resource-efficient operation, seeking innovative approaches to reduce costs and ensure Defra's waste hierarchy is followed when disposing of Equipment.</p>

Task/ Responsibility	Interface Issues	Proposed Approach
	metals, rubbers, plastics, wood, foams, adhesives etc.) complicates disposal.	
ICT equipment and infrastructure	<p>The [Authority/School Entities] will need to continue to use [its/their] existing ICT solution in the Facilities. New infrastructure (passive, active and associated components) will be provided by Project Co. A summary of what will be included within this infrastructure can be found in the ICT Responsibility Matrix set out in paragraph 4 of the Authority's Construction Requirements. The Responsibility Matrix shows for each ICT system whether the Authority or Project Co will:</p> <p>Specify – determine the technical specification of the solution to meet stated requirements;</p> <p>Supply – procure the equipment and services to provide the solution;</p> <p>Install – install and commission the equipment;</p> <p>Test – confirm the correct working of the equipment and services of the solution;</p> <p>Integrate – Authority specific configuration, including implementing any interconnections between systems and applications. Where shared between Authority and Project Co responsibility sits with the Authority but Project Co will provide support including limited resources. The package of</p>	<p>The ICT Responsibilities Matrix sets out the responsibilities for the following ICT systems:</p> <ul style="list-style-type: none"> • Server room & distribution rooms; • Network infrastructure - passive and active; • Local technology – Core; • Local technology – AV; • Automated systems; • Building control and Energy Management Systems; • Fire alarm/detection; and • Telephony, internet and TV signal.

Task/ Responsibility	Interface Issues	Proposed Approach
	<p>support provided by Project Co is detailed under the relevant sections later in the document; and</p> <p>Maintain– provide day-to-day management, repair and replacement of the equipment and services throughout the Project Term.</p>	
Security systems	<p>The Authority (via the Facility Premises Team) will open and close the Facilities and provide security patrols during Core Sessions. They will monitor security and access control systems without amending settings. In addition, they will also assist with the day-to-day operation of external CCTV, Building controls and Energy Management Systems and access control, providing first line attendance and contacting Project Co for specialist support.</p> <p>Internal CCTV systems are the responsibility of the Authority.</p>	Agreed training may be provided to the Facility Premises Team on specialist equipment. This will ensure that staff are competent and can work safely.
	The Authority shall be required to procure that the Facility Premises Team is available for out-of-hours attendance to provide access for Project Co's staff.	Project Co to be advised of an on-call rota so Facility Premises Team can be contacted if necessary.
	Access required for Routine, Lifecycle Replacement and Unprogrammed Maintenance Work purposes to all areas.	Project Co will agree access protocol for Project Co's staff and Sub-Contractors, including the Access to Work Protocol.
Utilities	Project Co will monitor utilities consumption and report to the Authority.	Project Co will provide training on utilities management and operation of Building Controls and the Energy Management Systems (" EMS ").

Task/ Responsibility	Interface Issues	Proposed Approach
	Project Co and the Authority will work together to deliver the energy and water efficiency management plans and targets for resource consumption. A best practice resource efficient operation with all parties seeking innovative approaches to operation will reduce costs and save resource consumption.	<p>Project Co will use the EMS to set up, collate and analyse consumption data and to automatically report and present it to the [relevant] [Authority/School Entity] on weekly, monthly, and annual reporting cycles, as well as automated weekly upload to the Automated Energy Data Collection Portal (eg iSERV cmb/k2n) portal.</p> <p>Project Co will work together with the Authority on initiatives to reduce utility consumption (energy and water) and meet reduction targets and PSs.</p>
Access to Work Protocol	Project Co should use the Access to Work Protocol which ensures that the Facility Premises Team are aware at all times who is working on the Site[s] and the nature and impact of that work. This process is a key component of operating a Health and Safety Management Plan and ensures that all parties know where they stand with respect to responsibilities while on Site.	There needs to be discussion on how best to operate the Access to Work Protocol for the Authority.
Health and Safety	Both parties will be responsible for health and safety within their own areas of responsibility and will have a duty of care to ensure safety of all Facility Users.	Project Co and the individual Facility Representative(s) will develop a joint Health and Safety Management Plan clearly outlining areas of responsibility.
	There must be a clear demarcation of responsibilities particularly around areas where there is a combined approach to delivering services, i.e. Programmed Maintenance, Unprogrammed Maintenance Work and Lifecycle Replacement.	Health and Safety Management Plans compiled by both Project Co and the Authority should clearly outline any specific training that needs to take place to ensure that individuals from both parties are competent to carry out their responsibilities. Individual Health and safety Management Plans must recognise other health and safety management plans.

Task/ Responsibility	Interface Issues	Proposed Approach
Equality Act 2010	The Authority will retain responsibility for compliance with the requirements of Equality Act 2010 at the Site	Project Co will support the Authority in meeting the statutory management obligations for the Equality Act 2010 and will ensure that all their systems are compliant with Law.
Fire Safety Management	<p>The Authority will retain responsibility for the Fire Safety Management Plan including Fire Risk Assessment.</p> <p>Project Co will be responsible for the firefighting equipment and the Authority (through the Facility Premises Team) will complete statutory tests on fire systems and update log books.</p>	<p>Project Co will support the Authority in the meeting of statutory management obligations by maintaining the written Fire Safety Management Plan and will ensure that all systems are statutory compliant.</p> <p>A list of Programmed Maintenance tasks to be undertaken by Project Co is to be included in the Schedule of Programmed Maintenance and the Fire Safety Management Plan.</p> <p>The Facility Premises Team will be given training to undertake these tasks and provided with the necessary risk assessments and method statements.</p>
Insurance	All parties must hold the appropriate insurances for the services that they are responsible for undertaking.	This will be established during the mobilisation phase but must appear on the routine agenda at least on a 6-monthly basis to ensure that appropriate insurances are updated.
Grounds Maintenance	Subject to paragraph [2.30] of this Service Level Specification, Grounds Maintenance will come under the responsibility of the Authority. Liaison between Project Co and the Authority will permit works to be carried out in sympathy with Authority requirements.	<p>The Facility Premises Team and Project Co will have regular informal and formal meetings to discuss planned/reactive Grounds Maintenance works and lifecycle replacement programmes.</p> <p>A list of Programmed Maintenance tasks to be undertaken by Project Co shall be included in the Schedule of</p>

Task/ Responsibility	Interface Issues	Proposed Approach
	<p>The Facility Premises Team will be expected to undertake the following tasks:</p> <ul style="list-style-type: none"> • daily litter collection; • emptying of bins; • remove litter and leaves from gullies; and • snow and ice clearance and gritting of all access roads and paths. 	<p>Programmed Maintenance. The Facility Premises Team will be given training to undertake these tasks and provided with the necessary risk assessments and method statements.</p>
		<p>Project Co and the Authority should work together to deliver a best-practice, resource-efficient operation, seeking innovative approaches to reduce costs and save resource consumption in grounds maintenance. Green waste should be composted.</p>
Caretaking and Portering	<p>Day to day programmed maintenance and minor repair work to Building and components.</p> <p>There are a number of the first line remediation/maintenance tasks that the Facility Premises Team will be required to undertake.</p> <p>The Facility Premises Team will require the necessary PPE and tools to undertake Programmed and Unprogrammed Maintenance Work.</p>	<p>A list of typical Unprogrammed Maintenance Work will be agreed with the Authority.</p> <p>A list of PPM tasks to be undertaken by the Facility Premises Team is to be included in the Schedule of Programmed Maintenance.</p> <p>Facility Premises Team will be given training to undertake these tasks and provided with the necessary risk assessments and method statements.</p>

Task/ Responsibility	Interface Issues	Proposed Approach
		Project Co will identify the PPE and tools required for maintenance purposes. These will be provided by the Authority.
Catering	The management of catering services will be retained by the Authority.	The Facility's Premises Team and Project Co will have regular informal and formal meetings to discuss access arrangements for maintenance.
	Project Co will require liaison with the Facility's Premises Team on cooking, cleaning (daily and periodic), and usage methodology for the catering equipment.	Caterers to use and clean equipment in line with manufacturers' instructions and Good Industry Practice. Authority to be able to provide evidence that has been undertaken. Caterers to adopt "Good Industry Practice" and minimise contributing to maintenance costs, e.g. fats & oils not disposed of via drains.
	<p>Project Co will work closely with the Facility Premises Team to ensure that they can undertake both responsive and Programmed Maintenance on catering equipment and associated plant within the agreed response times.</p> <p>Project Co and the Authority will be working together to deliver a best practice resource efficient operation of catering, seeking innovative approaches to reduce the very high costs of food wastage, and saving energy and water.</p>	<p>Schedules of Programmed Maintenance will be in consultation with the Authority and as far a possible be scheduled out of the Core Sessions/Day and during holiday periods.</p> <p>Project Co to work with the Authority to offer and implement innovative solutions to reduce food wastage and kitchen energy and water consumption – and help the catering Project Co to meet Performance Standards for food waste reduction set by the Authority.</p>
	Where applicable, administrative management of any cashless catering systems will be the responsibility of the Authority.	

[Section 3: Specific Tasks to be carried out by the Facility Premises Team and frequencies

The following tasks are required to be carried out by Facility Premises Team staff, subject to amendment depending on capabilities of Facility Premises Team at the [relevant] Facility after training by Project Co.

All defects identified by the Facility Premises Team during the below tasks are to be reported to the Helpdesk following inspection.

Item	Task	Frequency per annum
Heating pipe work	Visual inspection	1
Thermostatic radiator valves	Visual inspection and operational check	1
Thermal insulation	Inspect & where appropriate make good	1
Sinks / lab sinks	Visual inspection	1
Wash hand basins	Visual inspection	1
WCs including cisterns and flushing device	Visual inspection / operational check	4
Shower mixers	Temperature check	4
Shower trays	Visual inspection	12
Shower heads / taps	Clean	52
Drinking fountains	Visual inspection / operational check	52
Urinals	Trap cleaning	12
Flush controllers	Operational check	4
Plumbing pipe work	Visual inspection	1
Waste pipe work	Visual inspection	1

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Item	Task	Frequency per annum
Lighting	Lamp inspection (visual)	12
Emergency lighting	Visual inspection / testing	12
Stage lighting	Visual inspection	12
Fire alarm	Weekly testing and sounding	52
Building fabric	Inspection and defects reported	12
Gutters / down pipes	Cleaning	4
Grounds	Visual inspection and defects reported	52
Sports pitches	Re-marking	4
Drainage gulleys	Visual inspection / cleaning	12
Roof	Integrity / water penetration check	4
Doors & ironmongery	Check, alter and re-hang	2
Furniture	Asset and condition check	4
Firefighting equipment	Visual inspection and defects reported to Helpdesk	52
First Aid equipment	Inspection and replenishment outside of plant rooms	52
General	Inspections to ensure compliance with the Service Quality Standards set out at Annex 2 of the Services Level Specification	52 (unless identified separately above)

Section 3: Helpdesk

1. The Helpdesk will provide a single point of contact for the Authority and [each]/[the] [School Entity] under this Agreement;
2. The Helpdesk will be operational between 7.00 a.m. and 5.00 p.m. Monday to Friday. Outside these hours an emergency call-out service will be available 24 hours per day, 365 (366 in leap years) days per year. Each Facility will establish a list of Facility Representatives. (The number on each site will vary depending on size of site and other factors.)
3. The Helpdesk and contract management software will provide a number of integrated packages which will allow the following tasks to be undertaken:
 - 3.1 Programmed Maintenance scheduling, work request generation and outcome completed in Helpdesk records;
 - 3.2 reactive maintenance, work request generation, and outcomes completed in Helpdesk records;
 - 3.3 Helpdesk request / contact logging and tracking;
 - 3.4 energy targeting and monitoring and consumption recording;
 - 3.5 performance monitoring and reporting;
 - 3.6 report generation; and
 - 3.7 asset registers, logging and tracking.
4. Project Co staff will be trained to process all requests and queries in an efficient manner.
5. To ensure a friendly, readily accessible, efficient and direct route for communication for all Facilities to the management and service delivery team, Project Co will establish and operate a Helpdesk. This will provide a single point of contact for all.
6. The Helpdesk staff will be tasked with “owning” requests and reported problems and will persist in their efforts to resolve any matter until the Facility has received a satisfactory outcome, whilst maintaining contact with the originator throughout the process. This process is aimed at reducing the involvement of the Facility staff to a minimum whilst reassuring them that every matter that they report is being dealt with. To aid this process the Helpdesk staff are trained to identify the four main parts of any Helpdesk request. These are:
 - 6.1 who is the authorised person making the request;
 - 6.2 which location requires attention;

6.3 what action is required; and

6.4 who is going to provide the response?

7. Subsequently the Helpdesk operator will record the attendance provided and inform the originator of the actions taken. A record will be maintained which will show for each request the date, time and outline detail, action taken and by whom. This record will then be available for consideration at the regular review meetings between Project Co and the Authority.]

Section 4: Soft Services Training Plan

Key to Soft Services Training Plan Table:

- X = training provided
- PRE-COM = Prior to the [relevant] Actual Completion Date [in respect of each Facility]
- POST-COM = After [relevant] the Actual Completion Date [in respect of each Facility]
- SMT = Senior Management Team or its nominee

The activities detailed below are to be carried out in accordance with the Final Commissioning Programme.

	Training on new build system will be provided for the following areas:	Timing	Hard FM (Service Provider) Team	Facility Premises Team	Soft Services Team	Teaching Staff
1.	Contacting the Helpdesk (Overview)	Pre-COM	X	X	X	X SMT
2.	Contacting the Helpdesk (Detailed)	Pre-COM	X	X		
3.	Accessing data and running reports	Pre-COM	X	X		
4.	Building User Guide	Pre-COM	X	X	X	X SMT
5.	Building and grounds familiarisation and tour (Maintenance)	Pre-COM	X	X		
6.	CAFM system overview	Pre-COM	X	X		
7.	Data entry, management and reporting	Pre-COM	X Helpdesk			
8.	PPM issue and completion	Pre-COM	X	X		

9.	Reactive Project works logging, control and completion	Pre-COM	X	X		
10.	Purchase ordering	Pre-COM	X	X		
11.	Responding to service user queries	Pre-COM	X	X		
12.	Tour of the Building(s) and grounds (Site familiarisation)	Pre-COM Post-COM tours will be provided	X	X	X	X
13.	Room User Guide	Pre-COM				X
14.	Inspection of External/Facades etc	Pre-COM	X	X		
15.	Roof access, mansafe systems	Pre-COM	X	X		
16.	Location of utility meters	Pre-COM	X	X		
17.	Plant and equipment relating to heating and hot water system i.e. boilers, isolation points	Pre-COM	X	X		

18.	Plant and equipment relating to any renewable energy system or LZC technology, i.e., heat pumps, PV panels, biomass boilers, wind turbines, etc.	Pre-COM	X	X		
19.	Plumbing/cold water system, isolation points	Pre-COM	X	X		
20.	Electrical systems, power circuits, distribution boards	Pre-COM	X	X		
21.	Ventilation systems, location, access and controls	Pre-COM	X	X		
22.	All local room controls ie heating, ventilation, windows, lighting etc	Pre-COM followed up Post- COM	X	X	X	X
23.	Uninterruptible power supply systems	Pre-COM	X	X		
24.	Electric vehicle charging points	Pre-COM	X	X	X	X

25.	Building control and Energy Management systems	Pre-COM	X	X		
26.	Fire alarm - panel, sounders (audio and visual), heat and smoke detectors, paging systems, deaf alarm	Pre-COM	X	X	X	X
27.	Fire fighting equipment, extinguishers, hydrants	Pre-COM	X	X	X	X
28.	Intruder alarm - panel and sensors	Pre-COM	X	X		X
29.	Intruder alarm - handover of codes	Pre-COM	X	X		
30.	Access control - software and sensors	Pre-COM	X	X	X	X
31.	CCTV - software and cameras	Pre-COM	X	X		X SMT

32.	Class change - software and sounders	Pre-COM	X	X		X SMT
33.	PA system - software and sounders	Pre-COM	X	X		X SMT
34.	Audio devices for aiding hearing and learning	Pre-COM, followed up Post-COM	X	X		X
35.	Audio visual devices in the classroom and teaching spaces	Pre-COM, followed up Post-COM	X	X		X
36.	Lighting system - internal, lamp controls/override capability	Pre-COM, followed up Post-COM	X	X	X	X
37.	Lighting system - external, lamp controls/override capability	Pre-COM, followed up Post-COM	X	X	X	X SMT
38.	Lighting - internal classroom controls	Pre-COM, followed up Post-COM	X	X	X	X

39.	Lighting - internal sports/hall/dining/studio lamp controls override/ capability	Pre-COM, followed up Post-COM	X	X	X	X
40.	Lighting - external sports pitch controls	Pre-COM, followed up Post-COM	X	X		X
41.	Emergency lighting	Pre-COM	X	X		
42.	Emergency stop circuits i.e. technology/home economics/science labs	Pre-COM, followed up Post-COM	X	X	X	X
43.	Telephone system - software	Pre-COM, followed up Post-COM	X	X		X
44.	Telephone system - handsets	Pre-COM, followed up Post-COM	X	X		X
45.	IT/data systems	Pre-COM, followed up Post-COM	X	X		X
46.	Joint inspection of building clean	Pre-COM	X	X		X SMT

47.	Kitchen equipment, cooking, refrigeration, water and energy management, ventilation, drainage, waste management - demo / training / daily maintenance	Pre-COM	X	X	X	
48.	Cashless catering system	Pre-COM, followed up Post-COM	X	X	X	
49.	Lifts	Pre-COM, followed up Post-COM	X	X	X	X
50.	Hoists	Pre-COM, followed up Post-COM	X	X		X
51.	Electronic security gates	Pre-COM	X	X		
52.	Door internal, manual and automatic	Pre-COM, followed up Post-COM	X	X	X	X
53.	Door external, manual and automatic	Pre-COM, followed up Post-COM	X	X	X	X

54.	Folding doors	Pre-COM, followed up Post-COM	X	X		X
55.	Window and room ventilation controls - winter and summer mode	Pre-COM, followed up Post-COM	X	X		X
56.	Black out blinds and blinds in classrooms and occupied areas	Pre-COM, followed up Post-COM	X	X		X
57.	Locking mechanisms, keys	Pre-COM, followed up Post-COM	X	X	X	X
58.	Access systems	Pre-COM, followed up Post-COM	X	X	X	X
59.	Equipment - fume cupboards	Pre-COM, followed up Post-COM	X	X		X
60.	Equipment - Design and Technology Equipment	Pre-COM, followed up Post-COM	X	X		X
61.	Electric vehicle charging points	Pre-COM, followed up Post-COM	X	X		X

62.	Equipment- - heat bay equipment	Pre-COM, followed up Post-COM	X	X		X
63.	Equipment- - light and sound equipment	Pre-COM, followed up Post-COM	X	X		X
64.	Equipment – specialist ventilation, dust collection/extract systems, fume extract ventilation systems, etc	Pre-COM, followed up Post-COM	X	X		X
65.	Equipment - library security	Pre-COM, followed up Post-COM	X	X		X
66.	Equipment- kiln	Pre-COM, followed up Post-COM	X	X		X
67.	Waste management including waste hierarchy	Pre-COM, followed up Post-COM	X	X	X	X
68.	Asbestos management and awareness (Retained / refurbished buildings)	Post-COM	X	X	X	X SMT
69.	Room user guide	Pre-COM followed up Post-COM	X	X	X	X

70.	Building locking up and opening guide	Pre-COM followed up Post-COM	X	X	X	X
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[Section 5: Project Co FM Team Structure]

Appendix C - Statutory Inspection, Testing and Maintenance Requirements

The following table details the Statutory Testing required. All tests shall be undertaken by Project Co unless specifically stated (highlighted in *RED Italics* below). Any Programmed Maintenance tasks that are to be carried out by the Authority do not supersede or replace the need for Statutory Testing; they are to promote routine operational testing and aid early identification of problems.

Item	Test Frequency	Regulation
Air Conditioning Systems	Annual certified inspection for leakage of refrigerant and minimum five (5) yearly inspection of system by qualified energy assessor	Fluorinated Greenhouse Gas Regulations 2015 and Energy Performance of Buildings (Certificates and Inspections (England and Wales) Regulations 2012
Compressors, Pressure Vessels and Compressed Air	Annually, with suitable Written Scheme of Examination (WSE) in place. Inventory of Equipment maintained and up to date, examinations to be carried out by a competent person.	Pressure System Safety Regulations 2000.
Emergency Lighting	<i>Monthly</i> , annually and three (3) yearly tests basis in accordance with BS5266: Part 1: 1999.	Regulatory Reform Fire Safety Order (RRFSO) 2005.
Fixed Electrical Wiring Installation	Five (5) year test (swimming pools annually) by the NICEIC registered Project Co.	Electricity at Work Regulations 1989.
Fire Safety Risk Assessment	Annually or sooner if there is a change in circumstances under the Regulatory Reform (Fire Safety) Order 2005.	Regulatory Reform Fire Safety Order (RRFSO) 2005.
Fire Alarms	Quarterly, annually, three (3) yearly inspections by a competent electrician in accordance with BS 5839 Part 1: 1988. <i>Weekly testing by the [Authority]/ [School Entity]</i>	Regulatory Reform Fire Safety Order (RRFSO) 2005.
Fire Fighting Equipment (including extinguishers, fire blankets and hoses)	All Portable firefighting equipment must be serviced annually by a specialist contractor and recorded in a log book.	Regulatory Reform Fire Safety Order (RRFSO) 2005.
Gas Boilers	Annual servicing and testing of gas appliances by a Specialist Gas Safe registered Project Co.	Gas Safety (Installation and Use) Regulations 1998.
Gas Appliances Safety Check (including catering equipment)	Annual servicing and testing of gas appliances by a Specialist Gas Safe registered Project Co.	Gas Safety (Installation and Use) Regulations 1998.

Item	Test Frequency	Regulation
Gas soundness testing	Annual.	Gas Safety (Installation and Use) Regulations 1998.
Lift Insurance	6-monthly checks and certification by the Insurance Company.	Lifting Operations and Lifting Equipment Regulations 1998.
Lifts (Passenger)	6-monthly as detailed by the manufacture. Suitable Written Scheme of Examination (WSE) in place. Planned Preventative Regime in place. Annual, five (5) year and ten (10) year tests by qualified person.	Lifting Operations and Lifting Equipment Regulations 1998.
Lifts (Non Passenger)	6-monthly as detailed by the manufacture. Suitable Written Scheme of Examination (WSE) in place. Planned Preventative Regime in place. Hand powered service lifts and platforms hoists, annual checks, annual insurer's inspection, and a five (5) yearly safety gear test in accordance with BS 5655 : Part 14 : 1995.	Lifting Operations and Lifting Equipment Regulations 1998.
Lifts (Powered Stair)	6-monthly as detailed by the manufacture. Suitable Written Scheme of Examination (WSE) in place. Planned Preventative Regime in place. Annual insurer's inspection, an annual Programmed Maintenance inspection in accordance with British Standard (BS) 5776: 1996.	Lifting Operations and Lifting Equipment Regulations 1998.
Lightning Conductors	Every eleven (11) months in accordance with BS 6651: 1999.	Health and Safety at Work Act etc, 1974.
Local Exhaust Ventilation (including Chimneys / Flues) and Fume Cupboards	Every fourteen (14) months or less, in accordance with manufacturer's guidance. Planned Preventative Regime in place.	Control of Substances Hazardous to Health (COSHH) Regulations.
Playground Equipment, Adventure Areas and Gym Equipment	Annual inspection and maintenance by a specialist company (as detailed by the Manufacturer). <i>In addition, [Authorities]/ [School Entities] should undertake a weekly visual inspection (to check for loose bolts and screws etc).</i>	Management of Health and Safety at Work Regulations 1999 and Provision and Use of Work Equipment Regulations 1998.
Portable Appliance Testing	Annual (<i>desirable</i>). All portable appliances must be tested at the correct frequency and then labelled and dated to confirm the test in accordance with the IEE Code of	Electricity at Work Regulations 1989.

Item	Test Frequency	Regulation
	Practice for Service Inspection and Testing Electrical Equipment.	
Powered Pedestrian Doors	6-monthly checks and annual test in accordance with BS7036: 1996 Parts 1, 2 and 3.	Management of Health and Safety at Work Regulations 1999.
Water Quality Sampling: Temperature	<p><i>Monthly temperature checks should be undertaken by the [Authority]/[School Entity], supported by an on-site risk assessment undertaken by a specialist in legionella testing company.</i></p> <p><i>Tests by the [Authority's]/[SchoolEntity's] Staff as required by Project Co's Water Quality and Efficiency Plan document which is a requirement of the Authority's Construction Requirements</i></p>	Control of Substances Hazardous to Health (COSHH) Regulation and Approved Code of Practice & Guidance - The Control of Legionella Bacteria in Water Systems (L8).
Water Quality Sampling	Annually. Water tests need to be carried out and test results checked as required by Water Quality and Efficiency Plan. Water risk assessment and control method to be reviewed every two (2) years.	Water Act 1989, Water supply (water quality) Regulations 1994, and amended 1991 Food Safety Act.
Refrigeration systems	Inspect and check systems for leaks at regular intervals in accordance with the F-Gas regulations using an approved and properly qualified technician. The inspection regime will depend upon quantities and types of refrigeration equipment installed.	F-Gas regulations

Appendix D – Minimum Residual Life Expectancy Requirements

The Facilities shall be specified as having a life of sixty (60) years or more.

The following table sets out the Minimum Residual Life Expectancy Requirements of key Building Elements, the purpose of which is to manage the frequency at which the replacement of Lifecycle Assets takes place. Where the Minimum Residual Life Expectancy Requirements are deemed to have a significant impact on capital expenditure which is disproportionate to the benefit, Project Co is encouraged to offer best value components to achieve optimum solutions. Where alternative Minimum Residual Life Expectancy Requirements are proposed by Project Co this must be accompanied by an assessment of how the disruption and impact on the operation of the Facilities is balanced and justified against the overall whole life cost benefit to the Project.

				20
Substructure	Foundations	60 years	35 years	
	Slab	60 years	35 years	
Structure	Walls	60 years	35 years	
	Upper floors	60 years	35 years	
	Roof structure	60 years	35 years	
	Structural frame	60 years	35 years	
	Stairs	60 years	35 years	
Underground Drainage	Tanks, leaf filters, SUDs attenuation cells and systems pipes, inspection chambers	60 years	35 years	
External envelope	Roof coverings	30 years and easily overlaid, over-coated, upgraded or replaced without affecting the structure or deck below	5 years	
	External walls / cladding	40 years	15 years	
	Windows and external doors	25 years	10 years	
	Roof lights	25 years	10 years	
Rainwater disposal installations	Rainwater pipes, hoppers and gutters	25 years	10 years	

²⁰ To be completed on a project specific basis

				20
Canopies	Frame and roof covering	20 years	10 years	
Internal partitions	Non-loadbearing partitions	30 years	10 years	
Internal doorsets	Internal doors	20 years	10 years	
Internal ironmongery	Internal ironmongery (including finger guards)	10 years	5 years	
Roller Shutters	Between the Kitchen server and hall and Facility reception hatch. These may need to be fire-rated depending on Project Co's fire strategy	20 years	10 years	
Internal Guarding	Internal guarding to stairs and ramps	20	5 years	
Internal Finishes	Floor finishes	10 years	5 years	
	Decorations	5 years ²¹	3 years	
	Tiling	15 years	5 years	
	Ceiling finishes (suspended and plasterboard)	20 years	10 years	
	Sanitary fittings	20 years	5 years	
	Integrated plumbing system (IPS)	15 years	5 years	
Building Services	Engineering services (major components) and sprinklers	In accordance with CIBSE Guide M Table Appendix 12.A1 and below	See below	
	Waste installations	30 years	5 years	
	HVAC installations	20 years	10 years	
	Electrical installations	30 years	5 years	

²¹ Time to first repaint. Some finishes allow partial repaint and touching up before first repaint is required.

				20
	Security and communication installations	15 years	5 years	
	Catering Kitchen ventilation canopy	20 years	10 years	
	Photo-voltaics and other renewables	20 years	15 years	
ICT Passive Infrastructure	Wired and wireless infrastructure including cabling, containment and routing	15 years ²²	15 years	
	Sockets	10 years	5 years	
Sanitary and Catering Fittings		20 years	10 years	
Lifts (including controls)		15 years	5 years	
External space	Roads and paving	40 years	10 years	
	Fencing	15 years	5 years	
	Hard surfaced play areas	20 years	10 years	
	External furniture	10 years	5 years	
	Door barriers	20 years		

²² Project Co shall note that although ICT Passive Infrastructure may have a life cycle exceeding 15 years it is anticipated that the ICT Passive Infrastructure will be technologically obsolete after 15 years and Project Co will be required to replace this ICT Passive Infrastructure once during the Project Term, timing to be agreed with the Authority.

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol



Llywodraeth Cymru
Welsh Government

Template Education Design & Build Development Agreement (WEP Strategic Partnering Delivery Model)

ITPDSB Version 1.2

**Template Education D&B Development Agreement, WEP Strategic Partnering Delivery Model
Version**

Important Notice¹

1. This is the template agreement for use on education sector design and build projects (the "**Template Education D&B Agreement**") as referred to in and set out in Section 2 of Schedule 7 (*Design and Build Development Agreement*) of the WEP Strategic Partnering Agreement ("**SPA**"). Under the terms of the SPA, the parties are obliged to use this Template Education D&B Agreement in connection with Approved Projects (as such term is defined in the SPA) which are publicly financed design and build projects in the education sector, subject to the amendments described below.

2. The drafting approach follows that of the template 'Project Agreement for Education Sector MIM Projects' (as referred to and set out in Section 1 of Schedule 7 (*MIM Projects*) of the SPA (the "**Template MIM Education PA**")). Please refer to the explanatory note at the start of the Template MIM Education PA for further background to the origins of that document. However, a number of the provisions present in the Template MIM Education PA have necessarily required to be removed, amended and, in some instances, substituted in the Template Education D&B Agreement to reflect the different approach to the funding of the Works and the absence of long-term maintenance obligations. Of particular note are the following design and build specific provisions:
 - (a) Application for Payment, Project Bank Account and Retention drafting in Clause 29 (*Payment*); and
 - (b) Defects drafting in Clause 19 (*Defects*).

3. This Template Education D&B Agreement assumes that:
 - (a) in respect of further education college projects, the relevant "Further Education Corporation" or "Designated Institution" shall be the "Authority" (and a Participant under the SPA);
 - (b) in respect of schools projects, the relevant local authority shall be the "Authority" (and a Participant under the SPA).

4. The Template Education D&B Agreement has been drafted on the basis of a community school project with some alternative drafting and/or drafting notes provided where it is to be used on a further education college project. Amendments may be required where the Template Education D&B Agreement is to be used for different educational facilities such as a voluntary aided school. The Template Education D&B Agreement has been prepared on the basis of a single facility new build project. It is assumed that the works will be completed in two phases, being the 'Main Works' phase (required for the school or college to become operational) and a second 'Post Completion Works' phase (required in order to complete demolition of existing buildings and/or external works/pitches). It is also assumed that the Authority will engage an ICT contractor to fit out the facility with the relevant ICT Assets in a 4 week pre-completion commissioning phase. On the basis that the draft assumes a

¹ It is anticipated amendments to reflect the UK's withdrawal from the European Union will require to be made to the Template Education D&B Agreement by Welsh Government.

standard schools approach, the "ICT Handover" provisions may not be appropriate for all types of further education college projects and should be specifically considered by further education institutions and their advisers. Where there are no Post Completion Works, more than one Facility and/or a different approach to project phasing, project specific tailoring will be required. There is no standard form of Authority's Construction Requirements but there is an expectation that these will align with the Authority's Construction Requirements in the Template MIM Education PA, where appropriate. Similarly, the contents of other technical schedules such as the Outline Commissioning Programme and Equipment schedule will require to be developed on a project specific basis, aligned to the extent appropriate with the Template MIM Education PA.

5. Whilst drafting and guidance has been included in the footnotes of this Template Education D&B Agreement, Authorities should note:
- (a) Use of the Template Education D&B Agreement is not a substitute for project specific advice and Authorities must take appropriate legal, financial and technical advice when using them. Authorities should also obtain professional insurance advice on all insurance related provisions in the context of the insurance market at that time.
 - (b) The footnotes in the Template Education D&B Agreement do not represent an exhaustive list of project specific matters that need to be considered by each Authority and its advisers, who must analyse and review them in detail to ensure that they are tailored to the requirements of the specific project and that their terms (and their impact) are clearly understood by the Authority.
 - (c) The Template Education D&B Agreement should be used in conjunction with any further guidance issued/adopted by the Welsh Government from time to time. It should also be read in conjunction with the accompanying SPA.
 - (d) All changes to the Template Education D&B Agreement require the prior approval of the Welsh Government, acting through the relevant officials. For the avoidance of doubt, this includes any amendments to "technical" schedules, such as the Authority's Construction Requirements and the Outline Commissioning Programme and relates to the process for the procurement of "WEPCo", as well as the new project approvals process under the SPA.
 - (e) It should be noted derogations to the Template Education D&B Agreement are strongly discouraged and it is expected Welsh Government approval will be strictly limited to changes that represent value for money and are required for project specific reasons, or to reflect a change to Welsh Government guidance or demonstrable changing market circumstances.
 - (f) Authorities must propose a detailed timetable indicating when requests for derogations to the Template Education D&B Agreement will be presented to the Welsh Government, and such programme shall then be updated in discussion with the Welsh Government, as required. An Authority/the project team must give Welsh Government no less than one (1) month notice of when it intends to submit a request for derogations and the dates should generally tie in with Commercial Approval Point ("**CAP**") dates. The Welsh Government will endeavour to respond to a request for approval to derogations within two (2) weeks of receipt. In requesting derogations the Authority must provide its amended version of the Template Education D&B Agreement (including the Schedules) and provide explanations for the proposed amendments by way of accompanying commentary. Authorities should liaise with Welsh Government regarding the level of detail required. The Welsh Government will do a comparison of the document submitted

against its master version of the Template Education D&B Agreement. It will then decide whether to approve each derogation, or whether to decline to do so, and in each case will inform the Authority and the relevant project team of its decision in writing.

- (g) As noted above, this Template Education D&B Agreement contains optional/required drafting to deal with matters that are specific to the education sector and in some instances specific to schools (only) or colleges (only) and particular circumstances that are commonly encountered. Use of such drafting must nevertheless be reported to the Welsh Government and approval obtained.
- (h) All footnotes (and optional drafting) should be used/implemented/deleted as appropriate before the document is issued by the relevant Authority for a specific project. For ease of future contract management, the Welsh Government does not expect to see the Template Education D&B Agreement amended to any individual law firm's house style. Clause and paragraph numbering should be preserved through the use of lettered additions and "not used" deletions. Automatic numbering and hyperlinked cross references should be maintained.

AGREEMENT

between

[AUTHORITY]

and

[D&B CO]

[Project]

[Date]

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THIS AGREEMENT is made on the _____ day of _____

BETWEEN:

- (1) [♦] (the "**Authority**"); and
- (2) [♦] (registered under number [♦]) whose registered office is [♦] ("**D&B Co**²").

RECITALS:

- (A) The Authority wishes to procure the design and construction of [♦]³ (the "**Project**");
- (B) The Authority and WEPCo are parties to a strategic partnering agreement dated [♦] which establishes a long-term strategic partnering relationship within Wales between the Authority and inter alios, WEPCo (the "**Strategic Partnering Agreement or SPA**");
- (C) Pursuant to the Strategic Partnering Agreement, the Authority issued a new project request in respect of the Project to WEPCo, in response to which WEPCo prepared staged development proposals, as required by the new project approval process detailed therein;
- (D) Following approval by the Authority of WEPCo's stage 2 submission for the Project, the Authority has appointed the nominated D&B Co to design and build [♦]⁴;
- (E) The Authority, D&B Co and the Contractor wish to adopt a mechanism which allows for payments in connection with the Project to be made to D&B Co, the Contractor and Sub-Contractors (other than the Consultants) through the operation of a Project Bank Account; and
- (F) The Project has been approved by the Minister for Finance and Trefnydd and the Minister for Education, on behalf of the Welsh Ministers.

NOW IT IS HEREBY AGREED as follows:

PART 1: GENERAL

1. DEFINITIONS AND INTERPRETATION

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

² Adjust to reflect the identity of the Project Service Provider (as defined under the SPA). Consideration will be required to whether D&B Co is to be WEPCo or a WEPCo subsidiary.

³ Insert description of project i.e. name and location of the School/College.

⁴ Insert name of Facilities.

2. EXECUTION AND DELIVERY OF DOCUMENTS

On or prior to execution of this Agreement:

- 2.1 D&B Co shall deliver to the Authority the documents referred to in Section 1 (*Documents to be Delivered by D&B Co*) of Schedule 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by the Authority by written notice to D&B Co); and
- 2.2 the Authority shall deliver to D&B Co the documents referred to in Section 2 (*Documents to be Delivered by the Authority*) of Schedule 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by D&B Co by written notice to the Authority).

3. COMMENCEMENT AND DURATION

This Agreement, and the rights and obligations of the parties, shall commence on the date of execution of this Agreement and, without prejudice to Clause 37.5 (*Continuing Obligations*), shall terminate automatically on the Termination Date.

4. PROJECT DOCUMENTS

Documents

- 4.1 D&B Co shall perform its obligations under, and observe all of the provisions of, the Project Documents to which it is a party and shall not:
 - 4.1.1 terminate or agree to the termination of all or part of any Project Document;
 - 4.1.2 make or agree to any material variation to, or extension or renewal of any Project Document;
 - 4.1.3 in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights they may have in a material respect), under any Project Document; or
 - 4.1.4 enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Project Document,

unless the proposed course of action (and any relevant documentation) has been submitted to the Authority's Representative for review under Schedule 7 (*Review Procedure*) and either:

- (a) there has been no objection in accordance with paragraph 3 of Schedule 7 (*Review Procedure*) within twenty (20) Business Days of receipt by the Authority's Representative of the submission of the proposed course of action (and any relevant documentation), or such shorter period as may be agreed by the parties; or
- (b) D&B Co is acting in accordance with the comments of the Authority as provided in paragraph 4.2 of Schedule 7 (*Review Procedure*);

and, in the circumstances specified in Clause 4.1.1, D&B Co has complied with Clause 45 (*Sub-Contracting and Assignment*).

Delivery

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

5. GENERAL OBLIGATIONS

Scope

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

General Standards

- 5.2 D&B Co shall at its own cost be solely responsible for procuring that the Project Operations are at all times performed:
 - 5.2.1 in compliance with all Law and Consents (including without limitation the giving of notices and the obtaining of any such Consents) and so as not to prejudice the renewal of any such Consents;⁵

⁵ Refer to guidance in footnote at Clause 11.3.

- 5.2.2 in a manner that is not likely to be injurious to health or to cause damage to property; and
- 5.2.3 in a manner consistent with the Authority discharging its statutory duties and other functions undertaken by it as the same may be notified to D&B Co from time to time.

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

Authority's Undertaking

- 5.3 [The Authority undertakes to D&B Co that it shall:
 - 5.3.1 not wilfully impede D&B Co in the performance of its obligations under this Agreement (having regard always to the interactive nature of the activities of the Authority and/or Authority Parties and of D&B Co and to the Authority's use of the Facilities to provide the relevant Authority Services and any other operations or activities carried out by the Authority and/or Authority Parties on or at the Site for the purposes contemplated by this Agreement and any other of the Authority's statutory functions),

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

Notification of Terms and Examination Periods

- 5.4 The Terms for the [first] Academic Year are [◆].
- 5.5 No later than [31st December] in each year prior to [the later to occur of] the Actual Completion Date [and the Actual Post Completion Works Date], the Authority must notify D&B Co of the dates for Terms (including any half-term holidays) in the period [1st September] to [31st August] following that notice.
- 5.6 The Examination Periods for the current [and subsequent]⁶ Academic Year[s] following the date of this Agreement have been notified by the Authority to D&B Co.
- 5.7 Where such dates have not already been notified pursuant to Clause 5.6 (*Notification of Terms and Examination Periods*), then no later than [31 August] in

⁶ Depending on when in the Academic Year the date of execution falls.

each Academic Year prior to [the later to occur of] the Actual Completion Date [and the Actual Post Completion Works Date], the Authority shall notify D&B Co of the dates of the Examination Periods for the next Academic Year.

Co-operation

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

6. GENERAL OBLIGATIONS AND RESPONSIBILITIES OF D&B CO

[Other Business

- 6.1 D&B Co shall not engage in any business or activity other than the business or activities related to, and conducted for, the purpose of the Project Operations]⁷.

D&B Co Parties

- 6.2 Subject to the provision of Clause 25.1.7 (*Relief Events*), D&B Co shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any D&B Co Party. D&B Co shall, as between itself and the Authority, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches and negligence of all D&B Co Parties. All references in this Agreement to any act, default, omission, breach or negligence of D&B Co shall be construed accordingly to include any such act, default, omission, breach or negligence of a D&B Co Party.

Safety

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

Authority Policies

- 6.4 D&B Co shall, and shall procure that all D&B Co Parties shall, comply at all times with the Authority Policies (insofar as relevant to the Project Operations).
- 6.5 The Authority shall notify D&B Co of any proposed change to the Authority Policies as soon as practicable (and, in any event, prior to such change taking effect) and consult with D&B Co. Subject to Clause 6.6 such change shall take effect as an

⁷ This provision will not be appropriate where the Project Operations are to be delivered by WEPCo.

Authority Works Variation Enquiry in accordance with Schedule 13 (*Variation Procedure*).

- 6.6 The Authority may, at its sole option, notify D&B Co that D&B Co shall not be obliged to comply with any change to any Authority Policy and that D&B Co should continue to comply with the relevant Authority Policy prior to any change in which case such change shall not take effect as a Variation in accordance with Schedule 13 (*Variation Procedure*).

7. AUTHORITY'S DATA

No Liability

- 7.1 [Subject to Clause 40 (*Warranties*),]⁸ the Authority shall not be liable to D&B Co for and D&B Co shall not seek to recover from the Authority (or from any Authority Party) any damages, losses, costs, liabilities or expenses which may arise (whether in contract, tort or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, D&B Co, the Independent Tester or any D&B Co Party.

No Warranty

- 7.2 [Subject to Clause 40 (*Warranties*),] the Authority gives no warranty or undertaking of whatever nature in respect of the Disclosed Data and, specifically (but without limitation), the Authority does not warrant that the Disclosed Data represents all of the information in its possession or power (either during the conduct of the tender process for the Project or at the time of execution of this Agreement) relevant or material to or in connection with the Project or the obligations of D&B Co under this Agreement or under any of the Project Documents. In addition, without prejudice to the application of [Clause 40 (*Warranties*),] Clause 24.11 (*Compensation*), and/or Clause 24.3.2 (*Delay Events and Compensation Events*) to the extent that such provisions may apply in respect of any breach on the part of the Authority of Clauses 9.1 (*Access During Construction*) or 9.2 (*Access Following Construction*), the Authority shall not be liable to D&B Co in respect of any failure to disclose or make available to D&B Co (whether before, on or after the execution of this Agreement) any information, documents or data, nor any failure to review or to update the Disclosed Data, nor any failure to inform D&B Co (whether before, on or after execution of this Agreement) of any inaccuracy, error, omission, defects or inadequacy in the Disclosed Data.

D&B Co Investigation

- 7.3 [Without prejudice to its rights and remedies under Clause 40 (*Warranties*),] D&B Co acknowledges and confirms that:

⁸ Any warranties to be given by the Authority must be justified on a project specific basis and should be set out at Clause 40. The drafting in square brackets should be deleted where no relevant warranties are to be provided by the Authority.

- 7.3.1 it has conducted its own analysis and review of the Disclosed Data and has, before the execution of this Agreement, satisfied itself as to the accuracy, completeness and fitness for purpose of any such Disclosed Data upon which it places reliance; and
- 7.3.2 it shall not be entitled to and shall not (and shall procure that no D&B Co Party shall) make any claim against the Authority or any Authority Party whether in contract, tort or otherwise including, without limitation, any claim in damages, for extensions of time or for additional payments under this Agreement on the grounds:
- (a) of any misunderstanding or misapprehension in respect of the Disclosed Data; or
 - (b) that incorrect or insufficient information relating to the Disclosed Data was given to it by any person, whether or not an Authority Party,

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

Fraudulent Statements

- 7.4 Nothing in this Clause 7 (*Authority's Data*) shall exclude any liability which the Authority or any of its agents or employees would otherwise have to D&B Co in respect of any statements made fraudulently prior to the date of this Agreement.

8. REPRESENTATIVES

Representatives of the Authority

- 8.1 The Authority's Representative shall be [♦] or such other person appointed pursuant to Clause 8.3 (*Representatives of the Authority*). The Authority's Representative shall exercise the functions and powers of the Authority in relation to the Project Operations which are identified in this Agreement as functions or powers to be carried out by the Authority's Representative. The Authority's Representative shall also exercise such other functions and powers of the Authority under this Agreement as may be notified to D&B Co from time to time.
- 8.2 The Authority's Representative shall be entitled at any time, by notice to D&B Co, to authorise any other person to exercise the functions and powers of the Authority delegated to him pursuant to this Clause 8 (*Representatives*), either generally or specifically. Any act of any such person shall, for the purposes of this Agreement, constitute an act of the Authority's Representative and all references to the "**Authority's Representative**" in this Agreement (apart from this Clause 8 (*Representatives*)) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.

- 8.3 The Authority may by notice to D&B Co change the Authority's Representative. The Authority shall (as far as practicable) consult with D&B Co prior to the appointment of any replacement for the Authority's Representative, taking account of the need for liaison and continuity in respect of the Project. Such change shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to D&B Co in the execution of its obligations under this Agreement).
- 8.4 During any period when no Authority's Representative has been appointed (or when the Authority's Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement) the Authority shall carry out the functions which would otherwise be performed by the Authority's Representative.
- 8.5 No act or omission of the Authority, the Authority's Representative or any officer, employee or other person engaged by the Authority shall, except as otherwise expressly provided in this Agreement:
- 8.5.1 in any way relieve or absolve D&B Co from, modify, or act as a waiver or personal bar of, any liability, responsibility, obligation or duty under this Agreement; or
- 8.5.2 in the absence of an express order or authorisation under Schedule 13 (*Variation Procedure*), constitute or authorise a Variation.
- 8.6 Except as previously notified in writing before such act by the Authority to D&B Co, D&B Co and D&B Co's Representative shall be entitled to treat any act of the Authority's Representative which is authorised by this Agreement as being expressly authorised by the Authority and D&B Co and D&B Co's Representative shall not be required to determine whether an express authority has in fact been given.

Representative of D&B Co

- 8.7 D&B Co's Representative shall be [♦] or such other person appointed pursuant to Clause 8.8 (*Representative of D&B Co*). D&B Co's Representative shall have full authority to act on behalf of D&B Co for all purposes of this Agreement. Except as previously notified in writing before such act by D&B Co to the Authority, the Authority and the Authority's Representative shall be entitled to treat any act of D&B Co's Representative in connection with this Agreement as being expressly authorised by D&B Co and the Authority and the Authority's Representative shall not be required to determine whether any express authority has in fact been given.
- 8.8 D&B Co may by reasonable notice to the Authority change D&B Co's Representative. Where D&B Co wishes to do so it shall by written notice to the Authority propose a substitute for approval, taking account of the need for liaison and continuity in respect of the Project. Such appointment shall be subject to the approval of the Authority (not to be unreasonably withheld or delayed).

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

[Liaison Procedures

- 8.10 The Authority and D&B Co shall establish and maintain throughout the Construction Phase (or, if earlier, until the Termination Date) a joint Liaison Committee and shall initiate, develop, agree, distribute, implement, control and maintain liaison procedures, all in accordance with the provisions of Schedule 22 (*Liaison Procedure*)].⁹

8.11 [Facility Representative

8.11.1 The [head teacher/principal] of the Facility or such other member of staff of a Facility as the [head teacher/principal] may notify in advance to D&B Co from time to time, shall undertake the role of a Facility representative (the "**Facility Representative**"), which Facility Representative shall provide a day to day contact with D&B Co for the routine operation of this Agreement.

8.11.2 Unless pursuant to a specific delegation under Clause 8.11.3 or otherwise specifically provided for in terms of this Agreement, the Facility Representative shall have no power or authority to bind the Authority or vary the terms of this Agreement in any way and D&B Co acknowledges that it shall not act on the instructions of or as a consequence of or otherwise rely upon any act or omission of a Facility Representative for the purposes of this Agreement unless under a specific [delegation issued pursuant to Clause 8.11.3 or otherwise specifically provided for in this Agreement].

8.11.3 The Authority's Representative may from time to time by notice to D&B Co in writing, delegate any of his powers, duties or responsibilities under this Agreement to a Facility Representative, subject to such terms and conditions, and for such duration as may be specified by the Authority's Representative.]

⁹ Liaison procedures may be adopted where this is considered beneficial to a specific project. The role of the Liaison Committee should only be to make recommendations to the parties, which they may accept or reject in their complete discretion. Neither the Liaison Committee itself, nor the members acting in that capacity, should have the authority to vary any of the provisions of the Education D&B Agreement or make any decision that is binding on the parties

PART 2: LAND ISSUES

9. NATURE OF LAND INTERESTS¹⁰

Access During Construction¹¹

9.1 From the Commencement Date until the Actual Completion Date [and from the Actual Completion Date until the Actual Post Completion Works Date in respect of the Post Completion Works Areas], or (if earlier) the Termination Date, the Authority shall grant to D&B Co and D&B Co Parties, or procure that D&B Co and the D&B Co Parties are granted:

9.1.1 access to the Site; and

9.1.2 the Ancillary Rights;

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

Access Following Construction

9.2 After the occurrence of the Actual Completion Date [and the Actual Post Completion Works Date in respect of the Post Completion Works Areas] the Authority shall grant to D&B Co and D&B Co Parties, or procure that D&B Co and D&B Co Parties are granted, access to the Facilities subject only to the Reserved Rights, the Title Conditions and the provisions of this Agreement and solely for the purposes of:

9.2.1 carrying out D&B Co's Post-Completion Commissioning during the period permitted therefor and subject to the terms of the Final Commissioning Programme;

9.2.2 remedying Defects pursuant to Clause 19 (*Defects*) during the [relevant] Defects Liability Period and the period of [♦] months specified in Clause 19.2 (*Defects*);

¹⁰ The Authority must arrange for suitable title due diligence to be carried out by its own or external legal advisors prior to issuing a New Project Request under the SPA in order to determine whether any title matters might reasonably be expected to interfere with the carrying out of the Works. Where D&B Co would reasonably be expected to be the party best placed to manage any identified issues, these issues should be disclosed as Reserved Rights or Title Conditions associated with the relevant Site, in Schedule 4 (*Land Matters*). See further guidance at Schedule 4 (*Land Matters*) below. The drafting assumes a licence structure. This will need to be kept under review.

¹¹ To be reviewed on a project specific basis. Where a project involves phased construction or Post Completion Works, a phased programme of access may be required.

- 9.2.3 exercising the Ancillary Rights; and
- 9.2.4 addressing any Snagging Items in accordance with the Snagging Programme.

Extent of Rights

- 9.3 The rights referred to at Clauses 9.1 (*Access During Construction*) and 9.2 (*Access Following Construction*) shall not operate or be deemed to operate as a lease of the Facilities or the Site or any part of the Facilities or the Site and D&B Co shall not have or be entitled to exclusive possession (save to the extent expressly included within the Ancillary Rights) or any estate, right, title or interest in and to the Site or the Facilities except as provided herein and shall occupy the Site as a licensee only.
- 9.4 The rights referred to at Clause 9.1 (*Access During Construction*) and 9.2 (*Access Following Construction*) are personal to D&B Co and the D&B Co Parties.
- 9.5 D&B Co shall procure that:
 - 9.5.1 all Project Operations carried out at the Site by or on behalf of D&B Co (whether before, during or after the completion of the Works) shall be carried out in a manner which does not breach any of the Title Conditions and/or the Reserved Rights; and
 - 9.5.2 there shall be no action, or omission to act by D&B Co or a D&B Co Party, which shall give rise to a right for any person to obtain title to the Site or any part of it.
- 9.6 Notwithstanding the terms of Clauses 9.1 (*Access During Construction*) and 9.2 (*Access Following Construction*) or any other rights granted under this Agreement, the Authority shall (if it is the legal owner of the Site), or (if it is not the legal owner of the Site) shall procure that the legal owner of the Site shall, enter into such wayleaves, deeds of easement and grant or other similar agreements with any third party that D&B Co or any D&B Co Party may require to be granted in favour of or by any third party, in order to exercise its rights or perform its obligations under this Agreement (other than Utilities Agreements which are subject to the provisions of Clause 10.15 (*Utilities*)). The Authority shall enter into (or, where appropriate, shall procure that the legal owner of the Site shall enter into) any such wayleave, deed of easement and grant or other similar agreement (other than Utilities Agreements which are subject to the provisions of Clause 10.15 (*Utilities*)), as soon as reasonably practicable after D&B Co has provided to the Authority all relevant information in connection therewith provided always that D&B Co has obtained at its own cost the prior agreement of the third party in terms acceptable to the Authority (acting reasonably). D&B Co shall reimburse the Authority for all costs and expenses reasonably and properly incurred by the Authority (and/or the legal owner of the Site) in connection with entering into such wayleaves, deeds of easement and grant or other similar agreements at the request of D&B Co.

10. THE SITE¹²

- 10.1 Without prejudice to Clause 19 (*Defects*) the condition of the Site shall[, subject to Clauses 10.3 [and 10.4] (*[Responsibility for Ground Conditions and Contamination]*) / to 10.14 (*[Asbestos]*),] between the Commencement Date and the Actual Completion Date [or, in respects of areas of the Site where Post Completion Works are undertaken, until the Actual Post Completion Works Date,] be the sole responsibility of D&B Co. Accordingly (without prejudice to any other obligation of D&B Co under this Agreement), D&B Co shall be deemed to have:
- 10.1.1 carried out the Ground Physical and Geophysical Investigation and to have inspected and examined the Site and its surroundings and (where applicable) any existing structures or works on, over or under the Site;
 - 10.1.2 satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the form and nature of the Site, the load bearing and other relevant properties of the Site, the risk of injury or damage to property affecting the Site, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, work and materials necessary for the execution of the Works;
 - 10.1.3 satisfied itself as to the extent and adequacy of the Site and of the rights of access to and through the Site granted hereunder and any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the Site) without prejudice to D&B Co's rights under this Agreement in respect of a breach by the Authority of its obligations under Clause 9.1 (*Access During Construction*) and/or Clause 9.2 (*Access Following Construction*);
 - 10.1.4 satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties (except where such matters can only be ascertained by a review of title conditions, not included in the Title Conditions); and
 - 10.1.5 satisfied itself as to the conditions, burdens, restrictions and reservations set out in the Title Conditions and the Reserved Rights.

¹² To the extent that it is not practical to investigate areas of the Site (for example, due to Authority occupation of existing premises on the Site to be developed in order to construct the Facilities), the drafting at Clauses 10.3 and 10.4 can be included to provide D&B Co with appropriate relief. These Clauses provide that the Authority bears any additional costs arising out of unforeseen conditions in areas which D&B Co cannot investigate and which cannot be reasonably identified by D&B Co. Areas of the Site to which this carve out applies should also be clearly identified in the D&B Agreement.

WEPCO will be required to undertake Ground Physical and Geographical Investigations at stage 1 of the New Projects Approval process under the SPA, where these have not already been procured by them in advance of the New Project Requests (and included in the site brief). It may be appropriate, where updated or additional surveys are obtained by WEPCo (acting in accordance with Good Industry Practice and in good faith during the New Project Approval Process under the SPA) that these should also be specifically carved out of Clause 10.3.

The risk that an Authority assumes in terms of Clauses 10.3 and 10.4 where relevant (i.e. where there are areas of the Site(s) under or within existing buildings that are not capable of survey) will not include the risk of asbestos.

Where a specific asbestos risk has been identified and the risk of Additional Asbestos is to be an Authority risk, the drafting at Clauses 10.5 to 10.14 should also be referenced here.

10.2 To avoid doubt, D&B Co accepts full responsibility for all matters referred to in Clause 10.1 and [subject to Clause 10.3 and Clause 10.4 (*[Responsibility for Ground Conditions and Contamination]*) / to 10.14 (*[Asbestos]*) [and Clause 40 (*[Warranties]*)],] D&B Co shall:

10.2.1 not be entitled to make any claim against the Authority of any nature whatsoever save, if applicable, as expressly provided in Clause 24 (*[Delay Events and Compensation Events]*), on any grounds including (without limitation) the fact that incorrect or insufficient information on any matter relating to the Site was given to it by any person, whether or not the Authority or an Authority Party; and

10.2.2 be responsible for, and hold the Authority harmless from, cleaning up and/or otherwise dealing with any Contamination:

(a) at the Site prior to the Actual Completion Date[; or

(b) where there are Post Completion Works, at the Post Completion Works Areas prior to the Actual Post Completion Works Date¹³,]

so that it shall at all times comply with its obligations under this Agreement including (without limitation) complying with, at its own cost, any applicable Laws and any Consents, orders, notices or directions of any regulatory body (whether made against the Authority or D&B Co).

[Responsibility for Ground Conditions and Contamination

10.3 To the extent that unforeseen ground conditions and/or Contamination exist in any parts of the Site which are under existing buildings as at the Commencement Date and which it is not practical for D&B Co to investigate or survey, D&B Co shall not be responsible for them unless they were discovered by the Ground Physical and Geophysical Investigation and accordingly identified in Section 3 (*[Authority's Construction Requirements]*) of Schedule 5 (*[Construction Matters]*) or unless they should reasonably have been discoverable if the Ground Physical and Geophysical Investigation had been properly carried out or unless they would have been identified had D&B Co carried out such additional surveys as it would have been reasonable to expect an experienced contractor to have carried out in the circumstances. The Authority shall be responsible for any ground conditions and/or Contamination for which D&B Co is not responsible by virtue of this Clause 10.3 (*[Responsibility for Ground Conditions and Contamination]*). This Clause 10.3 (*[Responsibility for Ground Conditions and Contamination]*) applies to the following areas: [♦].

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

¹³ Drafting to be considered on a project specific basis to reflect D&B Co's phasing solution and ensure that it retains responsibility for Contamination under this provision in respect of areas of the Site within its control.

- 10.4.1 any such matter shall be deemed to be a Delay Event (to the extent that there will be (or is likely to be) delay to [satisfaction of the ICT Handover Requirements] completion of the [Main] Works [or, the Post Completion Works (as applicable)] as a result and/or a Compensation Event (where D&B Co has incurred a loss (including a loss in revenue) and/or expense as a direct result; and
- 10.4.2 where any such matter is Contamination the Authority shall further hold D&B Co harmless from cleaning up and otherwise dealing with the Contamination and shall indemnify D&B Co in respect of all Direct Losses incurred by D&B Co resulting from such Contamination.]

[Asbestos¹⁴

- 10.5 Subject to Clauses 10.6 to 10.14 below D&B Co shall be responsible for and shall hold the Authority harmless from the removal of any Asbestos at the Site and the Authority shall have no liability in respect of the removal of any Asbestos at the Site other than as set out in Clauses 10.6 to 10.14.
- 10.6 Prior to the commencement of the Works at a Demolition Site, D&B Co shall procure¹⁵:
- 10.6.1 the appointment of an Asbestos Surveyor in accordance with Clause 10.7 and 10.9; and
- 10.6.2 the Asbestos Surveyor (appointed in accordance with Clause 10.7 and 10.9) carries out an Asbestos Survey and submits an Asbestos Survey Report in respect of the relevant Demolition Site.
- 10.7 D&B Co shall seek competitive tenders from a minimum of three [(3)] licensed Asbestos surveyors with the necessary skills, qualifications and experience to carry out Asbestos Surveys on the basis that the successful tenderer shall:
- 10.7.1 provide Asbestos Surveys in respect of all of the Demolition Sites; and
- 10.7.2 for each Demolition Site, as soon as reasonably practicable after the relevant Asbestos Survey has been carried out, produce the Asbestos Survey Report to include its recommendations as to updates required to the Asbestos Schedule and with all information required to complete the Asbestos Schedules pursuant to Clause 10.7.3;

¹⁴ This drafting should be included where D&B Co is required to carry out demolition work and an initial Asbestos Management Surveys carried out under the SPA have identified an asbestos risk.

¹⁵ The drafting assumes that (a) an Asbestos Surveyor has not been appointed to carry out Demolition survey(s), HSG 264; and (b) a Licensed Contractor has not priced and been appointed in respect of associated works, prior contract signature. If it is the case that these appointments have been made prior to contract signature (and the HSG 264 Refurbishment/Demolition survey carried out before contract signature), Asbestos risk should sit entirely with D&B Co.

- 10.7.3 liaise with the Authority and/or its designated asbestos specialist¹⁶ on the content of the updated Asbestos Schedule, in order to agree (where applicable) the items to be included and the quantities to be inserted and such Asbestos Schedule shall be in a format suitable for pricing by a Licensed Contractor tendering for the Asbestos Works;
- 10.7.4 for each Demolition Site, on a monthly basis in respect of the period when the Asbestos Works are being undertaken by the Licensed Contractor, produce updated Asbestos Survey Reports to include its recommendations as to updates required to the Asbestos Schedules and with all information required to complete the Asbestos Schedules referred to in Clause 10.7.5;
- 10.7.5 for each Demolition Site, on a monthly basis in respect of the period when the Asbestos Works are being undertaken by the Licensed Contractor, liaise with the Authority and/ or its designated asbestos specialist¹⁷ on the content of the updated Asbestos Schedules, for the purpose of agreeing the nature and extent of any Additional Asbestos; and
- 10.7.6 comment upon and provide guidance in connection with the proposed methodologies included within the tenders submitted pursuant to Clause 10.8 by the Licensed Contractors.
- 10.8 D&B Co shall procure competitive tenders from a minimum of [three (3)] Licensed Contractors, based on the Asbestos Schedule as updated pursuant to Clause 10.10.1 and to include the scope of materials identified in the relevant Asbestos Survey Report and a target programme that is aligned so far as practicable (and without prejudice to D&B Co's obligations pursuant to Clause 24.2.1, 24.4.5 and 24.13 (*Delay Events and Compensation Events*)) with the Asbestos Works Period. Tenders are to be invited and evaluated on the basis of the scope of materials shown in such Asbestos Schedule, with each individual line being priced on an open book basis in order to derive the total tendered price including analytical costs of associated asbestos removal and subject to any discount (the "**Asbestos Tendered Sum**"). Tenders shall include a schedule of rates to assist in the pricing of the Asbestos Works and which shall apply in respect of transparent verification of allowances (which may be subject to discounting) within the Asbestos Tendered Sum and the calculation of any Additional Asbestos pursuant to Clause 10.13.1(b).
- 10.9 As soon as reasonably practicable following receipt of the tender referred to in Clauses 10.7 and 10.8, D&B Co shall submit copies of such tenders to the Authority together with D&B Co's recommendation as to which tenders should be accepted and the Authority shall notify D&B Co within five (5) Business Days which tender to accept (such period shall commence on the date which the Authority has all relevant information including any responses to clarifications that the Authority may, acting reasonably, request.)¹⁸. D&B Co or the Contractor (but not any other subcontractor) shall appoint the Licensed Contractor and Asbestos

¹⁶ It is anticipated that the Authority will appoint its own specialist asbestos technical adviser who will provide support through the project development phase under the SPA and through the procedure for D&B Co's appointment of an Asbestos Surveyor and Licensed Contractor, to payment for any Further Asbestos and/or an extension of time for any Further Asbestos Delay.

¹⁷ Please note comments above as regards the Authority's appointment of its own asbestos specialist.

¹⁸ Authorities should liaise with their specialist asbestos technical adviser and Welsh Government in connection with the appointment of the Licensed Contractor.

Surveyor that are selected by the Authority (and shall take on board any reasonable representations of the Authority as to the terms of those appointments), provided that where the Authority does not respond to the D&B Co within five (5) Business Days of receipt of the information to be provided by D&B Co pursuant to this Clause 10.9, D&B Co or the Contractor (but not any other subcontractor) shall be entitled to appoint the Licensed Contractor and/or Asbestos Surveyor (as the case may be) that D&B Co has recommended to the Authority pursuant to this Clause 10.9.

10.10 D&B Co shall procure that a copy of each Asbestos Survey Report (and updates thereto) issued by the Asbestos Surveyor is submitted to the Authority within seven (7) Business Days of receipt of the same by D&B Co and the Parties shall agree the items to be included and the quantities to be inserted in the relevant updated Asbestos Schedule:

10.10.1 in the case of an Asbestos Schedule to be issued as part of the tender for a Licensed Contractor, as referred to in Clause 10.8 within ten (10) Business Days of receipt by the Authority of the Asbestos Survey Report¹⁹

10.10.2 in the case of the updated Asbestos Survey Reports to be issued on a monthly basis while Asbestos Works are being undertaken by the Licensed Contractor within 10 Business Days receipt by the Authority of:

(a) the relevant Asbestos Survey Report; and

(b) complete, true and up to date records and all other documentation that the Health and Safety Executive require to be maintained by the Licensed Contractor and complete, true and up to date records and documentation as is required to be produced or maintained in respect of the Asbestos Works in accordance with Law, demonstrating the nature, extent and location of all asbestos forming part of the Asbestos Works²⁰.

10.11 D&B Co shall procure the Asbestos Works are completed by the Licensed Contractor in accordance with the requirements of Clause 10.2.

10.12 To the extent that, only as a result of the nature and/or extent and/or location of Further Asbestos, the period of time taken to complete the Asbestos Works at a Demolition Site is longer than the relevant Asbestos Works Period ("**Further Asbestos Delay**"), D&B Co will be entitled to apply for relief from its obligations and/or compensation in accordance with Clause 24 (*Delay Events and Compensation Events*) provided compensation for any additional direct costs and associated expenditure incurred by D&B Co for the removal and disposal of Further Asbestos (including any Additional Asbestos) shall be calculated on the

¹⁹ Authorities should liaise with their specialist asbestos technical advisor and Welsh Government in connection with the Asbestos Survey Report and Asbestos Schedule.

²⁰ Authorities should liaise with their specialist asbestos technical advisor and Welsh Government in connection with the Asbestos Survey Report and Asbestos Schedule.

basis provided for in Clause 10.13 below and Clause 24 (*Delay Events and Compensation Events*) shall be construed accordingly²¹.

10.13 In respect of any additional direct costs and associated expenditure incurred by D&B Co as a result of the nature and/or extent and/or location of Further Asbestos at a Demolition Site (whether or not there has been a Further Asbestos Delay):

10.13.1 D&B Co shall deliver to the Authority a valid VAT invoice for such additional direct costs and associated expenditure, calculated on the basis of:

- (a) In respect of Identified Asbestos, the Licensed Contractor's Asbestos Tended Sum, less any sum identified in respect of such Asbestos Works in the column titled "Total allowance" of the asbestos schedule set out at Schedule [◆] (*Asbestos Surveys and Schedule*); and
- (b) in respect of Additional Asbestos the schedule of rates set out in [the Licensed Contractor's tender and the relevant Asbestos Schedule, as updated at that time pursuant to Clause 10.10.2

provided that in each case no sums may be claimed for Further Asbestos to the extent such sums have already been claimed in respect of such Further Asbestos and where a sum calculated in respect of Identified Asbestos in accordance with paragraph (a) of this Clause 10.13.1 is a negative figure, such sum shall be deducted from any sum due by the Authority to D&B Co under Clause 10.13.2 or otherwise may be set off to reduce any amount owed by the Authority to D&B Co (provided the Authority has issued a Pay Less Notice) in accordance with Clause 29.33 (*Set Off*); and

10.13.2 where sums are due to D&B Co from the Authority under Cause 10.13.1 above the Authority shall pay to D&B Co the amount of each such invoice that is provided in accordance with Clause 10.13.1 above) within twenty (20) Business Days of receipt of the same²².

10.14 Unless the exposure arises directly or indirectly as a result of any act or omission of D&B Co or any D&B Co Party, the Authority accepts full responsibility, including any financial and other consequences which result (whether directly or indirectly) for death and personal injury in respect of exposure to Asbestos on the Site, where the exposure takes place prior to the date on which D&B Co is given possession of the Site for the purposes of carrying out the Works.]

10.15 **Utilities**

²¹ As part of the New Project Approval and tendering process under the SPA, consideration should be given to weekly prelim cost for any additional time on Site as a result of Asbestos Works having to be carried out beyond the Asbestos Works Period, as a consequence of Further Asbestos being identified. The asbestos drafting should be updated to refer to any agreed weekly prelim cost.

²² Authorities should liaise with their legal advisers on payment terms to ensure Construction Act compliance.

10.15.1 Until the Actual Completion Date [or, where there are Post Completion Works, the Actual Post Completion Works Date in respect of Post Completion Works Areas] but without prejudice to Clause 19 (*Defects*), D&B Co shall, in relation to the Utilities required or affected as a result of carrying out the Works:

- (a) be responsible for determining the location of such Utilities as may be at the Site and for the maintenance of access to such Utilities at the Site;
- (b) make and rely upon all necessary investigations and surveys as to such Utilities at the Site;
- (c) be responsible and make provision for lawfully diverting, disconnecting, connecting or otherwise dealing as may be necessary with any Utilities not within the Site;
- (d) pay to all Relevant Authorities or undertakings all costs and expenses incurred in diverting, disconnecting or otherwise carrying out works in respect of such Utilities within the Site; and
- (e) otherwise do all that is required in relation to the Utilities required for the purpose of the carrying out of the Works including but not limited to: (i) using all reasonable endeavours to conclude with each Utilities Third Party the terms of the relevant Utilities Agreement and gaining the execution of the relevant Utilities Agreement by the relevant Utilities Third Party; (ii) keeping the Authority updated at reasonable intervals as to the content and progress of discussions with any Utilities Third Party (including any difficulty or reasonably anticipated difficulty in obtaining any Utilities Agreement along with reasons for such difficulty); (iii) giving due regard to any comments made by the Authority in relation to each Utilities Agreement; (iv) being party to any Utilities Agreement when properly required for the purpose of the Works; (v) executing such agreed Utilities Agreement within ten (10) Business Days of receipt; and (vi) complying with its obligations as party to such Utilities Agreement.

10.15.2 Provided that D&BCo has complied with Clause 10.15.1 (e), the Authority shall procure that the legal owner of the Site:

- (a) be party to any Utilities Agreement when properly required for the purpose of the Works (including as grantor, grantee or consentor);
- (b) within ten (10) Business Days of receipt of a Utilities Agreement agreed pursuant to Clause 10.15.1 (e) execute such Utilities Agreement; and

(c) complies with its obligations as party to any Utilities Agreement.

- 10.15.3 Any delay in the obtaining of a Utilities Agreement not due to an Authority breach of Clause 10.15.2, shall be deemed to be a Relief Event, provided in each case that such event does not arise (directly or indirectly) as a result of any wilful act or default of the party claiming relief and/or (i) in the case of D&B Co claiming relief, any D&B Co Party; and (ii) in the case of the Authority claiming relief, any Authority Party subject to and in accordance with Clause 25 (*Relief Events*).
- 10.15.4 Without prejudice to Clause 19 (*Defects*), following the Actual Completion Date [or, where there are Post Completion Works, the Actual Post Completion Works Date in respect of the Post Completion Works Areas,] D&B Co shall be responsible for the costs of cleaning up and/or otherwise dealing with any Contamination which subsequently occurs on any part(s) of the Site (whether arising from a source on or off the Site) to the extent that such Contamination has been caused by D&B Co or a D&B Co Party either by a breach of D&B Co's obligations under this Agreement or otherwise due to an act or omission in carrying out the Project Operations and shall reimburse the Authority within [♦] Business Days in respect of all Direct Losses resulting from such Contamination.

Off Site Contamination²³

- 10.16 To the extent that (a) prior to the Actual Completion Date, any part(s) of the Site; or (b) prior to the Actual Post Completion Works Date in respect of the Post Completion Works Areas,]²⁴ suffer from or are affected by Contamination arising from a source off Site (whether or not on adjacent land):
- 10.16.1 D&B Co shall be responsible for cleaning up or otherwise dealing with such Contamination and for taking reasonable steps to prevent the recurrence of such Contamination;
- 10.16.2 the occurrence of any such Contamination shall be deemed to constitute a Relief Event for a reasonable period (to be agreed between the Parties acting reasonably) for the purposes of this Agreement;
- 10.16.3 other than where Clause 10.16.4 applies, D&B Co shall further hold the Authority harmless from and indemnify the Authority in respect of all Direct Losses incurred by the Authority resulting from such Contamination; and
- 10.16.4 the Authority shall, but only to the extent that D&B Co is able to demonstrate to the Authority that it does not have the right to take action against third parties in its own name to recover the losses suffered of

²³ To the extent that D&B Co can demonstrate that it is not feasible to insure against a project specific risk of off site contamination, an Authority may discuss approach to this risk and scope for derogation from the existing provisions further with D&B Co and Welsh Government.

²⁴ Drafting to be considered on a project specific basis to reflect D&B Co's phasing solution and ensure that it retains responsibility for Contamination under this provision in respect of areas of the Site within its control.

incurred by D&B Co in cleaning up or otherwise dealing with such Contamination, at the Authority's option either:

- (a) take such action against third parties in its own name as D&B Co may (acting reasonably) direct; or
- (b) permit D&B Co to take such action in the name of the Authority at D&B Co's own expense in which case the provisions of Clause 38.3(*Conduct of Claims*) shall apply as if D&B Co were the Indemnifier and the Authority were the Beneficiary,

subject to D&B Co indemnifying the Authority in respect of all costs properly and reasonably incurred by the Authority in respect of such action. Where the Authority takes action under Clause 10.16.4(a) or 10.16.4(b) the Authority shall be liable to D&B Co for all losses suffered or incurred by D&B Co as a result of its obligations under this Clause 10.16.4 provided that D&B Co's entitlement in respect of any matter to which this Clause 10.16.4 applies shall be limited to the amount recovered by or in the name of the Authority from the relevant third party in respect of the losses referred to in this Clause 10.16.4.

11. CONSENTS AND PLANNING APPROVAL²⁵

11.1 D&B Co shall be responsible for:

- 11.1.1 obtaining all Consents which may be required for the performance of the Project Operations²⁶; and
- 11.1.2 implementing each Consent within the period of its validity in accordance with its terms²⁷.

11.2 In the event that:

- 11.2.1 a Consent that has been granted is subsequently amended, repealed, revoked or otherwise ceases to be in full force and effect in accordance with its terms as a consequence of any action by a Relevant Authority;
- 11.2.2 affected persons are entitled to claim compensation for the adverse effects of such action under a statutory scheme of compensation; and

²⁵ Authorities will require WEPCo to deal with detailed planning prior to FBC approval and entry into the Education D&B Agreement.

²⁶ Where, on a project specific basis, there are certain Consents which only the Authority can obtain, or Consents which D&B Co can obtain only with input from the Authority, appropriate drafting should be included in this Clause 11 (*Consents and Planning Approval*) and cross referred to in Clause 5.2.1. Acceptance of any such responsibility by the Authority should be narrowly prescribed. A similar approach should be followed where there are legislative requirements in relation to the Facilities which can only be complied with by, or that require the input or co-operation of the Authority as occupier or user of the Facilities or any part of them. Again, acceptance of any such responsibility by the Authority should be narrowly prescribed.

²⁷ The costs associated with any planning agreements etc should be for the account of D&B Co.

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

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

11.3 Each party shall, at its own cost, comply with its responsibilities for complying with or discharging the conditions attached to the Planning Approval, as determined by reference to the table set out at Schedule 23 (*Planning Responsibilities Matrix*).²⁸

11.4 ²⁹**[Judicial Proceedings**

11.4.1 Either party shall notify the other forthwith upon becoming aware of any Judicial Proceedings.

11.4.2 If in accordance with Clause 11.4.1 either party serves a notice then:

- (a) the Authority shall be entitled by notice in writing to D&B Co (the "**Suspension Notice**") to require D&B Co to suspend the Works (or the relevant part thereof) and D&B Co shall forthwith suspend the Works (or the relevant part thereof) upon receipt of the Suspension Notice and such suspension shall subsist subject to Clause 11.4.5(a) until such time as (i) such Judicial Proceedings are finally dismissed or withdrawn leaving in place a valid planning permission; or (ii) provided there is no subsisting Judicial Proceedings Action, the Authority informs D&B Co that the Works (or the relevant part thereof) should be resumed (whichever is the earlier); and/or
- (b) D&B Co must suspend the Works (or the relevant part thereof) and forthwith give notice of such suspension in writing to the Authority (the "**D&B Co Suspension Notice**") and such suspension shall subsist subject to Clause 11.4.5(b) until such time as (i) such Judicial Proceedings Action is finally overturned leaving in place a valid planning permission; (ii) this Agreement is varied by means of an Authority Works Variation in order to permit D&B Co to lawfully to resume the Works (or the relevant part thereof) and/or perform its obligations under this Agreement; or (iii) the parties otherwise agree in writing

²⁸ The parties should agree the Planning Responsibilities Matrix before signing the Education D&B Agreement. If the detailed planning permission includes conditions with which the Authority (as owner/occupier of the Facilities) must comply, appropriate drafting should be included at Clause 11.3 (*Consents and Planning Approval*) and cross referred to in Clause 5.2.1 (*General Standards*) Authorities should seek advice on the extent and consequences of any such obligations.

²⁹ This drafting must be used where entry into the Education D&B Agreement less than six (6) weeks after detailed planning permission is granted. In line with market practice, this drafting places the risk of judicial review of the planning permission within that six (6) week period with the Authority. Thereafter judicial review risk transfers to D&B Co. The risk transferred to the Authority excludes any judicial review or challenge that arises from D&B Co's conduct during or compliance with the planning process.

that the Works (or the relevant part thereof) should be resumed (whichever is the earlier).

11.4.3 Save for where D&B Co or a D&B Co Party (and for the purposes of this Clause 11.4.3 only “D&B Co or a D&B Co Party” shall exclude an employee or agent of D&B Co or of a D&B Co Party acting in a personal capacity) has brought or caused to be brought on its behalf Judicial Proceedings, any suspension of the Works (or the relevant part thereof) pursuant to Clause 11.4.2(a) or 11.4.2(b) shall be deemed to be:

- (a) A Delay Event (to the extent that there will be (or is likely to be) delay to [satisfaction of the ICT Handover Requirements,] completion of the [Main] Works [or, the Post Completion Works (as applicable)] as a result (and for the purposes of the provisions of Clause 52 (*Notices*) D&B Co is deemed to have become aware that there will be or is likely to be a delay in the commencement or completion of the [relevant] Works on the date of receipt of the Suspension Notice or the date of D&B Co Suspension Notice as appropriate); and/or
- (b) A Compensation Event where D&B Co has incurred a loss (including a loss in revenue) and/or expense as a direct result of the Suspension Notice or D&B Co Suspension Notice, from the date of the Suspension Notice or D&B Co Suspension Notice as appropriate.

11.4.4 Where a D&B Co Party (and for the purposes of this Clause 11.4.4 only “D&B Co Party” shall exclude an employee or agent of D&B Co or any D&B Co Party acting in a personal capacity) has brought or caused to be brought on its behalf Judicial Proceedings any suspension of the Works (or the relevant part thereof) pursuant to Clause 11.4.2(a) or 11.4.2(b) shall be deemed to be a Relief Event from the date of the Suspension Notice or D&B Co Suspension Notice as appropriate and the provisions of Clause 25 (*Relief Events*) shall apply but solely for the purpose of entitling D&B Co to apply for relief from any rights of the Authority to terminate this Agreement for a D&B Co Event of Default pursuant to Clauses 33.1.2 (*Long Stop*)and/or 33.1.4 (*Default*).

11.4.5 If by the date falling [twelve (12)]³⁰ months after the date of the:

- (a) Suspension Notice, the Works (or the relevant part thereof) are still suspended pursuant to Clause 11.4.2(a); or
- (b) D&B Co Suspension Notice, the Works (or the relevant part thereof) are still suspended pursuant to Clause 11.4.2(b),

then unless agreed otherwise in writing between the parties, the Authority shall either (i) issue an Authority Works Variation Enquiry to vary the

³⁰ The time limit must be realistic and take into account the likely time for the Judicial Proceedings to be heard.

Authority's Construction Requirements to remove those requirements relating to the affected part of the Facility to which the Judicial Proceedings relate; or (ii) serve notice of termination under Clause 32 (*Authority Events of Default*) of this Agreement.]

PART 3: DESIGN AND CONSTRUCTION

12. THE DESIGN CONSTRUCTION AND COMMISSIONING PROCESS³¹

Overall Responsibility

12.1 D&B Co shall carry out the Works:

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

12.1.2 in accordance with D&B Co's Proposals;

12.1.3 in accordance with the Quality Plans;

12.1.4 in accordance with Good Industry Practice; and

12.1.5 in accordance with the terms of this Agreement.

12.2 To avoid doubt, the obligations in Clauses 12.1.1 to 12.1.5 are independent obligations and, in the case of conflict between obligations requiring different levels of performance, the default position is that the obligation requiring the highest standard of performance shall take precedence. In particular:

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

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

provided always that where there is any conflict between the Authority's Construction Requirements, D&B Co's Proposals and/or Quality Plans, the Authority shall, subject to any applicable default order of precedence, be entitled (in its sole discretion) to decide which shall take precedence and shall inform D&B Co of its decision (within five (5) Business Days of D&B Co's reasonable request for such decision of the Authority pursuant to this Clause 12.2) and D&B Co shall, at its own cost, be obliged to implement the Authority's decision.

³¹ Tailoring will generally be required to this Part and associated drafting on multi-facility projects and where there are different phases of Post-Completion Works.

Design Responsibility

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

Corporate Identity and Signage

- 12.4 The parties acknowledge that the Authority may, from time to time during the Construction Phase, be required to procure the erection of hoarding, site boards, plaques and/or other signage in connection with the Project. Accordingly:
- 12.4.1 where requested by the Authority (acting reasonably), D&B Co shall procure the erection and maintenance of such hoarding, site boards, plaques and/or other signage as the Authority may require; and
- 12.4.2 the size, design, information disclosed, position and materials used in connection with such hoarding, site boards, plaques or other signage shall be approved by the Authority, such approval not to be unreasonably withheld; and
- 12.4.3 for the purposes of this Clause 12.4 (*Corporate Identity and Signage*), the Authority shall be deemed to be acting reasonably where any proposals made by it and/or any approvals exercised by it conform with the Welsh Language Standards and any further relevant guidance, amendments or supplements issued by the Welsh Government from time to time in connection with bilingual use of the Welsh and English language.

Authority Design Review³²

- 12.5 D&B Co shall develop and finalise the design and specification of the Works and the Authority shall review the Reviewable Design Data in accordance with Schedule 7 (*Review Procedure*) and the provisions of this Clause 12.5 (*Authority Design*):
- 12.5.1 D&B Co shall submit the Reviewable Design Data and the design of any Variations developed in accordance with [the Reviewable Design Data Programme] and the procedure set out in Schedule 13 (*Variation Procedure*) to the Authority's Representative for review under Schedule 7 (*Review Procedure*). D&B Co shall not commence or permit the commencement of construction of the part or parts of the Facilities to which such Reviewable Design Data relates until it has submitted the appropriate Reviewable Design Data and either it is confirmed by the Authority's Representative that D&B Co is entitled to proceed with

³² A timetable for submission of RDD will need to be developed by D&B Co and agreed by the Authority. This can be developed along with a process protocol and should tie in with the Project BIM Agreement.

construction in accordance with paragraph 3.3 of Schedule 7 (*Review Procedure*) or D&B Co is:

- (a) disputing the status of such Reviewable Design Data pursuant to paragraph 1.3.1 or paragraph 4.3 of Schedule 7 (*Review Procedure*); and
- (b) proceeding at risk pursuant to paragraph 1.3.2 of Schedule 7 (*Review Procedure*).

12.5.2 with effect from the date at which any item of Reviewable Design Data is or becomes an Approved RDD Item in accordance with Schedule 7 (*Review Procedure*), D&B Co is entitled to proceed with construction of the relevant part or parts of the Works (subject to the need to submit any associated Reviewable Design Data for review) in accordance with that Approved RDD Item;

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

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

Rectification of D&B Co's Proposals

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

12.6.1 D&B Co's Proposals shall satisfy the Authority's Construction Requirements; and

12.6.2 following the amendment or rectification, the structural, mechanical and electrical performance of the Facilities will be of an equivalent standard of performance to that set out in D&B Co's Proposals prior to their amendment or rectification (for the purpose of this comparison

disregarding the fault which required the amendment or rectification to be made).

- 12.7 Where Clause 12.6 (*Rectification of D&B Co's Proposals*) applies, D&B Co shall submit its proposal for amending D&B Co's Proposals and rectifying the Works (or any part affected) to the Authority's Representative for review under Schedule 7 (*Review Procedure*) and shall not amend D&B Co's Proposals or commence or allow the commencement of the rectification of the Works (or any part affected) until it is permitted to proceed in accordance with Schedule 7 (*Review Procedure*).

Construction Skills Certification Scheme

- 12.8 D&B Co shall ensure that all persons engaged in carrying out the Works (or part thereof) on the Site are accredited under the Construction Skills Certification Scheme or an equivalent scheme and where D&B Co enters into a sub-contract for the purposes of carrying out the Works, D&B Co shall cause a term to be included in such sub-contract:

12.8.1 which requires the Sub-Contractor to ensure that such persons are accredited under the Construction Skills Certification Scheme or an equivalent scheme; and

12.8.2 in the same terms as that set out in this Clause 12.8 (*Construction Skills Certification Scheme*) (including for the avoidance of doubt this Clause 12.8.2) subject only to modification to refer to the correct designation of the equivalent party as D&B Co and sub-contractor as the case may be.

Building Information Model³³

- 12.9 The Authority and D&B Co shall:

12.9.1 comply with their respective obligations set out in the Project BIM Agreement;

12.9.2 have the benefit of any rights granted to them in the Project BIM Agreement; and

12.9.3 have the benefit of any limitations or exclusions of their liability contained in the Project BIM Agreement.

³³ Welsh Government requires the use of Building Information Modelling on all projects delivered under the SPA.

13. RIGHT OF ACCESS OF AUTHORITY'S REPRESENTATIVE³⁴

Access to the Site

13.1 D&B Co shall procure that:

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

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

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

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

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

13.1.4 satisfactory facilities are made available to accommodate the Authority's Representative and his staff or visitors (when accompanied by a representative of the Authority) for the purposes of Clause 13.1.1(a) and 13.1.1(b) (*Access to the Site*), subject to D&B Co and the Contractor's construction obligations not being adversely affected and the Authority

³⁴ Authorities are reminded of the duty they ultimately owe to the public to ensure the provision of a safe environment. Authorities should therefore consider what internal resource and/or specialist technical support is needed to perform the role of the 'intelligent client' and carry out the appropriate degree of internal assurance, notwithstanding the services being provided by the Independent Tester. Authorities should discuss their intended approach with the Welsh Government and seek guidance in relation to assurance processes.

reimbursing D&B Co for any reasonable costs or expenses incurred in connection with the accommodation of the Authority under this Clause 13.1 (*Access to the Site*).

Increased Monitoring

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

Right to Open Up

- 13.3 Subject to Clause 13.4 (*Right to Open Up*), the Authority's Representative shall have the right at any time prior to[

13.3.1]the Actual Completion Date to request D&B Co to open up and inspect any part or parts of the [Main] Works[; and

13.3.2 the Actual Post Completion Works Date, to request D&B Co to open up and inspect any part or parts of the Post Completion Works]³⁵

where the Authority's Representative reasonably believes that such part or parts of the [Main] Works [or the Post Completion Works (as appropriate)] is or are defective and D&B Co shall comply with such request.

- 13.4 Prior to exercising his right pursuant to Clause 13.3 (*Right to Open Up*) above, the Authority's Representative shall notify D&B Co of his intention to exercise such right, setting out detailed reasons.
- 13.5 If, following the exercise by the Authority's Representative of his right pursuant to Clause 13.3 (*Right to Open Up*), the inspection shows that the relevant part or parts of the Works are not defective then Clause 24 (*Delay Events and Compensation Events*) shall apply.
- 13.6 If, following the exercise by the Authority's Representative of his right pursuant to Clause 13.3 (*Right to Open Up*), the inspection shows that the relevant part or parts of the Works is or are defective, D&B Co shall rectify and make good such Defect(s) and any consequence of such rectification and/or making good Defect(s)

³⁵ An Authority should decide whether to require a right to open up in respect of Post Completion Works (if relevant to the Project depending on the nature of those Works).

shall be carried out by D&B Co at no cost to the Authority and D&B Co shall not be entitled to any extension of time in relation to such rectification and making good of the Works.

- 13.7 If, following the exercise by the Authority's Representative of his right pursuant to Clause 13.3 (*Right to Open Up*), the Authority's Representative is of the opinion that the inspection shows that the relevant part or parts of the Works is or are defective and D&B Co does not agree with such opinion, the matter shall be determined in accordance with Schedule 15 (*Dispute Resolution Procedure*).
- 13.8 Without prejudice to the rights of the Authority's Representative pursuant to this Clause 13 (*Right of Access of Authority's Representative*) the parties acknowledge that the exercise of such rights shall not in any way affect the obligations of D&B Co under this Agreement save as expressly set out in this Clause 13 (*Right of Access of Authority's Representative*).

Safety during Construction

- 13.9 The provisions of Section 2 (*Safety During Construction*) of Schedule 5 (*Construction Matters*) shall apply to matters of safety.

14. PROGRAMME AND DATES FOR COMPLETION

Dates for Completion

- 14.1 D&B Co shall:
- 14.1.1 [satisfy the ICT Handover Requirements by the ICT Handover Date; and]
- 14.1.2 complete the [Main] Works by the Completion Date [; and]
- 14.1.3 [complete the Post Completion Works and satisfy the Post Completion Works Requirements by the Post Completion Works Date.]

Without prejudice to [Clause 14.9 (*Provision of Temporary Accommodation*)], [Clause 14.10 (*Unavailability of Existing Facilities*)], [Clause 14.11 (*Post Completion Works Phase*)], Clause 19.5 (*Liability*), Clause 33 (*D&B Co Event of Default*) and Clause 37 (*Consequences of Termination*), the Authority shall not be entitled to claim [liquidated or] general damages in respect of any delay which elapses between the ICT Handover Date and the corresponding Actual ICT Handover Date[, or] the Completion Date and the Actual Completion Date [or the Post Completion Works Date and Actual Post Completion Works Date].

- 14.2 [The Certificate of Practical Completion shall not be issued any less than [twenty (20)] Business Days after the issue of the ICT Handover Acceptance Certificate.]³⁶

The Programme

- 14.3 Any Programme submitted in accordance with the provisions set out below shall be prepared in accordance with Good Industry Practice and shall be in sufficient detail so as to enable the Authority's Representative to monitor the progress including all commissioning activities and likely future progress of the Works.
- 14.4 The initial Programme is set out at Schedule 6 (*The Programme*). Any change to the Programme shall only be made in accordance with this Clause 14 (*Programme and Dates for Completion*) and Schedule 7 (*Review Procedure*). D&B Co shall promptly submit to the Authority's Representative a copy of any version of the Programme varied in accordance with this Clause 14 (*Programme and Dates for Completion*) and Schedule 7 (*Review Procedure*).
- 14.5 If it appears to the Authority's Representative at any time that the actual progress of the Works has significantly fallen behind the Programme, then the Authority's Representative shall be entitled to require D&B Co to submit to the Authority's Representative a report identifying the reasons for the delay and, unless the event causing the delay is still subsisting and it is not possible to predict with any certainty when the delay might come to an end, require D&B Co (at the Authority's option):
- 14.5.1 to produce and submit to the Authority's Representative in accordance with Schedule 7 (*Review Procedure*) a revised Programme showing the manner and the periods in which the Works will be carried out to ensure completion; and/or
 - 14.5.2 to produce and submit to the Authority's Representative in accordance with Schedule 7 (*Review Procedure*) a revised Programme showing the steps which are to be taken to eliminate or reduce the delay.

[Early Completion]³⁷

- 14.6 Notwithstanding that the [Main] Works [or Post Completion Works] may have been completed in accordance with this Agreement[:

³⁶ To be reviewed in the context of college commissioning needs.

³⁷ Provision for notification of early completion has been included to enable the parties (at their discretion) to consider early occupation by the Authority of the Facilities. The need for any restriction at all (in a D&B context) should be considered on a project specific basis in light of ICT Handover and decant activities. Where this Clause is adopted, the consequential amendments required as a result of agreeing to early completion during the construction period (e.g. in relation to commissioning, phasing, equipment procurement, scheduled payment profile etc) would have to be considered and agreed on a project specific basis at the time and Authorities will be required to seek Welsh Government approval prior to agreeing to early completion. If the Authority is not willing to accept early completion of the Facilities under any circumstances, this Clause may be deleted. However, an Authority should be mindful that there may be circumstances where these provisions are useful e.g. where a Delay Event has impacted upon the Completion Date and D&B Co has subsequently made up time in its Programme.

14.6.1]the Actual Completion Date may only occur on a date on or (subject to Clause 14.8 (*Handover Dates*)) after the Completion Date[: and

14.6.2 the Actual Post Completion Works Date may only occur on a date on or after the Post Completion Works Date],

unless the Authority, in its absolute discretion, agrees otherwise in writing.

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

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

14.7.2 the parties to consider what modifications (if any) will be required to the Agreement in order to accommodate such earlier date for completion if agreed to by the Authority pursuant to Clause 14.6 (*Early Completion*).]

[Handover Dates

14.8 [Subject to Clause 14.6 (*Early Completion*),] the Actual ICT Handover Date shall be the date on which the ICT Handover Acceptance Certificate is issued, provided that if:

14.8.1 the ICT Handover Acceptance Certificate is not issued by the ICT Handover Date, it shall not thereafter be issued until the [twenty-fifth (25th)] Business Day before the first day of the half term (other than the summer half term) or Term commencing after the ICT Handover Date, and, if not issued by that date, it shall not thereafter be issued until the [twenty-fifth (25th)] Business Day before any subsequent start of half term (other than summer half term) or Term; and

14.8.2 a Certificate of Practical Completion is not issued by the Completion Date, it shall not thereafter be issued until the [fifth (5th)] Business Day before the first day of the half term (other than the summer half term) or Term commencing after the Completion Date and, if not issued by that date it shall not thereafter be issued until the [fifth (5th)] Business Day before any subsequent start of half term (other than summer half term) or Term.]³⁸

³⁸ Approach to be reviewed on a project specific basis in the case of colleges.

[Provision of Temporary Accommodation]³⁹

14.9 If for any reason a Certificate of Practical Completion [in respect of the Main Works] is not issued by the Completion Date then:

14.9.1 from the Completion Date until:

- (a) the Actual Completion Date; or
- (b) if earlier, the Termination Date; or
- (c) the date on which the Actual Completion Date would otherwise have occurred if a Delay Event occurs following the Completion Date and this delays the achievement of the Certificate of Practical Completion,

other than where Clause 14.9.2 applies, D&B Co shall be responsible for ensuring that suitable temporary accommodation is available to the Authority that (i) complies with the Authority's Construction Requirements; and (ii) can be used without interfering with the provision of education to all Students, including any increase in student numbers due to be accommodated at the Facility.

14.9.2 [Subject to:

- (a) D&B Co complying with its obligations to survey and carry out any necessary remedial works required pursuant to Clauses 14.9.3 and 14.9.4; and
- (b) the Existing Facility meeting the requirements of [♦] of Section 3 (*Authority's Construction Requirements*) of Schedule 5 (*Construction Matters*),

the Existing Facility shall be deemed to be suitable temporary accommodation under Clause 14.9.1, provided always D&B Co provides or funds such additional temporary accommodation (within or outside of the curtilage of the site of the Existing Facility) as may be necessary in accordance with Clause 14.9.5, in order to satisfy in full the requirements

³⁹ In the event the Certificate of Practical Completion has not been issued by the Completion Date, the Authority may need recourse to either liquidated damages or the provision of temporary accommodation. Drafting has been included above in relation to provision of temporary accommodation in respect of delay to the main facility. The Authority must decide which option is the most appropriate for its project. It will not generally be appropriate to include provision for temporary accommodation where LADs are payable and if an Authority wishes to change approach here it must seek Welsh Government approval.

of [♦] of Section 3 (*Authority's Construction Requirements*) of Schedule 5 (*Construction Matters*)]⁴⁰

- 14.9.3 Where this Clause 14.9 applies and an Existing Facility is proposed for use as temporary accommodation (with or without additional temporary accommodation within the curtilage of the site of the Existing Facility), D&B Co shall be responsible for and shall procure (at its cost) an independent survey of the Existing Facility to ascertain the extent to which such accommodation is suitable for temporary use in accordance with Clause 14.9.1.
- 14.9.4 To the extent that D&B Co is seeking to utilise an Existing Facility as temporary accommodation, pursuant to Clause 14.9.1, the Authority shall not be required to accept such temporary accommodation unless and until the survey referred to in Clause 14.9.3 has been carried out and D&B Co has completed all necessary remedial works, identified in the survey.
- 14.9.5 If the provision of temporary accommodation in accordance with Clauses 14.9.2 to 14.9.4 is not possible or practical [to accommodate some or all Students of [the Authority]/[the School Entity]] at the Existing Facility (with or without additional temporary accommodation within the curtilage of the site of the Existing Facility), D&B Co shall at the option of the Authority either:
- (a) reimburse to the Authority, the proper costs reasonably incurred by the Authority in the provision of alternative accommodation and any additional or alternative ancillary services as may be required to enable that accommodation to be used for the provision of Educational Services, including, if relevant, the cost of providing temporary facilities or accommodation and/or the costs of transportation to and from any facilities or accommodation so provided; or
 - (b) provide at D&B Co's expense equivalent alternative accommodation that meets the requirements of Clause 14.9.1 in a location within one (1) mile of the [Facility/ Existing Facility] and provide such additional or alternative ancillary services as may be required to enable that accommodation to be used for the provision of Educational Services.

⁴⁰ This drafting will require to be reviewed on a project specific basis. The general principle to be followed is that where the relevant requirements are met the Existing Facility should be used to the extent such Facilities are suitable for the relevant educational services that are to be delivered from the Completion Date. If for example, the Existing Facility is too small to accommodate Student numbers at that time, D&B Co's obligation to provide or pay for additional alternative accommodation (such as portacabins) shall only apply to the extent necessary to accommodate those Students / classes that cannot be taught in the Existing Facility.

[Unavailability of Existing Facilities⁴¹

14.10 If a Disruption Event occurs at an Existing Facility (or part thereof) prior to the Actual Completion Date:

14.10.1 where the Disruption Event arises from a breach by D&B Co of the site conduct requirements set out in [♦] of Section 3 (*Authority's Construction Requirements*) of Schedule 5 (*Construction Matters*) and the Disruption Event will cease upon suspension of the part of the Works which are the subject of that breach, the Authority may require a suspension of that part of the Works. D&B Co shall comply with such request until such time as it can carry out such Works in accordance with this Agreement and shall not be entitled to claim any relief or compensation in respect of any delay to the Works arising in such circumstances; and

14.10.2 where the Disruption Event arises from a breach by D&B Co of the site conduct requirements set out in [♦] of Section 3 (*Authority's Construction Requirements*) of Schedule 5 (*Construction Matters*) and the Works are not suspended in accordance with Clause 14.10.1, D&B Co and the Authority shall agree (acting reasonably) as expeditiously as possible the steps to be taken to ensure any unavailable parts of an Existing Facility may be re-provided as soon as practicable. The steps the parties agree to consider are the following (in the agreed order of preference set out below) or any combination of the following as appropriate:

- (a) remediation of the Disruption Event through temporary and/or permanent measures;
- (b) use of other facilities at the Existing Facility;
- (c) use of temporary accommodation at the Existing Facility;
- (d) use of facilities at another [school]/[college] or Authority property;
- (e) use of temporary accommodation at another [school]/[college] or Authority property; and/or
- (f) use of commercial facilities (in the case only if specialist facilities cannot be otherwise provided under this Clause).]

14.10.3 D&B Co shall be responsible for providing such facilities or accommodation as are agreed appropriate pursuant to Clause 14.10.2 and [♦] of Section 3 (*Authority's Construction Requirements*) of Schedule 5 (*Construction Matters*) and shall be responsible for all proper costs arising from all administrative arrangements associated with

⁴¹ Only applicable where Works are being carried out on existing sites.

providing such facilities or accommodation, including, if relevant, the cost of providing temporary facilities or accommodation and/or costs of transportation to and from any facilities or accommodation so provided. Whenever D&B Co fails to implement any steps in the manner agreed pursuant to Clause 14.10.2, the Authority may (provided it has first served written notice on D&B Co to that effect) take such steps itself and D&B Co shall reimburse to the Authority the costs incurred by the Authority in so doing, on demand.

14.10.4 Where in any circumstances the Authority requires suspension of part of the Works and notifies D&B Co that this is because the Works are interfering with or otherwise disrupting examinations at an Existing Facility during the Examination Period, D&B Co shall immediately cease such part of the Works and/or take or refrain from taking such other steps as are necessary to cease interference with examinations until the end of the Examination Period in question (or such other time is reasonably decided by the Authority [or the relevant School Entity]).]

14.10.5 Where Clause 14.10.4 applies, provided:

- (a) D&B Co has complied with its obligations under Clause 14.10.4; and
- (b) it is agreed (or determined) that the interference or disruption in question did not arise from a Disruption Event,

there shall be deemed to be a Delay Event (to the extent that there will be (or is likely to be) delay to [satisfaction of the ICT Handover Requirements, completion of the [Main] Works [or, the Post Completion Works (as applicable)] and/or a Compensation Event (where D&B Co has incurred a loss (including a loss in revenue) and/or expense as a direct result).

[Post Completion Works Phase⁴²

14.11 Subject to Clauses 14.12 (*[Post Completion Works Phase]*) and 14.13 (*[Post Completion Works Phase]*) following issue of a Certificate of Practical Completion, D&B Co shall or shall procure that the Contractor shall carry out the Post Completion Works at the Site so that such Post Completion Works are completed by the Post Completion Works Date provided:

14.11.1 where the Certificate of Practical Completion for the Post Completion Works has not been issued by the Post Completion Works Date, the

⁴² Where Post Completion Works are required to demolish Existing Facilities and/or build playing fields for example this drafting should be considered to allow the Authority to recover the costs it would incur in respect of securing use alternative facilities, such as playing fields. Where there are different Phases of Post Completion Works, project specific drafting to reflect different LAD levels should be included with reference to specific phases of works.

Authority shall be entitled to levy liquidated and ascertained damages in respect of each calendar week (or part thereof) that elapses after the Post Completion Works Date up to and including the date that a Certificate of Practical Completion for the Post Completion Works is issued, for the following amount:

For each calendar week following the Post Completion Works Date	£[INSERT FIGURE] ⁴³
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and

- 14.11.2 after the date that falls [◆]⁴⁴ after the Post Completion Works Date the Authority shall be entitled to employ an alternative contractor to carry out the Post Completion Works and shall be entitled to be reimbursed by D&B Co for all costs properly and reasonably incurred in the carrying out of any such Post Completion Works, within [◆] days of a valid invoice⁴⁵.
- 14.12 Where the Authority employs an alternative contractor to carry out any Post Completion Works in accordance with Clause 14.11.2 it shall cease to have the right to levy liquidated damages in accordance with Clause 14.11.1 once a reasonable period of time for completing the relevant Post Completion Works (having regard to the nature and extent of the relevant Post Completion Works outstanding and the programme for carrying out of such Post Completion Works by the Authority's alternative contractor) has expired.
- 14.13 Without prejudice to Clause 19 (*Defects*), Clause 14.11 (*Post Completion Works Phase*), Clause 14.12 (*Post Completion Works Phase*) and Clause 29 (*Payment*) shall be the Authority's sole remedy in connection with any delays to the completion of the Post Completion Works prior to the Actual Post Completion Works Date.
- 14.14 If a Disruption Event occurs between the Actual Completion Date and the Actual Post Completion Works Date, where the Disruption Event arises from a breach by D&B Co of the site conduct requirements set out in [◆] of Section 3 (*Authority's Construction Requirements*) of Schedule 5 (*Construction Matters*) the Authority may by written notice require suspension of that part of the Post Completion Works on the basis that the Post Completion Works are interfering with or otherwise disrupting examinations at the Facility during the Examination Period and D&B Co shall immediately cease such part of the Post Completion Works and/or take or refrain from taking such other steps as are necessary to cease interference with examinations until the end of the Examination Period in question (or such other time as is reasonably decided by the Authority [or the School Entity] and D&B Co shall not be entitled to claim any relief or compensation in respect of any delay to the Post Completion Works arising in such circumstances.]
- 14.15 It is acknowledged and agreed by the Authority and D&B Co that the damages provided for in Clause 14.11 (*Post Completion Works Phase*) are in all respects

⁴³ Where the Post Completion Works are sports pitches the LADs figure will need to include all costs to be incurred in hiring alternative facilities, transporting pupils to the alternative facilities etc.

⁴⁴ Insert number of days.

⁴⁵ Appropriate number of days to be considered on a project-specific basis.

fair and reasonable and represent a genuine pre estimate of the losses, damages and expenses, arising out of any breach by D&B Co if its obligations under this Agreement to complete the Post Completion Works by the Post Completion Works Date.

- 14.16 In the event that the provisions of Clause 14.11(*Post Completion Works Phase*) are unenforceable so that the Authority is unable to recover any payment to which the Authority would otherwise have been entitled under Clause 14.11(*Post Completion Works Phase*) the Authority shall be entitled to claim general damages from D&B Co in respect of the loss and/or damage and/or expense suffered or incurred by the Authority up to, but not exceeding the sum that would have been payable under Clause 14.11(*Post Completion Works Phase*) had the same been enforceable.

15. INDEPENDENT TESTER

Appointment

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

Changes to Terms of Appointment

- 15.2 Neither the Authority nor D&B Co shall without the other's prior written approval (not to be unreasonably withheld or delayed):
- 15.2.1 terminate, repudiate or discharge the Independent Tester Contract or treat the same as having been terminated, repudiated or otherwise discharged;
 - 15.2.2 waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Independent Tester; or
 - 15.2.3 vary the terms of the Independent Tester Contract or the service performed or to be performed by the Independent Tester.
- 15.3 The parties shall comply with and fulfil their respective duties and obligations arising under or in connection with the Independent Tester Contract.

Co-operation

- 15.4 The parties agree to co-operate with each other generally in relation to all matters within the scope of or in connection with the Independent Tester Contract. All

instructions and representations issued or made by either of the parties to the Independent Tester shall be simultaneously copied to the other and both parties shall be entitled to attend all inspections undertaken by or meetings involving the Independent Tester.

Replacement

- 15.5 If the Independent Tester's appointment is terminated otherwise than for full performance, the parties shall liaise and co-operate with each other in order to appoint, in accordance with this Clause 15.5 (*Replacement*), a replacement consultant to act as the Independent Tester as soon as reasonably practicable. The identity of any such replacement shall be as agreed by the parties and the terms of his appointment shall, unless otherwise agreed, be as set out in the Independent Tester Contract.
- 15.6 If the parties fail to agree the identity and/or terms of a replacement Independent Tester in accordance with Clause 15.5 (*Replacement*) within ten (10) Business Days of the original Independent Tester's appointment being terminated then such disagreement shall be referred for resolution in accordance with Schedule 15 (*Dispute Resolution Procedure*).

16. EQUIPMENT

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

17. PRE-COMPLETION COMMISSIONING AND COMPLETION⁴⁶

- 17.1 Not less than [six (6)] months before the Completion Date [and the Post Completion Works Date], D&B Co shall provide the Authority with a draft of the Final Commissioning Programme in respect of the Works relative thereto, as jointly developed by the Authority and D&B Co in accordance with the provisions of Clause 17.2 and 17.3 (*Pre-Completion Commissioning and Completion*) and Schedule 10 (*Outline Commissioning Programme*). The Authority shall provide D&B Co with comments on the draft Final Commissioning Programme submitted to it within [fifteen (15)] Business Days. The parties shall, within [fifteen (15)] Business Days of receipt by D&B Co of the Authority's comments agree the terms of the Final Commissioning Programme provided that the Authority may by prior notice to D&B Co change the scope and time of the Authority's Commissioning or the Authority's Post Completion Commissioning and reimburse D&B Co its

⁴⁶ The Template Education D&B Agreement assumes the Authority and D&B Co will each undertake inspection and commissioning activities both prior to and after completion. Parties need to consider which commissioning activities have to occur before and which after completion (and, in each case, by whom) on a project specific basis. In the case of schools projects, the approach to commissioning that is to be followed should be set out in an outline commissioning programme in Appendix A of Schedule 10 (*Outline Commissioning Programme*). Broadly it is envisaged that the drafting of this Schedule will follow the same approach as has been taken to schedule 10 of the Template MIM Education PA. The Template Education D&B Agreement envisages that the Final Commissioning Programme(s) will set out all requirements and obligations in relation to the development, nature, principles and performance of the completion tests to be performed to enable certification of completion to take place. Parties need to consider which commissioning activities have to occur before and which after completion (and, in each case, by whom) on a project specific basis on further education college projects in particular. Template drafting has been provided here for Post Completion Works, to be used where relevant. Authorities will need to consider whether further project specific drafting is required, including amendments to accommodate multi-facility projects where relevant.

reasonable costs incurred as a result of such change in scope or time of the Authority's Commissioning. If the parties are unable to agree the Final Commissioning Programme or the change in scope or time of the Authority's Commissioning by [♦], the matter shall be referred for determination in accordance with Schedule 15 (*Dispute Resolution Procedure*).

- 17.2 The Final Commissioning Programme[s] [in respect of the Main Works and the Post Completion Works] shall be in accordance with the [relevant] Outline Commissioning Programme and shall impose no greater or more onerous obligations on the Authority than those set out in the [relevant] Outline Commissioning Programme (unless otherwise agreed by the Authority in its absolute discretion). The Final Commissioning Programme shall then replace the [relevant] Outline Commissioning Programme. Without prejudice to the parties obligations in Clause 17.1, where this Agreement refers to an obligation being in accordance with, or pursuant to the [relevant] Final Commissioning Programme, such reference shall prior to the replacement of the [relevant] Outline Commissioning Programme with the [relevant] Final Commissioning Programme, be deemed to be a reference to the obligation being in accordance with or pursuant to the [relevant] Outline Commissioning Programme.
- 17.3 [The] [Each] Final Commissioning Programme shall describe the steps necessary, the party responsible for taking each of such steps and the timing and sequence of each of such steps to ensure insofar as relevant to the applicable Works[:
- 17.3.1 that D&B Co's Pre-Completion Commissioning and the Authority's Commissioning will not delay:
- (a)]the Actual Completion Date occurring by the Completion Date[;
or
- (b) the Actual Post Completion Works Date occurring by the Post Completion Works Date;]
- 17.3.2 that D&B Co's Post-Completion Commissioning and the Authority's Post Completion Commissioning in respect of the [Main] Works [and D&B Co's Post-Completion Commissioning and the Authority's Post Completion Commissioning in respect of the Post Completion Works] are [each] completed by the relevant Commissioning End Date.
- 17.4 The parties shall procure that the steps that they are responsible for carrying out and completing pursuant to the Final Commissioning Programme include, the activities described in Schedule 10 (*Outline Commissioning Programme*) [and in the case of D&B Co's activities, the activities described at paragraph [♦] of the Authority's Construction Requirements].⁴⁷
- 17.5 D&B Co shall notify the Independent Tester and the Authority's Representative of the date when D&B Co (acting reasonably) considers that the Works will achieve

⁴⁷ The Authority should describe any other core requirements to be complied with in relation to D&B Co's commissioning activities, including in respect of the decant of ICT equipment under the Authority's Construction Requirements.

the [ICT Handover Requirements,] the [Main] Works Requirements [and the Post Completion Works Requirements] not less than [◆] months prior to such anticipated completion. Such notification shall trigger the completion activities of the Independent Tester under this Clause.

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

Commissioning prior to Completion Date

- 17.7 D&B Co shall:

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

17.7.2 permit the Authority to undertake the Authority's Commissioning [including permitting specialist contractors engaged by the Authority to deliver and install equipment] on such dates as agreed between the Authority and D&B Co, in accordance with the [relevant] Final Commissioning Programme,⁴⁸

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

- 17.8 D&B Co shall:

17.8.1 give not less than [◆] Business Days written notice to the Independent Tester, the Facility Representative and the Authority Representative of the commencement of D&B Co's Pre-Completion Commissioning in respect of the [Main] Works Requirements [and in respect of the Post Completion Works Requirements] and shall ensure that the Independent Tester, the Facility Representative, the Authority's Representative [and the ICT Installer] are invited to witness all of, and are provided with all information they may reasonably require in relation to such D&B Co's Pre-Completion Commissioning and that the Independent Tester is invited to comment on D&B Co's Pre-Completion Commissioning; and

17.8.2 be entitled to and if so requested, shall attend the inspection referred to at Clause 17.10 (*Pre-Completion Inspections*).

- 17.9 D&B Co shall (or shall procure that the Contractor shall), give the Authority access to the Facilities at such times as may be set out in the [relevant] Final Commissioning Programme to enable the Authority and Authority Parties to

⁴⁸ The Authority should consider what the Authority's commissioning activities, if any, will entail. Parties will need to consider when the Authority's commissioning activities (including, for example, installing of its own equipment) will be carried out.

undertake the Authority's Commissioning in accordance with such Final Commissioning Programme for the period prior to completion of the [Main] Works [or the Post Completion Works (as applicable)]. When exercising such rights the Authority shall and shall procure the Authority Parties shall comply with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.

Pre-Completion Inspections

- 17.10 D&B Co shall give the Independent Tester, [the Facility Representative] and the Authority's Representative not less than [five (5)]⁴⁹ Business Days' notice and not more than [thirty (30)] Business Days' notice of the date upon which D&B Co considers that [the ICT Handover Requirements,] [Main] Works Requirements [and Post Completion Works Requirements] will be complete and the relevant tests on completion required to be performed in accordance with the [relevant] Final Commissioning Programme will be carried out. Following receipt of the notice specified in this Clause 17.10 (*Pre-Completion Inspection*) the Authority's Representative, [the Facility Representative], [a representative of the ICT Installer] and the Independent Tester shall be entitled to inspect the relevant Works on the date or dates reasonably specified by D&B Co in accordance with this Clause 17.10 (*Pre-Completion Inspection*), and to attend any of the tests on completion. D&B Co shall be entitled to and if so requested shall accompany the Authority's Representative, the Facility Representative, [the representative of the ICT Installer] and the Independent Tester on any such inspection.

Pre-Completion Matters

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

⁴⁹ Whilst this time period is in square brackets, the 5 Business Day minimum notice period is the default position and any extension to this will need to be justified on a project specific basis.

Completion Certificate[s]⁵⁰

- 17.12 Pursuant to the terms of the Independent Tester Contract and subject to Clauses 17.14 to 17.18 (*Snagging Items*), the parties shall procure that the Independent Tester shall when he is satisfied that: (i) the [ICT Handover Requirements are satisfied, issue the ICT Handover Acceptance Certificate; (ii) the [Main] Works Requirements are satisfied, issue a Certificate of Practical Completion [in respect of the Main Works]; [(iii) the Post Completion Works Requirements are satisfied, issue a Certificate of Practical Completion in respect of those Post Completion Works]; and (iv) the Snagging Items in respect of the relevant Works have been completed to his satisfaction in accordance with Clauses 17.14 to 17.18 (*Snagging Items*), issue a Snagging Items Completion Certificate, each to that effect, to the Authority and D&B Co.
- 17.13 Without prejudice to Clauses 17.14 (*Snagging Items*) and 17.19 (*Snagging Items*), or Clause 19 (*Defects*) (or either party's right to make a claim under the Independent Tester Contract) the issue of the [ICT Handover Acceptance Certificate,] Certificate of Practical Completion [in respect of the Main Works] [and/or Certificate of Practical Completion in respect of the Post Completion Works (as applicable)] shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence (but only for the purpose of ascertaining the Actual Completion Date [,ICT Handover Date,] [and/or the Actual Post Completion Works Date (as applicable)]) that the Works are complete in accordance with the [Main] Works Requirements [ICT Handover Requirements] [and/or Post Completion Works Requirements] [(as the case may be)] on the date stated in the [relevant] Certificate of Practical Completion [or ICT Handover Acceptance Certificate].

Snagging Items⁵¹

- 17.14 [The Independent Tester shall on the same day as the date of issue of the ICT Handover Acceptance Certificate issue to D&B Co and the Authority a list of any relevant Snagging Items (the "**Snagging List**"). Within [five (5)] Business Days after the date of receipt from the Independent Tester of the Snagging List, D&B Co will provide to the Authority and the Independent Tester a reasonable programme (the "**Snagging Programme**") for making good each Snagging Item set out in the Snagging List provided that the Snagging Programme will require that each Snagging Item will be made good within twenty (20) Business Days after the date of provision of the Snagging List or, where it is not reasonably practicable to make good within twenty (20) Business Days due to the lead times for supplies or materials, or to avoid interference with the ICT Installer, within such time as is reasonably practicable (up to a maximum of [three (3) months]). The parties will seek to agree the Snagging Programme or in default of agreement will refer the matter for determination under Clause 44 (*Dispute Resolution Procedure*).]
- 17.15 [The Independent Tester shall on the same day as the date of issue of the Certificate of Practical Completion in relation to the [Main] Works issue an update of the Snagging Items on the Snagging List prepared pursuant to Clause 17.14 (*Snagging Items*). Within [five (5)] Business Days after the date of receipt from the Independent Tester of that updated Snagging List, D&B Co will provide to the Authority and the Independent Tester an updated Snagging Programme for

⁵⁰ Clauses 17.12 and 17.13 will need to be adjusted to include reference to Post Completion Works if relevant.

⁵¹ Clauses 17.14 to 17.19 may require to be tailored for college projects, where the standard school phasing approach is not adopted.

making good each new or outstanding Snagging Item set out on the Snagging List, provided that the Snagging Programme will require that each Snagging Item included on the original Snagging List will be made good within such period as is provided under the original Snagging Programme and, in the case of new Snagging Items, within [twenty (20)] Business Days after the date of provision of the updated Snagging List or, where it is not reasonably practicable to make good within [twenty (20)] Business Days due to the lead times for supplies or materials, within such time as is reasonably practicable (up to a maximum of [three (3) months]). The parties will seek to agree the Snagging Programme or in default of agreement will refer the matter for determination under Clause 44 (*Dispute Resolution Procedure*).]

- 17.16 [The Independent Tester shall on the same day as the date of issue of the Certificate of Practical Completion in relation to the Post Completion Works issue a list of any relevant Snagging Items in respect of the Post Completion Works, (the "**PCW Snagging List**"). Within [five (5)] Business Days after the date of receipt from the Independent Tester of that PCW Snagging List, D&B Co will provide to the Authority and the Independent Tester a reasonable programme (the "**PCW Snagging Programme**") for making good each Snagging Item set out on the PCW Snagging List provided that the PCW Snagging Programme will require that each Snagging Item will be made good within [twenty(20)] Business Days after the date of provision of the PCW Snagging List or, where it is not reasonably practicable to make good within [twenty (20)] Business Days due to the lead times for supplies or materials, within such time as is reasonably practicable (up to a maximum of [three (3) months]). The parties will seek to agree the PCW Snagging Programme or in default of agreement will refer the matter for determination under Clause 44 (*Dispute Resolution Procedure*).]
- 17.17 D&B Co shall, in consultation with the Authority's Representative and in such a manner as to cause as little disruption as reasonably practicable to the Authority's Post Completion Commissioning and the Authority's use of the Facilities [and so as not to interfere with the activities of the ICT Installer to be carried out pursuant to Section 2 (*Construction Phase Access Protocol*) of Schedule 21 (*Joint Operating Protocol*) and otherwise in accordance with the requirements of Schedule 21 (*Joint Operating Protocol*),] make good each Snagging Item in accordance with the [relevant] Snagging Programme [or PCW Snagging Programme (as applicable),] to the satisfaction of the Independent Tester. Upon satisfactory completion of the [relevant] Snagging List [or PCW Snagging List (as applicable)], the Independent Tester will issue the [relevant] Snagging Items Completion Certificate in accordance with the Independent Tester Contract and Schedule 16 (*Certificates*).
- 17.18 If any Snagging Item has not been rectified within the time periods permitted pursuant to Clause 17.14, Clause 17.15 or Clause 17.16 (*Snagging Items*), as applicable, then the Authority will be entitled to effect such repairs as may be necessary to rectify the Snagging Item(s) and recover the costs of effecting such repairs from D&B Co as a debt.
- 17.19 The issue of [the ICT Handover Acceptance Certificate and] [the]/[a] Certificate of Practical Completion [in respect of the Main Works or Post Completion Works (as applicable)] shall in no way affect or diminish the obligations of D&B Co under this Agreement including in respect of any Defects.

[WiFi Completion

- 17.20 D&B Co and the Authority shall procure that the Independent Tester shall, in accordance with the Independent Tester Contract and no earlier than the date that falls [♦]⁵² weeks following the Actual Completion Date carry out the WiFi Post-Completion Tests so that they have been completed by no later than the WiFi Tests Completion Date. The Authority and D&B Co shall be entitled to attend such WiFi Post-Completion Tests. D&B Co shall, if so requested, accompany the Authority's Representative and the Independent Tester in relation to the carrying out of the WiFi Post Completion Tests.
- 17.21 The parties shall procure that the Independent Tester, within [five (5)] Business Days of any inspection made pursuant to Clause 17.20 (*WiFi Completion*), notifies D&B Co and the Authority of any outstanding matters (including, without limitation, the repetition of any of the WiFi Post-Completion Tests which are required to be carried out and passed in accordance with the Final Commissioning Programme) which are required to be attended to before the WiFi Post-Completion Tests can be considered to be complete in accordance with the WiFi PC Criteria. D&B Co shall attend to such matters at its own cost and shall give the Independent Tester and the Authority's Representative further notice of the date on which D&B Co considers that such matters have been attended to so that the procedures in Clause 17.20 (*WiFi Completion*) and this Clause 17.21 (*WiFi Completion*) are repeated as often as may be necessary to ensure that all such outstanding matters are attended to and that the WiFi PC Criteria are satisfied.
- 17.22 Pursuant to the terms of the Independent Tester Contract, the parties shall procure the Independent Tester shall, when he is satisfied that the WiFi Post Completion Tests have been passed and the WiFi PC Criteria met, issue a Certificate of WiFi Completion to that effect. The issue of the Certificate of WiFi Completion shall in the absence of manifest error, bad faith or fraud, be conclusive evidence that the WiFi PC Criteria have been satisfied on the date stated in such certificate.
- 17.23 If the WiFi Actual Completion Date has not occurred on the date that falls [♦] weeks after the Actual Completion Date the Authority, acting reasonably, may itself take or engage others to remedy any of the outstanding matters that remain to be carried out in order to satisfy the WiFi Post Completion Tests to the same standard as would be required of D&B Co under the terms of this Agreement (the "**WiFi Remedial Steps**") provided that if the Authority either takes steps itself or engages with others to remedy any of the outstanding matters that remain to be carried out it will be entitled to recover the costs of effecting such works from D&B Co as a debt.
- 17.24 The issue of the Certificate of WiFi Completion shall in no way affect or diminish the obligations of D&B Co under this Agreement including in respect of any Defects.]

As-built specification

- 17.25 Prior to issue of [the]/[a] Certificate of Practical Completion [in respect of the Main Works] [and in respect of the Post Completion Works] D&B Co shall provide to the Authority a hard copy and an electronic copy (in accordance with the Project BIM Agreement) of the "as-built" drawings, "as-built" specification and all ["final issue"

⁵² This would need to be tested shortly after the Actual Completion Date, when the Facility is occupied (and in any event significantly ahead of the end of the relevant Defects Liability Period).

construction drawings] relating to the relevant Works, together with a written statement from D&B Co's Representative to the Authority's Representative certifying that all such items are true and accurate.]⁵³

18. [POST COMPLETION COMMISSIONING]

[Commissioning

18.1 D&B Co and the Authority shall, within[:

18.1.1 [♦] Business Days following the Actual Completion Date]; and

18.1.2][♦] Business Days following the Actual Post Completion Works Date,]

respectively undertake and complete D&B Co's Post-Completion Commissioning and the Authority's Post Completion Commissioning, in accordance with the [relevant] Final Commissioning Programme. Both parties shall, at all times, and in particular in the period between the Actual Completion Date and the Actual Commissioning End Date [or the Actual Post Completion Works Date and Actual Commissioning End Date, as relevant,] use reasonable endeavours to assist the other party to ensure compliance with the [relevant] Final Commissioning Programme.]

Information

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

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

18.4 On the completion of D&B Co's Post-Completion Commissioning and the Authority's Post Completion Commissioning [in respect of the Main Works and, in respect of and the Post Completion Works] the Independent Tester shall issue the Commissioning Completion Certificate [in respect of that aspect of the Works].

⁵³ Documentation to be specified on a project by project basis. Documents should, as a minimum, include "as-built" drawings and "final issue" construction drawings. Authorities should monitor compliance with this important provision, through the relevant completion requirements. Note the drafting assumes use of BIM. Where this is not the case, the Authority should discuss approach with Welsh Government.

[Operational Manuals⁵⁴

- 18.5 D&B Co shall make available on the Site to the Authority's Representative:
- 18.5.1 at least [◆] weeks prior to the anticipated Actual Completion Date [◆] [paper] copies and [electronic copies (in accordance with the Project BIM Agreement)] of a draft operation and maintenance manual in sufficient detail to allow the Authority to plan for the safe and efficient operation of the Facilities;
 - 18.5.2 on or before the Actual Completion Date [◆] [paper] copies [and electronic copies (in accordance with the Project BIM Agreement)] of a final draft operation and maintenance manual in sufficient detail to allow the Authority to operate and use the Facilities safely and efficiently; and
 - 18.5.3 within [twenty (20) Business Days]⁵⁵ following the Actual Completion Date, [◆] [paper] copies [and electronic copies (in accordance with the Project BIM Agreement)] of the principal operation and maintenance manual,
- in each case including all manufacturers' instructions relating to Equipment installed by D&B Co and [◆].⁵⁶
- 18.6 D&B Co shall provide to the Authority such information after the Actual Completion Date [and the Actual Post Completion Works Date] as relates to any Snagging Items or rectification of Defects relative thereto, as is reasonably necessary to allow for the updating of any of the items listed in Clause 18.5 (*Operational Manuals*).
- 18.7 On termination of this Agreement (howsoever arising) prior to the provision by D&B Co in accordance with Clause 18.5 (*Operational Manuals*) of the items listed therein, D&B Co shall within ten (10) Business Days of such termination provide a copy of any operating and maintenance manual not yet provided (completed as appropriate to the date of termination) to the Authority.]

⁵⁴ To be discussed on a project specific basis, whether/to what extent D&B Co will have a role in the preparation of Operational Manuals.

⁵⁵ Note that drafting for the final operation and maintenance manual in respect of the final Phase of a School/College Facility should tie in with the timescale referred to in Appendix B (*Completion Criteria*) of Schedule 10 (*Outline Commissioning Programme*) ..

⁵⁶ To be amended on a project specific basis. For example, operational manuals may need to be made available at an earlier date depending on the timing of commissioning activities. Further, it may be possible, for D&B Co to provide draft manuals to the Authority for comment prior to finalisation and suitable amendments should be made to the Clause where relevant. It is expected that substantially complete manuals will be available by the Actual Completion Date with final drafts being made available within an agreed time thereafter. The Authority should list any other manuals required.

Please note that in accordance with Welsh Language Standards certain documents may need to be translated and/or produced in bi-lingual form. Specific Authority requirements should be considered during the New Project Approval Process under the SPA.

[Decanting, Decommissioning and Equipment Transfer

- 18.8 The Authority and D&B Co shall, as appropriate, undertake any necessary decanting and decommissioning activities in accordance with the requirements of the [relevant] Final Commissioning Programme and Appendix A (*Commissioning Responsibilities*) of Schedule 10 (*Outline Commissioning Programme*) and any Equipment transfer in accordance with Schedule 11 (*Equipment*) such that D&B Co is able to perform its obligations in respect of the Works.⁵⁷

19. DEFECTS

D&B Co to Make Good

- 19.1 D&B Co shall procure that all Defects which are present or shall appear in the Works during the [relevant] Defects Liability Period for those Works shall be made good by D&B Co to the standards required by this Agreement within a reasonable time. The Authority and D&B Co both acting reasonably and subject to Schedule 21 (*Joint Operating Protocol*), shall agree a programme for access for this purpose with the intention to cause the least practicable disruption to users of the Facilities.

Schedule of Defects

- 19.2 Without prejudice to Clause 19.1 (*D&B Co to Make Good*), not later than [♦] Business Days after the expiry of the [relevant] Defects Liability Period, the Authority shall procure that the Authority's Representative shall prepare a schedule of Defects ("**Schedule of Defects**") specifying any Defects in the [Main] Works [or the Post Completion Works (as applicable)] apparent as at the date of expiry of the [relevant] Defects Liability Period which have not been made good by D&B Co by such date in accordance with Clause 19.1 (*D&B Co to Make Good*) and shall deliver such Schedule of Defects to D&B Co. Subject always to Clause 19.3 (*D&B Co Failure to Comply*), D&B Co shall, at its own expense, as soon as reasonably practicable after the date of issue of the relevant Schedule of Defects taking into account the requirements of Schedule 21 (*Joint Operating Protocol*) make good all such Defects.

D&B Co Failure to Comply

- 19.3 Where D&B Co fails to comply with the provisions of Clause 19.1 (*D&B Co to Make Good*) or Clause 19.2 (*Schedule of Defects*) [in respect of the Main Works or the Post Completion Works (as relevant)], the Authority may appoint or instruct any third party contractor to execute and complete the remedial, repair or other works as may be necessary to make good any Defect [in the relevant Works], in which event D&B Co shall reimburse the Authority, on demand, its reasonable costs of doing so (which costs shall include any cost premium applied by the relevant third party to account for the requirements and restrictions for its access

⁵⁷ In the case of a school project, the Authority will need to liaise with the School Entity on its decant requirements which are to be reflected in Schedule 11 (*Equipment*).

of the same or a similar nature to those restrictions and requirements set out in Schedule 21 (*Joint Operating Protocol*).

Certificate of Making Good Defects

19.4 Without prejudice to D&B Co's continuing obligations under this Agreement, when, following[:

19.4.1]the Actual Completion Date, all Defects in the Schedule of Defects in respect of the [Main] Works have been made good[; and

19.4.2 the Actual Post Completion Works Date all Defects in the Schedule of Defects in respect of the Post Completion Works have been made good,

[in each case]] the Authority's Representative shall issue a statement to that effect to D&B Co (a "**Certificate of Making Good Defects**").

Liability

19.5 Following the expiry of the [relevant] Defects Liability Period, D&B Co shall be liable to the Authority for the reasonable costs of, and reasonably foreseeable expenses properly incurred in, procuring the repair of the [relevant] Defects. For the avoidance of doubt, the provisions of this Clause 19 (*Defects*) shall not be construed as limiting or excluding in any way the Authority's general right to claim damages for any breach of this Agreement by D&B Co.

Limitation

19.6 For the avoidance of doubt, the provisions of this Clause 19 (*Defects*) shall not in any manner or way serve to limit, reduce, satisfy, discharge, negate, avoid or otherwise affect the obligations and/or liability (including in respect of Defects) of D&B Co to the Authority specified or referred to elsewhere in this Agreement.

20. FOSSILS AND ANTIQUITIES

Property

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

Discovery

20.2 Upon the discovery of any such item during the course of the Works, D&B Co shall:

- 20.2.1 immediately notify the Authority's Representative of such discovery;
- 20.2.2 take all steps not to disturb the object and, if necessary, cease any Works in so far as the carrying out of such Works would endanger the object or prevent or impede its excavation; and
- 20.2.3 take all necessary steps to preserve the object in the same position and condition in which it was found.

Action

- 20.3 The Authority shall procure that the Authority's Representative promptly, and in any event within ten (10) Business Days of receipt of notice pursuant to Clause 20.2.1, issues an instruction to D&B Co specifying what action the Authority's Representative requires D&B Co to take in relation to such discovery.
- 20.4 D&B Co shall promptly and diligently comply with any instruction issued by the Authority's Representative referred to in Clause 20.3 (*Action*) above (except and to the extent that such instruction constitutes an Authority Works Variation pursuant to Clause 20.6 (*Action*) below, in which case the provisions of Schedule 13 (*Variation Procedure*) shall apply, at its own cost.
- 20.5 If directed by the Authority's Representative, D&B Co shall allow representatives of the Authority to enter the Site for the purposes of removal or disposal of such discovery provided that such entry shall be subject to the Authority complying with all relevant safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.
- 20.6 If, in relation to such discovery, the Authority requires D&B Co to carry out works (being any work of alteration, addition, demolition or extension or variation in the Works) which are not works which would be necessary for the purpose of compliance with Law or any Consents, it must issue an Authority Works Variation Enquiry in accordance with the provisions of Schedule 13 (*Variation Procedure*).⁵⁸

⁵⁸ The discovery of fossils and antiquities is treated as a Relief Event entitling D&B Co to an extension of time in accordance with Clause 24 (*Delay Events*) but leaving the financial risks of such discovery with D&B Co. If there is a known problem on the/a Site the provisions relating to discoveries may need to be reviewed and amended on a project specific basis.

PART 4: QUALITY ASSURANCE

21. QUALITY ASSURANCE

Quality Plans and Systems

- 21.1 D&B Co shall procure that all aspects of the Project Operations are the subject of quality management systems in accordance with the provisions of this Clause 21 (*Quality Assurance*).
- 21.2 The quality management systems referred to in Clause 21.1 (*Quality Plans and Systems*) above shall be reflected in appropriate quality plans, the standard of which shall be consistent with [BS EN ISO 9001] (as the case may be) or any equivalent standard which is generally recognised as having replaced them (or either of them).
- 21.3 Without limitation to the generality of Clause 21.2 (*Quality Plans and Systems*), there shall be:
- 21.3.1 a Design Quality Plan; and
- 21.3.2 a Construction Quality Plan,
- provided that the Design Quality Plan and the Construction Quality Plan may be incorporated into one document.
- 21.4 D&B Co shall procure that the Project Operations are carried out in compliance with the Quality Plans. All Quality Plans shall be submitted to the Authority's Representative in accordance with Schedule 7 (*Review Procedure*) and D&B Co shall not be entitled to implement or procure the implementation of any Quality Plan unless D&B Co is entitled to proceed with such implementation pursuant to Schedule 7 (*Review Procedure*).
- 21.5 D&B Co shall implement the quality management systems referred to in Clause 21.1 (*Quality Plans and Systems*) and shall procure that:
- 21.5.1 the Contractor implements the Design Quality Plan; and
- 21.5.2 the Contractor implements the Construction Quality Plan.
- 21.6 Where any aspect of the Project Operations is performed by more than one contractor or subcontractor, then the provisions of this Clause 21 (*Quality Assurance*) (in so far as relevant or appropriate to the activities to be performed by such contractor or subcontractor) shall apply in respect of each of such contractors or subcontractors, and references in this Clause 21 (*Quality Assurance*) to the

"Contractor" shall be construed accordingly. To avoid doubt, this Clause shall not be construed as requiring subcontractors of the Contractor to have their own quality plans but only to comply with the Design Quality Plan and the Construction Quality Plan (as the case may be).

- 21.7 D&B Co shall from time to time submit to the Authority's Representative in accordance with Schedule 7 (*Review Procedure*) any changes to any of the Quality Plans required for such Quality Plan to continue to comply with the requirements set out in Clause 21.2 (*Quality Plans and Systems*). The Authority's Representative may raise comments on any such proposed change only on the grounds set out in paragraph 3 of Schedule 7 (*Review Procedure*).
- 21.8 If there is no objection under Schedule 7 (*Review Procedure*) to a change to any Quality Plan proposed pursuant to Clause 21.7 (*Quality Plans and Systems*), the Quality Plan shall be amended to incorporate such change.

Quality Manuals and Procedures

- 21.9 If any Quality Plan refers to, relies on or incorporates any quality manual or procedure, then such quality manual or procedure or the relevant parts of it shall be submitted to the Authority's Representative at the time that the relevant Quality Plan or part of (or change to) a Quality Plan is submitted in accordance with Schedule 7 (*Review Procedure*), and the contents of such quality manual or procedure shall be taken into account in the consideration of the relevant Quality Plan or part of (or change to) a Quality Plan in accordance with Schedule 7 (*Review Procedure*).

Quality Management

- 21.10 D&B Co shall maintain a quality management system which shall:
- 21.10.1 ensure the effective operation of the quality systems described in this Clause 21 (*Quality Assurance*);
 - 21.10.2 cause an audit of the quality systems at regular intervals and the findings of such audit will be reported to the Authority's Representative;
 - 21.10.3 require review of all quality systems at intervals agreed with the Authority's Representative to ensure their continued suitability and effectiveness;
 - 21.10.4 require liaison with the Authority's Representative on all matters relating to quality management; and
 - 21.10.5 require production of reports and their delivery to the Authority's Representative.

Quality Monitoring

- 21.11 The Authority's Representative may carry out audits of D&B Co's quality management system (including all relevant Quality Plans and any quality manuals and procedures) to establish that D&B Co is complying with Clauses 21.1 and 21.3 (*Quality Plans and Systems*). The Authority's Representative may carry out such audits at approximate intervals of three (3) months and may carry out other periodic monitoring, spot checks and auditing of D&B Co's quality management systems. D&B Co shall procure that the Authority's Representative shall have an equivalent right in respect of the Contractor's quality management systems. D&B Co shall cooperate, and shall procure that any Sub-Contractor co-operates, with the Authority's Representative including providing him with all information and documentation which he reasonably requires in connection with his rights under this Clause.

Hazardous Substances and Materials⁵⁹

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

21.12.1 material damage to the Facilities;

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

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

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

- 21.13 D&B Co shall not bring in or on to (or keep or maintain in or on) the Site any hazardous materials or equipment without the prior written consent of the Authority and unless D&B Co has complied with all relevant Law.

- 21.14 Without prejudice to the generality of its obligations, D&B Co shall:

21.14.1 procure that all hazardous materials and equipment used, by it or by a Sub-Contractor or used on behalf of any of them, or stored, by it or by a Sub-Contractor or stored on behalf of any of them, on the Site are kept in accordance with all relevant Law and Good Industry Practice, properly

⁵⁹ Where the Authority considers it appropriate, a carve-out may be provided to cover the case of phased construction and handover for the Site.

and securely labelled and stored, under appropriate supervision and used only by appropriately trained and competent staff; and

21.14.2 use all practicable and reasonable means to:

- (a) prevent or counteract, to the satisfaction of the Authority's Representative, the unlawful emission of any such hazardous substance;
- (b) avoid the unlawful discharge into any conducting media serving the Facilities of any hazardous substance;
- (c) prevent the unlawful generation, accumulation or migration of any hazardous substance at or from the Facilities; and
- (d) prevent any environmental claims arising or any circumstances arising likely to result in any environmental claims,

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

22. COMMUNITY BENEFITS

22.1 D&B Co shall comply with the Authority's Community Benefits Requirements in accordance with D&B Co's Community Benefits Method Statements.

22.2 If, in relation to the Works and prior to issue of the Certificate of Practical Completion [in respect of the [Main] Works]:

22.2.1 [*insert target*] then D&B Co shall pay to the Authority the sum of [*insert amount*] (indexed);

22.2.2 [*insert target*] then D&B Co shall pay to the Authority the sum of [*insert amount*] (indexed);

22.2.3 [*insert target*] then D&B Co shall pay to the Authority the sum of [*insert amount*] (indexed); and

22.2.4 provide the Authority with quarterly monitoring information in the form required using the Dashboard Template at the end of each quarter, commencing on the Commencement Date, and ending on the Certificate of Practical Completion [for the Facility] (each a "**Quarterly Works Monitoring Date**") then D&B Co shall pay to the Authority the sum of [five thousand pounds (£5,000)] (indexed);

[provided that in each case the Authority has first served notice on D&B Co notifying it of its non-compliance and (where remediable) D&B Co has failed to remedy such non-compliance prior to issue of the Certificate of Practical Completion [for the Facility]. The parties shall endeavour to agree the contents of each quarterly monitoring report within [ten (10)] Business Days of the [4th, 8th and 12th] Quarterly Works Monitoring Dates in accordance with this Clause 22.2, failing which either party may refer the matter to the Dispute Resolution Procedure.]

- 22.3 The Authority's sole and exclusive remedy in respect of a breach of Clause 22.2.1 to Clause 22.2.3 above shall be the payments provided for in Clause 22.2.1 to Clause 22.2.3, respectively [and D&B Co's maximum liability in this respect shall be [insert amount] (indexed)].
- 22.4 All payments due by D&B Co to the Authority under this Clause shall become due and payable within [♦] Business Days of written demand.

Sustainable Development

- 22.5 D&B acknowledges that the Authority is subject to the Well-being of Future Generations Act and shall assist and cooperate with the Authority to facilitate the Authority's compliance with its obligation to carry out sustainable development.
- 22.6 D&B further acknowledges that the information contained in or supplied in connection with Clauses 22.1 to 22.4 (*Community Benefits*) and Schedule 20 (*Community Benefits*) may be published in whole or in part and/or supplied by the Authority to a Relevant Authority, as the Authority in its sole discretion considers necessary for compliance with its obligations to supply, produce and/or publish information under the Well-being of Future Generations Act.
- 22.7 Where the Authority requests information from D&B Co in connection with D&B Co's obligations under this Agreement (including without limitation Clauses 22.1 to 22.4 (*Community Benefits*) and Schedule 20 (*Community Benefits*)) in relation to any duty or obligation on the Authority under the Well-being of Future Generations Act, D&B Co shall supply such information as soon as possible and in any event within [♦] Business Days of receiving such request, D&B Co shall⁶⁰:
- 22.7.1 comply with the Ethical Employment Code and any similar applicable schemes or codes of practice which apply to D&B Co;
- 22.7.2 encourage all Sub-Contractors to sign up to the Ethical Employment Code and any similar applicable schemes or codes of practice promoted by the Welsh Government; and
- 22.7.3 ensure that [the Contractor and] all Sub-Contractors who have signed up to the Ethical Employment Code comply with that code of practice and

⁶⁰ Where the Contractor has signed up to the Welsh Government's Code of Practice - Ethical Employment and Supply Chains, compliance with the code shall be mandatory.

any similar applicable schemes or codes of practice which apply to that Sub-Contractor.

PART 5: INFORMATION TECHNOLOGY

23. INFORMATION TECHNOLOGY⁶¹

- 23.1 The Authority shall procure that the Authority Parties shall, carry out the works and activities identified as its responsibility in the [ICT Design Requirements] contained in [♦] of Section [♦] of Schedule 5 (*Authority's Construction Requirements*) in respect of the specification, design, construction, provision, installation, test and integration of ICT Infrastructure and ICT Assets.
- 23.2 D&B Co shall, or shall procure that the D&B Co Parties shall carry out the Works and the activities identified as its responsibility in the [ICT Design Requirements] contained in [♦] of Section [♦] of Schedule 5 (*Authority's Construction Requirements*) in respect of the specification, design, construction, provision, installation, test and integration of ICT Infrastructure and ICT Assets.
- 23.3 D&B Co and the Authority shall each comply with their respective obligations in this Agreement in respect of the commissioning of ICT Infrastructure and ICT Assets including (without limitation) Schedule 10 (*Outline Commissioning Programme*), Schedule 11 (*Equipment*) and Section 2 (*Construction Phase Access Protocol*) of Schedule 21 (*Joint Operating Protocol*).

⁶¹ Provisions relating to Information Technology are to be included on a project specific basis, where required (or marked 'not used', where not required).

PART 6: DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE

24. DELAY EVENTS AND COMPENSATION EVENTS⁶²

- 24.1 If, at any time, D&B Co becomes aware that there will be (or is likely to be) a delay in completion of the Works, D&B Co shall forthwith give notice to the Authority's Representative to that effect specifying the relevant delay or impediment. In relation to any such delay or impediment if the Authority's Representative is satisfied, or it is determined in accordance with Schedule 15 (*Dispute Resolution Procedure*), that such delay or impediment has arisen as a result of the occurrence of a Delay Event, then, subject to Clause 24.2 (*Delay Events and Compensation Events*) and Clause 24.15 (*Term Dates*), the Authority's Representative shall allow D&B Co an extension of time equal to the delay or impediment caused by such Delay Event (taking into account reasonably foreseeable consequences of the Delay Event) and shall revise the Completion Date, [the ICT Handover Date] [and/or the Post Completion Works Date (as appropriate)].
- 24.2 Notwithstanding any other provision in this Agreement, if D&B Co is (or claims to be) affected by a Delay Event and/or a Compensation Event:
- 24.2.1 it shall (and shall procure that the D&B Co Parties shall) take and continue to take all reasonable steps to eliminate or mitigate the consequences of such an event upon the performance of its obligations under this Agreement and, where relevant, resume performance of its obligations affected by the Delay Event and/or Compensation Event as soon as practicable; and
- 24.2.2 it shall neither be relieved from liability under this Agreement nor entitled to any extension of time for the purpose of Clause 24 (*Delay Events and Compensation Events*) to the extent that it is delayed or impeded due to its failure (if any) to comply with its obligations under Clause 24.2.1 above.
- 24.3 For the purposes of this Agreement, a Delay Event means any of the following to the extent in each case that there will be (or is likely to be) a delay to [satisfaction of the ICT Handover Date, completion of the [Main] Works [or, the Post Completion Works Date (as applicable)]:
- 24.3.1 an Authority Works Variation initiated by an Authority Works Variation Enquiry in accordance with paragraph 2 of Section 2 of Schedule 13 (*Variation Procedure*) in relation to which D&B Co has issued a response pursuant to paragraph 3.2.2(b) of Section 2 of Schedule 13 (*Variation Procedure*) specifying and providing evidence that implementation of the Authority Works Variation would delay the completion of the Facilities if

⁶² Delay Events may apply after the original completion date. However, the Authority should be under no obligation to accept early completion where D&B Co has completed prior to the revised completion date.

this has been agreed between the parties or determined to be the case in accordance with Schedule 15 (*Dispute Resolution Procedure*),⁶³

- 24.3.2 any breach by the Authority and/or any Authority Party of any of the Authority's express obligations under this Agreement to the extent in each case that any such breach is not caused, or contributed to, by D&B Co or any D&B Co Party;
- 24.3.3 the execution of works on the Site not forming part of this Agreement by the Authority or any contractors employed by the Authority;
- 24.3.4 opening up of the Works pursuant to Clauses 13.3 to 13.7 (*Right to Open Up*) (inclusive) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with Schedule 15 (*Dispute Resolution Procedure*) that the opening up of the Works was reasonable in the light of other Defects previously discovered by the Authority);
- 24.3.5 Force Majeure;
- 24.3.6 a Relief Event;
- 24.3.7 the suspension by D&B Co pursuant to Clause 29.13 (*Right to Suspend*) of any or all obligations as a result of the non-payment by the Authority of sums properly due to D&B Co under this Agreement;
- 24.3.8 [the occurrence of circumstances deemed to be a Delay Event pursuant to Clause 10.4 (*Responsibility for Ground Conditions and Contamination*)];⁶⁴
- 24.3.9 [a Further Asbestos Delay];⁶⁵
- 24.3.10 [the occurrence of circumstances deemed to be a Delay Event pursuant to Clause 11.4.3 (a) (*Judicial Proceedings*)] [or];⁶⁶
- 24.3.11 the occurrence of circumstances deemed to be a Delay Event pursuant to Clause 14.10.5 (*Unavailability of Existing Facilities*),

⁶³ The issue of an Authority Works Variation will not, in itself, give rise to a Delay Event as D&B Co will be obliged to continue to carry out the Project Operations until such time as the Variation is agreed. The Authority may wish to consider whether the Project Operations ought to be suspended whilst the Variation process is ongoing e.g. to avoid abortive works and costs being incurred, in which case it would be appropriate to factor the time/cost implications of such suspension in D&B Co's claim for a Delay Event and Compensation Event.

⁶⁴ Include where Clauses 10.3 and 10.4 are used.

⁶⁵ Include where Clauses 10.5 to 10.14 are used.

⁶⁶ Include where Clause 11.4 is used.

- 24.4 Without prejudice to the generality of Clause 24 (*Delay Events and Compensation Events*), D&B Co shall give notice in writing to the Authority's Representative as soon as it (or the Contractor) can reasonably foresee a Delay Event and/ or a Compensation Event (as applicable) occurring or, if the same is not reasonably foreseeable, as soon as it (or the Contractor) shall become aware of a Delay Event and/or a Compensation Event (as applicable). D&B Co shall within ten (10) Business Days after such notification, give further written details to the Authority's Representative which shall include:
- 24.4.1 a statement of which Delay Event and/ or Compensation Event the claim is based upon;
 - 24.4.2 details of the circumstances from which the Delay Event and/ or Compensation Event arises;
 - 24.4.3 details of the contemporary records which D&B Co will maintain to substantiate its claim;
 - 24.4.4 details of the consequences (whether direct or indirect, financial or non-financial) which such Delay Event and/ or Compensation Event may have upon completion of the [Facilities/Main Works] [, the achievement of the ICT Handover Requirements] [and/or completion of the Post Completion Works if relevant];
 - 24.4.5 details of any measures which D&B Co proposes to adopt to mitigate the consequences of such Delay Event and/ or Compensation Event; and
 - 24.4.6 details of any relief from its obligations under this Agreement that D&B Co considers is reasonably required as a consequence of a Compensation Event including:
 - (a) a detailed description of the obligations from which relief is requested and the extent and duration of the requested relief;
 - (b) an explanation of why D&B Co considers that the Compensation Event has or will result in a breach of D&B Co's obligations would be reasonable in the circumstances; and
 - (c) the likely impact on D&B Co and/or the Project in the event that D&B Co is not relieved from such obligations under the this Agreement.
- 24.5 As soon as possible but in any event within [five (5)] Business Days of D&B Co (or the Contractor) receiving, or becoming aware of, any supplemental information which may further substantiate or support D&B Co's claim then, other than in respect of:

- 24.5.1 a Delay Event where the Completion Date[, ICT Handover Date] [and/or the Post Completion Works Date (if relevant)] has already been revised pursuant to Clause 24.7 (*Delay Events and Compensation Events*); or
- 24.5.2 a Compensation Event where D&B Co has already been compensated pursuant to Clause 24.14 (*Compensation*) and has (where relevant) been granted such relief from its obligations under this Agreement as is reasonable for such Compensation Event,

D&B Co shall submit further particulars based on such information to the Authority's Representative.

24.6 The Authority's Representative shall, after receipt of written details under Clause 24.4 (*Delay Events and Compensation Events*), or of further particulars under Clause 24.5 (*Delay Events and Compensation Events*), be entitled by notice in writing to require D&B Co to provide such further supporting particulars as he may reasonably consider necessary. D&B Co shall afford the Authority's Representative reasonable facilities for investigating the validity of D&B Co's claim including, without limitation, onsite inspection.

24.7 Subject to the provisions of this Clause 24 (*Delay Events and Compensation Events*), the Authority's Representative shall:

- 24.7.1 in respect of a Delay Event, revise the Completion Date[, ICT Handover Date] [and/or the Post Completion Works Date (as appropriate)] in accordance with Clause 24.1 (*Delay Events and Compensation Events*); and
- 24.7.2 in respect of a Compensation Event, give D&B Co such relief from its obligations under this Agreement as is reasonable for such Compensation Event,

as soon as reasonably practicable and in any event within [five (5)] Business Days of the later of:

- (a) the date of receipt by the Authority's Representative of D&B Co's notice given in accordance with Clause 24.4 (*Delay Events and Compensation Events*) and the date of receipt of any further particulars (if such are required under Clause 24.6 (*Delay Events and Compensation Events*)), whichever is the later; and
- (b) the date of receipt by the Authority's Representative of any supplemental information supplied by D&B Co in accordance with Clause 24.5 (*Delay Events and Compensation Events*) and the date of receipt of any further particulars (if such are required under Clause 24.6 (*Delay Events and Compensation Events*)), whichever is the later.

24.8 If D&B Co has failed to comply with the requirements as to the giving of notice under Clause 24.4 (*Delay Events and Compensation Events*), or has failed to maintain records or afford facilities for inspection to the Authority's Representative, then:

24.8.1 in respect of a Delay Event, D&B Co shall not be entitled to any extension of time (and the Completion Date[, ICT Handover Date] [and/or the Post Completion Works Date] shall not be revised); and

24.8.2 in respect of a Compensation Event D&B Co shall not be entitled to any compensation or relief from its obligations under this Agreement,

in respect of any period of delay by D&B Co in giving notice or providing information under Clause 24.4 (*Delay Events and Compensation Events*) and/or to the extent that its failure to maintain records or afford facilities for inspection to the Authority's Representative has prevented the Authority's Representative from assessing the consequences of the Delay Event and/or Compensation Event as applicable.

24.9 If:

24.9.1 in respect of a Delay Event, the Authority's Representative declines to fix a revised Completion Date[, ICT Handover Date] [and/or Post Completion Works Date (as relevant)]; or

24.9.2 D&B Co considers that a different Completion Date[, ICT Handover Date] [and/or Post Completion Works Date] should be fixed; or

24.9.3 there is a disagreement as to whether a Delay Event has occurred; or

24.9.4 the parties cannot agree the extent of any relief from D&B Co's obligations under this Agreement in respect of a Compensation Event,

then D&B Co shall be entitled to refer the matter for determination in accordance with Schedule 15 (*Dispute Resolution Procedure*).

Compensation

24.10 If a Compensation Event occurs, D&B Co's sole right to compensation shall be as provided for in Clauses 24.12 to 24.14 (*Compensation*) inclusive. To avoid doubt, no other Delay Event shall entitle D&B Co to receive any compensation save as otherwise expressly provided in Schedule 13 (*Variation Procedure*) in the case of a Delay Event referred to in Clause 24.3.1.

24.11 For the purposes of Clause 24.10 (*Compensation*), a Compensation Event arises where D&B Co has incurred a loss (including a loss of revenue) and/ or expense as a direct result of any of the following circumstances arising in the period prior to

the Actual Completion Date[, or the Actual Post Completion Works Date in respect of the Post Completion Works (only)]:

- 24.11.1 any breach by the Authority and/or any Authority Party of any of the Authority's express obligations under this Agreement to the extent that such breach is not caused, or contributed to, by D&B Co or any D&B Co Party[;
 - 24.11.2 the execution of works on the Site not forming part of this Agreement by the Authority or any contractors employed by the Authority;
 - 24.11.3 opening up of the Works pursuant to Clauses 13.3 to 13.7 (*Right to Open Up*) (inclusive) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with Schedule 15 (*Dispute Resolution Procedure*) that the opening up of the Works was reasonable in the light of other Defects previously discovered by the Authority);
 - 24.11.4 [a Further Asbestos Delay (provided that in calculating any compensation due to D&B Co pursuant to Clause 24.12 (*Compensation*) there shall be no double counting with sums which are payable to D&B Co pursuant to Clause 10.13 (*Asbestos*));]⁶⁷
 - 24.11.5 [the occurrence of circumstances deemed to be a Compensation Event pursuant to Clause 10.4 (*Responsibility for Ground Conditions and Contamination*);]⁶⁸
 - 24.11.6 [the occurrence of circumstances deemed to be a Compensation Event pursuant to Clause 11.4.3 (b) (*Judicial Proceedings*);] [or]⁶⁹
 - 24.11.7 the occurrence of circumstances deemed to be a Compensation Event pursuant to Clause 14.10.5 (*Unavailability of Existing Facilities*),
- 24.12 Subject to Clause 24.13 (*Compensation*), if it is agreed, or determined, that there has been a Compensation Event, and D&B Co has incurred loss (including loss of revenue) and/or expense as a direct result of such Compensation Event, D&B Co shall be entitled to such compensation as would place D&B Co in no better or worse position than it would have been in had the relevant Compensation Event not occurred and (where relevant) such relief from its obligations under this Agreement as is reasonable for such Compensation Event (taking into account the reasonably foreseeable consequences of the Compensation Event). D&B Co shall promptly provide the Authority's Representative with any additional information he may require in order to determine the amount of such compensation and where applicable, the extent of relief from D&B Co's obligations under this Agreement.

⁶⁷ Include where Clauses 10.5 to 10.14 are used.

⁶⁸ Include where Clauses 10.3 and 10.4 are used.

⁶⁹ Include where Clause 11.4 is used.

- 24.13 Notwithstanding any other provisions of this Agreement, D&B Co shall take all reasonable steps so as to minimise the loss and/or expense referred to in Clause 24.12 (*Compensation*) in relation to any Compensation Event and any compensation payable shall:
- 24.13.1 exclude any amounts incurred or to be incurred as a result of any failure of D&B Co (or any D&B Co Party) to comply with this Clause 24.13 (*Compensation*); and
- 24.13.2 be reduced by any amount which D&B Co has recovered or will recover under any insurance policy (or would have recovered if it had complied with the requirements of this Agreement or of any policy of insurance required under this Agreement) which amount, to avoid doubt, shall not include any excess or deductibles or any amount over the maximum amount insured applicable to any such insurance policy.
- 24.14 The amount of any compensation due to D&B Co under Clause 24.12 (*Compensation*) shall be agreed between the parties or, failing agreement, determined pursuant to Schedule 15 (*Dispute Resolution Procedure*) and such compensation shall be payable within twenty (20) Business Days of receipt of a written demand accompanied by a valid VAT invoice for the same by D&B Co, supported by all relevant information, following such agreement or determination of the amount due.

[Term Dates

- 24.15 The Authority agrees that when assessing the effect of any Delay Event for the purpose of Clause 24.7 (*Delay Events and Compensation Events*) and assessing the effect of any Compensation Event for the purpose of Clause 24.12 (*Compensation*), any delay to the achievement of a revised Completion Date[, ICT Handover Date] [and/or the Post Completion Works Date (as applicable)] shall be taken into account provided that: the ICT Handover Date shall only ever move to the [twenty fifth (25th)] Business Day, and the Completion Date shall only ever move to the [fifth (5th)] Business Day, before the first day of a Term or half term (other than the summer half term).]⁷⁰

25. RELIEF EVENTS

- 25.1 For the purposes of this Agreement, subject to Clause 25.4 (*Mitigation*), Relief Events mean any of the following events:
- 25.1.1 fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute Force Majeure), earthquake, riot or civil commotion;
- 25.1.2 failure by any statutory undertaker, utility company, local authority or other like body to carry out works or provide services;

⁷⁰ See note at Clauses 14.6 to 14.8.

- 25.1.3 accidental loss or damage to the Works and/or Facilities or any roads servicing the same;
- 25.1.4 blockade or embargo falling short of Force Majeure;
- 25.1.5 without prejudice to any obligation of D&B Co to provide stand-by power facilities in accordance with the Authority's Construction Requirements, failure or shortage of power, fuel or transport;
- 25.1.6 the discovery of fossils, antiquities and human remains requiring action in accordance with Clause 20 (*Fossils and Antiquities*); or
- 25.1.7 official or unofficial strike, lockout, go slow or other dispute in each case generally affecting the construction industry (or a significant sector of that industry),

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

- 25.2 Subject to Clauses 25.3 (*Relief Events*) and 25.4 (*Mitigation*), no right of termination shall arise under this Agreement by reason of any failure by a party to perform any of its obligations under this Agreement to the extent that such failure to perform occurs because of the occurrence of a Relief Event (and, to avoid doubt, and without prejudice to Clause 25.9 (*Mitigation*), unless expressly stated to the contrary in this Agreement, it is acknowledged that all other rights and obligations of the parties under this Agreement remain unaffected by the occurrence of a Relief Event).
- 25.3 Without prejudice to D&B Co's rights under Clause 24 (*Delay Events and Compensation Events*), D&B Co shall only be relieved of its obligations under Clauses 12 (*The Design Construction and Commissioning Process*), 13 (*Right of Access of Authority's Representative*), 14 (*Programme and Dates for Completion*), 17 (*Pre-Completion Commissioning and Completion*) and 24 (*Delay Events and Compensation Events*) by Delay Events in accordance with Clause 24 (*Delay Events and Compensation Events*).

Mitigation

- 25.4 Where a party is (or claims to be) affected by a Relief Event:
 - 25.4.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the Relief Event as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and

- 25.4.2 it shall not be entitled to rely upon the relief afforded to it pursuant to Clause 25.2 (*Relief Events*) of this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 25.4.1 above.
- 25.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant Relief Event. Such initial notice shall give sufficient details to identify the particular event claimed to be a Relief Event.
- 25.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days of the notice referred to in Clause 25.5 (*Mitigation*) which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Relief Event on the ability of the party to perform, the action being taken in accordance with Clause 25.4 (*Mitigation*), the date of the occurrence of the Relief Event and an estimate of the period of time required to overcome it (and/or its effects).
- 25.7 The party claiming relief shall notify the other as soon as the consequences of the Relief Event have ceased and of when performance of its affected obligations can be resumed.
- 25.8 If, following the issue of any notice referred to in Clause 25.6 (*Mitigation*), the party claiming relief receives or becomes aware of any further information relating to the Relief Event (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.
- 25.9 To avoid doubt, and subject to any other express provision of this Agreement, the occurrence of a Relief Event shall not entitle D&B Co to any compensation.

26. FORCE MAJEURE

- 26.1 For the purposes of this Agreement, Force Majeure means any of the following events or circumstances:
- 26.1.1 war, civil war, armed conflict or terrorism; or
- 26.1.2 nuclear contamination unless in any case D&B Co and/or any D&B Co Party is the source or the cause of the contamination; or
- 26.1.3 chemical or biological contamination of the Works and/or Facilities and/or Site from any of the events referred to in Clause 26.1.1 above; or
- 26.1.4 pressure waves caused by devices travelling at supersonic speeds,

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

- 26.2 Subject to Clauses 26.3 and 26.4 (*Force Majeure*) the party claiming relief shall be relieved from liability under this Agreement to the extent that by reason of the Force Majeure it is not able to perform its obligations under this Agreement. For the avoidance of doubt (but without prejudice to Clause 34 (*Termination Resulting from Force Majeure*)) the Authority shall not be entitled to terminate this Agreement for a D&B Co Event of Default if such D&B Co Event of Default arises from an event of Force Majeure.
- 26.3 Where a party is (or claims to be) affected by an event of Force Majeure:
- 26.3.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the event of Force Majeure as soon as practicable and use all reasonable endeavours to remedy its failure to perform; and
- 26.3.2 it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 26.3.1.
- 26.4 Without prejudice to D&B Co's rights under Clause 24 (*Delay Events and Compensation Events*), D&B Co shall only be relieved from its obligations under Clauses 12 (*The Design Construction and Commissioning Process*), 13 (*Right of Access of Authority's Representative*), 14 (*Programme and Dates for Completion*) and 24 (*Delay Events and Compensation Events*) by Delay Events in accordance with Clause 24 (*Delay Events and Compensation Events*).
- 26.5 The party claiming relief shall serve written notice on the other party within five (5) Business Days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- 26.6 A subsequent written notice shall be served by the party claiming relief on the other party within a further five (5) Business Days which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the party to perform, the action being taken in accordance with Clause 26.3 (*Force Majeure*), the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects).
- 26.7 The party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.

- 26.8 If, following the issue of any notice referred to in Clause 26.6 (*Force Majeure*), the party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other party as soon as reasonably possible.
- 26.9 The parties shall endeavour to agree any modifications to this Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Schedule 15 (*Dispute Resolution Procedure*) shall not apply to a failure of the Authority and D&B Co to reach agreement pursuant to this Clause 26.9 (*Force Majeure*).
- 26.10 Without Prejudice to Clause 37.8 (*Payments Following Termination Upon Force Majeure*), the occurrence of an event of Force Majeure shall not entitle D&B Co to any compensation.

PART 7: CHANGES IN LAW & VARIATIONS

27. CHANGES IN LAW

General

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

Variation to be Agreed

- 27.2 Either party may give notice to the other of the need for a Variation which is necessary in order to enable D&B Co to comply with any Change in Law in which event:

27.2.1 the parties shall meet within [fifteen (15)] Business Days of the notice referred to in Clause 27.2 to consult on the occurrence of and effect of the Change in Law and any Variation required as a consequence. If the parties, within [ten (10)] Business Days of this meeting, have not agreed the occurrence or the effect of the relevant Change in Law, either party may refer the question of whether a Change in Law has occurred or the effect of the Change in Law for resolution in accordance with Schedule 15 (*Dispute Resolution Procedure*); and

27.2.2 within [ten (10)] Business Days of the agreement or determination referred to in Clause 27.2.1 above the Authority's Representative shall, if it is agreed or determined that a Variation is required in order to comply with the Change in Law, issue an Authority's Variation Enquiry and the relevant provisions of Schedule 13 (*Variation Procedure*) shall apply except that:

- (a) D&B Co may give notice to the Authority's Representative that it objects to such an Authority's Variation Enquiry only on the grounds that the implementation of the Variation would not give effect to or comply with the Change in Law;
- (b) the Authority shall issue a Variation Confirmation in respect of the Variation in accordance with the relevant provisions of Schedule 13 (*Variation Procedure*);
- (c) the provisions of Clause 11 (*Consents and Planning Approval*) shall apply and, to avoid doubt, paragraph 5 of Section 2 of Schedule 13 (*Variation Procedure*) shall not apply;

- (d) the Authority shall not be entitled to withdraw any Authority's Variation Enquiry or Variation Confirmation issued in accordance with this Clause 27.2 (*Variation to be Agreed*); and
- (e) D&B Co shall not be entitled to any payment or other compensation or relief from any performance of its obligations under this Agreement in respect of such Change in Law or associated Variation (or the consequences of either).

28. VARIATION PROCEDURE

The provisions of Schedule 13 (*Variation Procedure*) shall have effect in respect of Variations except as otherwise expressly provided in this Agreement.

PART 8: FINANCIAL

29. PAYMENT⁷¹

Development Amount

- 29.1 The Authority shall, in accordance with the provisions of this Clause 29 (*Payment*) pay to D&B Co the Development Amount in consideration of the performance by D&B Co of its obligations under this Agreement in accordance with this Agreement.
- 29.2 The Development Amount shall be a lump sum fixed price for the carrying out of D&B Co's obligations under the Agreement and shall not be altered or adjusted in any way whatsoever (and D&B Co shall not be entitled to any payment in respect of the Works or this Agreement) except in accordance with the express provisions of this Agreement.

Project Development Fee

- 29.3 The Authority shall pay the Project Development Fee to D&B Co. The due date for payment of the Project Development Fee shall be the date of the Authority's receipt of the relevant invoice which may be issued by D&B Co on [◆]. Within five (5) days after the due date for payment the Authority's Representative shall issue a payment notice detailing the sum that the payer considers to be or to have been due at the payment due date and the basis on which that sum is calculated. The final date for payment shall be five (5) days after the due date.

Applications for Payment⁷²

- 29.4 No later than each Application Date, D&B Co shall make an application ("**Application for Payment**") to the Authority's Representative for an Interim Certificate of payment in respect of that Relevant Month. [Each Application for Payment shall be split into two sections, one section which relates to the Main Works and another section which relates to the Post Completion Works.] [Each Section of the] Application for Payment shall be in accordance with Clause 29.5 (*Form of Application*) and include such supporting information and documentation as is reasonably required by the Authority in order to prepare and issue an Interim Certificate (as defined in Clause 29.7 (*Issue of Interim Certificate*)). The payment due date for an Interim Certificate (as defined in Clause 29.7 (*Issue of Interim Certificate*)) in respect of a Relevant Month shall be the Application Date (the "**Due Date**").

⁷¹ Authorities must seek consent from the Welsh Government to any and all public financing proposals, at each stage of the New Project Approval Process under the SPA.

⁷² The Application for Payment drafting will require review on a project specific basis. The present drafting assumes that there will be an overlap in applications for Applications for Payments being made in respect of the Main Works and the Post Completion Works.

Form of Application

29.5 Without prejudice to Clause 29.6 (*Value of Goods and Materials*), each Application for Payment shall specify[, separately in respect of the Main Works and the Post Completion Works,]:

29.5.1 the cumulative value claimed by D&B Co of each of the [Main] Works [and the Post Completion Works] that have been properly executed up to the end of the Relevant Month as set out in Schedule 18 (*Development Amount Analysis*) as amended from time to time in accordance with this Agreement;

29.5.2 the cumulative amount of any other payments to which D&B Co claims to be entitled under this Agreement up to the end of the Relevant Month;

29.5.3 the relevant Retention, if applicable , pursuant to Clauses 29.8 to 29.10 (*Retention*);

29.5.4 the amount D&B Co considers is due on the Due Date and the basis upon which that amount has been calculated including a breakdown of the cumulative value of the [Main] Works [and the cumulative value of the Post Completion Works (separately)] that have been properly executed up to the end of the Relevant Month by specific reference to each of the elements set out in the Development Amount Analysis; and

29.5.5 the breakdown of the amount D&B Co considers is due on the Due Date into the separate amounts that D&B Co considers to be due to:

- (a) D&B Co in accordance with this Agreement but excluding the amounts due under Clause 29.5.5(b), (c) and (d) and, for the avoidance of doubt, the Project Development Fee;
- (b) the Contractor in accordance with the Construction Contract but excluding the amounts due under Clause 29.5.5(c) and (d);
- (c) each PBA Sub-Contractor in accordance with its Sub-Contract; and
- (d) each Non-PBA Sub-Contractor in accordance with its Sub-Contract,

[Where the amounts or sums due that are referred to in Clause [29.5.1] above do not relate specifically to the Main Works or the Post Completion Works (or relate to both in indeterminate proportions), in recording such sums in the Application for Payment D&B Co shall attribute [◆]% of such amounts or sums to the Main Works and [◆]% to the Post Completion Works.]

Value of Goods and Materials

- 29.6 If an Application for Payment includes any amount in respect of payment for goods or materials before incorporation thereof in the relevant Works, the following provisions shall apply:
- 29.6.1 D&B Co shall provide the Authority with proof that property in such goods or materials is vested in D&B Co;
 - 29.6.2 D&B Co shall ensure that the goods or materials are set apart from other goods or materials at the place where they are manufactured or stored and that they are clearly identified as being the property of the Authority without damaging or defacing them, and shall provide proof of compliance with this requirement. D&B Co shall bear the risk of loss or damage to such materials or goods;
 - 29.6.3 unless and until D&B Co has complied with Clauses 29.6.1 and 29.6.2 above, D&B Co shall not be entitled to any payment in respect of such goods or materials;
 - 29.6.4 such goods or materials shall become the property of the Authority upon payment therefor;
 - 29.6.5 D&B Co shall permit the Authority, the Authority's Representative and any other persons authorised by the Authority at any time upon reasonable notice to inspect the materials or goods which have become the property of the Authority and shall grant or procure the grant of access to the Authority, the Authority's Representative and any other person authorised by the Authority for such purpose to the premises where such goods or materials may be located; and
 - 29.6.6 payment by the Authority for such goods or materials shall not prejudice the rights of the Authority in relation to goods or materials which are not in accordance with this Agreement.

Issue of Interim Certificate

- 29.7 Within two (2) Business Days (which for the purposes of this Clause 29.7 only shall include bank holidays in Cardiff) of the Due Date, the Authority's Representative shall issue an interim certificate of payment (an "**Interim Certificate**") setting out the sum that the Authority or the Authority's Representative considers to be or to have been due at the Due Date, and the basis on which that sum is calculated[, including, in each case separately for the Main Works and the Post Completion Works]:
- 29.7.1 the cumulative value of each of the [Main] Works [and the Post Completion Works (as applicable)] that have been properly executed as at the end of the Relevant Month in question;

29.7.2 the cumulative value of any Variation instructed in accordance with Schedule 13 (*Variation Procedure*) (to the extent such sum is not captured under Clause 29.7.1 above; and

29.7.3 the cumulative amount of any other payments to which D&B Co is entitled under this Agreement as at the end of the Relevant Month in question to the extent not paid under another provision of this Agreement;

LESS

29.7.4 the relevant Retention, if applicable, pursuant to Clauses 29.8 to 29.10 (*Retention*);

29.7.5 any sums due from D&B Co to the Authority or deductions to be made under this Agreement; and

29.7.6 the amounts certified for payment in Interim Certificates previously issued,

and stating the balances (if any) due from the Authority to D&B Co or from D&B Co to the Authority in respect of [each of the Main Works and the Post Completion Works and] cumulatively the Works as a whole.

[Where the amounts or sums due that are referred to in Clause [29.7.1], [29.7.3], [29.7.5] and/or [29.7.6] above do not relate specifically to the Main Works or the Post Completion Works (or relate to both in indeterminate proportions), in recording such sums in the Application for Payment the Authority shall attribute [◆]% of such amounts or sums to the Main Works and [◆]% to the Post Completion Works.]

It is immaterial that the sum referred to in this Clause 29.7 (*Issue of Interim Certificate*) may be zero. If D&B Co fails submit an Application for Payment and supporting information and documentation in accordance with Clause 29.4 (*Applications for Payment*) and Clause 29.5 (*Form of Application*) above in respect of a Relevant Month by the relevant Application Date then the balances referred to in this Clause 29.7 shall be zero. If the Authority fails to give an Interim Certificate in accordance with Clause 29.7 and D&B Co has given an Application for Payment in accordance with Clause 29.4 (*Applications for Payment*) and Clause 29.5 (*Form of Application*), the sum to be paid by the Authority shall, subject to any Pay Less Notice given under Clause 29.23 (*Pay Less Notice*), be the sum specified in the Application for Payment.

Retention

- 29.8 The Authority shall be entitled to deduct and retain[:
- 29.8.1][◆] per cent ([◆]%) of the total aggregate amounts specified in Clause 29.7.1 to 29.7.3 (*Issue of Interim Certificate*) which relate to the [Main] Works from time to time (provided that credit shall be given in respect of amounts retained previously in respect of the [Main] Works) [(the "[Main] Retention")]; and
- 29.8.2 [◆] per cent ([◆]%) of the total aggregate amounts specified in Clause 29.7.1 to 29.7.3 (*Issue of Interim Certificate*) which relates to the Post Completion Works from time to time (provided that credit shall be given in respect of amounts retained previously in respect of the Post Completion Works) (the "**Post Completion Retention**"),]
- [(together, the "**Retentions**")]
- 29.9 The following provisions shall apply to the Retention[s]:-
- 29.9.1 the Authority shall owe no fiduciary duty to D&B Co in respect of the Retentions;
- 29.9.2 any interest earned on the Retention[s] shall be permanently retained by the Authority;
- 29.9.3 no later than ten (10) Business Days after the Actual Completion Date, the Authority shall pay to D&B Co [◆]% of the [Main] Retention deducted and retained (less any amounts or liabilities duly paid or incurred by the Authority in respect of the [Main] Works in accordance with Clause 29.10);
- 29.9.4 [no later than ten (10) Business Days after the Actual Post Completion Works Date, the Authority shall pay to D&B Co [◆]% of the Post Completion Retention deducted and retained (less any amounts or liabilities duly paid or incurred by the Authority in respect of the Post Completion Works in accordance with Clause 29.10);]
- 29.9.5 no later than ten (10) Business Days after the issue of[:
- (a)]the Certificate of Making Good Defects in respect of the [Main] Works, the Authority shall pay to D&B Co the balance of the [Main] Retention deducted and retained (less any amounts or liabilities duly paid or incurred by the Authority in accordance with Clause 29.10); [and

- (b) the Certificate of Making Good Defects in respect of the Post Completion Works, the Authority shall pay to D&B Co the balance of the Post Completion Retention deducted and retained (less any amounts or liabilities duly paid or incurred by the Authority in accordance with Clause 29.10);]

29.9.6 the Authority shall not hold the Retention[s] in the Project Bank Account.

29.10 In the event that D&B Co fails to comply with its obligations under Clause 19 (*Defects*) to rectify a Defect, the Authority shall be entitled to[:

29.10.1]deduct from the balance of the [Main] Retention from time to time such amounts as are equal to the costs, reasonably and properly incurred by the Authority in rectifying, or procuring the rectification of any such Defect in respect of the [Main] Works[; and

29.10.2 deduct from the balance of the Post Completion Retention from time to time such amounts as are equal to the costs, reasonably and properly incurred by the Authority in rectifying, or procuring the rectification of any such Defect in respect of the Post Completion Works].

Non-Compliant Works

29.11 By each Interim Certificate the Authority gives notice to D&B Co specifying the amount of the payment proposed to be made and the basis upon which it is calculated. For the avoidance of doubt, no sum shall be included in any Interim Certificate if, in the reasonable opinion of the Authority, any Works to which the Interim Certificate relates do not comply with the provisions of this Agreement, in which event the amount relating to such non-compliant Works shall be omitted from such Interim Certificate and such sum shall only be included in an Interim Certificate following rectification of such Works by D&B Co to the satisfaction of the Authority (acting reasonably).

Date for Payment

29.12 Following receipt of an Interim Certificate from the Authority, D&B Co shall, within two (2) Business Days of the date of issue of such Interim Certificate, submit an invoice to the Authority for the amount certified in such Interim Certificate together with a Payment Instruction. The final date for payment of such amount (the "**Final Date**") shall be seven (7) Business Days after the Authority's receipt of D&B Co's invoice and Payment Instruction.

Right to Suspend

- 29.13 Without prejudice to any other rights and remedies which D&B Co may possess, if:-
- 29.13.1 the Authority fails to pay any sum due pursuant to Clause 29.12 (*Date for Payment*) by the Final Date; and
- 29.13.2 it has not given a notice pursuant to Clause 29.23 (*Pay Less Notice*) in respect of such sum: and
- 29.13.3 such failure continues for a period of seven (7) days after D&B Co has given to the Authority written notice of its intention to suspend performance of any or all of its obligations under this Agreement and the ground or grounds on which it is intended to suspend performance,
- then D&B Co may, following the expiry of such seven (7) day period, suspend performance of any or all of its obligations under this Agreement until payment in full of the sum payable occurs.
- 29.14 Where D&B Co exercises its right of suspension under Clause 29.13.3 (*Right to Suspend*), it shall be entitled to a reasonable amount in respect of costs and expenses reasonably incurred by it as a result of the exercise of the right.
- 29.15 Applications in respect of any such costs and expenses shall be made to the Authority and D&B Co shall with its Application for Payment provided for in Clause 29.4, in the month following the month in which the right arose, submit such details of the costs and expenses as are reasonably necessary to enable D&B Co's entitlement to be ascertained.

Statement of Final Accounts and Issue of Payment Certificates

- 29.16 A final account shall be required for [each of] the [Main] Works [(the "**Main Works Final Account**") [and the Post Completion Works (the "**Post Completion Works Final Account**")], each] a "**Statement of Final Account**". Without prejudice to Clause 29.4 (*Applications for Payment*), within [one month] of the date of issue of the Certificate of Practical Completion in respect of [each of] the [Main] Works [and the Post Completion Works], D&B Co shall submit to the Authority's Representative the [relevant] Statement of Final Account and supporting documents showing in detail the value in accordance with this Agreement of all relevant work executed and all further sums which D&B Co considers to be due to it in respect of the relevant Works in accordance with this Agreement.
- 29.17 If D&B Co has not submitted the [relevant] Statement of Final Account and supporting documents to the Authority's Representative by the date [one month] after the date on which it was required to do so pursuant to Clause 29.16, the Authority's Representative may give notice to D&B Co in writing that if such a Statement of Final Account is not prepared and submitted by D&B Co after: a

further [one month] the Authority's Representative may do so itself. Upon the expiry of the later of:

29.17.1 that [one month] period of notice; and

29.17.2 a [one month] period from the issue of[:

- (a)]the Certificate of Making Good Defects in respect of the [Main] Works, in respect of the Main Works Final Account; [or
- (b) the Certificate of Making Good Defects in respect of the Post Completion Works, in respect of the Post Completion Works Final Account],

the Authority's Representative may prepare the relevant Statement of Final Account and issue it to D&B Co.

29.18 The Due Date for payment of the [relevant] Statement of Final Account shall be within [] Business Days after whichever is the later of:

29.18.1 the date of issue of[:

- (a)]in respect of the [Main Works/Statement of] Final Account, the Certificate of Making Good Defects in respect of the [Main] Works[; or
- (b) in respect of the Post Completion Works Final Account, the date of issue of the Certificate of Making Good Defects in respect of the Post Completion Works]; and

29.18.2 receipt of D&B Co's relevant Statement of Final Account pursuant to Clause 29.16 or alternatively the Authority issuing a Statement of Final Account under Clause 29.17 (the "**Payment Certificate Due Date**").

Within five (5) days of the [relevant] Payment Certificate Due Date the Authority's Representative shall issue to D&B Co a certificate in respect of the [relevant] Statement of Final Account (a "**Payment Certificate**") stating the sum that the Authority or the Authority's Representative considers to be or have been due at the [relevant] Payment Certificate Due Date and the basis on which that sum is calculated including the value in accordance with this Agreement, of all [Main] Works [or Post Completion Works (as relevant to that Statement of Final Account)] carried out by D&B Co and all the sums due to D&B Co in accordance with this Agreement less the sum of the amounts already certified by Interim Certificates and all sums due from D&B Co to the Authority or deductions to be made under this Agreement, and showing the balance payable from D&B Co to the Authority or from the Authority to D&B Co, as the case may be. It is immaterial that the sum referred to in this Clause 29.18 may be zero.

- 29.19 If the Authority fails to issue the relevant Payment Certificate in accordance with Clause 29.18 (where D&B Co has submitted the [relevant] Statement of Final Account pursuant to Clause 29.16) D&B Co's Statement of Final Account shall take effect as if it were the Payment Certificate in respect of the [Main Works/Statement of] Final Account [or Post Completion Works Final Account (as relevant)].
- 29.20 If either Payment Certificate under Clause 29.18 provides that D&B Co requires to make a payment to the Authority, the Authority may recover the same as a debt.
- 29.21 Following receipt of a Payment Certificate D&B Co shall submit an invoice to the Authority for the amount certified in such Payment Certificate. The final date for payment of such amount (the "**Payment Certificate Final Date**") shall be fifteen (15) Business Days after the Authority's receipt of an invoice from D&B Co in respect of the relevant Payment Certificate.
- 29.22 A Payment Certificate issued pursuant to Clause 29.16 to this Clause 29.22 shall at the expiry of one month after it is issued save in respect of fraud have effect in any proceedings arising out of or in connection with this Agreement as:
- 29.22.1 conclusive evidence that all and only such extensions of time, if any, as are due have been given in respect of the relevant Works; and
- 29.22.2 conclusive evidence that the payment to D&B Co of all and any additions to or increases in the Development Amount shall be in full and final settlement of all and any claims which D&B Co has or may have arising out of or in connection with this Agreement or in relation to the relevant Works whether such claims may be for breach of contract, in tort, for breach of statutory duty or otherwise.

Pay Less Notice

- 29.23 If the Authority intends in good faith to pay less than the sum notified pursuant to a Payment Certificate or Interim Certificate (or Application for Payment if the final sentence of Clause 29.7 (*Issue of Interim Certificate*) applies), the Authority or the Authority's Representative shall, at least four (4) Business Days before the Final Date or Payment Certificate Final Date give a notice (a "**Pay Less Notice**") to D&B Co. Such Pay Less Notice shall specify both the sum that it considers to be due to D&B Co at the date the Pay Less Notice is given and the basis on which that sum has been calculated. It is immaterial that the sum referred to in this Clause 29.23 (*Pay Less Notice*) may be zero.

Revised Payment Instruction

- 29.24 If the Authority gives a Pay Less Notice to D&B Co in accordance with Clause 29.23 (*Pay Less Notice*) then D&B Co shall submit a revised Payment Instruction to the Authority by no later than the date falling one (1) Business Day prior to the Final Date.

- 29.25 If D&B Co does not comply with Clause 29.24 (*Revised Payment Instruction*) then the PBA Beneficiary Amounts shall be deemed to be reduced on an equal pro rata basis based on the difference between the amount certified in an Interim Certificate and the amount specified as considered by the Authority to be due pursuant to a Pay Less Notice issued in accordance with Clause 29.23 (*Pay Less Notice*) (a “**Deemed Allocation**”).

Adjustments to Certificates

- 29.26 If any sum shall become due to D&B Co under this Agreement otherwise than for work executed, the amount thereof shall (provided D&B Co has submitted an Application for Payment therefore in accordance with Clause 29.4 (*Applications for Payment*)) be included in the next Interim Certificate. If any sum shall become payable under this Agreement by D&B Co to the Authority, whether by deduction from the Development Amount or otherwise, the same shall become due on the date on which D&B Co receives a written demand for the same from the Authority and shall be paid by D&B Co to the Authority within twenty (20) Business Days (being the Final Date for payment) of such written demand or, at the option of the Authority, the amount thereof may be deducted from the next Interim Certificate (or Application for Payment if the final sentence of Clause 29.7 (*Issue of Interim Certificate*) applies) and (if necessary) from subsequent Interim Certificates (or Applications for Payment if the final sentence of Clause 29.7 (*Issue of Interim Certificate*) applies).

Correction of Certificates

- 29.27 The Authority may in any Interim Certificate or Payment Certificate make any correction or modification that should properly have been made in respect of any previous Interim Certificate.

Effect of Certificates

- 29.28 No certificate shall of itself be conclusive evidence that any design, works, materials or goods to which it relates are in accordance with this Agreement and, without prejudice to the generality of the foregoing, the issue of an Interim Certificate or of the Payment Certificate shall not prejudice any right of the Authority against D&B Co in respect of any defect in the Works (including the Authority's rights under Clause 19 (*Defects*)).

Manner of Payment⁷³

- 29.29 Subject to Clause 29.30 (*Manner of Payment*), all payments under this Agreement shall be made in Pounds Sterling by [electronic transfer of funds for value on the day in question] to the bank account of the recipient (located in the United Kingdom) specified in the relevant invoice (or otherwise notified to the payer by the recipient), quoting the invoice number against which payment is made.

⁷³ D&B Co to specify the manner of payment.

- 29.30 Any sum due by the Authority pursuant to Clause 29.12 (*Date for Payment*) shall be made in Pounds Sterling by [electronic transfer of funds for value on the day in question] to the Project Bank Account, quoting the invoice number against which payment is made. Payments made by the Authority into the Project Bank Account are deemed to be payments from the Authority to D&B Co in accordance with this Agreement and discharge the Authority's payment obligations under this Agreement in equal proportion to the sums paid by the Authority to the Project Bank Account.

Disputes

- 29.31 If either party (acting in good faith) disputes all or any part of the Interim Certificate calculated in accordance with this Clause 29 (*Payment*) or the Payment Certificate (subject to Clause 29.22 (*Statement of Final Accounts and Issue of Payment Certificate*)), the undisputed amount of the Interim Certificate or Payment Certificate (as the case may be) shall be paid by the Authority in accordance with Clause 29.12 (*Date for Payment*) or 29.21 (*Statement of Final Accounts and Issue of Payment Certificate*) (as the case may be) and the provisions of this Clause 29.22 (*Statement of Final Accounts and Issue of Payment Certificate*) shall apply. The parties shall use all reasonable endeavours to resolve the Dispute in question within [◆] Business Days of the Dispute arising. If they fail so to resolve it, either party may refer the matter to the Dispute Resolution Procedure. Following resolution of the Dispute, any amount agreed or determined to have been payable shall be paid forthwith by the Authority to D&B Co, together with interest on such amount calculated in accordance with Clause 29.32 (*Late Payments*).

Late Payments

- 29.32 Each party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not duly made pursuant to the terms of this Agreement on the Final Date or Payment Certificate Final Date (as the case may be) calculated from day to day at a rate per annum equal to the Default Interest Rate from the Final Date or Payment Certificate Final Date (as the case may be) up to and including the date of payment.

Set Off

- 29.33 Whenever any sum of money shall be agreed, or determined, as due and payable by D&B Co to the Authority, such sum may at the Authority's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, to D&B Co from the Authority under this Agreement provided that the Authority has issued a Pay Less Notice.
- 29.34 Whenever any sum of money shall be agreed, or determined, as due and payable by the Authority to D&B Co, such sum may at D&B Co's discretion be deducted from or applied to reduce the amount of any sum then due, or which at any time afterwards may become due, from D&B Co to the Authority under this Agreement provided that D&B Co has given the Authority not less than [◆]Business Days' notice of its intention to deduct or apply such sum.

Project Bank Account⁷⁴

- 29.35 Within five (5) Business Days of the earlier of:
- 29.35.1 the date of appointment of each Qualifying Sub-Contractor by the Contractor to undertake sub-contract works (including off-site fabrication) in connection with the Project; and
 - 29.35.2 the date falling five (5) Business Days prior to each Qualifying Sub-Contractor commencing sub-contract works (including off-site fabrication) in connection with the Project,
- D&B Co shall procure and deliver to the Authority an original version of a Joining Declaration duly executed by D&B Co, the Contractor and the relevant Qualifying Sub-Contractor provided such requirements shall not apply where a Qualifying Sub-Contractor has not consented to enter into a Joining Application but without prejudice to D&B Co's obligations under Clause 29.37.
- 29.36 Where D&B Co has delivered a Joining Declaration the Authority shall execute the relevant Joining Declaration within five (5) Business Days of receipt of the same from D&B Co,
- 29.37 Where any Qualifying Sub-Contractor declines to enter into a Joining Declaration, D&B Co shall procure that the Contractor uses all reasonable endeavours to obtain disclosure from the Qualifying Sub-Contractor of the reasons for such refusal. D&B Co shall procure that the Contractor seeks to persuade the Qualifying Sub-Contractor to re-consider its position. D&B Co shall procure that the Contractor shall record this process and provide copies of such records to D&B Co who shall, in turn, provide such records to the Authority.
- 29.38 D&B Co shall procure that the Contractor informs each Below Threshold Sub-Contractor that the Below Threshold Sub-Contractor may make a Joining Request at any time.
- 29.39 D&B Co shall procure that the Contractor communicates every Joining Request by a Below Threshold Sub-Contractor to D&B Co within five (5) Business Days of such Joining Request being received by the Contractor.
- 29.40 D&B Co shall communicate each Joining Request by a Below Threshold Sub-Contractor to the Authority's Representative within five (5) Business Days of such Joining Request being communicated to D&B Co by the Contractor.
- 29.41 Following the receipt of any Joining Request by a Below Threshold Sub-Contractor, the Authority and D&B Co shall discuss with the Contractor whether it

⁷⁴ Reference should be made to applicable guidance on Project Bank Accounts. The Welsh Government is committed to the use of Project Bank Accounts on D&B Projects. Updates to this drafting may be considered to reflect developing Welsh Government policy and guidance in this area.

is practicable and desirable for payments to the Below Threshold Sub-Contractor to be made through the Project Bank Account having regard to the number, timing and value of such payments. If the Authority, D&B Co and the Contractor agree that payments to the Below Threshold Sub-Contractor should be made through the Project Bank Account then D&B Co shall procure and deliver to the Authority an original version of a Joining Declaration duly executed by D&B Co, the Contractor and the relevant Below Threshold Sub-Contractor. The Authority shall thereafter execute the relevant Joining Declaration within five (5) Business Days of receipt of the same from D&B Co. If the Authority, D&B Co and the Contractor do not agree that payments to the Below Threshold Sub-Contractor should be made through the Project Bank Account then D&B Co shall write to the Authority and fully explain the reasons for the failure to so agree.

29.42 If this Agreement is terminated no further monies shall be payable into the Project Bank Account.

29.43 Within [two (2) months] of the date of issue of the [each] Certificate of Practical Completion, D&B Co shall submit to the Authority's Representative a summary report relating to the use and operation of the Project Bank Account specifying (as a minimum):

29.43.1 the total amount of payments made through the Project Bank Account to PBA Beneficiaries;

29.43.2 the total amount of payments made through the Project Bank Account to PBA Sub-Contractors;

29.43.3 the total amount of payments made through the Project Bank Account to the Contractor in respect of Non-PBA Sub-Contractors;

29.43.4 the reasons for any Qualifying Sub-Contractor failing to be paid through the Project Bank Account; and

29.43.5 lessons learned from the use and operation of the Project Bank Account, including feedback from the Contractor and PBA Sub-Contractors.

30. VAT AND CONSTRUCTION INDUSTRY TAX DEDUCTION SCHEME

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

30.2 Each party shall pay to the other party any VAT properly chargeable on any supply made to it under this Agreement provided that it shall first have received from the other party a valid tax invoice in respect of that supply which complies with the requirements of Part III Value Added Tax Regulations 1995.

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

claims to be properly chargeable to the First Party in connection with this Agreement is not in fact properly so chargeable, the First Party shall be entitled to require the Second Party to obtain clearance from HM Revenue and Customs (or, if relevant, such other body as is charged at the time with the collection and management of VAT) as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request HM Revenue and Customs for such clearance.

- 30.4 The following further provisions shall apply in respect of the application for clearance in accordance with Clause 30.3 (*VAT and Construction Industry Tax Deduction Scheme*):
- 30.4.1 prior to submitting its request for such clearance and any further communication to HM Revenue and Customs in connection with the obtaining of the clearance, the Second Party shall first obtain the agreement of the First Party to the contents of such request and any such further communication, such agreement not to be unreasonably withheld or delayed;
- 30.4.2 the Second Party shall provide to the First Party copies of all communications received from HM Revenue and Customs in connection with the application for clearance as soon as practicable after receipt; and
- 30.4.3 the Second Party shall use all reasonable endeavours (including without limitation the provision of such additional information as HM Revenue and Customs may require) to obtain such clearance as soon as reasonably practicable following the initial request.
- 30.5 If clearance is required by the First Party under Clause 30.3 (*VAT and Construction Industry Tax Deduction Scheme*), the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until clearance is received from HM Revenue and Customs which states that a sum of VAT (the "**VAT Sum**") is properly so chargeable or HM Revenue and Customs state that they are not prepared to give any clearance on the matter. In this case, then subject to Clauses 30.6 (*VAT and Construction Industry Tax Deduction Scheme*) and 30.7 (*VAT and Construction Industry Tax Deduction Scheme*) and provided that the First Party shall first have received a valid tax invoice which complies with the requirements of Part III Value Added Tax Regulations 1995 and which states the VAT Sum to be the amount of VAT chargeable to the First Party, the First Party shall pay the VAT Sum (and any interest or penalties attributable to the VAT Sum) to the Second Party.
- 30.6 If the First Party disagrees with any clearance obtained pursuant to Clause 30.3 (*VAT and Construction Industry Tax Deduction Scheme*) by the Second Party from HM Revenue and Customs, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs and expenses including interest and penalties which it may incur in relation thereto) shall take such action and give such information and assistance to the First Party as the First Party may require to challenge such clearance or otherwise to resist or avoid the imposition of VAT on the relevant supply.
- 30.7 The following further provisions shall apply if the First Party shall exercise its rights under Clause 30.6 (*VAT and Construction Industry Tax Deduction Scheme*):

- 30.7.1 the action which the First Party shall be entitled to require the Second Party to take shall include (without limitation) contesting any assessment to VAT or other relevant determination of HM Revenue and Customs before any tax tribunal or court of competent jurisdiction and appealing any judgement or decision of any such tribunal or court;
- 30.7.2 if the Second Party shall be required to pay to or deposit with HM Revenue and Customs a sum equal to the VAT assessed as a condition precedent to its pursuing any appeal, the First Party shall, at its election, either pay such sum to HM Revenue and Customs on behalf of the Second Party or on receipt of proof in a form reasonably satisfactory to the First Party that the Second Party has paid such sum to or deposited such sum with HM Revenue and Customs the First Party shall pay such sum to the Second Party;
- 30.7.3 save as specifically provided in Clause 30.5 (*VAT and Construction Industry Tax Deduction Scheme*), the First Party shall not be obliged to pay to the Second Party any sum in respect of the VAT in dispute to the Second Party or in respect of VAT on any further supplies made by the Second Party to the First Party which are of the same type and raise the same issues as the supplies which are the subject of the relevant dispute unless and until the final outcome of the relevant dispute is that it is either determined or agreed that VAT is properly chargeable on the relevant supply or supplies; and
- 30.7.4 the Second Party shall account to the First Party for any costs awarded to the Second Party on any appeal, for any sum paid to or deposited with HM Revenue and Customs in accordance with Clause 30.7.2 which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

Changes in Recoverability of VAT

- 30.8 Subject to Clause 30.9 (*Changes in Recoverability of VAT*), if, following a Change in Law, D&B Co becomes unable to recover VAT attributable to supplies to be made to the Authority by D&B Co pursuant to this Agreement, the Authority shall ensure that D&B Co is left in no better and no worse position than it would have been had such Change in Law not occurred (including but not limited to making such amendments to this Agreement as D&B Co and the Authority shall agree acting reasonably), provided that D&B Co shall use all reasonable endeavours to mitigate the adverse effects of any such Change in Law.
- 30.9 The provisions of Clause 30.8 (*Changes in Recoverability of VAT*) shall apply only if (and to the extent that) the Change in Law was not reasonably foreseeable at the date of this Agreement by an experienced contractor performing operations similar to the relevant Works on the basis of draft bills published in Government green or white papers or other Government departmental consultation papers, bills, draft statutory instruments or draft instruments or proposals published in the Official Journal of the European Union, in each case published:
- 30.9.1 prior to the date of this Agreement; and

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

Construction Industry Tax Deduction Scheme

30.10 This Clause 30.10 (*Construction Industry Tax Deduction Scheme*) relates to the Construction Industry Tax Deduction Scheme:

30.10.1 In this Clause 30.10 (*Construction Industry Tax Deduction Scheme*) (but not otherwise):

- (a) "**the Act**" means the Finance Act 2004;
- (b) "**the Regulations**" means the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045);
- (c) "**the Legislation**" means Chapter 3 Part 3 of the Act and the Regulations, taken together;
- (d) "**Contractor**" means a person who is a contractor for the purposes of Chapter 3 Part 3 of the Act; and
- (e) "**sub-contractor**" means a person who is a sub-contractor for the purposes of Chapter 3 Part 3 of the Act.

30.10.2 Each of the Authority and D&B Co shall comply with the Legislation.

30.10.3 If any payment due from the Authority to D&B Co under this Agreement is a contract payment under section 60(1) of the Act, then the Authority, as Contractor, shall (not later than fifteen (15) Business Days before the first such payment is due to be made) verify, in accordance with Regulation 6 of the Regulations, whether the sub-contractor is registered for gross payment or for payment under deduction or is not registered under Chapter 3 Part 3 of the Act.

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

- (a) if D&B Co is registered for gross payment under section 63(2) of the Act, the Authority shall make a payment to D&B Co without any deduction;
- (b) if D&B Co is not registered for gross payments under section 63(2) of the Act, the Authority shall make a payment to D&B Co, subject to the deduction of the relevant percentage in accordance with section 61(1) of the Act, and thereupon Clause 30.10.6 below shall apply.

- 30.10.5 If any dispute arises between the Authority and D&B Co as to whether any payment due by the Authority to D&B Co under this Agreement is or is not a contract payment by virtue of the exemption in Regulation 23 of the Regulations, the parties will jointly apply to HM Revenue and Customs for a written clearance and until such clearance is received it shall be assumed that such payment is a contract payment and the provisions of Clause 30.10 (*Construction Industry Tax Deduction Scheme*) shall apply accordingly.
- 30.10.6 The Authority shall be entitled to make a deduction at the rate specified in section 61(1) of the Act or at such other rate as may be in force from time to time from the whole of any payment to D&B Co (and not just that part of such payment which does not represent the direct cost to D&B Co or any other person of materials used or to be used in carrying out the construction operations to which the relevant payment relates) unless prior to making such payment the Authority shall have received written confirmation from HM Revenue and Customs (obtained by and at the expense of D&B Co) in a form which is reasonably satisfactory to the Authority directing the Authority to make the deduction against only a specified amount or proportion of any such payment to D&B Co.
- 30.10.7 Where any error or omission has occurred in calculating or making any payment under this Clause 30.10 (*Construction Industry Tax Deduction Scheme*) then:
- (a) in the case of an over deduction, the Authority shall correct that error by repayment of the sum over deducted to D&B Co; and
 - (b) in the case of an under deduction, D&B Co shall correct that error or omission by repayment of the sum under deducted to the Authority.
- 30.10.8 The Authority shall send promptly to HM Revenue & Customs any returns required by the Legislation, and shall provide to D&B Co a payment statement (where appropriate) and/or such other information as may be required by the Legislation in relation to any contract payment.
- 30.10.9 If compliance with this Clause 30.10 (*Construction Industry Tax Deduction Scheme*) involves the Authority or D&B Co in not complying with any other of the terms of this Agreement, then the provisions of this Clause shall prevail.

31. RECORDS AND OPEN BOOK ACCOUNTING

Records and Reports

The provisions of Schedule 14 (*Record Provisions*) shall apply to the keeping of records and the making of reports.

PART 9: TERMINATION

32. AUTHORITY EVENTS OF DEFAULT

- 32.1 For the purposes of this Agreement, Authority Events of Default means any of the following events or circumstances:
- 32.1.1 a breach by the Authority of its obligations under this Agreement which substantially frustrates or renders it impossible for D&B Co to perform its material obligations under this Agreement for a continuous period of not less than sixty (60) days; or
 - 32.1.2 the Authority fails to pay any sum or sums due to D&B Co under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) £[♦] (index linked) from time to time and such failure continues for thirty (30) Business Days from receipt by the Authority of a notice of non-payment from D&B Co; or
 - 32.1.3 the Authority is in breach of its obligations under Clause 45.7 (*Assignment*); or
 - 32.1.4 an expropriation, sequestration or requisition of a material part of the assets and/or shares of D&B Co by the Authority or a Relevant Authority.

D&B Co's Options

- 32.2 On the occurrence of an Authority Event of Default, or within a reasonable time after D&B Co becomes aware of the same, and while the same is still subsisting, D&B Co may, at its option:
- 32.2.1 suspend performance by it of its obligations under this Agreement until such time as the Authority shall have demonstrated to the reasonable satisfaction of D&B Co that it is capable of performing, and will perform, its obligations under this Agreement; or
 - 32.2.2 serve notice⁷⁵ on the Authority (or such other party as may be notified in advance in writing by the Authority to D&B Co) of the occurrence (and specifying details) of such Authority Event of Default. If the relevant matter or circumstance has not been rectified or remedied by the Authority (or otherwise) in respect of Clause 32.1.1, Clause 32.1.3 or Clause 32.1.4 within sixty (60) Business Days of such notice, and in respect of Clause 32.1.2 within thirty (30) Business Days of such notice, D&B Co may serve a further notice on the Authority (or its substitute

⁷⁵ Certain notices of importance (including a notice of an Authority Default) require to be issued to Welsh Government (as well as the Authority) pursuant to the notice provisions in Clause 52.

notified in accordance with this Clause 32.2.2) terminating this Agreement with immediate effect.

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

33. D&B CO EVENT OF DEFAULT

D&B Co Event of Default

33.1 For the purposes of this Agreement, D&B Co Event of Default means any of the following events or circumstances listed in this Clause 33.1 (*D&B Co Event of Default*):

Insolvency

- 33.1.1 the occurrence of any of the following events in respect of D&B Co, namely:
- (a) any arrangement or composition with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act 1986) being entered into by or in relation to D&B Co;
 - (b) a receiver, administrator, administrative receiver, liquidator or other encumbrancer or other similar officer taking possession of or being appointed over, or any distress, execution or other process being levied or enforced (and not being discharged within ten (10) Business Days) upon, the whole or any material part of the assets of D&B Co;
 - (c) D&B Co ceasing to carry on business;
 - (d) a petition being presented (and not being discharged within twenty (20) Business Days), or a resolution being passed or an order being made for the administration or the winding up, bankruptcy or dissolution of D&B Co; or
 - (e) if D&B Co shall suffer any event analogous to the events set out in Clauses 33.1.1(a) to (d) in any jurisdiction in which it is incorporated or resident;⁷⁶

Long Stop

⁷⁶ Delete limb 33.1.1(e) if all relevant parties are incorporated and resident in the jurisdiction of England and Wales.

- 33.1.2 [D&B Co failing to achieve the Actual Completion Date within a period of [nine (9)] months after the Completion Date ("**Longstop Date**")], provided that where, but for the terms of Clause 14.8.2 (*[Handover Dates]*), the Actual Completion Date could have occurred, the Longstop Date shall be extended to the next date on which such Actual Completion Date may occur pursuant to Clause 14.8.2 (*[Handover Dates]*);⁷⁷

Default

- 33.1.3 D&B Co committing a material breach of its obligations under this Agreement;
- 33.1.4 D&B Co Abandons the Works at any time (other than as a consequence of a continuing breach by the Authority of its obligations under this Agreement).

Assignment

- 33.1.5 D&B Co failing to comply with the provisions of Clauses 45.6 (*Assignment*) or 45.1 (*Sub-Contractors*);

Payment

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

Insurance

- 33.1.7 a breach by D&B Co of its obligation to take out and maintain the Insurances required by Clause 41.1(*D&B Co Insurances*);

Corrupt Gifts

- 33.1.8 D&B Co has:
- (a) committed a Prohibited Act, in relation to which Clause 36.3.1 (*Remedies*) applies; or

⁷⁷ Where phasing is adopted, a project specific approach will need to be considered.

- (b) D&B Co has committed a Prohibited Act, in relation to which Clause 36.3.2, 36.3.3, 36.3.4 or 36.3.5 (*Remedies*) applies; or

Tax Compliance

- 33.1.9 in the circumstances described at Clause 40.1.5(e) (*Tax Compliance*), Clause 40.1.6 (*Tax Compliance*) and/or Clause 40.1.7 (*Tax Compliance*);
or

Change in Control

- 33.1.10 the occurrence of any Change in Control which is prohibited by Clause 46 (*Ownership Information and Changes in Control*);

Notification

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

Authority's Options

- 33.3 On the occurrence of a D&B Co Event of Default, or within a reasonable time after the Authority becomes aware of the same, and while the same is subsisting, the Authority may:

- 33.3.1 in the case of the D&B Co Events of Default referred to in Clauses 33.1.1 (*Insolvency*), 33.1.2 (*Long Stop*), (*Default*), 33.1.5 (*Assignment*), 33.1.6 (*Payment*), 33.1.8 (*Corrupt Gifts*) and 33.1.10 (*Change in Control*) terminate this Agreement in its entirety by notice in writing having immediate effect;

- 33.3.2 in the case of any D&B Co Event of Default referred to in Clause 33.1.3 and 33.1.4 (*Default*), serve notice of default on D&B Co requiring D&B Co at D&B Co's option either:

- (a) to remedy the D&B Co Event of Default referred to in such notice of default (if the same is continuing) within twenty (20) Business Days of such notice of default; or

- (b) to put forward within twenty (20) Business Days of such notice of default a reasonable programme (set out, if appropriate, in stages) for remedying the D&B Co Event of Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such D&B Co Event of Default is proposed to be remedied (D&B Co shall only have the option of

putting forward a programme in accordance with this Clause 33.3.2(b) if it first notifies the Authority within ten (10) Business Days of such notice of default that it proposes to do so);

- 33.3.3 in the case of any D&B Co Event of Default referred to in Clause 33.1.7 (*Insurance*) serve notice of default on D&B Co requiring D&B Co to remedy the D&B Co Event of Default (if the same is continuing) within twenty (20) Business Days of such notice of default;
- 33.3.4 in the case of any D&B Co Event of Default referred to in Clause 33.1.9 (*Tax Compliance*), serve notice of default on D&B Co requiring D&B Co to remedy the D&B Co Event of Default (if the same is continuing) within thirty (30) Business Days of such notice of default; and
- 33.3.5 in the case of any D&B Co Event of Default referred to in Clause 33.1.8(b), serve notice of default on D&B Co requiring D&B Co to remedy the D&B Co Event of Default (if the same is continuing) within twenty (20) Business Days of such notice of default, on the terms required pursuant to Clauses 36.3.2, 36.3.3, 36.3.4 or 36.3.5, as appropriate.

Remedy Provisions

- 33.4 Where D&B Co puts forward a programme in accordance with Clause 33.3.2(b), the Authority shall have twenty (20) Business Days from receipt of the same within which to notify D&B Co (acting reasonably) that it does not accept the programme, failing which the Authority shall be deemed to have accepted the programme. Where the Authority notifies D&B Co that it does not accept the programme as being reasonable, the parties shall endeavour within the following five (5) Business Days to agree any necessary amendments to the programme put forward. In the absence of agreement within five (5) Business Days, the question of whether the programme (as the same may have been amended by agreement) will remedy the D&B Co Event of Default in a reasonable manner and within a reasonable time period (and, if not, what would be a reasonable programme) may be referred by either party for resolution in accordance with Schedule 15 (*Dispute Resolution Procedure*).
- 33.5 If:
 - 33.5.1 the D&B Co Event of Default notified in a notice of default served under Clause 33.3.2, Clause 33.3.3 or Clause 33.3.4 or Clause 33.3.5 (as the case may be) is not remedied before the expiry of the period referred to in Clause 33.3.2(a), Clause 33.3.3, Clause 33.3.4 or Clause 33.3.5 (as appropriate); or
 - 33.5.2 where D&B Co puts forward a programme pursuant to Clause 33.3.2(b) which has been accepted by the Authority or has been determined to be reasonable and D&B Co fails to achieve any element of the programme or the end date for the programme (as the case may be); or

33.5.3 any programme put forward by D&B Co pursuant to Clause 33.3.2(b) is rejected by the Authority as not being reasonable, and the Dispute Resolution Procedure does not find against that rejection,

then the Authority may terminate this Agreement in its entirety by written notice to D&B Co with immediate effect. Provided that for the purposes of Clause 33.5.2 if D&B Co's performance of the programme is adversely affected by the occurrence of Force Majeure or a Relief Event then, subject to D&B Co complying with the mitigation and other requirements in this Agreement concerning Force Majeure, or a Relief Event (as the case may be), the time for performance of the programme or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by Force Majeure or the Relief Event (as the case may be) which is agreed by the parties or determined in accordance with Schedule 15 (*Dispute Resolution Procedure*).

Authority's Costs

33.6 D&B Co shall reimburse the Authority for all reasonable costs incurred by the Authority in exercising any of its rights pursuant to this Clause 33 (*D&B Co Event of Default*) (including, without limitation, any relevant increased administrative expenses). The Authority shall take reasonable steps to mitigate such costs.

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

34. TERMINATION RESULTING FROM FORCE MAJEURE

If, in the circumstances referred to in Clause 26 (*Force Majeure*), the parties have failed to reach agreement on any modification to this Agreement pursuant to Clause 26 (*Force Majeure*) within six (6) calendar months of the date on which the party affected serves notice on the other party in accordance with Clause 26 (*Force Majeure*) either party may at any time afterwards terminate this Agreement by written notice to the other party having immediate effect provided always that the effects of the relevant event of Force Majeure continues to prevent either party from performing any material obligation under this Agreement.

35. NOT USED

36. CORRUPT GIFTS AND PAYMENTS

Prohibition on Corruption

- 36.1 The term "**Prohibited Act**" means:
- 36.1.1 offering, giving or agreeing to give to the Authority or any other public body or to any person employed by or on behalf of the Authority or any other public body any gift or consideration of any kind as an inducement or reward:
- (a) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other agreement with the Authority or any other public body; or
 - (b) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with the Authority or any other public body;
- 36.1.2 entering into this Agreement or any other agreement with the Authority or any other public body in connection with which commission has been paid or has been agreed to be paid by D&B Co or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Authority;
- 36.1.3 committing any offence:
- (a) under the Bribery Act 2010;
 - (b) under any Law creating offences in respect of fraudulent acts; or
 - (c) at common law, in respect of fraudulent acts in relation to this Agreement or any other agreement with the Authority or any other public body;
- 36.1.4 defrauding or attempting to defraud or conspiring to defraud the Authority or any other public body;
- 36.1.5 committing any breach of the Employment Relations Act 1999 (Blacklists Regulations) 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992;

- 36.1.6 committing any breach of the Data Protection Laws by unlawfully processing Personal Data in connection with any blacklisting activities; or
- 36.1.7 committing any offence under the Modern Slavery Act 2015.

Warranty

- 36.2 D&B Co warrants that in entering into this Agreement it has not committed any Prohibited Act.

Remedies

- 36.3 If D&B Co or any D&B Co Party (or anyone employed by or acting on behalf of them) commits any Prohibited Act, then the Authority shall be entitled to act in accordance with Clauses 36.3.1 to 36.3.6 below:
 - 36.3.1 if a Prohibited Act is committed by D&B Co or by an employee of D&B Co not acting independently of D&B Co, then the Authority may terminate this Agreement with immediate effect by giving written notice to D&B Co;
 - 36.3.2 if the Prohibited Act is committed by an employee of D&B Co acting independently of D&B Co, then the Authority may give written notice to D&B Co of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice D&B Co terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Project Operations by another person;
 - 36.3.3 if the Prohibited Act is committed by a Contracting Associate or by an employee of that Contracting Associate not acting independently of that Contracting Associate then the Authority may give written notice to D&B Co of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice D&B Co terminates the relevant Sub-Contract and procures the performance of the relevant part of the Project Operations by another person, where relevant, in accordance with Clause 45 (*Sub-Contracting and Assignment*);
 - 36.3.4 if the Prohibited Act is committed by an employee of a Contracting Associate acting independently of that Contracting Associate, then the Authority may give notice to D&B Co of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice D&B Co procures the termination of the employee's employment and (if necessary) procures the performance of the relevant part of the Project Operations by another person;
 - 36.3.5 if the Prohibited Act is committed by any other person not specified in Clauses 36.3.1 to 36.3.4 above, then the Authority may give notice to D&B Co of termination and this Agreement will terminate unless within twenty (20) Business Days D&B Co procures the termination of such

person's employment in relation to the Project and of the appointment of their employer (where the employer is not the Authority and where such person is not employed by D&B Co or the Contracting Associate) and (if necessary) procures the performance of the relevant part of the Project Operations by another person; and

36.3.6 any notice of termination under this Clause shall specify:

- (a) the nature of the Prohibited Act;
- (b) the identity of the party who the Authority believes has committed the Prohibited Act; and
- (c) the date on which this Agreement will terminate in accordance with the applicable provisions of this Clause.

36.4 Without prejudice to its other rights or remedies under this Clause, the Authority shall be entitled to recover from D&B Co:

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

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

Permitted Payments

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

Notification

36.6 D&B Co shall notify the Authority of the occurrence (and details) of any Prohibited Act promptly on D&B Co becoming aware of its occurrence.

37. CONSEQUENCES OF TERMINATION

Continued Performance

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

Transfer to Authority of Assets, Contracts etc.⁷⁸

- 37.2 On the service of a notice of termination in accordance with this Agreement for any reason:
- 37.2.1 in so far as any transfer shall be necessary fully and effectively to transfer property to the Authority, D&B Co shall transfer to, and there shall vest in, the Authority, such part of the Works and/or the Facilities as shall have been constructed and such items of the Plant [and [♦⁷⁹]] as shall have been procured by D&B Co if the Authority so elects;
- 37.2.2 all goods and all materials on or near to the Site not yet incorporated in the Works shall remain available to the Authority for the purposes of completing the Works and if the cost of such goods and materials has not been reflected in the payments that have been made by the Authority to D&B Co prior to the service of a notice of termination subject to the payment by the Authority to D&B Co in respect of such goods and materials (determined as between a willing vendor and willing purchaser with any disputes determined pursuant to Clause 44 (*Dispute Resolution Procedure*));
- 37.2.3 the construction plant shall remain available to the Authority for the purposes of completing the Works, subject to payment of the Contractor's reasonable charges;
- 37.2.4 if the Authority so elects, D&B Co shall procure that either or both the Construction Contract and Independent Tester Contract⁸⁰ shall be novated or assigned to the Authority, provided that where termination occurs under Clause 32 (*Authority Events of Default*) the consent of the Contractor and Independent Tester (in respect of the Independent Tester Contract only) shall be required;
- 37.2.5 D&B Co shall deliver to the Authority (as far as not already delivered to the Authority) one (1) complete set of:
- (a) "as built drawings" showing all alterations made to the Facilities since the commencement of operation of the Facilities; and
- (b) maintenance, operation and training manuals for the Facilities;
- 37.2.6 D&B Co shall use all reasonable endeavours to procure that the benefit of all manufacturer's warranties in respect of mechanical and electrical

⁷⁸ The Authority should include project specific provisions (e.g. relating to equipment, IT, planning, land and Authority Assets or information etc). The Authority should consider what protection is required to ensure compliance with the handover provisions on a project specific basis (taking into account the nature, importance and value of the assets that the handover provisions will apply to).

⁷⁹ The Authority should add other project specific items.

⁸⁰ Authorities should consider whether other contracts to which D&B Co is party should be listed here on a project specific basis.

plant and equipment used or made available by D&B Co under this Agreement and included in the Facilities are assigned, or otherwise transferred, to the Authority with full title guarantee; and

37.2.7 D&B Co shall deliver to the Authority the records referred to in Clause 31 (*Records and Open Book Accounting*) except where such documents are required by Law to be retained by D&B Co or its Contracting Associates (in which case complete copies shall be delivered to the Authority).

37.3 D&B Co shall ensure that provision is made in all contracts of any description whatsoever to ensure that the Authority will be in a position to exercise its rights, and D&B Co will be in a position to comply with its obligations, under Clause 37.2 (*Transfer to Authority of Assets, Contracts etc.*) and Clause 37.4 (*Transitional Arrangements*).

Transitional Arrangements

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

37.4.1 D&B Co shall as soon as practicable remove from the Site all property not acquired by the Authority pursuant to Clause 37.2 (*Transfer to Authority of Assets, Contracts etc.*) (or not belonging to the Authority or any Authority Party) and if it has not done so within forty (40) Business Days after any notice from the Authority requiring it to do so the Authority may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and shall hold any proceeds less all costs incurred to the credit of D&B Co;

37.4.2 D&B Co shall forthwith deliver to the Authority's Representative:

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

(b) without prejudice to Clause 43 (*Intellectual Property*), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facilities; and

37.4.3 D&B Co shall as soon as practicable vacate the Site and shall leave the Site and the Facilities in a safe, clean and orderly condition.

Continuing Obligations

- 37.5 Save as otherwise expressly provided in this Agreement:
- 37.5.1 termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination; and
- 37.5.2 [termination of this Agreement shall not affect the continuing rights and obligations of D&B Co and the Authority under Clauses 10 (*the Sites*), 19 (*Defects*) 26 (*Force Majeure*), 29 (*Payment*), 30 (*VAT and Construction Industry Tax Deduction Scheme*), 31 (*Records and Open Book Accounting*), Clause 36 (*Corrupt Gifts and Payments*), Clause 37 (*Consequences of Termination*), Clause 38 (*Indemnities*), Clause 41 (*Insurance*), 42 (*Exclusions and Limitations on Liability*), 43 (*Intellectual Property*), 44 (*Dispute Resolution Procedure*), 47 (*Mitigation*), 49 (*Confidentiality*), 52 (*Notices*) and Clause 63 (*Governing Law and Jurisdiction*) or under any other provision of this Agreement which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.]

Payments Following Termination Upon D&B Co Event of Default

- 37.6 If the Authority terminates D&B Co's employment under this Agreement in accordance with Clause 33 (*D&B Co Event of Default*) or Clause 36 (*Corrupt Gifts and Payments*);
- 37.6.1 D&B Co shall indemnify the Authority and keep the Authority fully indemnified against all reasonable expense, loss, damage and liabilities suffered or incurred by the Authority associated with or arising from the termination including any additional expense (above the amount that would reasonably have been paid to D&B Co had its employment not been terminated) incurred by the Authority in completing the Works (if applicable) including the cost of finding an alternative contractor or contractors and any additional amounts charged by them for completing the Works;
- 37.6.2 D&B Co shall be entitled to be paid the total value of work properly executed at, and of any design work properly carried out before, the Termination Date, ascertained in accordance with this Agreement, together with any other amounts due to D&B Co under this Agreement less any amounts previously paid to D&B Co under this Agreement; and
- 37.6.3 no payment shall be made to D&B Co in respect of Clause 37.6.2 until such time as the Works are complete.

Payments Following Termination Upon Authority Default

- 37.7 If this Agreement is terminated pursuant to Clause 32 (*Authority Events of Default*) D&B Co shall be entitled to be paid:
- 37.7.1 the total value of the Works properly executed at the Termination Date, ascertained in accordance with this Agreement under deduction of all amounts certified for payment in Interim Certificates previously issued under Clause 29.7 (*Issue of Interim Certificate*);
 - 37.7.2 the reasonable cost of removal of D&B Co's property from the Site;
 - 37.7.3 any Direct Losses caused to D&B Co by the termination; and
 - 37.7.4 to the extent not already included in the amount calculated in accordance with Clause 37.7.1, the cost of materials or goods properly ordered for the Works for which D&B Co shall have paid or for which D&B Co is legally bound to pay, and on such payment in full by the Authority such materials or goods shall become the property of the Authority provided always that D&B Co arranges for any such goods or materials to be delivered to the Site.

Payments Following Termination Upon Force Majeure

- 37.8 If this Agreement is terminated pursuant to Clause 34 (*Termination Resulting from Force Majeure*), D&B Co shall be entitled to be paid:
- 37.8.1 the total value of the Works properly executed at the Termination Date, ascertained in accordance with this Agreement under deduction of all amounts certified for payment in Interim Certificates previously issued under Clause 29.7 (*Issue of Interim Certificate*); and
 - 37.8.2 to the extent not already included in the amount calculated in accordance with Clause 37.8.1, the cost of materials or goods properly ordered for the Works for which D&B Co shall have paid or for which D&B Co is legally bound to pay, and on such payment in full by the Authority such materials or goods shall become the property of the Authority provided always that D&B Co arranges for any such goods or materials to be delivered to the Site.

Payments Under Clauses 37.6, 37.7 and 37.8 to be Exhaustive

- 37.9 Without prejudice to Clause 37.5.1 (*Continuing Obligations*), the making of those payments following a termination which are required to be made by Clauses 37.6 (*Payments Following Termination Upon D&B Co Event of Default*), 37.7 (*Payments Following Termination Upon Authority Default*) and 37.8 (*Payments Following Termination Upon Force Majeure*) shall be in full satisfaction of any claim in respect of the termination of, and the circumstances

leading to, the termination of this Agreement or D&B Co's employment under this Agreement and neither D&B Co nor the Authority shall be entitled to any other rights or remedies in that regard.

PART 10: INDEMNITIES, RELIEF, WARRANTIES & INSURANCE

38. INDEMNITIES

D&B Co Indemnities to Authority

- 38.1 D&B Co shall indemnify and keep the Authority indemnified at all times from and against all Direct Losses sustained by the Authority in consequence of:
- 38.1.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, D&B Co or any D&B Co Party notwithstanding any act or omission of the Authority or any Authority Party;⁸¹
 - 38.1.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 38.2.1) arising out of, or in the course of, the Project Operations, save to the extent caused (or contributed to) by any Unreasonable Act by the Authority or any Authority Party, breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate⁸² or negligent act or omission of the Authority or any Authority Party;
 - 38.1.3 any physical loss of or damage to Authority Assets arising by reason of any act or omission of D&B Co or any D&B Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate or negligent act or omission of the Authority or any Authority Party; and
 - 38.1.4 any loss of or damage to property or assets of any third party arising by reason of any act or omission of D&B Co or any D&B Co Party, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate or negligent act or omission of the Authority or any Authority Party.

Authority Indemnities to D&B Co

- 38.2 The Authority shall indemnify and keep D&B Co indemnified at all times from and against all Direct Losses sustained by D&B Co in consequence of:

⁸¹ This mirrors the indemnity given by the Authority in relation to its employees in Clause 38.2.1. D&B Co should manage the risks covered by the indemnity (and the fact that there is no carve out for causation) by putting appropriate insurance cover in place (which it is required by law to do), which contains satisfactory non-vitiation provisions (see Clause 41.6 (*Subrogation and Vitiating*)).

⁸² Deliberate acts or omissions do not include acts or omissions which are within the contemplation of the parties or provided for in this Agreement (see paragraph 11 of Section 2 (*Interpretation*) of Schedule 1 (*Definitions and Interpretation*)).

- 38.2.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, the Authority or any Authority Party notwithstanding any act or omission of D&B Co or any D&B Co Party;
- 38.2.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 38.1.1) arising by reason of any act or omission of the Authority or any Authority Party in the course of provision of the Authority Services, [any Unreasonable Act by the Authority or any Authority Party,] breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate act or omission of the Authority or any Authority Party, save to the extent caused (or contributed to) by any act or omission of D&B Co or any D&B Co Party;
- 38.2.3 any physical damage to any part of the Works or any assets or other property of D&B Co or any D&B Co Party arising by reason of any breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate act or omission of the Authority or any Authority Party, save to the extent caused (or contributed to) by any act or omission of D&B Co or any D&B Co Party; and
- 38.2.4 any loss of or damage to property or assets of any third party arising by reason of any breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate act or omission of the Authority or any Authority Party, save to the extent caused (or contributed to) by any act or omission of D&B Co or any D&B Co Party;

provided that in the case of Clauses 38.2.3 and 38.2.4 there shall be excluded from the indemnity given by the Authority any liability:

- (a) for the occurrence of risks against which and to the extent to which D&B Co is obliged to insure under this Agreement (but for the avoidance of doubt, not such liability to the extent within any applicable excess or deductible or over the maximum amount insured or to be insured under such insurance); or
- (b) in respect of a matter which is a Compensation Event.

Conduct of Claims

- 38.3 This Clause 38.3 (*Conduct of Claims*) shall apply to the conduct, by a party from whom an indemnity is sought under this Agreement, of claims made by a third person against a party having (or claiming to have) the benefit of the indemnity. The party having, or claiming to have, the benefit of the indemnity is referred to as the "**Beneficiary**" and the party giving the indemnity is referred to as the "**Indemnifier**". Accordingly:
- 38.3.1 if the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become, entitled to indemnification under this Agreement, the

Beneficiary shall give notice in writing to the Indemnifier as soon as reasonably practicable and in any event within twenty (20) Business Days of receipt of the same;

38.3.2 subject to Clauses 38.3.3, 38.3.4 and 38.3.5 below, on the giving of a notice by the Beneficiary pursuant to Clause 38.3.1 above, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all (but not part only) of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with an indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim;

38.3.3 with respect to any claim conducted by the Indemnifier pursuant to Clause 38.3.2 above:

- (a) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
- (b) the Indemnifier shall not bring the name of the Beneficiary into disrepute; and
- (c) the Indemnifier shall not pay or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;

38.3.4 the Beneficiary shall be free to pay or settle any claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if:

- (a) the Indemnifier is not entitled to take conduct of the claim in accordance with Clause 38.3.2 above; or
- (b) the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Beneficiary under Clause 38.3.1 above or notifies the Beneficiary that it does not intend to take conduct of the claim; or
- (c) the Indemnifier fails to comply in any material respect with the provisions of Clause 38.3.3 above;

- 38.3.5 the Beneficiary shall be free at any time to give notice to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any claim (or of any incidental negotiations) to which Clause 38.3.2 above applies. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Clause 38.3.5, then the Indemnifier shall be released from any liability under its indemnity under Clause 38.1 (*D&B Co Indemnities to Authority*) or Clause 38.2 (*Authority Indemnities to D&B Co*) (as the case may be) and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to Clause 38.3.2 in respect of such claim;
- 38.3.6 if the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:
- (a) an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out of pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and
 - (b) the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity,
- 38.3.7 provided that there shall be no obligation on the Beneficiary to pursue such recovery and that the Indemnifier is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Indemnifier exceeds any loss sustained by the Beneficiary (including for this purpose indirect or consequential losses or claims for loss of profits which are excluded by this Agreement from being recovered from the Indemnifier); and
- 38.3.8 any person taking any of the steps contemplated by Clauses 38.3.1 to 38.3.5 shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

Mitigation – Indemnity Claims

- 38.4 To avoid doubt the provisions of Clause 47 (*Mitigation*) apply to any indemnity given under this Agreement and any such indemnity shall not apply to the extent that such part or parts of Direct Losses could have been reduced or avoided by the Beneficiary complying with the provisions of such Clause 47 (*Mitigation*).

39. TAX ON INDEMNITY PAYMENTS

If any payment by one party under an indemnity in this Agreement is subject to income tax or corporation tax (or any tax replacing them) in the hands of the recipient, the recipient may demand in writing to the party making the payment that the payment shall be increased by such amount as would ensure that, after taking into account any such tax payable in respect of such additional amount, the recipient receives and retains a net sum equal to the amount it would have otherwise received had the payment not been subject to such tax. The party making the payment shall pay such additional amount within ten (10) Business Days of receipt of such demand.

40. WARRANTIES⁸³

40.1 Tax Compliance

- 40.1.1 D&B Co represents and warrants to the Authority that at the date of this Agreement, it has notified the Authority in writing of any Occasions of Tax Non-Compliance and any litigation in connection with any Occasions of Tax Non-Compliance that it or, so far as it is aware having made reasonable enquiries, any of the Shareholders (other than [♦]⁸⁴) is involved in.
- 40.1.2 If at any time an Occasion of Tax Non-Compliance occurs in relation to it or any Shareholder other than [♦]⁸⁵ (a "**Non-Compliant Shareholder**"), D&B Co shall:
- (a) notify the Authority in writing of such fact within five (5) Business Days of it becoming aware of that occurrence; and
 - (b) provide to the Authority:
 - (i) promptly, and in any event within twenty (20) Business Days of its becoming aware of that occurrence, details of the steps which it, or as the case may be, the Non-Compliant Shareholder is taking to address the Occasion of Tax Non-Compliance and to prevent the same from recurring, together with any mitigating factors that it considers relevant (together '**Proposed Mitigating Measures**'); and
 - (ii) such other information in relation to the Occasion of Tax Non-Compliance as the Authority may reasonably require within five (5) Business Days of receipt of notice from the Authority to do so.

⁸³ Subject to review in light of the entity that is party to the Agreement.

⁸⁴ Reference to be made to the Welsh Government shareholder entity, under the WEPCo Shareholders' Agreement.

⁸⁵ Reference to be made to the Welsh Government shareholder entity, under the WEPCo Shareholders' Agreement.

- 40.1.3 The Authority will notify D&B Co in writing if the Proposed Mitigating Measures are acceptable to it, in its reasonable opinion, within fifteen (15) Business Days of receipt of all information required to be provided in accordance with Clause 40.1.2.
- 40.1.4 Where the Authority notified D&B Co that the Proposed Mitigating Measures are not acceptable, the Authority may, in that notice, request that D&B Co provides details of further measures it, or as the case may be, the Non-Compliant Shareholder, would take to prevent the same from recurring, together with any further mitigating factors that it considers relevant. Within twenty (20) Business Days of receipt of a notice from the Authority requesting further measures, D&B Co will either provide details of the further measures it, or as the case may be, the Non-Compliant Shareholder, is willing to take or notify the Authority that it is not willing to take further measures. The Authority will consider any further measures proposed by D&B Co and notify D&B Co within fifteen (15) Business Days if those further measures, taken together with the Proposed Mitigating Measures, are acceptable to the Authority acting reasonably.
- 40.1.5 If:
- (a) the warranty by D&B Co contained in Clause 40.1.1 is untrue and Proposed Mitigating Measures are not agreed in accordance with Clauses 40.1.2 to 40.1.4 (inclusive); and/or
 - (b) D&B Co commits a material breach of its obligation to notify the Authority of any Occasion of Tax Non-Compliance and / or D&B Co fails to provide details of Proposed Mitigating Measures each as required by Clause 40.1.2; and/or
 - (c) the Authority otherwise becomes aware that an Occasion of Tax Non-Compliance has occurred in relation to D&B Co or a Shareholder (other than [♦]⁸⁶) and D&B Co fails to provide details of Proposed Mitigating Measures within twenty (20) Business Days of its being required by the Authority to do so; and/or
 - (d) the Authority notifies D&B Co under Clause 40.1.4 that the Proposed Mitigating Measures are not acceptable and, if D&B Co is requested to provide details of further measures pursuant to Clause 40.1.4 the further measures (if any) are not acceptable to the Authority, in its reasonable opinion and the Authority notifies D&B Co to that effect; and/or
 - (e) in any such case D&B Co fails to implement, or procure the implementation by a Non-Compliant Shareholder of, any Proposed Mitigating Measures agreed to by the Authority in any material respect (including as to timetable),

⁸⁶ Reference to be made to the public sector shareholder entities, under the WEPCo Shareholders' Agreement.

then the Authority shall be entitled to give to D&B Co:

- (i) where the Occasion of Tax Non-Compliance has occurred in relation to D&B Co, a notice under Clause 33.3.4 (*Authority's Options*); and
- (ii) where the Occasion of Tax Non-Compliance has occurred in relation to a Shareholder, a notice under Clause 40.1.6.

40.1.6 Where the Occasion of Tax Non-Compliance applies to a Non-Compliant Shareholder, the Authority may by written notice (a "**Shareholder Tax Non-compliance Notice**") require that the Non-Compliant Shareholder transfers all its shares and Shareholder loan notes in D&B Co to a person who is not a Restricted Person within one hundred and eighty (180) days commencing on the date the Shareholder Tax Non-compliance Notice is served. If the Non-Compliant Shareholder does not effect such transfer of shares and Shareholder loan notes in D&B Co to a person who is not a Restricted Person within such one hundred and eighty (180) day period (or such longer period as may be agreed by the Authority in its absolute discretion) then the Authority will be entitled to give a notice to D&B Co under Clause 33.3.4 (*Authority's Options*).

40.1.7 If D&B Co fails to implement, or procure the implementation by a Non-Compliant Shareholder of, any Proposed Mitigating Measures agreed to by the Authority in any material respect (including as to timetable) following an Occasion of Tax Non-Compliance which applies to a Non-Compliant Shareholder, the Authority may by written notice (a "**Shareholder Tax Mitigation Measures Non-Compliance Notice**") require that the Non-Compliant Shareholder transfers all its shares and Shareholder loan notes in D&B Co to a person who is not an Restricted Person within ninety (90) days commencing on the date the Shareholder Tax Mitigation Measures Non-Compliance Notice is served. If the Non-Compliant Shareholder does not effect such transfer of shares and Shareholder loan notes to a person who is not an Restricted Person within such ninety (90) day period (or such longer period as may be agreed by the Authority in its absolute discretion) then the Authority will be entitled to give a notice to D&B Co under Clause 33.3.4 (*Authority's Options*).

41. INSURANCE⁸⁷

D&B Co Insurances

41.1 D&B Co shall procure that the Insurances, details of which are set out in Section 1 of Schedule 12 (*Insurance Requirements*), are taken out prior to the commencement of the Works and are maintained for the periods specified in Section 1 of Schedule 12 (*Insurance Requirements*).

⁸⁷ The Authority should seek professional insurance advice on the insurance requirements in this Clause 41 and Schedule 12 (*Insurance Requirements*).

- 41.2 Without prejudice to the other provisions of this Clause 41 (*Insurance*), D&B Co shall, at all relevant times, at its own cost, effect and maintain in full force those insurances which it is required to effect by any applicable Law.
- 41.3 D&B Co shall discharge all its obligations under the Insurance Act 2015 when placing, renewing, maintaining or amending any of the Insurances referred to in Clauses 41.1 and 41.2 (*D&B Co Insurances*) and including complying with the duty of fair presentation to insurers, and taking the actions needed to protect the Authority's separate interests where appropriate.
- 41.4 All Insurances referred to in Clauses 41.1 (*D&B Co Insurances*) shall:
- 41.4.1 be maintained in the names of the parties specified in Schedule 12 (*Insurance Requirements*) and shall be composite policies of insurance (and not joint) unless stated otherwise in Schedule 12 (*Insurance Requirements*);
 - 41.4.2 be placed with insurers who are acceptable to the Authority (such acceptance not to be unreasonably withheld or delayed);
 - 41.4.3 in so far as they relate to damage to assets (including the Facilities), cover the same for the full reinstatement value;
 - 41.4.4 comply with the relevant provisions of Section 1 of Schedule 12 (*Insurance Requirements*); and
 - 41.4.5 provide for thirty (30) days prior written notice of their cancellation, non-renewal or amendment to be given to the Authority in accordance with Endorsement 1 in Section 3 (*Endorsements*) of Schedule 12 (*Insurance Requirements*).
- 41.5 D&B Co shall ensure that its brokers give the Authority a letter of undertaking substantially in the form set out in Section 4 (*Broker's Letter of Undertaking*) of Schedule 12 (*Insurance Requirements*) on or before the date of signature of this Agreement.

Subrogation and Vitiating

- 41.6 D&B Co shall in respect of the Insurances referred to in Clause 41.1 (*D&B Co Insurances*):
- 41.6.1 [procure that all policies of insurance to be effected by it pursuant to this Clause shall contain a provision to the effect that the insurers have agreed to waive all rights of subrogation against the Authority (and all

Authority Parties in accordance with Endorsement 2 in Section 3 (*Endorsements*) of Schedule 12 (*Insurance Requirements*);⁸⁸ and

41.6.2 [provide for non-vitiation protection in respect of any claim made by the Authority as co-insured in accordance with Endorsement 2 in Section 3 (*Endorsements*) of Schedule 12 (*Insurance Requirements*);]⁸⁹

provided that, to avoid doubt, this Clause 41.6 (*Subrogation and Vitiating*) shall not by itself prevent D&B Co from claiming against the Authority (or any Authority Party) under an express provision of this Agreement for any loss or damage not covered because of the level of deductibles under such insurance permitted by this Agreement or to the extent such loss or damage exceeds the maximum of such insurance required by this Agreement.

41.7 Neither party shall take any action or fail to take any reasonable action or (in so far as it is reasonably within its power) permit or allow others to take or fail to take any action (including failure to disclose any fact) as a result of which any of the Insurances may be rendered void, voidable, unenforceable or suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

Evidence of D&B Co Insurance

41.8 Not less than twenty (20) Business Days prior to the amendment [or expiry] of any relevant insurance policy D&B Co shall submit to the Authority a request for approval from the Authority of the insurer and the principal terms and conditions of such insurance policy (and any revision to such terms and conditions or change in identity of such insurer), such approval not to be unreasonably withheld or delayed.

41.9 D&B Co shall provide to the Authority:

41.9.1 copies on request of all insurance policies referred to in Clauses 41.1 (*D&B Co Insurances*) (together with any other information reasonably requested by the Authority relating to such insurance policies) and the Authority shall be entitled to inspect them during ordinary business hours; and

41.9.2 evidence that the premiums payable under all insurance policies have been paid and that the Insurances are in full force and effect in accordance with the requirements of this Clause 41 (*Insurance*) and Schedule 12 (*Insurance Requirements*).

⁸⁸ Waivers of subrogation are available in the prevailing UK insurance market and should be sought to protect the Authority's interests, particularly in relation to the insurances where the Authority is to be a co-insured party for its separate rights and interests. Drafting of the required endorsement is set out in Section 3 (*Endorsements*) of Schedule 12 (*Insurance Requirements*) (Endorsement 2).

⁸⁹ Non-vitiation protection will be required under every policy where the Authority requires that it be a co-insured party for its separate rights and interests. Drafting of the required endorsement is set out in Section 3 (*Endorsements*) of Schedule 12 (*Insurance*) (Endorsement 2).

- 41.10 [Renewal certificates or other such evidence of renewal in relation to the Insurances shall be obtained as and when necessary and copies (certified in a manner acceptable to the Authority) shall be forwarded to the Authority as soon as possible but in any event within twenty (20) Business Days of the Renewal Date.]⁹⁰
- 41.11 If D&B Co defaults in insuring or continuing to maintain the Insurances, the Authority may insure against any risk in respect of which such default has occurred and recover any premiums from D&B Co as a debt.

Acceptance and Compliance

- 41.12 The supply to the Authority of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause 41 (*Insurance*) shall not imply acceptance by the Authority (or the Authority's Representative) that the extent of insurance cover is sufficient and its terms are satisfactory.
- 41.13 Neither failure to comply, nor full compliance, with the insurance provisions of this Agreement shall relieve D&B Co of its liabilities and obligations under this Agreement.

Risk Management

- 41.14 With effect from the date of this Agreement, the Authority and D&B Co shall each designate or appoint an insurance and risk manager and notify details of the same to the other party. Such person shall:
- 41.14.1 be responsible for dealing with all risk management matters on behalf of its appointing or designating party including (without limitation) ensuring compliance by that party with this Clause 41.14 (*Risk Management*);
 - 41.14.2 advise and report to that party on such matters; and
 - 41.14.3 ensure that any report or survey conducted by any insurer of any relevant procedures in relation to the Project is disclosed to the parties.
- 41.15 Without prejudice to the provisions of Clause 41.14 (*Risk Management*), the parties shall notify one another, and in D&B Co's case the relevant insurer, of any circumstances which may give rise to a claim of a value equal to or in excess of [♦] pounds (£[♦]) (index linked)⁹¹ under the Insurances within [♦] Business Days of becoming aware of the same (or earlier, if so requested by the terms of the relevant insurance policy). If any insurer disputes any such claim, D&B Co shall provide the Authority with full details of any disputed claim and the parties shall liaise with one another to ensure that the relevant claim is preserved or pursued.

⁹⁰ This requirement applies only if project specific insurance policies are not placed for the Insurances required by Clause 41.1.

⁹¹ The insurance claims notification threshold should normally represent a significant or material value claim in connection with the requirement or represent an amount that would provide comfort to the Authority that it has knowledge of claims that might impact on the Authority.

Application of Proceeds

- 41.16 All insurance proceeds received by D&B Co under the Contractors' 'All Risks' Insurance referred to in Section 1 of Schedule 12 (*Insurance Requirements*) shall be paid into the Insurance Proceeds Account and shall be applied in accordance with this Agreement.⁹²
- 41.17 D&B Co shall apply any proceeds of any policies of Insurance:
- 41.17.1 in the case of third party legal liability or employers' liability insurance, in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable; and
- 41.17.2 in the case of any other insurance, so as to ensure the performance by D&B Co of its obligations under this Agreement, including where necessary the reinstatement, restoration or replacement of the Facilities, assets, materials or goods affected by the event giving rise to the insurance claim and consequent payment of proceeds.
- 41.18 Where reinstatement monies are required to be released from the Insurance Proceeds Account D&B Co shall obtain the Authority's consent. The Authority shall give its consent (or confirm that it is withholding its consent) to the release of monies from the Insurance Proceeds Account within one (1) Business Day of a request from D&B Co (provided that such consent must not be unreasonably withheld).
- 41.19 If the proceeds of any insurance claim are insufficient to cover the settlement of such claims, D&B Co will make good any deficiency forthwith.
- 41.20 **Reinstatement**
- 41.20.1 [Without prejudice to Clause 38 (*Indemnities*) D&B Co shall be responsible for repairing, rectifying and/or reinstating all damage caused to the Facilities by D&B Co or a D&B Co Party in the conduct of the Project Operations after the Actual Completion Date].
- 41.20.2 Where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) (the ("**Relevant Incident**") in an amount in excess of [♦] pounds (£[♦]) (index-linked):
- (a) D&B Co shall deliver to the Authority as soon as practicable and in any event within twenty-eight (28) days after the making of the claim a plan prepared by D&B Co for the carrying out of the works necessary (the "**Reinstatement Works**") to repair,

⁹² This Clause must refer to only such insurances, the proceeds of which are to be paid into the Insurance Proceeds Account i.e. Physical Damage insurance policies

reinstate or replace (the "**Reinstatement Outline**") the relevant Works which are the subject of the relevant claim or claims in accordance with Clause 41.20.3 (*Works Carried Out*) below. The Reinstatement Outline shall set out:

- (i) the identity of the person proposed to effect the Reinstatement Works, which (if not D&B Co or a D&B Co Party) shall be subject to the prior written approval of the Authority; and
 - (ii) the proposed terms and timetable or, if not then established, the reasonably anticipated terms and timetable upon which the Reinstatement Works are to be effected (including the date by which the Reinstatement Works will be completed), the final terms of which shall be subject to the prior written approval of the Authority (such approval not to be unreasonably withheld or delayed);
- (b) the Authority shall within ten (10) Business Days of receipt of the Reinstatement Outline notify D&B Co in writing that:
- (i) it is satisfied that the Reinstatement Outline will enable D&B Co to comply with its obligations to carry out the Reinstatement Works within a reasonable timetable, and (if not D&B Co or a D&B Co Party) that the identity of any person (set out in the Reinstatement Outline) that may be appointed to effect the Reinstatement Works is approved;
 - (ii) the identity of any person (set out in the Reinstatement Outline) that may be appointed to effect the Reinstatement Works (if not D&B Co or a D&B Co Party) is not approved together with its reasons for such non-approval in sufficient detail to enable D&B Co to understand the nature and extent of such non-approval and to assess whether the Authority's approval under Clause 41.20.2(a)(ii) has been unreasonably withheld;
 - (iii) it does not approve the Reinstatement Outline together with its reasons for such non-approval, in sufficient detail so as to enable D&B Co to understand the nature and extent of such non-approval and to assess whether the Authority's approval under Clause 41.20.2(a)(ii) has been unreasonably withheld; or
 - (iv) if the Authority does not make one of the above responses within the period specified in Clause 41.20.3, it shall be deemed to have approved the Reinstatement Outline, save where the Authority has reasonably requested any further information

from D&B Co, in which case the time limit outlined in Clause 41.20.3 will be deemed to commence upon receipt of such information by the Authority;

- (c) if the Authority gives notice of non-approval in accordance with Clauses 41.20.2(b)(ii) or 41.20.2(b)(iii), D&B Co may amend and re-submit the Reinstatement Outline (the "**Amended Reinstatement Outline**") to the Authority for its reconsideration and the Authority shall give its approval or non-approval within five (5) Business Days of the submission of the Amended Reinstatement Outline to the Authority. If the Authority does not approve the Amended Reinstatement Outline, it shall provide reasons for such non-approval in sufficient detail so as to enable D&B Co to understand the nature and extent of such non-approval and to assess whether the Authority's approval has been unreasonably withheld;
- (d) if the Amended Reinstatement Outline or a person proposed to carry out the Reinstatement Works is not approved by the Authority in accordance with Clause 41.20.2(c) D&B Co may submit the Amended Reinstatement Outline to the Dispute Resolution Procedure in order for it to be determined whether the Authority's approval under Clause 41.20.2(c) was unreasonably withheld;
- (e) the Reinstatement Outline or the Amended Reinstatement Outline (as the case may be) as approved by the Authority pursuant to this Clause 41.20 or as determined pursuant to the Dispute Resolution Procedure shall become the "**Reinstatement Plan**";
- (f) D&B Co shall effect the Reinstatement Works in accordance with the Reinstatement Plan, and:
 - (i) D&B Co shall enter into contractual arrangements to effect the Reinstatement Works with the person(s) identified in the Reinstatement Plan;
 - (ii) the insurance proceeds received under any Physical Damage Policy in respect of the Relevant Incident (together with any interest accrued) may be applied by D&B Co as required to enable it to make payments in accordance with the terms of the contractual arrangements entered into to effect the Reinstatement Works and to meet any other reasonable costs and expenses of D&B Co for the sole purposes of financing the Reinstatement Works;
 - (iii) the Authority agrees and undertakes that, subject to compliance by D&B Co with its obligations under this Clause, and provided that D&B Co procures that the Reinstatement Works are carried out and completed in accordance with this Clause 41.20, it shall not

exercise any right which it might otherwise have to terminate this Agreement by virtue of the event which gave rise to the claim under the Physical Damages Policy;

- (iv) the Authority undertakes to use reasonable endeavours to assist D&B Co in the carrying out of the Reinstatement Plan;
- (v) subject to the provisions of Clause 38 (*Indemnities*) D&B Co shall be solely responsible for the payment of any deficiency between the insurance proceeds and the cost of carrying out the Works.

Works Carried Out

41.20.3 Where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate or replace the whole or any part of the Works or Facility, D&B Co shall carry out the work in accordance with the Authority's Construction Requirements so that on completion of the work, the provisions of this Agreement are complied with.

Contractor's Insurance

41.21 D&B Co shall procure that the Contractor at its own cost takes out, or procures the taking out of, professional indemnity insurance with reputable insurers carrying on business in the [European Union] with a limit of indemnity of not less than £[◆] ,000,000 ([◆] million pounds) [in respect of any one claim without limit to the number of claims in any annual policy period, but £[◆] ([◆]million pounds any one claim and in the aggregate per annum for liability arising out of pollution or Contamination] [in respect of any on claim and in the aggregate per annum] with at least one annual reinstatement], in relation to the Works, provided always that:

41.21.1 such insurance shall be in place from the commencement of the Works until no less than

- (a) in respect of the Main Works, twelve (12) years after the Actual Completion Date; and
- (b) in respect of the Post Completion Works, twelve (12) years after the Actual Post Completion Works Date,

or in either case, if earlier, 12 years after the date of termination of the Construction Contract;

41.21.2 the insurance premiums in respect of the insurance shall, as between the Authority and D&B Co at all times be the responsibility of D&B Co;

41.21.3 if such insurance is not available to the Contractor (and/or design and build contractors engaged in projects of a similar scope, size, nature and complexity as the Contractor) at commercially reasonable rates and terms (excluding any increase in premiums attributable to the actions, omissions, errors or defaults of the Contractor), the Contractor, D&B Co and the Authority will meet and the Contractor will outline the steps it intends to take to manage such risks. If the steps proposed by the Contractor are not acceptable to the Authority (acting reasonably), the Contractor, D&B Co and the Authority shall agree an alternative method of managing such risk.

41.22 D&B Co will procure that the Contractor will, upon request, provide the Authority with reasonable evidence that the policy referred to in Clause 41.21 (*Contractor's Insurance*) is in full force and effect in accordance with the requirements of Clause 41.21 (*Contractor's Insurance*).

42. EXCLUSIONS AND LIMITATIONS ON LIABILITY

Exclusions

42.1 The indemnities under this Agreement shall not apply and there shall be no right to claim damages for breach of this Agreement, in tort or on any other basis whatsoever to the extent that any loss claimed by either party is for loss of profits, loss of use, loss of production, loss of business or loss of business opportunity or is a claim for consequential loss or for indirect loss of any nature ("**Indirect Losses**") suffered or allegedly suffered by either party. The Authority agrees that, notwithstanding the foregoing, any losses of D&B Co arising under the Construction Contract⁹³ as originally executed (or as amended in accordance with and subject to Clause 4.1 (*Documents*)) which are not Indirect Losses shall not be excluded from such a claim solely by reason of this Clause 42.1 (*Exclusions*).

42.2 The Authority shall not be liable in tort to D&B Co or any D&B Co Party in respect of any negligent act or omission of the Authority or any Authority Party relating to or in connection with this Agreement and D&B Co shall procure that no D&B Co Party shall bring such a claim against the Authority. D&B Co has accepted this on the basis that it and each D&B Co Party will cover the risk of negligent acts or omissions by insurance or in such other manner as it (or they) may think fit.

42.3 Nothing in this Clause 42 (*Exclusions*) shall exclude any right of the Authority to seek damages from D&B Co for breach of contract in respect of any losses it incurs as a direct result of the loss of use of all or any part of the Facilities arising out of any Defect.

⁹³ As a matter of good practice, the Authority should review the relevant Sub-contract(s) prior to entry into the Template Education D&B Agreement to ensure that they contain mirror provisions excluding the right to claim Indirect Losses. Assurances on the contents of the sub-contract(s) will be required to be provided to the Welsh Government, whether or not equity is being invested by the public sector.

No Double Recovery

- 42.4 Nothing in Clauses 42.4 to 42.7 shall prevent or restrict the right of the Authority to seek an injunction or an order for specific performance or other discretionary remedies of the court.
- 42.5 Notwithstanding any other provision of this Agreement, neither party shall be entitled to recover compensation or make a claim under this Agreement or any other agreement in relation to the Project in respect of any loss that it has incurred (or any failure of the other party) to the extent that it has already been compensated in respect of that loss or failure pursuant to this Agreement or otherwise.
- 42.6 Neither party shall have the right to terminate this Agreement for breach of contract save as expressly set out in this Agreement.
- 42.7 Subject to Clause 32.1 (*Authority Events of Default*) and any other express right of D&B Co pursuant to this Agreement, D&B Co's sole remedy in respect of any breach of this Agreement which is a Compensation Event shall be pursuant to Clause 24 (*Delay Events and Compensation Events*).

Limitation on Liability

- 42.8 [Subject to Clause 42.9, but notwithstanding any other provision of this Agreement the maximum aggregate liability of D&B Co to the Authority pursuant to and arising out of this Agreement shall not exceed the Liability Cap.]⁹⁴
- 42.9 [The limitation of D&B Co's liability under Clause 42.8 shall not apply to:
- 42.9.1 any liability in relation to death or personal injury; or
 - 42.9.2 any liability where such is caused or contributed to by:
 - (a) the wilful default of D&B Co and/or any D&B Co Party or abandonment by D&B Co and/or any D&B Co Party;
 - (b) fraud of D&B Co and/or any D&B Co Party;
 - 42.9.3 any liability, where and to the extent that D&B Co makes recovery from any other third party or from Insurances maintained by either party pursuant to Clause 41 (*Insurance*) in respect of such liability or where D&B Co would have made recovery:

⁹⁴ It is for Authorities to consider whether inclusion of a Liability Cap (and the level of such cap where included) represents value for money to the Authority or is otherwise acceptable.

- (a) had the relevant third party or insurer met its obligations under the relevant agreement or policy; or
- (b) had D&B Co complied with its obligations under this Agreement and/or the terms of any applicable insurance policy; or
- (c) had D&B Co diligently pursued such recovery; or

42.9.4 had D&B Co or a D&B Co Party, through its acts or omissions, not caused the relevant insurance policy to become void, voidable, unenforceable, suspended or impaired,

and excluding in each case any non-recovery to the extent such non-recovery has occurred as a direct result of the act, omission, breach or negligence of the Authority (to the extent such breach or negligence was not caused by the act or omission of D&B Co or a D&B Co Party);

42.9.5 any liability of D&B Co arising under paragraph 8.3 of Schedule 15 (*Dispute Resolution Procedure*) or in respect of any indemnity arising out of breach of Law by D&B Co or a D&B Co Party⁹⁵.]

42.10 D&B Co's liability under this Agreement shall[:

42.10.1]in respect of the [Main] Works end on the date falling twelve (12) years after the Actual Completion Date[; and

42.10.2 in respect of the Post Completion Works end on the date falling twelve (12) years after the Actual Post Completion Works Date,]

or in either case if earlier, end on the date falling twelve (12) years after the Termination Date,

save, in each case, in respect of claims which have been made prior to such date and in respect of which actions or proceedings have been commenced within six months of such date.

No Loss

42.11 Where the Authority would otherwise be expressly liable to make payment to D&B Co of sums which include amounts payable in turn by D&B Co to any Sub-Contractor, the Authority shall not be entitled to withhold, reduce or avoid any such payment to D&B Co in reliance only on the fact that the amount which is due from D&B Co to the Sub-Contractor or the entitlement of the Sub-Contractor to payment of such amount as a result of the circumstances giving rise to the Authority's

⁹⁵ Authorities may consider expanding the list of exclusions.

obligation to pay, is conditional on the entitlement of, or receipt of payment by D&B Co from the Authority.

- 42.12 [Where D&B Co would otherwise be expressly liable to make payment to the Authority of sums which include amounts payable in turn by the Authority to any School Entity, D&B Co shall not be entitled to withhold, reduce or avoid any such payment to the Authority in reliance only on the fact that the amount which is due from the Authority to the School Entity or the entitlement of the School Entity to payment of such amount as a result of the circumstances giving rise to D&B Co's obligation to pay, is conditional on the entitlement of, or receipt of payment by the Authority from D&B Co.]⁹⁶

⁹⁶ Drafting should be included on schools projects.

PART 11: MISCELLANEOUS

43. INTELLECTUAL PROPERTY

Project Data

- 43.1 D&B Co shall make available to the Authority free of charge (and hereby irrevocably licences the Authority to use) all Project Data that might reasonably be required by the Authority and D&B Co shall ensure that it can make the Project Data available to the Authority on these terms, for the purposes of:
- 43.1.1 the Authority carrying out the Authority Services (and its operations relating to the performance of the Authority Services including but not limited to the operation, maintenance or improvement of the Facilities), its duties under this Agreement and/or any statutory duties that the Authority may have; and
 - 43.1.2 following completion of the Works, the design or construction of the Facilities and/or the carrying out of operations the same as, or similar to, the Project Operations,

(together the "**Approved Purposes**") and in this Clause "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly.

Intellectual Property Rights

- 43.2 D&B Co:
- 43.2.1 hereby grants to the Authority, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub-licences) to use the Intellectual Property Rights which are or become vested in D&B Co; and
 - 43.2.2 shall, where any Intellectual Property Rights are or become vested in a third party, use all reasonable endeavours to procure the grant of a like licence to that referred to in Clause 43.2.1 above to the Authority,

in both cases, solely for the Approved Purposes.

D&B Co shall use all reasonable endeavours to ensure that any Intellectual Property Rights created, brought into existence or acquired during the term of this Agreement vest, and remain vested throughout the term of this Agreement, in D&B Co and D&B Co shall enter into appropriate agreements with any D&B Co Party

(or other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

Maintenance of Data⁹⁷

- 43.3 To the extent that any of the data, materials and documents referred to in this Clause are generated by or maintained on a computer or similar system, D&B Co shall use all reasonable endeavours to procure for the benefit of the Authority, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable the Authority or its nominee to access and otherwise use (subject to the payment by the Authority of the relevant fee, if any) such data for such purposes as the Authority may at its sole discretion require. As an alternative, D&B Co may provide such data, materials or documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format.
- 43.4 D&B Co shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Clause 43.3 (*Maintenance of Data*) in accordance with Good Industry Practice. Without prejudice to this obligation, D&B Co shall submit to the Authority's Representative for approval its proposals for the back-up and storage in safe custody of such data, materials and documents and the Authority shall be entitled to object if the same is not in accordance with Good Industry Practice. D&B Co shall comply, and shall cause all D&B Co Parties to comply, with all procedures to which the Authority's Representative has given its approval. D&B Co may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Authority's Representative, who shall be entitled to object on the basis set out above.

Claims

- 43.5 Where a claim or proceeding is made or brought against the Authority which arises out of the infringement of any rights in or to any Intellectual Property (other than any Disclosed Data) or because the use of any materials, Plant, machinery or equipment in connection with the Project Operations infringes any rights in or to any Intellectual Property of a third party then, unless such infringement has arisen out of the use of any Intellectual Property by or on behalf of the Authority otherwise than in accordance with the terms of this Agreement, D&B Co shall indemnify the Authority at all times from and against all such claims and proceedings and the provisions of Clause 38.3 (*Conduct of Claims*) shall apply.

44. DISPUTE RESOLUTION PROCEDURE

Except where expressly provided otherwise in this Agreement, any dispute arising out of or in connection with this Agreement shall be resolved in accordance with the procedure set out in Schedule 15 (*Dispute Resolution Procedure*).

⁹⁷ If either party is to be given access to any of the other party's computer systems, as a matter of good practice and also to clarify potential liability for unauthorised access to those systems under the Computer Misuse Act 1990, the scope of each party's authorisation to access each other's computer systems will need to be defined clearly. The terms of such authorisation will be project specific.

45. SUB-CONTRACTING AND ASSIGNMENT

Sub-Contractors

- 45.1 D&B Co shall, without prejudice to Clause 45.5 (*Assignment*), procure that none of the persons listed below shall sub-contract all (or substantially all) of their obligations under or in the agreement set out next to its name:

Person	Contract
Contractor	Construction Contract

without the prior written consent of the Authority (such consent not to be unreasonably withheld or delayed). To avoid doubt, (i) any failure to comply with Clause 45.3 (*Sub-Contractors*) shall be a reasonable ground for withholding consent and (ii) consent shall, without prejudice to the other provisions of Clause 45.1 (*Sub-Contractors*), not be required in respect of the appointment of any party currently approved by the Authority as a suitable replacement.

- 45.2 If the contract set out next to the name of any person referred to in Clause 45.1 (*Sub-Contractors*) shall at any time lapse, terminate or otherwise cease to be in full force and effect (whether by reason of expiry or otherwise), with the effect that such person shall cease to act in relation to the Project, D&B Co shall forthwith appoint a replacement (subject to compliance with Clause 45.1 (*Sub-Contractors*)).

- 45.3 D&B Co shall:

45.3.1 deliver the Contractor Collateral Agreement [and Key Sub-Contractor Collateral Agreement] on the date of this Agreement other than in respect of any Key Sub-Contractors who are not appointed at that time;

45.3.2 procure that any replacement for any person referred to in Clause 45.1 (*Sub-Contractors*) [or any Key Sub-Contractor] shall enter into a contract upon the same or substantially similar terms as the person so replaced, and, shall also enter into a collateral agreement on the same or substantially the same terms as the Collateral Agreement entered into by the person so replaced and shall deliver a certified copy of that appointment and the Collateral Agreement duly executed by each party to that Collateral Agreement other than the Authority no later than the date that such appointment is to take effect.

45.3.3 Where any new Key Sub-Contractor is to be engaged in connection with the Project, procure that: a certified true copy of their appointment; and, a collateral agreement substantially in the form or in the form set out in Section 2 (Key Sub-Contractor Collateral agreement) of Schedule 8 (*Collateral Agreements*) duly executed by each party to that Collateral Agreement other than the Authority, is delivered to the Authority no later than the date on which such appointment is to take effect.

- 45.4 [Where D&B Co enters into a contract with a Sub-Contractor for the purposes of carrying out the Project Operations or any part of the Project Operations under this Agreement, D&B Co shall cause a term to be included in such contract:
- 45.4.1 which requires an application for an Interim Certificate in respect of a Relevant Month be made by the Sub-Contractor not later than the date falling one (1) Business Day before the relevant Due Date (under this Agreement); (ii) the Due Date for payment of interim payments under such contract to occur on the date falling one (1) Business Days after the Due Date (under this Agreement); and (iii) the Final Date for payment of interim payments under such contract to on the date falling fourteen (14) Business Days after the Due Date for payment of interim payments under such contract and provides that, for the purpose of payment alone, where the Authority has made payment to D&B Co and the sub-contractor's invoice includes Project Operations in relation to which payment has been made by the Authority then, to the extent that it relates to such Project Operations, the invoice shall be treated as valid and payment shall be made to the Sub-Contractor without deduction (but without prejudice to any right to deduct or set off validly arising under the terms of the contract with the Sub-Contractor); and
 - 45.4.2 which notifies the Sub-Contractor that the contract forms part of a larger contract for the benefit of the Authority and that should the Sub-Contractor have any difficulty in securing the timely payment of an invoice that matter may be referred by the Sub-Contractor to the Authority's Representative; and
 - 45.4.3 in which requires any sub-contracts to be entered into in relation to the Project Operations to be on the same terms as this Clause 45.4 (including for the avoidance of doubt this Clause 45.4.3) subject only to modification to refer to the correct designation of the equivalent party as the supplier and recipient of the relevant Project Operations as the case may be.
 - 45.4.4 which requires any contract entered into by the Sub-Contractor and a sub-sub-contractor providing Project Operations to include a term in such contract:
 - (a) which requires (i) an application for an Interim Certificate in respect of a Relevant Month to be made by the sub-sub-contractor not later than the date falling two (2) Business Days before the relevant Due Date (under this Agreement); (ii) the Due Date for payment of interim payments under such contract to occur on the date falling two (2) Business Days after the Due Date (under this Agreement); and (iii) the Final Date for payment of interim payments under such contract on the date falling sixteen (16) Business Days after the Due Date for payment of interim payments under such contract and provides that, for the purpose of payment alone, where the Authority has made payment to D&B Co and the sub-contractor's invoice includes Project Operations in relation to which payment has been made by the Authority then, to the extent that it relates to such Project Operations, the invoice shall be treated as valid and payment shall be made to the Sub-Contractor without deduction (but without prejudice to any right to deduct or set off

validly arising under the terms of the contract with the sub-contractor); and

- (b) which notifies the sub-contractor that the contract forms part of a larger contract for the benefit of the Authority and that should the Sub-Contractor have any difficulty in securing the timely payment of an invoice that matter may be referred by the Sub-Contractor to the Authority's Representative; and
- (c) in the same terms as this Clause 45.4 (*Sub-Contractors*) (including for the avoidance of doubt this Clause 45.4.4(c)) subject only to modification to refer to the correct designation of the equivalent party as the supplier and recipient of the relevant Project Operations as the case may be.]⁹⁸

Assignment

- 45.5 This Agreement and any other agreement in connection with the Project to which both the Authority and D&B Co are a party shall be binding on, and shall enure to the benefit of, D&B Co and the Authority and their respective statutory successors and permitted transferees and assignees. [In the case of the Authority, its successors shall include any person to whom the Welsh Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Authority upon the Authority ceasing to exist, transfers the property, rights and obligations of the Authority under this Agreement and such other agreements in connection with the Project to which the Authority and D&B Co are both a party.]⁹⁹
- 45.6 D&B Co shall not, without the prior written consent of the Authority, assign, novate, transfer, sub-contract or otherwise dispose of any interest in this Agreement, [the Independent Tester Contract,] and the Construction Contract and [any other contract] entered into by D&B Co for the purposes of performing its obligations under this Agreement.
- 45.7 The rights and obligations of the Authority under this Agreement shall not be assigned, novated or otherwise transferred (whether by virtue of any Law or any scheme pursuant to any Law or otherwise) to any person other than to any [public] body (being a single entity) acquiring the whole of the Agreement and having the legal capacity, power and authority to become a party to and to perform the obligations of the Authority under this Agreement being:
 - 45.7.1 the Welsh Ministers or a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975; [or
 - 45.7.2 [in the case of any Further Education Corporation or Designated Institution (as defined in the Further and Higher Education Act 1992) any other Further Education Corporation or Designated Institution who has

⁹⁸ Timing/process to be discussed in conjunction with PBA. Prompt payment is required in accordance with Welsh Government policy.

⁹⁹ The inclusion of the words in square brackets should be considered on a project specific basis.

the legal capacity and sufficient financial resources to perform the obligations of the Authority and/or whose obligations are validly and enforceably guaranteed by the Welsh Ministers (in a form reasonably acceptable to D&B Co);]or

45.7.3 any other public body whose obligations under this Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to D&B Co) by the Authority, the Welsh Ministers or a Minister of the Crown having the legal capacity, power and authority to perform the obligations under the guarantee and the obligations of the Authority under this Agreement,

45.8 without the consent of D&B Co. The prior written consent of D&B Co (not to be unreasonably withheld or delayed) shall be required for any other assignment, transfer or disposal by the Authority of the whole or any part of this Agreement.

46. OWNERSHIP INFORMATION AND CHANGES IN CONTROL¹⁰⁰

46.1 D&B Co represents and warrants to the Authority that at the date of this Agreement the legal and beneficial ownership of D&B Co is as set out in Schedule 24 (*D&B Co Information*) and that, other than [◆]¹⁰¹ no arrangements are in place that have or may have or result in any sale, transfer or disposal of any legal, beneficial, equitable or other interest in any or all of the shares in D&B Co.

46.2 D&B Co shall inform the Authority of any proposed Change in Control in D&B Co prior to its occurrence, or, if it does not have any prior information, as soon as reasonably practicable (and in any event, within thirty (30) days) of any Change in Control occurring in respect of D&B Co.

46.3 The Authority may, not more than [twice] in any period of twelve months, or at any time when a D&B Co Event of Default is outstanding, require D&B Co to inform it, as soon as reasonably practicable and in any event within thirty (30) days of receipt of the Authority's request for details, of any Change in Control in respect of D&B Co.

46.4 D&B Co's obligations under Clauses 46.1 and 46.2 (*Ownership Information and Changes in Control*) above shall, except where a legal transfer of shares has occurred be limited to the extent of D&B Co's awareness having made all reasonable enquiry.

46.5 Subject to Clause 46.6 (*Ownership Information and Changes in Control*), prior to the expiry of a period of twelve (12) months commencing on the [Actual Completion Date] / [Actual Post Completion Works Date] , no Change in Control in any or all of the shares in D&B Co shall be permitted without the prior written approval of the Authority. Any Change in Control arising as a consequence of either:

¹⁰⁰ Clause to be reviewed on a project specific basis. Reference to the parent company, in addition to D&B Co should be made throughout this Clause where a holding company structure is put in place.

¹⁰¹ Reference may be made to pre-emption rights and traditional funding security where relevant.

- 46.5.1 [◆]¹⁰²;
- 46.5.2 any transfer by a Shareholder to an [Associate] of such transferor ;
- 46.5.3 any change in beneficial or legal ownership of any shares that are listed on a recognised investment exchange (as defined in section 285 of the Financial Services and Markets Act 2000); or
- 46.5.4 where the Change of Control arises as a consequence of any change in legal or beneficial ownership of any interest in shares owned at the date of this Agreement by the [◆]¹⁰³,

shall be disregarded for the purpose of this Clause 46.5 (*Ownership Information and Changes in Control*) above.

Where Clause 46.5.2 applies and subsequent to any such transfer (the "**Original Transfer**") the transferee ceases to be an [Associate] of the original transferor, it shall be a breach of this Clause 46.5 (*Ownership Information and Changes in Control*) if the shares or interests which were the subject of the Original Transfer are not [within twenty (20) Business Days] of the transferee ceasing to be an Associate of the original transferor, transferred to the original transferor or any Associate of such transferor.

- 46.6 No Change in Control (at any time) in any or all of the shares in D&B Co (or any company (other than a public quoted company whose equity securities are listed on a recognised investment exchange, as defined in section 285 of the Financial Services and Markets Act 2000) holding shares in D&B Co or in any company (or its shareholders) holding shares in such a company (or its shareholders)) shall be permitted without the prior written approval of the Authority where the person acquiring control is a Restricted Person.

47. MITIGATION

Each of the Authority and D&B Co shall at all times take all reasonable steps to minimise and mitigate any loss for which the relevant party is entitled to bring a claim against the other party pursuant to this Agreement.

¹⁰² Where D&B Co is subject to traditional lender security. Reference should be made to such security being enforced or, if so contemplated further security being granted, where approved.

¹⁰³ Reference to be made to the Welsh Government shareholder entity, under the Shareholders' Agreement where relevant and WEP Co (rather than a subsidiary) is performing the role of D&B Co.

48. DATA PROTECTION

Data Protection

- 48.1 For the purpose of the following Clauses, the terms "Controller", "Data Subject", "Personal Data Breach" and "Process/Processing" shall have the meanings given to them in the Data Protection Laws.
- 48.2 D&B Co undertakes to the Authority that it shall comply with the obligations of a "Data Controller" under the provisions of the Data Protection Laws in respect of the Personal Data processed by it. In addition, D&B Co:
- 48.2.1 warrants that it has, or will have at all material times, (and it shall procure that all Sub-Contractors (and their agents and sub-contractors of any tier) have or will have at all material times) Protective Measures in place to protect against unauthorised or unlawful Processing or any Data Loss Event and that it has taken, or will take at all material times, all reasonable steps to ensure the reliability of any of its staff which will have access to Personal Data Processed as part of the Project Operations;
 - 48.2.2 undertakes that it will only obtain, hold, Process, use, store and disclose Personal Data as is necessary to perform its obligations or exercise its rights under this Agreement and (without prejudice to Clause 5.2 (*General Standards*)) that such data will be held, Processed, used, stored and disclosed only in accordance with the Data Protection Laws and any other applicable Law;
 - 48.2.3 undertakes that it will notify the Authority without undue delay upon becoming aware of any Data Loss Event in respect of the Personal Data;
 - 48.2.4 will co-operate with the Authority, to the extent reasonably requested, in relation to any notifications to the Information Commissioner or to Data Subjects which either party is required to make following a Personal Data Breach;
 - 48.2.5 will co-operate with the Authority, to the extent reasonably requested in relation to:
 - 48.2.5.1 a request to the Authority from a Data Subject to exercise any right under the Data Protection Laws;
 - 48.2.5.2 any other communication from a Data Subject to the Authority concerning the Processing of their Personal Data; and

48.2.5.3 any communication from the Information Commissioner concerning the Processing of Personal Data, or compliance with the Data Protection Laws; and

48.2.6 undertakes to allow the Authority access to any relevant premises on reasonable notice to inspect its procedures described at Clause 48.2.1 above.

49. CONFIDENTIALITY¹⁰⁴

49.1 The Authority shall, subject to Clause 49.2 (*Confidentiality*) be entitled to make the documents and information listed in this Clause 49.1 (*Confidentiality*) freely available to the public (which may include, without limitation, publication on the Authority's website):

49.1.1 this Agreement;

49.1.2 the Independent Tester Contract; and

49.1.3 the Collateral Agreements;¹⁰⁵

and D&B Co acknowledges and agrees that, subject to the exclusion of information referred to in Clause 49.2.2, the provision or publication of the documents and information listed in this Clause 49.1 (*Confidentiality*) shall not give rise to any liability under the terms of this Agreement or otherwise. The Authority shall notify D&B Co in writing not less than ten (10) Business Days prior to any intended provision or publication of information pursuant to this Clause 49.1 (*Confidentiality*).

49.2

49.2.1 The parties agree that the provisions of this Agreement and each Project Document shall, subject to Clause 49.2.2 below, not be treated as Confidential Information and may be disclosed without restriction and D&B Co acknowledges that the Authority shall, subject to Clause 49.2.2 below, be entitled to make this Agreement and each Project Document available in the public domain.

49.2.2 Clause 49.2.1 above shall not apply to provisions of this Agreement or a Project Document designated as Commercially Sensitive Information and

¹⁰⁴ In line with the general approach taken by the Welsh Audit Commission, these Clauses support a general openness in regard to the project contracts and associated documentation. The Welsh Government considers there is a limited amount of the Project Data that can be properly regarded as falling under any of the exemptions in the freedom of information regime. These have been identified in Schedule 17 (*Commercially Sensitive Information*) with what are thought to be reasonable periods when the protection of confidentiality may be claimed. The Authority should be wary of attempts to widen the scope or extend the duration of the limited contractual confidentiality arrangements in these Clauses and should consider these Clauses in light of any other guidance with which it is required to comply.

¹⁰⁵ Any other information is to be listed on a project specific basis.

listed in Schedule 17 (*Commercially Sensitive Information*) to this Agreement which shall, subject to Clause 49.3 (*Permitted Disclosure*) be kept confidential for the periods specified in that Schedule 17 (*Commercially Sensitive Information*).

- 49.2.3 The parties shall keep confidential all Confidential Information received by one party from the other party relating to this Agreement and Project Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

Permitted Disclosure

49.3 Clauses 49.2.2 and 49.2.3 shall not apply to:

- 49.3.1 any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under this Agreement for the performance of those obligations;
- 49.3.2 any matter which a party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause;
- 49.3.3 any disclosure to enable a determination to be made under Schedule 15 (*Dispute Resolution Procedure*) or in connection with a Dispute between D&B Co and any of its sub-contractors;
- 49.3.4 any disclosure which is required pursuant to any Law or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or, if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- 49.3.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 49.3.6 any provision of information to the parties' own professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to D&B Co to enable it to carry out its obligations under this Agreement, or may wish to acquire shares in D&B Co in accordance with the provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- 49.3.7 any disclosure by the Authority of information relating to the design, construction, operation and maintenance of the Facilities and such other information as may be reasonably required for the purpose of conducting

a due diligence exercise, to any proposed new contractor, its advisers and lenders, should the Authority decide to retender this Agreement;

- 49.3.8 any registration or recording of the Consents and property registration required;
- 49.3.9 any disclosure of information by the Authority [or the School Entity] to any other department, office or agency of the Government or their respective advisers or to any person engaged in providing services to the Authority for any purpose related to or ancillary to this Agreement;
- 49.3.10 any disclosure for the purpose of:
- (a) the examination and certification of the Authority's or D&B Co's accounts;
 - (b) any examination pursuant to the Public Audit (Wales) Act 2004 of the economy, efficiency and effectiveness with which the Authority has used its resources;
 - (c) any disclosure required to be made to the Auditor General or the Wales Audit Office;
 - (d) complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies; or
 - (e) (without prejudice to the generality of Clause 49.3.4) compliance with the FOIA and/or the Environmental Information Regulations;
- 49.3.11 [disclosure pursuant to Clause 49.1 (*Confidentiality*); or]
- 49.3.12 disclosure to the extent required pursuant to Clause 51.2 (*Information and Audit Access*);
- 49.3.13 [disclosures by D&B Co [or the Shareholders] to WEPCo that is reasonably required to enable WEPCo to comply with its obligations under the SPA]¹⁰⁶ [or
- 49.3.14 *identify here disclosure requirements to other public bodies where Facilities are joint facilities;*]

¹⁰⁶ Subject to review of structure for the project. No provision would be required where WEPCo is itself party to this agreement in the capacity of D&B Co.

provided that, to avoid doubt, neither Clause 49.3.10(e) nor Clause 49.3.4 above shall permit disclosure of Confidential Information otherwise prohibited by Clause 49.2.3 where that information is exempt from disclosure under section 41 of the FOIA.

- 49.4 Where disclosure is permitted under Clause 49.3 (*Permitted Disclosure*), other than under Clauses 49.3.2, 49.3.4, 49.3.5, 49.3.8 and 49.3.10, the party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.
- 49.5 D&B Co shall not make use of this Agreement or any information issued or provided by or on behalf of the Authority in connection with this Agreement otherwise than for the purpose of this Agreement, except with the written consent of the Authority.
- 49.6 Where D&B Co, in carrying out its obligations under this Agreement, is provided with information relating to any Authority Party, D&B Co shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless D&B Co has obtained the prior written consent of that person and has obtained the prior written consent of the Authority.
- 49.7 On or before the expiry of the [relevant] Defects Liability Period, D&B Co shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any Authority Party including any documents in the possession, custody or control of a D&B Co Party, are delivered up to the Authority.
- 49.8 The parties acknowledge that [Welsh Audit Commission] has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament and/or National Assembly of Wales.
- 49.9 The provisions of this Clause 49 (*Confidentiality*) are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

Announcements

- 49.10 Unless otherwise required by any Law or any regulatory or governmental authority or otherwise as is expressly permitted by this Agreement (but only to that extent), neither party shall make or permit or procure to be made any public announcement or disclosure (whether for publication in the press, the radio, television screen or any other medium) of any Confidential Information or in the case of D&B Co of its (or any D&B Co Party's) interest in the Project or, in any such case, any matters relating thereto, without the prior written consent of the other party (which shall not be unreasonably withheld or delayed).

50. FREEDOM OF INFORMATION

- 50.1 D&B Co acknowledges that the Authority is subject to the requirements of the FOIA and the Environmental Information Regulations and shall assist and

cooperate with the Authority to facilitate the Authority's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in Clauses 50.2 to 50.8 (*Freedom of Information*).

50.2 Where the Authority receives a Request for Information in relation to Information that D&B Co is holding on its behalf and which the Authority does not hold itself the Authority shall refer to D&B Co such Request for Information as soon as practicable and in any event within five (5) Business Days of receiving such Request for Information and D&B Co shall:

50.2.1 provide the Authority with a copy of all such Information in the form that the Authority requires as soon as practicable and in any event within five (5) Business Days (or such other period as the Authority acting reasonably may specify) of the Authority's request; and

50.2.2 provide all necessary assistance as reasonably requested by the Authority in connection with any such Information, to enable the Authority to respond to the Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.

50.3 Following notification under Clause 50.2 (*Freedom of Information*), and up until such time as D&B Co has provided the Authority with all the Information specified in Clause 50.2.1, D&B Co may make representations to the Authority as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Authority shall be responsible for determining at its absolute discretion:

50.3.1 whether Information is exempt from disclosure under the FOIA and the Environmental Information Regulations; and

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

in no event shall D&B Co respond directly, or allow its Sub-Contractors to respond directly, to a Request for Information unless expressly authorised to do so by the Authority.

50.4 D&B Co shall ensure that all Information held on behalf of the Authority is retained for disclosure for at least the number of years (from the date it is acquired) [specified in the Authority Policy relating to records retention]¹⁰⁷ and shall permit the Authority to inspect such Information as requested from time to time. Following the expiry of such [♦] period, D&B Co shall be entitled to dispose of such records in circumstances which D&B Co has notified the Authority of such proposed disposal and the Authority has not requested within 20 Business Days of such notification that such information be handed over to the Authority.

¹⁰⁷ The Authority should ensure the appropriate policy is in place.

- 50.5 D&B Co shall transfer to the Authority any Request for Information received by D&B Co as soon as practicable and in any event within two (2) Business Days of receiving it.
- 50.6 D&B Co acknowledges that any lists provided by it listing or outlining Confidential Information are of indicative value only and that the Authority may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of FOIA and the Environmental Information Regulations.
- 50.7 In the event of a request from the Authority pursuant to Clause 50.2 (*Freedom of Information*) D&B Co shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Authority of D&B Co's estimated costs of complying with the request to the extent these would be recoverable, if incurred by the Authority, under section 13(1) of the FOIA and the Fees Regulations. Where such costs (either on their own or in conjunction with the Authority's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in section 12(1) of the FOIA and as set out in the Fees Regulations (the "**Appropriate Limit**") the Authority shall inform D&B Co in writing whether or not it still requires D&B Co to comply with the request and where it does require D&B Co to comply with the request the five (5) Business Days period for compliance shall be extended by such number of additional days for compliance as the Authority is entitled to under section 10 of the FOIA. In such case, the Authority shall notify D&B Co of such additional days as soon as practicable after becoming aware of them and shall reimburse D&B Co for such costs as D&B Co incurs in complying with the request to the extent it is itself entitled to reimbursement of such costs in accordance with its own FOIA policy from time to time.¹⁰⁸
- 50.8 D&B Co acknowledges that (notwithstanding the provisions of Clause 49 (*Confidentiality*)) the Authority may, acting in accordance with the Secretary of State's Code of Practice on the Discharge of Functions of Public Authorities under Part 1 of the Freedom of Information Act 2000 (the "**Code**"), and/or having full regard to any guidance or briefings issued by the Information Commissioner or the Welsh Government, be obliged under the FOIA, or the Environmental Information Regulations to disclose Information concerning D&B Co or the Project:

50.8.1 in certain circumstances without consulting with D&B Co; or

50.8.2 following consultation with D&B Co and having taken their views into account,

provided always that where Clause 50.8.1 above applies the Authority shall, in accordance with the recommendations of the Code, draw this to the attention of D&B Co prior to any disclosure.

¹⁰⁸ It is up to the parties to decide whether costs associated with any future change in the Authority's FOIA cost recovery policy should go through Schedule 13 (*Variation Procedure*).

If the Environmental Information Regulations are relevant to the project, the parties may include broadly equivalent provisions in the Agreement dealing with costs and based upon the Authority's policy towards reimbursement of such costs under section 10 of the Environmental Information Regulations.

- 50.9 In the event that the D&B Co is or becomes subject to the Environmental Information Regulations or the FOIA it shall comply with its obligations under the Environmental Information Regulations and the FOIA. In doing so, it will use reasonable endeavours to consult the Authority before disclosing Information about them or any agreement entered into between the Authority and D&B Co.

51. INFORMATION AND AUDIT ACCESS

- 51.1 D&B Co shall provide to the Authority's Representative all information, documents, records and the like in the possession of, or available to, D&B Co (and to this end D&B Co shall use all reasonable endeavours to procure that all such items in the possession of the Contractor shall be available to it and D&B Co has included, or shall include, relevant terms in all contracts with the Contractor to this effect) as may be reasonably requested by the Authority's Representative for any purpose in connection with this Agreement including in relation to the use and operation of the Project Bank Account.

- 51.2 For the purpose of:

51.2.1 the audit, examination and certification of the Authority's accounts; or

51.2.2 any examination pursuant to the Public Audit (Wales) Act 2004 of the economy, efficiency and effectiveness with which the Authority has used its resources,

the Wales Audit Office may examine such documents as it may reasonably require which are owned, held or otherwise within the control of D&B Co (and D&B Co shall procure that any person acting on its behalf who has such documents and/or other information shall also provide access) and may require D&B Co to produce such oral or written explanations as he considers necessary.

- 51.3 D&B Co shall provide and shall procure that its Sub-Contractors shall provide such information as the Authority may reasonably require from time to time to enable it to meet its obligations to provide reports and returns pursuant to regulations, directions or guidance applicable to the Authority including, without limitation, reports and returns regarding the physical condition of buildings occupied by the Authority, health and safety, under the firecode, relating to environmental health, the operation and administration of the Project Bank Account and to comply with [requirements for the provision of information relating to achievement of customer service targets].

- 51.4 D&B Co shall indemnify the Authority at all times against all administrative fines arising from any claim by a third party (including, without limitation, by data subjects, whether individually or in groups) or any action by the Information Commissioner or other Relevant Authority arising from:

51.4.1 a breach by D&B Co of Clause 48 (*Data Protection*) or Clause 51 (*Information and Audit Access*); and/or

51.4.2 any act or omission of D&B Co or a D&B Co Party that results in a breach by the Authority of the Data Protection Laws and/or Laws applicable to a Reportable Incident,

and the provisions of Clause 38.3 (*Conduct of Claims*) shall apply.

51.5 D&B Co shall indemnify the Authority at all times against all losses, costs and expenses (including, without limitation, reasonable legal, investigatory and consultancy fees and expenses) arising from: any claim by a third party (including, without limitation, by data subjects, whether individually or in groups) or any action by the Information Commissioner or other Relevant Authority arising from:

51.5.1 a breach by D&B Co of Clause 48 (*Data Protection*) or Clause 51 (*Information and Audit Access*); and/or,

51.5.2 any act or omission of D&B Co or a D&B Co Party that results in a breach by the Authority of the Data Protection Laws and/ or Laws applicable to a Reportable Incident,

and the provisions of Clause 38.3 (*Conduct of Claims*) shall apply.]

52. NOTICES

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

If to D&B Co:-

Address: [◆]

Email: [◆]

If to the Authority:-

Address: [◆]

Email: [◆]

52.2 Where any information or documentation is to be provided or submitted to the Authority's Representative or the D&B Co Representative it shall be provided or submitted by sending the same by first class recorded post, by hand or by email leaving the same at:

If to D&B Co's Representative:-

Address: [◆]

Email: [◆]

If to the Authority's Representative:-

Address: [◆]

Email: [◆]

(copied in each case to the Authority)

52.3 Either party to this Agreement (and either Representative) may change its nominated address (including email address) by prior notice to the other party.

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

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

52.6 Notices given by email shall be deemed to have been received:

52.6.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the email address specified in Clause 52.1 or 52.2 (*Notices*), or notified from time to time under Clause 52.3 (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

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

and provided no error message indicating failure has been received by the sender and provided that in the case of notices required by or issued Clause 24 (*Delay Events and Compensation Events*), Clause 25 (*Relief Events*), Clause 26 (*Force Majeure*), Clause 27 (*Changes in Law*), Clause 32 (*Authority Events of Default*), Clause 33 (*D&B Co Event of Default*), Clause 34 (*Termination Resulting from*

Force Majeure), Clause 36 (*Corrupt Gifts and Payments*); and/or Schedule 13 (*Variation Procedure*) that within 24 hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by hand to the intended recipient in accordance with the provisions of Clauses 52.1 and 52.2 (*Notices*)] and where notice is issued to the Authority or the Authority's Representative copied to [♦]¹⁰⁹.

53. NO WAIVER

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

Continued effect – no waiver

53.2 Notwithstanding any breach of this Agreement by either party, and without prejudice to any other rights which the other party may have in relation to it, the other party may elect to continue to treat this Agreement as being in full force and effect and to enforce its rights under this Agreement. The failure of either party to exercise any right under this Agreement, including any right to terminate this Agreement and any right to claim damages, shall not be deemed a waiver of such right for any continuing or subsequent breach.

54. NO AGENCY

54.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Authority and D&B Co.

54.2 Save as expressly provided otherwise in this Agreement, D&B Co shall not be, or be deemed to be, an agent of the Authority and D&B Co shall not hold itself out as having authority or power to bind the Authority in any way.

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

55. ENTIRE AGREEMENT

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

¹⁰⁹ Insert Welsh Government details. Authorities should liaise with Welsh Government on notification requirements for each project.

55.2 Each of the parties acknowledges that:

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

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

56. THIRD PARTY RIGHTS

Save in respect of Welsh Government's and WEPCo's rights pursuant to paragraph 9 of Section 1 of Schedule 14 (*Record Provisions*), it is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provision contained in this Agreement save to the extent expressly provided in this Agreement and, to avoid doubt, without prejudice to the rights of any permitted successor to the rights of D&B Co or of any permitted assignee.

57. SEVERABILITY

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

58. CONFLICTS OF AGREEMENTS

In the event of any conflict between this Agreement and the Project Documents, the provisions of this Agreement shall prevail.

59. COSTS AND EXPENSES

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

60. AMENDMENTS

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

61. COUNTERPARTS

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

62. FURTHER ASSURANCE

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

63. GOVERNING LAW AND JURISDICTION

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

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

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

SCHEDULES

SCHEDULE 1

DEFINITIONS AND INTERPRETATION

SECTION 1

DEFINITIONS

In this Agreement unless the context otherwise requires:

"Abandons"	means a failure to carry out the Works at the Site in accordance with the Programme for any consecutive period of [♦] Business Days in any twelve month period or for [♦] Business Days (whether consecutive or not);
"Academic Year"	means the period from [1 September] to [31 August] and comprising the Terms published from time to time prior to the commencement of each Academic Year, in accordance with Clauses 5.4 and 5.5 (<i>Notification of Terms and Examination Periods</i>); ¹¹⁰
"Access to Work Permit"	means a permit issued pursuant to paragraph [5] of Section 3 of Schedule 21 (<i>Joint Operating Protocol</i>);
"Access to Work Protocol"	means the protocol set out in Section 3 of Schedule 21 (<i>Joint Operating Protocol</i>);
"Actual Commissioning End Date"	means the date specified in the Commissioning Completion Certificate for the [Main Works or the Post Completion Works, as applicable] issued by the Independent Tester pursuant to Clause 18.4 (<i>Information</i>);
"Actual Completion Date"	means the later of: (a) the date stated in the Certificate of Practical Completion in respect of the [Main] Works Requirements issued by the Independent Tester pursuant to Clause 17.12 (<i>Completion Certificate[s]</i>); and (b) [subject to Clause 14.6 (<i>Early Completion</i>), the Completion Date];
"Actual ICT Handover Date"	means the date so determined in accordance with Clause 14.8 (<i>Handover Dates</i>);

¹¹⁰ Definition to be adjusted as appropriate for Schools/Colleges.

"Actual Post Completion Works Date"	means the later of: <ul style="list-style-type: none"> (a) the date stated in the Certificate of Practical Completion in respect of the Post Completion Works Requirements issued by the Independent Tester pursuant to Clause 17.12 (<i>Completion Certificate[s]</i>); and (b) [subject to Clause 14.6 (<i>Early Completion</i>), the Post Completion Works Date] ¹¹¹
["Additional Asbestos"	means Asbestos that is included in the updated Asbestos Survey in accordance with Clause 10.10.2 (<i>Asbestos</i>) as having been discovered at a Demolition Site and disposed of as part of the Asbestos Works but only to the extent that such Asbestos differs in nature and/or extent and/or location from the Asbestos identified in the version of the Asbestos Schedule that has been used to determine the Asbestos Tendered Sum for the Licensed Contractor pursuant to Clauses 10.8 to 10.9 (<i>Asbestos</i>); ¹¹²
"Additional Community Benefit D&B Co Proposals"	means D&B Co's additional community benefit commitments and key performance indicators, distinct from the Authority's Community Benefit Requirement KPIs, described in the table set out in Part 1 of Section 2 of Schedule 20 (<i>Community Benefits</i>);
"Adjudicator"	means such person selected in accordance with paragraph 6 of Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Agreement"	means this D&B Agreement including the Schedules;
"Amended Reinstatement Outline"	has the meaning given in Clause 41.20.2(c) (<i>Reinstatement</i>);
"Ancillary Rights"	means such rights as set out in Section 3 (<i>Ancillary rights</i>) of Schedule 4 (<i>Land Matters</i>) as the same may be varied with the approval of the Authority such approval not to be unreasonably withheld;
"Anti-social Behaviour Orders"	means the following which have been ordered, granted or issued (as appropriate): <ul style="list-style-type: none"> (a) an anti-social behaviour order as defined in

¹¹¹ The Post Completion Works drafting in the Template Education D&B Agreement assumes that this is the only aspect of phasing that is required in respect of the Works. Further project specific amendment to the Post Completion drafting should however be considered by an Authority and its advisers where different phases of Post Completion Works are required.

¹¹² The Asbestos Schedule prepared following the Asbestos Management Survey should be inserted in the Schedule Part referred to.

the Crime and Disorder Act 1998;

- (b) a civil injunction as defined in Part 1 of the Anti-social Behaviour, Crime and Policing Act 2014;
- (c) a criminal behaviour order as defined in Part 2 of the Anti-social Behaviour, Crime and Policing Act 2014;
- (d) a direction excluding a person from an area as defined in Part 3 of the Anti-social Behaviour, Crime and Policing Act 2014;
- (e) a community protection notice as defined in Chapter 1 of Part 4 of the Anti-social Behaviour, Crime and Policing Act 2014; or
- (f) a public spaces protection order as defined in Chapter 2 of Part 4 of the Anti-social Behaviour, Crime and Policing Act 2014;

"Application Date"

means the date specified as such in respect of each Relevant Month in the Application Schedule¹¹³ (Section 2 of Schedule 19 (*Project Bank Account*));

"Application for Payment"

has the meaning given in Clause 29.4 (*Applications for Payment*);

"Application Schedule"

means the document at Section 2 (*Application Schedule*) of Schedule 19 (*Project Bank Account*);

"Appropriate Limit"

has the meaning given to it in Clause 50.7 (*Freedom of Information*);

"Approved Purposes"

has the meaning given to it in Clause 43.1 (*Project Data*);

"Approved RDD Item"

means an item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed either "Level A – no comment" or "Level B – proceed subject to amendment as noted" by the Authority's Representative pursuant to the provisions of Clause 12 (*The Design Construction and Commissioning Process*) and Schedule 7 (*Review Procedure*) (provided that in the case of any item of Reviewable Design Data which has been returned or has been deemed to have been returned endorsed "Level B – proceed subject to amendment as noted" D&B Co has taken account of the Authority's

¹¹³ Each Application Date must be an objectively fixed date (i.e. not contingent on an application being submitted).

	Representative's comments), as such item of Reviewable Design Data may be varied or amended from time to time in accordance with Schedule 13 (<i>Variation Procedure</i>);
"Articles of Association"	means D&B Co's articles of association and the term "Articles" shall be construed accordingly;
["Asbestos"	has the meaning given to it in the Control of Asbestos Regulations 2012;]
["Asbestos Management Survey"	means the asbestos management survey set out in [♦] (<i>Asbestos Surveys and Schedule</i>);]
["Asbestos Schedule"	means the initial asbestos schedule set out in [♦] of Schedule [♦] (<i>Asbestos Surveys and Schedule</i>) as updated in accordance with Clauses 10.7.2 to 10.7.5 and 10.10 (<i>Asbestos</i>);] ¹¹⁴
["Asbestos Survey"	means a Refurbishment/Demolition Survey as described in Guidance Note HSG264 (<i>Asbestos: The Survey Guide</i>) published by the Health & Safety Executive;]
["Asbestos Survey Report"	means a detailed report prepared by the Asbestos Surveyor on the results of an Asbestos Survey, which report shall include the Asbestos Surveyor's detailed recommendations as to the nature and scope of the Asbestos Works required at the relevant Demolition Site and the Asbestos Schedule, as updated in accordance with Clauses 10.7.2 to 10.7.5 and 10.10 (<i>Asbestos</i>);]
["Asbestos Surveyor"	means [a licensed asbestos surveyor appointed in accordance with Clauses 10.7 and 10.9 (<i>Asbestos</i>)];
["Asbestos Tendered Sum"	has the meaning given in Clause 10.8 (<i>Asbestos</i>);]
["Asbestos Works"	means the works required for the removal of all Asbestos at the relevant Demolition Site to be carried out in accordance with Clauses 10.5 to 10.11 of this Agreement;]
["Asbestos Works Period"	means, in relation to a Demolition Site, the period of time programmed for the carrying out of Asbestos Works as identified in the Asbestos Management Survey contained in [♦] (<i>Asbestos Surveys and Schedule</i>);] ¹¹⁵
"Associated Companies"	means [(a)], in respect of a relevant company, a company which is a Subsidiary, a Holding Company or a company that is a Subsidiary of the ultimate Holding Company of that relevant company, and in the case of D&B Co shall include each of the

¹¹⁴ Insert reference to Asbestos Schedule contained in the Asbestos Management Survey carried out under the SPA.

¹¹⁵ Reference should be made to the section of the Asbestos Management Survey that includes the Asbestos Provisional Sum and Programme.

Shareholders; [or (b) in respect of one of the initial shareholders [♦] Limited or any person which is a member of that [Investment Group], and the term "**Associate**" shall be interpreted accordingly;¹¹⁶

"Authority Assets"

means the [the ICT Assets] and [insert details of other Authority existing premises/sites etc] and any other assets and equipment or other property used by, or on behalf of, the Authority or any Authority Party;

"Authority Control Period"

has the meaning given to it in paragraph 4.1 of Section 2 (*Construction Phase Access Protocol*) of Schedule 21 (*Joint Operating Protocol*);

"Authority Events of Default"

has the meaning given in Clause 32.1 (*Authority Events of Default*);

"Authority Party"

means:

- (a) any of the Authority's agents, contractors and sub-contractors of any tier and its or their directors, officers and employees at the Facilities; and
- (b) in relation to any School Entity, any governor or member of that School Entity acting as such, or any teacher employed by that School Entity acting in the course of their employment¹¹⁷ [in each case] with the authority of the Authority but excluding D&B Co, any D&B Co Party and statutory undertakers and utilities and "**Authority Parties**" shall be construed accordingly;

"Authority Policies"

means subject to Clause 6.6 (*Authority Policies*) the policies of the Authority set out in the document annexed to this Agreement as Attachment [♦], as amended from time to time in accordance with the provisions of Clause 27 (*Changes in Law*) and Schedule 13 (*Variation Procedure*);¹¹⁸

"Authority Services"

means all of:

- (a) the Educational Services, [♦]¹¹⁹; and
- (b) services incidental thereto and such other services as may be notified to D&B Co by

¹¹⁶ Insert details of investment funds on a project specific basis, if appropriate. If a fund or limited partnership or "50:50" owned vehicle (which is not a "Subsidiary") or similar is in the relevant ownership chain of D&B Co, this definition will need to be expanded to cover this instance.

¹¹⁷ Definition to be tailored on a project specific basis to capture those providing Educational Services, community services and other services at the local authority/School/College invitation (as appropriate).

¹¹⁸ The relevant policies will vary on a project specific basis.

¹¹⁹ To be completed on a project specific basis to capture any additional activities to be undertaken at the Facilities by the Authority/ School Entity which are not captured in the definition of Educational Services.

			the Authority from time to time;
"Authority Works Variation"			has the meaning given in Schedule 13 (<i>Variation Procedure</i>);
"Authority Works Variation Enquiry"			has the meaning given in Schedule 13 (<i>Variation Procedure</i>);
"Authority's Commissioning"			means the Authority's pre-completion commissioning activities to be carried out by the Authority in accordance with Clause 17 (<i>Pre-Completion Commissioning and Completion</i>);
"Authority's Community Benefit Requirement KPIs" or "ACBRs"			means the Authority's minimum community benefit requirements and key performance indicators, described in Part 2 (<i>Authority's Community Benefit Requirement KPIs</i>) of Section 1 of Schedule 20 (<i>Community Benefits</i>);
"Authority's Community Benefits Requirements"	Community	Benefits	means those requirements set out in Schedule 20 (<i>Community Benefits</i>);
"Authority's Construction Requirements"			means the requirements of the Authority set out or identified in Section 3 (<i>Authority's Construction Requirements</i>) of Schedule 5 (<i>Construction Matters</i>) as amended from time to time in accordance with the terms of this Agreement;
"Authority's Post Commissioning"	Post	Completion	means the Authority's post-completion commissioning activities to be carried out by the Authority in accordance with Clause 18.1 (<i>Post Completion Commissioning</i>);
"Authority's Representative"			means the person so appointed by the Authority pursuant to Clause 8 (<i>Representatives</i>);
"Barred List"			the barred lists provided for under the Safeguarding Vulnerable Groups Act 2006 as amended by the Protection of Freedoms Act 2012;
"Beneficial Access"			means a non-exclusive right to access and use the Facilities;
"Beneficiary"			has the meaning given in Clause 38.3 (<i>Conduct of Claims</i>);
"Below Threshold Sub-Contractor"			means a Sub-Contractor [(other than a Consultant)] with a Sub-Contract Value of less than one per cent (1%) of the Development Amount;
"Business Day"			means a day other than a Saturday, Sunday or a bank holiday in England and Wales;
"CDM Regulations"			has the meaning given in Section 2 (<i>Safety During Construction</i>) of Schedule 5 (<i>Construction Matters</i>);
"Certificate of Making Good Defects"			has the meaning given in Clause 19.4.2 and in the form set out in Schedule 16 (<i>Certificates</i>);

"Certificate of Practical Completion"

means a certificate in the relevant form set out in Schedule 16(*Certificates*);

["Certificate of WiFi Completion"

means the certificate to be issued by the Independent Tester in accordance with Clause 17.22 in the form set out in Schedule 16 (*Certificates*);

"Change in Control"

means:

- (a) any sale or other disposal of any legal, beneficial or equitable interest in any or all of the equity share capital of a corporation (including the control over the exercise of voting rights conferred on that equity share capital, control over the right to appoint or remove directors or the rights to dividends); and/or
- (b) any other arrangements that have or may have or which result in the same effect as paragraph (a) above;

"Change in Law"

means the coming into effect or repeal (without re-enactment or consolidation) in England and Wales or in Wales alone of any Law, or any amendment or variation to any Law, or any judgement of a relevant court of law which changes binding precedent in England and Wales or in Wales alone in each case after the date of this Agreement;

"Code"

has the meaning given in Clause 50.8;

"Collateral Agreements"

means the Contractor's Collateral Agreement [and the Key Sub-Contractor Collateral Agreement];

"Commencement Date"

means [the date of this Agreement];

"Commercially Sensitive Information"

means the sub set of Confidential Information listed in column 1 of Schedule 17 (*Commercially Sensitive Information*) in each case for the period specified in column 2 of Schedule 17 (*Commercially Sensitive Information*);

"Commissioning Completion Certificate"

means a certificate in the relevant form set out in Schedule 16(*Certificates*);

"Commissioning End Date"

means the date [in respect of the Main Works and in respect of the Post Completion Works] by which the parties' commissioning activities are programmed to be completed in accordance with the Final Commissioning Programme;

"Compensation Event"

has the meaning given in Clause 24.11(*Compensation*);

"Completion Criteria"	means the completion criteria required to meet the Actual Completion Date[, ICT Handover Date] [and/or Actual Post Completion Works Date], set out in Appendix B (<i>Completion Criteria</i>) of Schedule 10 (<i>Outline Commissioning Programme</i>);
"Completion Date"	means [in respect of the [Main] Works Requirements], the date described as such in Section 2 (<i>Phasing</i>) of Schedule 6 (<i>The Programme</i>), ¹²⁰ or such revised date as may be specified by the Authority's Representative pursuant to Clause 24 (<i>Delay Events and Compensation Events</i>) or such other date as may be agreed by the parties;
"Confidential Information"	means: <ul style="list-style-type: none"> (a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either party and all Personal Data and Sensitive Personal Data within the meaning of the Data Protection Laws and (b) Commercially Sensitive Information, provided that information to be supplied by D&B Co to the Authority pursuant to Clause 22.5 to 22.7 (<i>Sustainable Development</i>) shall not be Confidential Information;
"Consents"	means all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorisations required by Law, and all necessary consents and agreements from any third parties (including, without limitation, any Planning Permission), needed to carry out the Project Operations in accordance with this Agreement;
"Consolidated Adjudication Costs"	has the meaning given in paragraph 6.15.3 of Schedule 15 (<i>Dispute Resolution Procedure</i>)
"Construction Contract"	means the design and build contract dated on or around the date of this Agreement between D&B Co and the Contractor (which, as at the date of this Agreement, is in the Agreed Form) as amended or replaced from time to time in accordance with this Agreement;
"Construction Contract Dispute"	has the meaning given in paragraph 8.1 of Schedule 15 (<i>Dispute Resolution Procedure</i>);

¹²⁰ Insert agreed date(s) on which completion is scheduled to occur.

"Construction Phase"	means the period from and including the Commencement Date to and including the Actual Completion Date[, or where there are Post Completion Works, the Actual Post Completion Works Date];
"Construction Quality Plan"	means the document at Section 8 (<i>Quality Plans (Design and Construction)</i>) of Schedule 5 (<i>Construction Matters</i>);
"Construction Skills Certification Scheme"	means the scheme operated by Construction Skills Certification Scheme Limited (registered number 03024675) to evidence the skills and competence of persons employed on construction sites;
"Consultants"	means [♦];
"Contamination"	means all or any pollutants or contaminants, including any chemical or industrial, radioactive, dangerous, toxic or hazardous substance, waste or residue (whether in solid, semi-solid or liquid form or a gas or vapour) and including without limitation genetically modified organisms [but for the purpose of Clauses 10.3, 10.4 (<i>Responsibility for Ground Conditions and Contamination</i>) and 10.16 does not include Asbestos];
"Contracting Associate"	means the Contractor [and any other entity which performs on behalf of D&B Co any material function in connection with this Agreement or the Project Operations]; ¹²¹
"Contractor"	means [♦] ¹²² engaged by D&B Co to carry out the Works and any substitute design and/or building contractor engaged by D&B Co as may be permitted by this Agreement;
"Contractor's Collateral Agreement"	means a collateral agreement among the Authority, D&B Co and the Contractor in the form set out in Section 1 (<i>Contractor's Collateral Agreement</i>) of Schedule 8 (<i>Collateral Agreements</i>);
"Contractor's Site Manager"	means the manager to be appointed by the Contractor for purposes of supervision of all day-to-day activities on the Site;
"Contractor's Site Rules"	means the Contractor's rules, applicable on the Site to the Authority, D&B Co, the Contractor and their respective sub-contractors and suppliers of every tier during the construction of the Facilities;
"Convictions"	means, other than in relation to any minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding orders (including any spent convictions as

¹²¹ This provision should be drafted on a project specific basis to encompass any principal sub-contractors to D&B Co.

¹²² Insert description of construction contractor

	contemplated by section 1(1) of the Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of Schedule 1 of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023) or any replacement or amendment to that Order) and including any Anti-Social Behaviour Orders;
"Dashboard Template"	means the forma attached at Part 3 of Section 1 of Schedule 20 (<i>Community Benefits</i>);
"D&B Co Event of Default"	has the meaning given in Clause 33 (<i>D&B Co Event of Default</i>);
"D&B Co Party"	means D&B Co's agents and Contractors (including without limitation the Contractor and its or their sub-contractors of any tier and its or their directors, officers, employees and workmen in relation to the Project and "D&B Co Parties" shall be construed accordingly;
"D&B Co Suspension Notice"	has the meaning given in Clause 11.4.2(b);
"D&B Co's Community Benefit Method Statements"	means the method statements set out in Schedule 20 (<i>Community Benefits</i>);
"D&B Co's Key Personnel"	means the personnel identified in Schedule 3 (<i>Key Personnel</i>);
"D&B Co's Post-Completion Commissioning"	means D&B Co's commissioning activities carried out in accordance with Clause 18.1 (<i>Post Completion Commissioning</i>);
"D&B Co's Pre-Completion Commissioning"	means D&B Co's commissioning activities to be carried out in accordance with Clause 17 (<i>Pre-Completion Commissioning and Completion</i>);
"D&B Co's Proposals"	means the document at Section 4 (<i>D&B Co's Proposals</i>) of Schedule 5 (<i>Construction Matters</i>) as amended from time to time in accordance with Clause 28 (<i>Variation Procedure</i>);
"D&B Co's Representative"	means the person appointed by D&B Co pursuant to Clause 8 (<i>Representatives</i>);
"Data Loss Event"	means any event that results, or may result, in unauthorised access to Personal Data held by D&B Co under this Agreement, and/or actual or potential loss and/or destruction of Personal Data, in breach of this Agreement, including any Personal Data Breach;
"Data Protection Laws"	means Law protecting personal data of natural persons (including the Data Protection Act 2018, GDPR and codes of practice issued from time to time by relevant supervisory authorities);
"Decant"	means the completion by D&B Co of the removal of all equipment items and materials to be removed by D&B Co from the Existing Facilities in accordance

	with the terms of the Decant Protocol;
"Decant Protocol"	means the protocol set out in [Section 4 (<i>Decant Protocol</i>) of Schedule 11 (<i>Equipment</i>)] ¹²³ , identifying the obligations and responsibilities of the parties in relation to the removal of items from the Existing Facilities and their relocation and installation in the Facilities;
"Deed of Trust"	means the deed of trust in the form set out in Section 1 (<i>Deed of Trust</i>) of Schedule 19 (<i>Project Bank Account</i>) dated on or around the date hereof among the Authority, D&B Co and the Contractor relating to facilitating the making of payments in connection with the Project to D&B Co, the Contractor and Sub-Contractors;
"Deemed Allocation"	has the meaning given in Clause 29.25 (<i>Revised Payment Instruction</i>);
"Default Interest Rate"	means 2% over [♦];
"Defects"	means any defect or fault in the Works and/or the Facilities which occurs due to a failure by D&B Co to meet the Authority's Construction Requirements and/or D&B Co's Proposals or otherwise to comply with its obligations under this Agreement;
"Defects Liability Period[s]"	means ¹²⁴ [: <ul style="list-style-type: none"> (c)]the period of twelve (12) months from the Actual Completion Date, in respect of the Main Works]; [and (d) twelve (12) months from the Actual Post Completion Works Date, in respect of the Post Completion Works;]
"Delay Event"	has the meaning given in Clause 24.3 (<i>Delay Events and Compensation Events</i>);
["Demolition Site"	means [♦];]
"Design Data"	means all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing and/or operation of the Facilities;
"Design Quality Plan"	means the document at Section 8 (<i>Quality Plans (Design and Construction)</i>) of Schedule 5 (<i>Construction Matters</i>);
"Development Amount"	means the sum of £[INSERT SUM];

¹²³ To be developed on a project specific basis with reference to the Decant Protocol in schedule 11 of the Template MIM Education PA.

¹²⁴ A twelve month Defects Liability Period is the minimum Defects Liability Period to be applied.

"Development Amount Analysis"	means the development amount analysis set out at Schedule 18 (<i>Development Amount Analysis</i>);
"Direct Losses"	means, subject to the provisions of Clause 42.1 (<i>Exclusions and Limitations on Liability</i>), all damage, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an agent/client, client paying basis), proceedings, demands and charges whether arising under statute, contract or at common law but, to avoid doubt, excluding Indirect Losses;
"Disclosed Data"	means any Design Data and any other written information, survey reports, data and documents made available or issued to D&B Co or any D&B Co Party in connection with the Project by or on behalf of the Authority (or any Authority Party) whether on, before or after the execution of this Agreement;
"Disclosure and Barring Service"	means the non-departmental public body established pursuant to the Protection of Freedoms Act 2012;
["Disruption Event"	means a failure by D&B Co to carry out the Works in accordance with this Agreement the result of which is that an Existing Facility (or part thereof) cannot reasonably continue to be used for the provision of Educational Services;]
"Dispute"	has the meaning given in paragraph 1 of Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Dispute Resolution Procedure"	means the procedure set out in Schedule 15 (<i>Dispute Resolution Procedure</i>);
"DOTAS"	means the Disclosure of Tax Avoidance Schemes rules which require a promoter of tax schemes to tell HM Revenue & Customs of any specified notifiable arrangements or proposals and to provide prescribed information on those arrangements or proposals within set time limits as contained in Part 7 of the Finance Act 2004 and in secondary legislation made under vires contained in Part 7 of the Finance Act 2004 and as extended to National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868 made under s.132A of the Social Security Administration Act 1992;
"Due Date"	has the meaning in Clause 29.4 (<i>Applications for Payment</i>);
"Educational Services"	means [the provision of teaching and pastoral support for school age children, the provision of careers advice, liaison with parents and guardians of Students and the carrying on of extra-curricular activities for Students and the use of school accommodation by the local community;] [the provision of teaching, vocational training,

	careers advice, mentoring and associated support services for Students and the carrying on of extra-curricular activities for Students and the use of the Facilities by the local community]; ¹²⁵
"Environmental Information Regulations"	means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such regulations;
"Equipment"	has the meaning given to it in [♦]of Schedule 10 (<i>Outline Commissioning Programme</i>);
"Ethical Employment Code"	means the Code of Practice - Ethical Employment in Supply Chains issued by the Welsh Government on [♦];
"Examination Period"	means the [external examination periods for Students at the Facility published by the Authority or the School Entity] for each Academic Year and notified by the Authority to D&B Co in accordance with Clause 5.6 and 5.7 (<i>Notification of Terms and Examination Periods</i>) of this Agreement] / [examination periods for Students at the Facility for each Academic Year notified by the Authority to D&B Co in accordance with Clause 5.6 and 5.7 (<i>Notification of Terms and Examination Periods</i>) of this Agreement];
["Existing Facility"	means a [♦];
"Facility" or "Facilities"	means [the buildings and other facilities, together with all supporting infrastructure (including the Plant and [the Group 1 Equipment]), external hard-standings, specialist surfaces and other amenities located on the Site, as required to enable D&B Co to comply with its obligations under this Agreement, all as the same may be varied, amended or supplemented from time to time in accordance with this Agreement;]
["Facility Representative"	has the meaning given in Clause 8.11.1 (<i>[Facility Representative]</i>); ¹²⁶
"Fees Regulations"	means the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004;
"Final Commissioning Programme"	means the programme jointly developed and agreed by the Authority and D&B Co in accordance with the

¹²⁵ The first definition is the proposed starting point for a Schools Project, and the second, for a College Project. Each will require to be reviewed on a project specific basis and adjusted to reflect the educational/community activities to be undertaken at the relevant School or College including pre-school education where relevant.

¹²⁶ Please refer to comment at Clause 8.11.1.

	provisions of Clause 17.1 (<i>Pre-Completion Commissioning and Completion</i>);
"Final Date"	has the meaning given to it in Clause 29.12 (<i>Date for Payment</i>);
"Finishes"	means those finishes listed in the table set out in paragraph 1.2.3 of Schedule 7 (<i>Review Procedure</i>);
"Finishes Proposal Date"	means, in relation to a Finish, the relevant date identified in the table set out in paragraph 1.2.3 of Schedule 7 (<i>Review Procedure</i>);
"Finishes Selection Date"	means, in relation to a Finish, the relevant date identified in the table set out in paragraph 1.2.3 of Schedule 7 (<i>Review Procedure</i>);
"First Party"	has the meaning given in Clause 30.3 (<i>VAT and Construction Industry Tax Deduction Scheme</i>);
"FOIA"	means the Freedom of Information Act 2000 and any subordinate legislation (as defined in section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such Act;
"Force Majeure"	has the meaning given in Clause 26 (<i>Force Majeure</i>);
["Further Asbestos"	means Asbestos discovered at a Demolition Site and set out in the Asbestos Schedule (as updated) that has been agreed pursuant to Clauses 10.10.1 and/or 10.10.2 (<i>Asbestos</i>) to the extent only that it differs in nature and/or extent and/or location from the Asbestos identified in the asbestos schedule contained in [♦] of Schedule [♦] (<i>Asbestos Surveys and Schedule</i>);]
["Further Asbestos Delay"	has the meaning given to it in Clause 10.12 (<i>Asbestos</i>);]
"GDPR"	means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to processing of Personal Data and on the free movement of such data;
"General Anti-Abuse Rule"	means: <ul style="list-style-type: none"> (a) the legislation in Part 5 of the Finance Act 2013; and (b) any future legislation introduced into parliament to counteract tax advantages arising from abusive arrangements to avoid national insurance contributions;

"Good Industry Practice"	means using standards, practices, methods and procedures conforming to the Law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under the same or similar circumstances;
"Government"	means the government of the United Kingdom or the Welsh Ministers;
"Ground Physical and Geophysical Investigation"	means the investigation of all the ground, physical and geophysical conditions of and surrounding the Site and of any extraneous materials in, on or under the Site (including its surface and subsoil) to enable the Facilities to be designed and constructed and the Works to be carried out with due regard for those conditions and the seismic activity (if any) in the region of the Site;
["Group 1 Equipment"	means each item of equipment identified as Group 1 Equipment in column [♦] of the tables set out on each of the Loaded Room Layout Drawings;]
["Group 2 Equipment"	means [♦];]
["Group 3 Equipment"	means [♦];]
"Halifax Abuse Principle"	means the principle explained in the CJEU Case C 255/02 Halifax and others;
"Holding Company"	has the meaning given to it in section 1159 of the Companies Act 2006;
["ICT Assets"	means: <ul style="list-style-type: none"> (a) hardware, software, networking equipment, telecommunications equipment, telephone systems, projectors, screens, digital signage, interactive whiteboards, video playback equipment, stage lighting control systems, audio systems, assisted hearing systems, technological sports equipment, cashless catering equipment, registration systems, internal CCTV equipment, peripherals, manuals, documentation and related ICT products and materials ; and (b) the ICT Infrastructure;]
["ICT Handover"	means, in relation to the Facility satisfaction of the ICT Handover Requirements;]
["ICT Handover Acceptance Certificate"	means a certificate in the relevant form set out in Schedule 16 (<i>Certificates</i>);]
["ICT Handover Date"	means subject to Clause 24 (<i>Delay Events and Compensation Events</i>), the date described as such in Section 2 (<i>Phasing</i>) of Schedule 6 (<i>The Programme</i>) or such other date as the parties may

	agree ¹²⁷ ;
["ICT Handover Period"	means, the date commencing on the Actual ICT Handover Date and ending on the Actual Completion Date;]
["ICT Handover Requirements"	means the requirements set out in paragraphs [♦] of Appendix B) of Schedule 10 (<i>Outline Commissioning Programme</i>);]
["ICT Infrastructure"	has the meaning given to it in Section 3 of Schedule 5 (<i>Authority's Construction Requirements</i>);]
["ICT Installer"	has the meaning given to that term in [♦];]
["ICT Service Contract"	means the agreement(s) dated [♦]/ [on or around the date of this Agreement] between the [School Entity/ Authority] and the ICT Installer related to the provision of ICT at the Facility;]
["Identified Asbestos"	means Asbestos identified on the Asbestos Schedule at the time it is issued for the purpose of the tender for a Licensed Contractor pursuant to Clause 10.8 (<i>Asbestos</i>);]
"Indemnifier"	has the meaning given in Clause 38.3 (<i>Conduct of Claims</i>);
"Independent Tester"	means the [insert name of Independent Tester] or such substitute independent tester as may be permitted pursuant to this Agreement;
"Independent Tester Contract"	means the contract dated on or around the same date as this Agreement in the form set out in Schedule 9 (<i>Independent Tester Contract</i>) or any replacement thereof among D&B Co, the Authority, the Contractor and the Independent Tester;
"Indirect Losses"	has the meaning given in Clause 42.1 (<i>Exclusions and Limitations on Liability</i>);
"Information"	has the meaning given under section 84 of the Freedom of Information Act 2000;
"Information Commissioner"	has the meaning given in the Data Protection Laws;
"Information System"	means a system for generating, sending, receiving, storing or otherwise processing electronic communications;
["Initial ICT Equipment"	means the legacy ICT Assets and new ICT Assets which are described in [♦] of the Authority's Construction Requirements;]

¹²⁷ The date programmed for ICT Handover should be set out here.

"Insurance Proceeds Account"	means the account numbered [♦] in the joint names of D&B Co and the Authority;
"Insurances"	means, as the context requires, all or any of the insurances required to be maintained by D&B Co pursuant to this Agreement;
"Intellectual Property"	means all registered or unregistered trademarks, service marks, patents, registered designs, utility models, applications for any of the foregoing, copyrights, unregistered designs, the sui generis rights of extraction relating to databases, trade secrets and other confidential information or know-how;
"Intellectual Property Rights"	means the Intellectual Property which (or the subject matter of which) is created, brought into existence, acquired, used or intended to be used by D&B Co, any D&B Co Party or by other third parties (for the use by or on behalf of or for the benefit of D&B Co) for the purposes of the design or construction of the Facilities, the operation, maintenance, improvement and/or testing of the Facilities or the conduct of any other Project Operation or otherwise for the purposes of this Agreement;
"Interim Certificate"	has the meaning given in Clause 29.7 (<i>Issue of Interim Certificate</i>);
"Joining Declaration"	means a joining declaration entered into by the Authority, D&B Co, the Contractor and a Sub-Contractor or Sub-Contractors in the form set out in Schedule 3 (<i>Deed of Adherence and Joining Deed</i>) of the Deed of Trust;
"Joining Request"	means a request by a Below Threshold Sub-Contractor to be added as a party to the Deed of Trust for the purpose of facilitating the receiving of payments in connection with the Project through the Project Bank Account;
"Joint Operating Protocol"	means the joint operating protocol set out in Schedule 21 (<i>Joint Operating Protocol</i>);
["Judicial Proceedings"	means the grant of permission for an application of judicial review within six (6) weeks of the date of a Planning Approval (and any subsequent application or related process) under Part 54 of the Civil Procedure Rules in respect of a Planning Approval;] ¹²⁸

¹²⁸ Definition required where drafting in Clause 11.4 (*Judicial Proceedings*) is used.

["Judicial Proceedings Action"	means any court order or declaration made by a relevant court (including without limitation the granting of an injunction) arising out of or in connection with any Judicial Proceedings that renders unlawful and/or prevents the performance of all or part of D&B Co's obligations under this Agreement;] ¹²⁹
"Key Personnel"	has the meaning given to it in Schedule 3 (<i>Key Personnel</i>);
"Key Sub-Contractor"	means the architects, structural engineers, mechanical and electrical engineers, acoustic engineers, 'Principal Designer' under the CDM Regulations and [♦] ¹³⁰ employed by the Contractor in connection with the Works and any employer's agent employed by D&B Co;
"Key Sub-Contractor Collateral Agreements"	means the collateral agreement among the Authority, D&B Co [, the Contractor] and the Key Sub-Contractors in the form set out in Section 2 of Schedule 8 (<i>Collateral Agreements</i>);
"Law"	<p>means:</p> <ul style="list-style-type: none"> (a) any applicable statute or proclamation or any delegated or subordinate legislation; (b) any enforceable community right within the meaning of section 2(1) of the European Communities Act 1972; (c) any applicable guidance, direction or determination with which the Authority and/or D&B Co is bound to comply (including the Welsh Language Standards) to the extent that the same are published and publicly available or the existence or contents of them have been notified to D&B Co by the Authority; and (d) any applicable judgement of a relevant court of law which is a binding precedent in England and Wales, <p>in each case in force in England and Wales or Wales alone;</p>
"Liability Cap"	means []% of the Development Amount; ¹³¹
"Liaison Committee"	has the meaning given to it in Schedule 22 (<i>Liaison Procedure</i>);

¹²⁹ Definition required where drafting in Clause 11.4 (*Judicial Proceedings*) is used.

¹³⁰ This list should be reviewed and supplemented on a project specific basis.

¹³¹ To be completed by Authority on a project specific basis.

["Licensed Contractor"	means a contractor licensed by the Health and Safety Executive to work with Asbestos;]
"Loaded Room Layout Drawings"	has the meaning given in the Authority's Construction Requirements;
"Longstop Date"	has the meaning given to it in Clause 33.1.2 (<i>Long Stop</i>)
["Main Retention"	has the meaning given in Clauses 29.8 (<i>Retention</i>);]
["Main Works"	means the Works with the exception of the Post Completion Works;]
["Main Works Final Account"	has the meaning given in Clause 29.16 (<i>Statement of Final Accounts and Issue of Payment Certificate</i>);]
"[Main] Works Requirements"	has the meaning given to it in paragraph [♦] of Appendix B (<i>Completion Criteria</i>) of Schedule 10 (<i>Outline Commissioning Programme</i>);
"Non-Compliant Shareholder"	has the meaning given to it in Clause 40.1.2 (<i>Tax Compliance</i>);
"Non-PBA Sub-Contractor"	means a Sub-Contractor that is not a party to the Deed of Trust;
"Notice of Adjudication"	has the meaning given in paragraph 6.1 of Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Occasion of Tax Non-Compliance"	means: <ul style="list-style-type: none"> (a) any tax return of D&B Co or a Shareholder submitted to a Relevant Tax Authority on or after 1 October 2012 is found to be incorrect as a result of: <ul style="list-style-type: none"> (i) a Relevant Tax Authority successfully challenging D&B Co or the relevant Shareholder under the General Anti-Abuse Rule or the Halifax Abuse Principle or under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax Abuse Principle; (ii) the failure of an avoidance scheme which D&B Co or the relevant Shareholder was involved in, and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime; and/or (b) D&B Co's or the relevant Shareholder's tax affairs giving rise on or after 1 April 2013 to a criminal conviction in any jurisdiction for tax-related offences which is not spent at the date of this Agreement or to a penalty for civil fraud or evasion;

"Outline Commissioning Programme"	means the programme setting out the standards, specifications, procedures and other requirements for the carrying out and completion of the commissioning activities of the parties set out in outline in Schedule 10 (<i>Outline Commissioning Programme</i>);
"Pay Less Allocation"	means (i) a Pay Less Payment Instruction; or, where D&B Co does not comply with Clause 29.24 (<i>Revised Payment Instruction</i>), (ii) a Deemed Allocation;
"Pay Less Notice"	has the meaning given in Clause 29.23 (<i>Pay Less Notice</i>);
"Pay Less Payment Instruction"	means a document prepared by D&B Co specifying the sum due to each PBA Beneficiary in respect of a sum specified as considered by the Authority to be due pursuant to a Pay Less Notice issued in accordance with Clause 29.23 (<i>Pay Less Notice</i>);
"Payment Certificate"	has the meaning given in Clause 29.18 (<i>Pay Less Notice</i>);
"Payment Certificate Due Date"	has the meaning given in Clause 29.18 (<i>Statement of Final Accounts and Issue of Payment Certificate</i>);
"Payment Certificate Final Date"	has the meaning given in Clause 29.21 (<i>Statement of Final Accounts and Issue of Payment Certificate</i>);
"Payment Instruction"	means a document prepared by D&B Co specifying the sum due to each PBA Beneficiary in respect of a sum due pursuant to Clause 29.12 (<i>Date for Payment</i>);
"PBA Beneficiary"	means a beneficiary under the Deed of Trust;
"PBA Beneficiary Amount"	means the amount due to a PBA Beneficiary pursuant to: (i) a Payment Instruction; or, where a Pay Less Notice has been issued, (ii) a Pay Less Allocation;
"PBA Sub-Contractor"	means a Sub-Contractor that is a party to the Deed of Trust;
["PCW Snagging List"	means the list to be prepared by the Independent Tester in accordance with Clause 17.16 (<i>Snagging Items</i>) in respect of the Post Completion Works containing Snagging Items;]
["PCW Snagging Programme"	has the meaning given to it in Clause 17.16 (<i>Snagging Items</i>);]
"Performance Guarantee(s)"	means the guarantees to D&B Co in respect of the Construction Contract [insert details of any other guarantees to be given] which, as at the date of this

	Agreement are in the Agreed Form ¹³² ;
"Personal Data"	means personal data (as that term is defined in the Data Protection Laws) processed by either Party in connection with their respective rights and obligations in this Agreement;
"Physical Damage Policies"	means the policies of insurance referred to in paragraph 1 of Section 1 of Schedule 12 (<i>Insurance Requirements</i>);
"Planning Approval"	means detailed planning consent for the Project dated [insert date of Planning Approval] and annexed as Attachment [♦];
"Planning Permission"	means any planning permission, approval of reserved matters, listed building consent, conservation areas consent and/or other consent or approval reasonably required from time to time for construction and/or operation of the Facilities (including without limitation for any Authority Works Variation and the Planning Approval);
"Plant"	means the infrastructure systems, building systems, fixed, and immovable equipment systems, installed as part of the Works or pursuant to an Authority Works Variation, as replaced from time to time;
"Post Completion Commissioning"	means, as appropriate, D&B Co's Post-Completion Commissioning and/or the Authority's Post Completion Commissioning [in respect of the Main Works and/or the Post Completion Works, as applicable];
["Post Completion Retention"	has the meaning given in Clauses 29.8 (<i>Retention</i>);]
["Post Completion Works"	means those parts of the Works [described as such in the Authority's Construction Requirements and D&B Co's Proposals/highlighted as such on the Programme] ¹³³ to be completed after the Actual Completion Date in accordance with the Programme;]
["Post Completion Works Areas"	means [♦];]
["Post Completion Works Date"	means, the date shown as the Post Completion Works Date in Section 2 of Schedule 6 (<i>The Programme</i>), or such revised date as may be specified by the Authority's Representative pursuant to Clause 24 (<i>Delay Events and Compensation Events</i>), or such other date as may be agreed by the parties;]

¹³² Insert details of any other guarantees to be given.

¹³³ Where there are Post Completion Works on a Project, these must be clearly identified and distinguished from the Main Works.

["Post Completion Works Final Account	has the meaning given in Clause 29.16 (<i>Statement of Final Accounts and Issue of Payment Certificate</i>);]
["Post Completion Works Requirements"	has the meaning given to it in paragraph [♦] of Appendix B (<i>Completion Criteria</i>) of Schedule 10 (<i>Outline Commissioning Programme</i>);]
"Pounds Sterling"	means the currency issued by the Bank of England from time to time;
"Programme"	means the programme set out in Schedule 6 (<i>The Programme</i>) as revised and issued by D&B Co (or on its behalf) from time to time pursuant to Clause 14 (<i>Programme and Dates for Completion</i>);
"Prohibited Act"	has the meaning given in Clause 36 (<i>Corrupt Gifts and Payments</i>);
"Project"	has the meaning given to it in Recital (A);
"Project Bank Account"	means the bank account provided by the Project Bank Account Provider in the joint names of the Authority, D&B Co and the Contractor in relation to the Project;
"Project Bank Account Provider"	means [♦];
"Project BIM Agreement"	means the agreement with that title originally entered into between WEPCo and the Authority and subject to a novation agreement dated on or around the date hereof, under the terms of which all of WEPCo's rights and obligations under the agreement as originally executed have been novated to D&B Co;
"Project Data"	means: <ul style="list-style-type: none"> (a) all Design Data; (b) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the provision of the Works; and (c) any other materials, documents and or data acquired, brought into existence or used in relation to the Project Operations or this Agreement;
"Project Development Fee"	means [<i>correct figure reflecting terms of Strategic Partnering Agreement to be inserted on a project by project basis</i>];

"Project Documents"	means the Construction Contract and the Performance Guarantees, all as the same may be amended or replaced from time to time; ¹³⁴
"Project Operations"	means the carrying out of the Works, the carrying out of D&B Co's Pre-Completion Commissioning and D&B Co's Post-Completion Commissioning and the performance of all other obligations of D&B Co under this Agreement from time to time;
"Proposed Mitigating Measures"	has the meaning given in Clause 40.1.2(b) (<i>Tax Compliance</i>);
"Protective Measures"	means appropriate technical and organisational measures which may include: pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of such measures;
"Qualifying Sub-Contractor"	means a Sub-Contractor (other than a Consultant) with a Sub-Contract Value of at least one per cent (1%) of the Development Amount;
"Quality Plans"	means the Design Quality Plan and Construction Quality Plan, prepared in accordance with Section 8 (<i>Quality Plans (Design and Construction)</i>) of Schedule 5 (<i>Construction Matters</i>), as required to be implemented by D&B Co in accordance with Clause 21 (<i>Quality Assurance</i>);
"Range of Finishes"	has the meaning given in paragraph 1.2.3(a) of Schedule 7 (<i>Review Procedure</i>);
"RDD Meeting Protocol"	means the protocol set out in [◆];
"Referral"	has the meaning given in paragraph 6.4 of Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Referral Notice"	has the meaning given in paragraph 6.4 of Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Referring Party"	has the meaning given in Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Reinstatement Outline"	has the meaning given in Clause 41.20.2(a) (<i>Reinstatement</i>);
"Reinstatement Plan"	has the meaning given in Clause 41.20 (<i>Reinstatement</i>);
"Reinstatement Works"	has the meaning given in Clause 41.20.2(a) (<i>Reinstatement</i>);

¹³⁴ Authority to consider if there are any other significant project documents.

"Related Adjudication"	has the meaning given in paragraph 6.14 of Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Related Adjudicator"	has the meaning given in paragraph 6.14 Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Related Agreements"	has the meaning given in paragraph 6.14 of Schedule 15 (<i>Dispute Resolution Procedure</i>);
"Relevant Authority"	means any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom, or of the European Union, (or of the Welsh Ministers or the National Assembly for Wales);
"Relevant Incident"	has the meaning given in Clause 41.20.2 (<i>Reinstatement</i>);
"Relevant Month"	means each calendar month from the Commencement Date until (and including) the calendar month after the calendar month in which the [final] Certificate of Practical Completion is issued;
"Relevant Tax Authority"	means HM Revenue & Customs, or, if applicable, a tax authority in the jurisdiction in which D&B Co, or, as the case may be, the relevant person is established;
"Relief Events"	has the meaning given in Clause 25 (<i>Relief Events</i>);
["Renewal Date"	means [♦];
"Reportable Incident"	<p>means any incident or event having an actual adverse effect on:</p> <ul style="list-style-type: none"> (a) an electronic communications network relevant within the meaning of Section 32(1) of the Communications Act 2003; (b) any device or group of interconnected or related devices one or more of which, pursuant to a program, perform automatic processing of digital data; or (c) digital data stored, processed, retrieved or transmitted by elements covered under paragraph (a) or (b) for the purposes of their operation, use, protection and maintenance, <p>and which has a significant impact on the continuity of Educational Services and/or the Authority [or School Entity] discharging its statutory duties or functions that affect the [School/College];</p>
"Request for Information"	has the meaning set out in the FOIA or the Environmental Information Regulations as relevant (where the meaning set out for the term "request"

shall apply);

"Reserved Rights"

means the matters referred to in Section 2 (*Reserved Rights*) at Schedule 4 (*Land Matters*);

"Responding Party"

has the meaning given in paragraph 6.4 of Schedule 15 (*Dispute Resolution Procedure*);

"Restricted Person"

means either:

- (a) a person providing or proposing to provide [♦] services of a similar nature to those provided or contemplated by the Authority at the time in question; or
- (b) any person who has a material interest in the manufacture, production, sale or distribution of [pornography,] or [arms and weapons] or [the production of tobacco products and/or alcoholic beverages];
- (c) a person who poses, or could pose (in the reasonable opinion of the Authority) a threat to national security;
- (d) [any person whose tax returns submitted on or after 1 October 2012 have been found to be incorrect as a result of:
 - (i) HM Revenue and Customs successfully challenging it under the General Anti-Abuse Rule ("**GAAR**") or the Halifax Abuse Principle;
 - (ii) the Relevant Tax Authority challenging it under any tax rules or legislation that have an effect equivalent or similar to the GAAR or the Halifax Abuse Principle; and/or
 - (iii) the failure of an avoidance scheme which the person was involved in and which was, or should have been, notified under the DOTAS or any equivalent or similar regime in a jurisdiction in which the person is established;]

["Retention[s]"	means the Main Works Retention and/or the Post Completion Works Retention as the context so requires;]
"Review Procedure"	means the procedure set out in Schedule 7 (<i>Review Procedure</i>);
"Reviewable Design Data"	means the Design Data listed at Section 5 (<i>Reviewable Design Data</i>) of Schedule 5 (<i>Construction Matters</i>);
"Reviewable Design Data Programme"	means the programme for submission and review of the Submitted Items as set out in Appendix 1 of Schedule 7 (<i>Review Procedure</i>);
"Schedule of Defects"	has the meaning given in Clause 19.2 (<i>Schedule of Defects</i>);
["School Entity"	means [a governing body constituted in accordance with Section 19 of the Education Act 2002];]
"Second Party"	has the meaning given in Clause 30.3 (<i>VAT and Construction Industry Tax Deduction Scheme</i>);
"Shareholder(s)"	means any person(s) who from time to time, as permitted by this Agreement, holds share capital in [D&B Co] which persons are, as at the date of this Agreement, listed as such in Schedule 2 (<i>Completion Documents</i>);
"Shareholder Tax Mitigation Measures Non-Compliance Notice"	has the meaning given to it in Clause 40.1.7 (<i>Tax Compliance</i>);
"Shareholder Tax Non-Compliance Notice"	has the meaning given to it in Clause 40.1.6 (<i>Tax Compliance</i>);
["Shareholders' Agreement"	means [♦];]
"Site"	means the land made available to D&B Co for the Project outlined in red on [♦] ¹³⁵ ;
"Site Conditions"	means the condition of the Site including (but not limited to) climatic, hydrological, hydrogeological, ecological, environmental, geotechnical, topographical and archaeological conditions;
"Site Plan"	means the site plan attached at Appendix 2 of Schedule 4 (<i>Land Matters</i>); ¹³⁶
"Snagging Completion Date"	means the date of the relevant Snagging Items Completion Certificate issued by the Independent Tester in respect of the [Main Works] [or the Post Completion Works (as applicable)] pursuant to Clause 17.17 (<i>Snagging Items</i>);

¹³⁵ Insert details of relevant plan.

¹³⁶ Plan to be developed on a project specific basis.

"Snagging Items"	means minor defects, deficiencies or omissions of a snagging nature whose remediation cannot reasonably be expected to affect the provision of the Authority Services, disrupt the use of the Facilities, prejudice the safe use of the Facilities or prevent the Independent Tester from issuing a Certificate of Practical Completion for the [Main] Works [or Post Completion Works (as applicable)] [or the ICT Handover Acceptance Certificate] and the remediation of which cannot reasonably be expected to exceed in aggregate twenty (20) Business Days from the [relevant] Certificate of Practical Completion [or ICT Handover Acceptance Certificate (as applicable)], or such longer period (up to a maximum of [three (3) months]) as may be reasonable taking into account the lead time for supplies or materials [or to avoid interference with the ICT Installer];
"Snagging Items Completion Certificate"	means the certificate(s) issued by the Independent Tester in accordance with Clause 17.17 (<i>Snagging Items</i>) and in accordance with the terms of the Independent Tester Contract;
"Snagging List"	means the list to be prepared by the Independent Tester in accordance with Clause 17.14 (<i>Snagging Items</i>) [in respect of the Main Works] containing Snagging Items, as updated pursuant to Clause 17.15 (<i>Snagging Items</i>);
"Snagging Programme"	has the meaning given to it in Clause 17.14, as updated pursuant to Clause 17.15 (as applicable) (<i>Snagging Items</i>);
"Strategic Partnering Agreement" or "SPA"	has the meaning given in Recital (B);
"Statement of Final Account"	has the meaning given to it in Clause 29.16 (<i>Statement of Final Accounts and Issue of Payment Certificates</i>);
"Student"	means a student of the Facility;
"Sub-Contract"	means any contract entered into, by or between D&B Co and/or the Contractor and other third parties, in relation to any aspect of the Project Operations;
"Sub-Contract Value"	means the original contract sum of a Sub-Contract;
"Sub-Contractor"	means any third party (including the Contractor) who enters into any Sub-Contract;
"Submitted Item"	has the meaning given to it in Paragraph 1.2 of Schedule 7 (<i>Review Procedure</i>);
"Subsidiary"	has the meaning given to it in section 1159 of the Companies Act 2006;
"Suspension Notice"	has the meaning given to it in Clause 11.4.2 (<i>Judicial Proceedings</i>);

"Term"	the terms published by the Authority for each Academic Year and notified to D&B Co in accordance with Clauses 5.4 and 5.5 (<i>Notification of Terms and Examination Periods</i>) (and "half term" references shall be construed accordingly);
"Termination Date"	means the date on which termination of this Agreement takes effect in accordance with its terms;
"Title Conditions"	means title conditions set out in Section 1 (<i>Title Conditions</i>) of Schedule 4 (<i>Land Matters</i>);
["Unreasonable Act"	means any act or omission which is contrary to any reasonable instruction, guidance or rules for the operation or management of the Facilities;]
"Utilities"	means [♦];
"Utilities Agreement"	means: <ul style="list-style-type: none"> (a) those agreements listed in Schedule [♦] (<i>Utilities Agreements</i>); and (b) any other agreements with, or consents, releases, notices or variations properly required for the purposes of carrying out the Works to be obtained from and/or served on, any public or private utility, drainage, sewage, water, electricity, gas or telecommunications undertaker, authority or company or any service provider or company, body or authority for the requisitioning, design, commissioning, installation, laying, relaying, construction, repair, maintenance, use or diversion or disconnection and/or connection to any services and/or services media of any kind including without prejudice to the generality thereof gas, water, electricity, signals and pulses, telecommunications, drainage, sewers, wires, cables, conduits and apparatus;
"Utilities Third Party"	means a third party on whom a Utilities Agreement is to be served or from whom a Utilities Agreement is required to be given or executed;
"Variation"	has the meaning given in Schedule 13 (<i>Variation Procedure</i>);
"Variation Confirmation"	has the meaning given in Schedule 13 (<i>Variation Procedure</i>);
"Variation Enquiry"	has the meaning given in Schedule 13 (<i>Variation Procedure</i>);
"Variation Procedure"	means the procedure set out in Schedule 13 (<i>Variation Procedure</i>);
"VAT"	means value added tax at the rate prevailing at the time of the relevant supply charged in accordance with the provisions of the Value Added Tax Act

	1994;
"VAT Sum"	has the meaning given in Clause 30.5 (<i>VAT and Construction Industry Tax Deduction Scheme</i>);
"Vitiating Act"	has the meaning given in Endorsement 2, Section 3 (<i>Endorsements</i>) of Schedule 12 (<i>Insurance Requirements</i>);
"Well-being of Future Generations Act"	means the Well-being of Future Generations (Wales) Act 2015;
"Welsh Language Standards"	means the Welsh Language Standards (No. 1) Regulations 2015;
"WEPCo"	means [♦]; ¹³⁷
["WiFi"	means [♦];]
["WiFi Actual Completion Date"	means such date stated in the Certificate of WiFi Completion or, in the event of dispute, as such date may be determined in accordance with Schedule 15 (<i>Dispute Resolution Procedure</i>);]
["WiFi PC Criteria"	means the WiFi Post Completion Tests have been passed;]
["WiFi Post-Completion Tests"	means the tests described at [♦] of the Authority's Construction Requirements; and]
"Works"	means the design (including the preparation of all Design Data), construction, installation, testing, commissioning and completion of the Facilities (including any temporary works) [and the Group 2 Equipment, Group 3 Equipment] (to the extent provided for in [♦] and [♦] of the Authority's Construction Requirements) to be performed by D&B Co in accordance with this Agreement (as varied, amended or supplemented from time to time in accordance with this Agreement) [including the Post Completion Works].

¹³⁷ Insert description of WEP entity.

SECTION 2
INTERPRETATION

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

1. The headings and marginal notes and references to them in this Agreement shall be deemed not to be part of this Agreement and shall not be taken into consideration in the interpretation of this Agreement.
2. Except where the context expressly requires otherwise, references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedules are references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedules to this Agreement and references to Sections, Appendices and Attachments (if any) are references to Sections, Appendices and Attachments to or contained in this Agreement.
3. The Schedules (including Sections, Parts, Appendices and Attachments thereto, if any) to this Agreement are integral parts of this Agreement and a reference to this Agreement includes a reference to the Schedules (including Sections, Parts Appendices and Attachments thereto, if any).
4. Words importing persons shall, where the context so requires or admits, include individuals, firms, partnerships, trusts, corporations, governments, governmental bodies, authorities, agencies, unincorporated bodies of persons or associations and any organisations having legal capacity.
5. Where the context so requires words importing the singular only also include the plural and vice versa and words importing the masculine shall be construed as including the feminine or the neuter or vice versa.
6. The language of this Agreement is English. All correspondence, notices, drawings, Design Data, test reports, certificates, specifications and information shall be in English.¹³⁸ All name plates, identification labels, instructions and notices to the public and staff and all other written, printed or electronically readable matter required in accordance with, or for purposes envisaged by, this Agreement shall comply with Welsh Language Standards (including any amending, supplemental or replacement Law from time to time) and shall be bilingual (in English and Welsh), where required by the Authority provided that all operating and maintenance instructions (and any other complex technical documents) are permitted in English only.
7. Save where stated to the contrary, references to any agreement or document include (subject to all relevant approvals and any other provisions of this Agreement concerning amendments to agreements or documents) a reference to that agreement or document as amended, supplemented, substituted, novated or assigned.

¹³⁸ Whilst the Education D&B Agreement will be in English, Authorities should stipulate their language of preference for instructions, notices etc and any Welsh language requirements ought to be priced as part of the Development Amount.

8. References to any Law are to be construed as references to that Law as from time to time amended or to any Law from time to time replacing, extending, consolidating or amending the same provided that the provision of this paragraph shall be without prejudice to the operation of Clause 27 (*Change in Law*) and Schedule 13 (*Variation Procedure*) which shall operate in relation to Change in Law on the basis set out in this Agreement.
9. Without prejudice to Clause 45.5 (*Assignment*), references to a public organisation (other than the Authority) shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the relevant functions and relevant responsibilities of such public organisation.
10. Without prejudice to Clause 45.5 (*Assignment*), references to other persons (other than the Authority and D&B Co) shall include their successors and assignees.
11. References to a deliberate act or omission of the Authority or any Authority Party shall be construed having regard to the interactive nature of the activities of the Authority and of D&B Co and the expression shall exclude acts or omissions which were within the contemplation of the parties or which were otherwise provided for in this Agreement.
12. The words in this Agreement shall bear their natural meaning. The parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore, be construed contra proferentem.
13. Reference to "parties" means the parties to this Agreement and references to "a party" mean one of the parties to this Agreement.
14. In construing this Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word "other" or "including" or "in particular" shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
15. All of D&B Co's obligations, duties and responsibilities shall be construed as separate obligations, duties and responsibilities owed to the Authority and to be performed at D&B Co's own cost and expense.
16. References to "indexed" or "index-linked" shall mean [♦];
17. Reference to a document being in the Agreed Form is a reference to the form of the relevant document [(or where appropriate, the form of the relevant document on disk)] agreed between the parties and for the purpose of identification either (i) initialled or signed by each of them or on their behalf or (ii) entered into on or around the Commencement Date.
18. Words in parenthesis and italics appearing after a Clause reference or a reference to a Schedule are inserted for ease of reference only. If there is any discrepancy between the Clause reference and the words appearing in parenthesis and italics after the Clause reference, the Clause reference shall prevail.

19. Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a prescribed number of Business Days after a stipulated date or event, or "no later than" or "by" a stipulated date or event which is a prescribed number of Business Days after a stipulated date or event, the latest time for performance shall be [5pm] on the last Business Day for performance of the obligations concerned.

20. Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a prescribed number of Business Days before a stipulated date or event, or "no later than" or "by" a stipulated date or event which is a prescribed number of Business Days before a stipulated date or event, the latest time for performance shall be [5pm] on the last Business Day for performance of the obligations concerned.

SCHEDULE 2

COMPLETION DOCUMENTS

SECTION 1

DOCUMENTS TO BE DELIVERED BY D&B CO

Unless an original document is specifically requested, a copy (certified by an officer of D&B Co as being a true copy) of each of the following documents is to be delivered by D&B Co to the Authority in accordance with Clause 2.1 (*Execution and Delivery of Documents*) of this Agreement:

1. The Consents and other authorisations, licences, permits, and approvals listed below:

[♦]¹³⁹
2. The Construction Contract and the Performance Guarantees, executed by the parties to such agreements.
3. An original of the Independent Tester Contract, the Collateral Agreements¹⁴⁰ and the brokers letters of undertaking relating to the Insurances referred to in paragraph 6 below in the Agreed Form, executed by the parties to such agreements (other than the Authority).
4. Extracts from the minutes of the meeting of the board of directors (certified as true and accurate by a director of the relevant company) of D&B Co, and each of the other parties to the documents listed in Section 1 (*Documents to be Delivered by D&B Co*) of Schedule 2 (*Completion Documents*), at which resolutions were passed approving the execution, delivery and performance of each relevant document to which such person is expressed to be a party and in each case authorising a named person or persons to execute and deliver each such document and any other documents to be delivered by it pursuant to it.
5. A certificate of a director of each of the companies referred to in paragraph 4 above setting out the names and specimen signatures of the person or persons named in the relevant certified extract.
6. The insurance broker's letter of undertaking, evidence of the Insurances required in accordance with Clause 41 (*Insurance*) having been taken out by D&B Co and that the policies comply with the requirements of this Agreement.
7. [D&B Co's Certificate of Incorporation and any Certificate of Incorporation on change of Name.]
8. [The Articles of Association of D&B Co.]

¹³⁹ Project specific items to be listed.

¹⁴⁰ In the event that any Key Sub-Contractors have not been appointed at completion, the relevant Key Sub-Contractor Collateral Agreements should be carved out from this drafting.

9. An original Deed of Trust duly executed by D&B Co and the Contractor.
10. Evidence that D&B Co has agreed to be treated as the only "client" for the Project for the purposes of the CDM Regulations.
11. Evidence that the Insurance Proceeds Account has been opened.
12. [♦]¹⁴¹
13. An original duly executed copy of this Agreement.

¹⁴¹ Authority to indicate other project specific documents, including any other Project Document, planning and property related agreements, where appropriate.

SECTION 2

DOCUMENTS TO BE DELIVERED BY THE AUTHORITY

The Authority shall deliver to D&B Co the following documents:

1. An original copy of the Collateral Agreements, the Independent Tester Contract and this Agreement, duly executed by the Authority.
2. A certified copy of the resolution of the Authority approving the execution, delivery and performance of the documents referred to in paragraph 1 above and in each case authorising a named person or persons to execute and deliver each such document and any documents to be delivered by it pursuant thereto.
3. A certificate of the relevant officer of the Authority setting out the names and specimen signatures of the person or persons named in the resolution of the Authority referred to in paragraph 2 above.
4. Evidence that the Project Bank Account has been opened.

[♦]¹⁴²

¹⁴² Authority to list other project specific documents to be included.

SCHEDULE 3
KEY PERSONNEL

SCHEDULE 4

LAND MATTERS

SECTION 1

TITLE CONDITIONS¹⁴³

1. [All title conditions, rights, real burdens, covenants and other rights identified in Appendix 1 of this Schedule 4 (*Land Matters*).
2. All third party rights and rights of way in respect of the Site which were or should have been apparent from a visual inspection of the Site or which were or should have been apparent from the Site investigations pursuant to Clause 7.3 (*D&B Co Investigation*) and Clause 10 (*The Site*).
3. All conditions contained in any agreements entered into pursuant to [Clause 9.6 (*Extent of Rights*) and Clause 10.15 (*Utilities*)].¹⁴⁴

¹⁴³ This should include any restrictions on the use of any part of the Site(s) following title due diligence and must be completed in advance of the Authority issuing a New Project Request under the SPA. Undisclosed title issues may constitute a Delay Event and/or a Compensation Event so the Authority must ensure adequate title diligence and appropriate disclosure through Section 1 of Schedule 5 (*Construction Matters*), on a value for money basis. The Authority will also need to be clear that, for any title Compensation Event proposed during the Project Approval Process that, (i) the rights subsist (ii) the rights would, if enforced, affect the Works (iii) WEPCo/ D&B Co could not reasonably have taken account of the problems in designing its solution and (iv) that insurance cover was not appropriate or available.

¹⁴⁴ To be reviewed on a project specific basis.

SECTION 2
RESERVED RIGHTS¹⁴⁵

In relation to the Site, there are excepted and reserved the following rights to the Authority[, Authority Parties] and/or the Authority's Representative:

1. [♦].¹⁴⁶
2. [♦]

and such rights as are set out under paragraphs [♦] are subject always to the terms of the Joint Operating Protocol.

¹⁴⁵ This should include any rights over any part of the Site(s) which have been or are being reserved for the Authority and/or any third party e.g. rights of access, wayleaves and must be completed in advance of the Authority issuing a New Project Request under the SPA. Undisclosed Reserved Rights may constitute a Delay Event and/or a Compensation Event so the Authority must ensure adequate title diligence and appropriate disclosure through Section 2 of Schedule 5 (*Construction Matters*), on a value for money basis. The Authority will also need to be clear that, for any title Compensation Event proposed by D&B Co/WEPCo, (i) the rights subsist (ii) the rights would, if enforced, affect the Works (iii) D&B Co/WEPCo could not reasonably have taken account of the problems in designing its solution and (iv) insurance cover was not appropriate or available.

¹⁴⁶ To be completed on a project specific basis.

SECTION 3

ANCILLARY RIGHTS¹⁴⁷

Ancillary Rights means:

- (a) a non-exclusive licence to enter and remain upon those parts of the Site that D&B Co and/or any D&B Co Party requires access to in order to carry out the Works;
- (b) such rights of access to and egress from the Site including those highlighted [◆] on the Site Plans, as are necessary for D&B Co and any D&B Co Party to perform their obligations and exercise their rights under this Agreement and in particular for the purposes of implementing the Works, provided that such rights may be varied by the Authority and such variation will be deemed to be an Authority Works Variation;
- (c) rights of free and uninterrupted passage and running of water, soil, gas, electricity, telephone and other services within the Site, including those highlighted [◆] on the Site Plans, provided that such rights of passage may be varied by the Authority to such alternative routes as the Authority may reasonably specify from time to time; and
- (d) the right where necessary to inspect, repair, maintain or renew the Utilities within the Site and the right (at the cost of D&B Co) to connect into the Utilities within the Site [or the [Utility Work Areas]] and to construct such new Utilities as may from time to time be necessary in connection with the Project Operations, provided that the prior written consent of the Authority is obtained (such consent not to be unreasonably withheld or delayed),

provided that:

- (i) such rights are subject to the Title Conditions, Reserved Rights and the Authority's rights under this Agreement; and
- (ii) without prejudice to paragraph (i) above, the rights shall not in any circumstances entitle D&B Co or any D&B Co Party to exclusive occupancy or exclusive possession of any part of the Site, save as may be required to the areas shaded [◆] on the Site Plans, for the periods shown on such plans (which, for the avoidance of doubt, shall not in any case extend beyond the Actual Completion Date [or, in respect of the Post Completion Works Date, the Actual Post Completion Works Date]) and such rights as are set out under paragraphs [◆] above are subject always to the terms of the Joint Operating Protocol).

¹⁴⁷ Development of plans will be project specific, albeit the default position should be that D&B Co/the Contractor is entitled to exclusive access to construction areas up to the point where the Authority starts its commissioning activity in line with the Final Commissioning Programme.

APPENDIX 1 TITLE CONDITIONS

[]¹⁴⁸

¹⁴⁸ To be completed on a project specific basis.

APPENDIX 2 SITE PLAN¹⁴⁹

¹⁴⁹ To be completed on a project specific basis.

SCHEDULE 5¹⁵⁰
CONSTRUCTION MATTERS
SECTION 1
PLANNING/CONSENTS

¹⁵⁰ Refer to comments on Clause 11.

SECTION 2

SAFETY DURING CONSTRUCTION

1. In this Section 2 (*Safety During Construction*) of Schedule 5 (*Construction Matters*) and wherever used elsewhere in this Agreement:
 - 1.1 "**CDM Regulations**" means the Construction (Design and Management) Regulations 2015 (and "**CDM Regulation**" shall be construed accordingly); and
 - 1.2 "**the client**", "**the Principal Designer**" shall have the same meanings as are ascribed to them in the CDM Regulations.
2. In so far as not already done, within five (5) Business Days of the date of execution of this Agreement, D&B Co shall make and serve on the Authority a notice in writing pursuant to and in the form (if any) required by CDM Regulation 4(8) that D&B Co agrees to be treated as the only client in relation to the Works for the purposes of the CDM Regulations. Notwithstanding D&B Co agreeing in writing to be treated as the only client pursuant to CDM Regulation 4(8), the Authority will comply with its remaining duties as set out in CDM Regulation 4(8). For so long as D&B Co has obligations under the CDM Regulations in respect of the Works, D&B Co shall not, and shall not seek to, withdraw, terminate or in any manner derogate from its declaration that it will act as, and its acceptance of its responsibilities as, the client in relation to the Works for all the purposes of the CDM Regulations. The Authority will endorse its consent, in writing, to such election on the said notice and return it to D&B Co within five (5) Business Days of receipt.
3. D&B Co warrants that it has the skills, knowledge, organisational capability and experience to and shall, observe, perform and discharge or shall procure the observance, performance and discharge of:
 - 3.1 all the obligations, requirements and duties of the client arising under the CDM Regulations in connection with the Works; and
 - 3.2 all obligations incumbent on the client under any code of practice or guidance for the time being approved by the Health and Safety Commission pursuant to the Health and Safety at Work etc Act 1974 issued in connection with the CDM Regulations.
4. D&B Co shall provide to the Authority's Representative:
 - 4.1 in a substantially complete form on the Actual Completion Date; and
 - 4.2 final form within [◆] of the Actual Completion Date,

[one (1)] electronic copy (on computer disk, tape or other format) of the revised and updated health and safety file and construction phase plan (current at that date) prepared by the Principal Designer pursuant to the CDM Regulations in relation to the Works and [◆] electronic or paper copies of every amendment or update made to such file until the later of

the Actual Completion Date and the Actual Post Completion Works Date and at any other time that D&B Co's activities in respect of the Works are subject to the CDM Regulations.

SECTION 3

AUTHORITY'S CONSTRUCTION REQUIREMENTS

SECTION 4
D&B CO'S PROPOSALS

SECTION 5
REVIEWABLE DESIGN DATA¹⁵¹

RDD Item	Definition
General Arrangements / Elevations	
Visitor, Student & Pastoral Reception Area Details (to the extent they are part of D&B Co's Proposals)	1:20 scale drawing reception desk layout - plan and elevations. Confirm location of any power, data and services on desk.
Drawing	Review of (but not selection of) external render / cladding panels colour prior to submission to planners.
Ironmongery	
Schedule	Ironmongery sets defined, including a full ironmongery breakdown, security control measures and door references identified.
Lock Suiting	Confirm locking strategy for all keyed locks; master, sub-master, slaves and pass keys.
Window Ironmongery	Provide samples only of proposed Ironmongery.
Signage	
Signage Schedule	Way finding and room signage schedule. Confirmation of front type size, font type, signage size, room name and number.
Signage Selection	Samples of sign finishes. External building sign material/colour.
Manifestation	Dots, squares, piano bars only for Building Regulations compliance. [Authority]/ [School Entity] specific logos can be included to a single

¹⁵¹ This RDD list has been prepared particularly with school facilities in mind. The Authority should consider where project specific tailoring may be necessary.

RDD Item	Definition
	location within the school (logo artwork provided by school).
Graphics/Artwork (particularly in primary schools)	Type, extent and location to be agreed. Vinyl transfers.
Equipment	
Equipment	Group 1 – Colours only where applicable. Bleacher Seating from standard range only.
Schedule of Group 2 and 3 Legacy Equipment	Group 2 – Confirmation of whether Group 2.1. Equipment or 2.2 Equipment and Group 3.1 Equipment or Group 3.2 Equipment only post validation survey.
Toilet Cubicles	Sample of lock type only.
M&E	
CCTV Strategy /Cashless catering	Location of legacy camera's and cashless catering pay points only.
Fire Strategy	Review of agreed strategy only following input from Building Control.
Building Access/Egress Control & Strategy	Review of agreed strategy only following input from Building Control.
External Lighting	Layout only.
External access control to entrance gates	Proposals for access/security to main gate for deliveries only to the extent required by D&B Co's Proposals.
Water Fountains - Drawing	Location only.
Finishes	

RDD Item	Definition
Wall Finishes (including Stairs /Landing)	Samples for Paint types. Colours only. But including any tiling for splash backs etc. Laminate panelling in kitchen.
WC toilet cubicles, doors and back panels	Colours only.
Floor Finishes	Samples for all floor finishes (including mat wells and barrier carpet/matting). Colours only.
Acoustic Treatment	Colours only.
Roller Blinds	Sample to be provided. Colours only 1 per Facility (where no impact on daylight requirements).
Landscaping	
External finishes	Schedule of external materials (to the extent they are not dictated by planning authorities).
External Planting	Schedule of plants.
Cycle Storage	Specification / product details.

SECTION 6
AREA DATA SHEETS

SECTION 7

THERMAL AND ENERGY EFFICIENCY TESTING PROCEDURE

SECTION 8
QUALITY PLANS (DESIGN AND CONSTRUCTION)

SECTION 9

NOT USED

SCHEDULE 6
THE PROGRAMME¹⁵²

[SECTION 1
PROGRAMME]

¹⁵² The contents of this Schedule 6 (*The Programme*) are project specific and need to be prepared by D&B Co and agreed with the Authority.

[SECTION 2
PHASING]¹⁵³

[ICT Handover Date	[◆]]
Completion Date	[◆]
[Post Completion Works Date	[◆]]

¹⁵³ Sample style. Adjustment will be required to reflect any further phasing.

SCHEDULE 7
REVIEW PROCEDURE

1. Review

1.1 The provisions of this Schedule 7 (*Review Procedure*) shall apply whenever any item, document or course of action is required to be reviewed, approved or otherwise processed in accordance with Schedule 7 (*Review Procedure*).

1.2 Subject to [Clause 12.5.1(*Authority Design Review*) and]¹⁵⁴ any express provision of this Agreement, the manner, form and timing of any submission to be made by D&B Co to the Authority's Representative for review under this Schedule 7 (*Review Procedure*) shall be a matter for D&B Co to determine. Each submission under this Schedule 7 (*Review Procedure*) shall be accompanied by a copy of the proposed document to be reviewed (including, where applicable, any Reviewable Design Data) or a statement of the proposed course of action (the entire contents of a submission being referred to in this Schedule 7 (*Review Procedure*) as a "**Submitted Item**"). In relation to each Submitted Item, the following procedure shall apply:

1.2.1 as soon as possible and, if the Submitted Item comprises:¹⁵⁵

- (a) an item of Reviewable Design Data;
- (b) a revised Programme submitted pursuant to Clause 14 (*Programme and Dates for Completion*); or
- (c) a document or proposed course of action submitted in the case of (an emergency),

within [♦] Business Days of the date of receipt of a submission (or re-submission, as the case may be) of the Submitted Item to the Authority's Representative (or such other period as the parties may agree), the Authority's Representative shall return one (1) copy of the relevant Submitted Item to D&B Co endorsed "no comment" or (subject to and in accordance with paragraph 3 (*Grounds Of Objection*)) "comments" as appropriate; and

1.2.2 subject to paragraph 1.4, if the Authority's Representative fails to return a copy of any Submitted Item (including any re-submitted Submitted Item) duly endorsed in accordance with paragraph 1.2.1, within [♦] Business Days (or within such other period as the parties may agree in writing) of the date of its submission to the Authority's Representative, then the Authority's Representative shall be deemed

¹⁵⁴ Please refer to comment at Clause 12.5.

¹⁵⁵ The Authority should include any other items which are relevant on a project specific basis.

to have returned the Submitted Item to D&B Co endorsed "no comment" (and, in the case of Reviewable Design Data, endorsed "Level A - no comment"); and

1.2.3 in relation to the aspects of each Finish identified in the table below:

- (a) D&B Co shall submit to the Authority a range or selection of finishes ("**Range of Finishes**") no later than the relevant Finishes Proposal Date;
- (b) the Authority's Representative shall by the relevant Finishes Selection Date notify D&B Co of its selection for the relevant Finish; and
- (c) if no selection of a Finish has been made by the Authority's Representative and notified to D&B Co in accordance with paragraph 1.2.3(b) by the relevant Finish Selection Date, D&B Co shall be entitled to make a selection from the Range of Finishes submitted in accordance with paragraph 1.2.3(a). After the relevant Finish Selection Date, should the Authority wish to vary any selection previously made by D&B Co or by the Authority, Schedule 13 (*Variation Procedure*) shall apply.

Table of Finishes¹⁵⁶

Finishes	Aspects	Finishes Proposal Date	Finishes Selection Date
External finishes (roof, windows and external elevations)	colour and material		
wall finishes	colour		
floor finishes	colour and type		
ironmongery	style and colour		
tapware	style and content		
main public light fittings	specification and style		
external signage	size, style, colour and location		
internal signage	size, style, colour and location		

¹⁵⁶ This is project specific. This table is intended to be for guidance only.

Finishes	Aspects	Finishes Proposal Date	Finishes Selection Date
light switches and sockets	style and colour		
light fittings	style and colour		
hard landscaping	colour and material		
[others to be inserted on a project specific basis by the Authority]			

1.3 If the Authority's Representative raises comments on any Submitted Item in accordance with paragraph 3 (*Grounds Of Objection*) he shall state the ground upon which such comments are based and the evidence or other information necessary to substantiate that ground. To the extent that the Authority's Representative comments on a Submitted Item other than on the basis set out in this Schedule 7 (*Review Procedure*), or fails to comply with the provisions of this paragraph, D&B Co may, in its discretion, either:

1.3.1 request written clarification of the basis for such comments and, if clarification is not received within [♦] Business Days of such request by D&B Co, refer the matter for determination in accordance with Schedule 15 (*Dispute Resolution Procedure*); or

1.3.2 in the case of a Submitted Item comprising Reviewable Design Data only, at its own risk, and without prejudice to Clause 12 (*The Design Construction and Commissioning Process*), proceed with further design or construction disregarding such comments pending the outcome of any reference to the Dispute Resolution Procedure that may be made by either party.

1.4 The parties shall comply with the RDD Meeting Protocol¹⁵⁷.

2. Further Information

D&B Co shall submit any further or other information, data and documents that the Authority's Representative reasonably requires in order to determine whether he has a basis for raising comments or making objections to any Submitted Item in accordance with this Schedule 7 (*Review Procedure*). If D&B Co does not submit any such information, data and documents, the Authority's Representative shall be entitled to:

¹⁵⁷ The RDD Meeting Protocol is to be prepared on a project specific basis to tie in with the procedure for Reviewable Design Data under this Schedule 8. A two stage meeting process should be included which includes submission by D&B Co of different levels of information. On schools projects it is envisaged that School Entities (as well as the relevant local authority) are involved in some of the meetings. After the final meeting in respect of an item of Reviewable Design Data D&B Co will complete a proforma form, setting out the details of the item together with relevant information and deliverables for approval on behalf of the relevant Authority.

- 2.1 comment on the Submitted Item on the basis of the information, data and documents which have been provided; or
- 2.2 object to the Submitted Item on the grounds that insufficient information, data and documents have been provided to enable the Authority's Representative to determine whether he has a legitimate basis for commenting or objecting in accordance with this Schedule 7 (*Review Procedure*).

3. **Grounds of Objection**¹⁵⁸

The expression "raise comments" in this paragraph shall be construed to mean "raise comments or make objections" unless the contrary appears from the context. The Authority's Representative may raise comments in relation to any Submitted Item on the grounds set out in paragraph 2 (*Further Information*) above or on the ground that the Submitted Item would (on the balance of probabilities) breach any Law but otherwise may raise comments in relation to a Submitted Item only as follows:

- 3.1 in relation to any Submitted Item if:
 - 3.1.1 D&B Co's ability to perform its obligations under this Agreement would (on the balance of probabilities) be adversely affected by the implementation of the Submitted Item; or
 - 3.1.2 the implementation of the Submitted Item would (on the balance of probabilities) adversely affect any right of the Authority under this Agreement or its ability to enforce any such right;
- 3.2 in relation to any Submitted Item submitted pursuant to Clause 4.1 (*Documents*) if:
 - 3.2.1 the Authority's ability to perform its obligations under this Agreement would be adversely affected by the proposed course of action;
 - 3.2.2 the Authority's ability to provide the relevant Authority Services or to carry out any of its statutory functions would (on the balance of probabilities) be adversely affected by the proposed course of action;
 - 3.2.3 the proposed course of action would be likely to result in an increase to the Authority's liabilities or potential or contingent liabilities under this Agreement;
 - 3.2.4 the proposed course of action would adversely affect any right of the Authority under this Agreement or its ability to enforce any such right; or

¹⁵⁸ This drafting has been included as a framework for guidance and should be amended as appropriate on a project specific basis, including, in particular, to take account of how commissioning of the Facilities is to be carried out (where relevant) and any other matters that are to be left to be agreed pursuant to the Review Procedure (such as proposals for self-monitoring systems etc).

- 3.2.5 D&B Co's ability to perform its obligations under this Agreement would be materially adversely affected by the proposed course of action;
- 3.3 in relation to Reviewable Design Data submitted pursuant to Clause 12.5 (*Authority Design Review*):
- 3.3.1 which does not comprise 1:50 scale room layout drawings the Authority's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*) on the ground that the Submitted Item:
- (a) is not in accordance with the Authority's Construction Requirements;
 - (b) is not in accordance with D&B Co's Proposals; and/or
 - (c) it would require the Authority [or a School Entity] to make changes to the ICT Services Contract.
- 3.3.2 which comprises a 1:50 scale Room Layout Drawing in respect of which there is a corresponding generic 1:50 scale Room Layout Drawing for the relevant room type (which has previously been reviewed and commented upon by the Authority's Representative in accordance with this Schedule 7 (*Review Procedure*)), the Authority's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*), on the ground that the Submitted Item does not conform to the generic 1:50 scale Room Layout Drawing; and
- 3.3.3 which comprises a 1:50 scale Room Layout Drawing in respect of which there is no corresponding generic 1:50 scale Room Layout Drawing for the relevant room type (which has previously been reviewed and commented upon by the Authority's Representative in accordance with this Schedule 7 (*Review Procedure*)), the Authority's Representative may raise comments, subject to and in accordance with paragraph 4 (*Effect of Review*), on the grounds that the Submitted Item is not in accordance with the Authority's Construction Requirements and/or D&B Co's Proposals and/or it would require the Authority [or a School Entity] to make changes to the ICT Services Contract;
- 3.4 in relation to a proposal to amend D&B Co's Proposals and rectify (part of) the Works submitted pursuant to Clause 12.7 (*Rectification of D&B Co's Proposals*), on the grounds that, following the amendment and rectification proposed:
- 3.4.1 D&B Co's Proposals would not satisfy the Authority's Construction Requirements;

- 3.4.2 the structural, mechanical and/or electrical performance of the Facilities would not be of an equivalent standard of performance to that set out in D&B Co's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made) and/or;
 - 3.4.3 the Authority [or a School Entity] would require to make changes to the ICT Services Contract.
- 3.5 in relation to Finishes:
- 3.5.1 which have the effect of making a selection from the Range of Finishes (or any alternative range or selection of Finishes submitted by D&B Co to the Authority's Representative) pursuant to Clause 12.5.1; or
 - 3.5.2 where the Submitted Item does not comply with the relevant provisions of the Authority's Construction Requirements and/or D&B Co's Proposals;
- 3.6 in relation to the submission of any revised Programme pursuant to Clause 14 (*Programme and Dates for Completion*) on the ground that the revised Programme:
- 3.6.1 would not (on the balance of probabilities) enable[:
 - (a) the [Main] Works to be completed by the Completion Date[;
 - (b) the Post Completion Works to be completed by the Post Completion Works Date]; [and/or
 - (c) the ICT Handover Requirements to be achieved by the ICT Handover Date;]
 - 3.6.2 would render the Authority unable to comply with the Decant Protocol without material additional expense or disruption;
 - 3.6.3 would materially increase the disruption to the provision of Educational Services by the Authority;
 - 3.6.4 would materially increase the cost or disruption to the Authority [or a School Entity] of any decanting from or within an Existing Facility; [or
 - 3.6.5 would adversely affect the delivery of services under the relevant ICT Services Contract.]

- 3.7 in relation to the submission of any Quality Plan or part of a Quality Plan or any changes to any Quality Plan pursuant to Clause 21.4 (*Quality Plans and Systems*) or Clause 21.7 (*Quality Plans and Systems*) or any quality manual or procedure in accordance with Clause 21.9 (*Quality Manuals and Procedures*), on the grounds that such Quality Plans, or parts of or changes to such Quality Plans, quality manuals or procedures, or the quality management systems which they reflect, would not comply with the requirements of Section 8 (*Quality Plans (Design and Construction)*) of Schedule 5 (*Construction Matters*).

4. Effect of Review

- 4.1 Any Submitted Item which is returned or deemed to have been returned by the Authority's Representative endorsed "no comment" (and in the case of Reviewable Design Data, endorsed "Level A - no comment") shall be complied with or implemented (as the case may be) by D&B Co, provided that where the Submitted Item is a revised Programme this paragraph 4.1 (*Effect of Review*) of Schedule 7 (*Review Procedure*) shall not be construed as imposing any additional obligations above those which apply otherwise to such Programme under the other terms of this Agreement, including but not limited to Clause 14 (*Programme and Dates for Completion*).
- 4.2 In the case of any Submitted Item other than Reviewable Design Data, if the Authority's Representative returns the Submitted Item to D&B Co endorsed "comments", D&B Co shall comply with such Submitted Item after amendment in accordance with the comments unless D&B Co disputes that any such comment is on grounds permitted by this Agreement, in which case D&B Co or the Authority's Representative may refer the matter for determination in accordance with Schedule 15 (*Dispute Resolution Procedure*) and D&B Co shall not act on the Submitted Item until such matter is so determined or otherwise agreed.
- 4.3 In the case of a Submitted Item comprising Reviewable Design Data, if the Authority's Representative returns the Submitted Item endorsed other than "Level A - no comment", D&B Co shall:
- 4.3.1 where the Authority's Representative has endorsed the Submitted Item "Level B - proceed subject to amendment as noted", either proceed to construct or proceed to the next level of design of the part of the Works to which the Submitted Item relates but take into account any amendments required by the Authority's Representative in his comments;
 - 4.3.2 where the Authority's Representative has endorsed the Submitted Item "Level C - subject to amendment as noted" not act upon the Submitted Item, amend the Submitted Item in accordance with the Authority's Representative's comments and re-submit the same to the Authority's Representative in accordance with paragraph 4.4; or
 - 4.3.3 where the Authority's Representative has endorsed the Submitted Item "Level D - rejected" not act upon the Submitted Item, amend the Submitted Item and re-submit the Submitted Item to the Authority's Representative in accordance with paragraph 4.4,

unless D&B Co disputes that any such comment or proposed amendment is on grounds permitted by this Agreement, in which case D&B Co or the Authority's Representative may refer the matter for determination in accordance with Schedule 15 (*Dispute Resolution Procedure*) and D&B Co shall not act on the Submitted Item until such matter is so determined or otherwise agreed except at its own risk in accordance with paragraph 1.3.2 (*Review*).

- 4.4 Within ten (10) Business Days of receiving the comments of the Authority's Representative on any Submitted Item comprising Reviewable Design Data, D&B Co shall (except in the case contemplated in paragraph 4.3.1) send a copy of the Submitted Item as amended to the Authority's Representative pursuant to paragraph 4.3 and the provisions of paragraphs 1.2.1 (*Review*), 4.1 and 4.3 shall apply (changed according to context) to such re-submission.
- 4.5 The return or deemed return of any Submitted Item endorsed "no comment" (or in the case of Reviewable Design Data endorsed "Level A - no comment" or otherwise endorsed in accordance with paragraph 4.3.1 or 4.3.2) shall mean that the relevant Submitted Item may be used or implemented for the purposes for which it is intended but, save to the extent expressly stated in this Agreement, such return or deemed return of any Submitted Item shall not otherwise relieve D&B Co of its obligations under this Agreement nor is it an acknowledgement by the Authority that D&B Co has complied with such obligations.

5. Documentation Management¹⁵⁹

- 5.1 D&B Co shall issue [one (1)] paper copy and [one (1)] electronic copy of all Submitted Items to the Authority and compile and maintain a register of the date and contents of the submission of all Submitted Items.
- 5.2 D&B Co shall compile and maintain a register of the date of receipt and content of all Submitted Items that are returned or deemed to be returned by the Authority's Representative.
- 5.3 Save to the extent set out in this Schedule 7 (*Review Procedure*), no review, comment or approval by the Authority shall operate to exclude or limit D&B Co's obligations or liabilities under this Agreement (or the Authority's rights under this Agreement).

6. Variation

- 6.1 No approval or comment or any failure to give or make an approval or comment under this Schedule 7 (*Review Procedure*) shall constitute a Variation save to the extent provided in this Schedule 7 (*Review Procedure*).
- 6.2 If, having received comments from the Authority's Representative, D&B Co considers that compliance with those comments would amount to a Variation, D&B Co shall, before complying with the comments, notify the Authority of the same

¹⁵⁹ This paragraph is intended as a framework basis only and should be developed on a project specific basis.

and, if it is agreed by the parties or determined pursuant to Schedule 15 (*Dispute Resolution Procedure*) that a Variation would arise if the comments were complied with, the Authority may, if it wishes, implement the Variation and it shall be dealt with in accordance with Schedule 13 (*Variation Procedure*). Any failure by D&B Co to notify the Authority that it considers compliance with any comments of the Authority's Representative would amount to a Variation shall constitute an irrevocable acceptance by D&B Co that any compliance with the Authority's comments shall be without cost to the Authority and without any extension of time.

- 6.3 No alteration or modification to the design, quality and quantity of the Works arising from the development of detailed design or from the co-ordination of the design shall be construed or regarded as a Variation.

APPENDIX 1 [REVIEWABLE DESIGN DATA PROGRAMME]¹⁶⁰

¹⁶⁰ Please refer to comment at Clause 12.5 (*Authority Design Review*)

SCHEDULE 8
COLLATERAL AGREEMENTS

SECTION 1

CONTRACTOR'S COLLATERAL AGREEMENT

COLLATERAL WARRANTY

AMONG:

- (1) [AUTHORITY] (the "**Authority**");
- (2) [CONSTRUCTION CONTRACTOR] (the "**Contractor**");
- (3) [D&B CO] ("**D&B Co**"); and
- (4) [GUARANTOR] (the "**Guarantor**").

WHEREAS:

- (A) The Authority and D&B Co have agreed the terms on which D&B Co will design, develop and construct [description of facilities] [(the "**Development**") at the Site (as that expression is defined in the Education D&B Agreement) and, accordingly, have entered into the Education D&B Agreement and the Project Documents.
- (B) The Contractor and D&B Co have entered into an agreement of even date herewith relating to the provision of the Works (as defined in the Education D&B Agreement) by the Contractor to enable D&B Co to discharge its obligations to the Authority regarding such Works under the Education D&B Agreement (the "**Construction Contract**").
- (C) This Contractor's Collateral Agreement (the "**Agreement**") is one of the Contractor's Collateral Agreements contemplated by the Education D&B Agreement.
- (D) Pursuant to the Construction Contract, the Guarantor has entered into a Guarantee in favour of D&B Co in respect of the Contractor's obligations under the Construction Contract (the "**Parent Company Guarantee**").

NOW IT IS HEREBY AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

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

" Business Day "	means a day other than a Saturday, Sunday or a bank holiday in England and Wales;
" Construction Contract "	has the meaning given in Recital B of this Agreement;
" Education D&B Agreement "	means the Education Design and Build Development Agreement between (1) the Authority and (2) D&B Co, dated on or around the date hereof;

"Event of D&B Co Default"	has the meaning given in the Construction Contract;
"Guarantor"	[has the meaning given in the Construction Contract];
"Novation Agreement"	has the meaning given in Clause 4.5.1(c);
"Novation Effective Date"	means the date of performance of the obligations set out in Clause 4 (<i>Novation</i>);
"Parent Company Guarantee"	has the meaning given in Recital (D) of this Agreement;
"Project Documents"	has the meaning given in the Education D&B Agreement;
"Proposed Novation Date"	has the meaning given in Clause 4.1 (<i>Proposed Substitute</i>);
"Proposed Novation Notice"	has the meaning given in Clause 4.1 (<i>Proposed Substitute</i>);
"Proposed Step-in Date"	has the meaning given in Clause 3.1 (<i>Step-in Notice</i>);
"Proposed Substitute"	has the meaning given in Clause 4.1 (<i>Proposed Substitute</i>);
"Step-in Date"	means the date of issue of the Step-in Undertaking;
"Step-in Notice"	has the meaning given in Clause 3.1 (<i>Step-in Notice</i>);
"Step-in Period"	means the period commencing on the Step-in Date and ending on the earliest of: <ul style="list-style-type: none"> (a) the date of the first anniversary of the Step-in Date (but subject always to Clause 4.7 (<i>Extension of Step-In Period</i>)); (b) the Step-out Date; (c) the Novation Effective Date; and (d) termination of the Construction Contract under Clause [3.3 (<i>Restriction of Right of Termination</i>)];
"Step-in Undertaking"	has the meaning given in Clause 3.2.4;
"Step-out Date"	has the meaning given in Clause 3.4.1; and
"Termination Notice"	has the meaning given in Clause 2.3 (<i>Termination Notice</i>).

1.2 Interpretation

Save to the extent that the context or the express provisions of this Agreement otherwise require:

- 1.2.1 headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- 1.2.2 all references to Clauses are references to Clauses of this Agreement;
- 1.2.3 all references to agreements, documents or other instruments include (subject to all relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned from time to time;
- 1.2.4 all references to any statute or statutory provision shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include any orders, regulations, codes of practice, instruments or other subordinate legislation made under the relevant statute or statutory provision;
- 1.2.5 any reference to time of day shall be a reference to Cardiff time;
- 1.2.6 the words "herein", "hereto" and "hereunder" refer to this Agreement as a whole and not to the particular Clause in which such word may be used;
- 1.2.7 words importing the singular include the plural and vice versa;
- 1.2.8 words importing a particular gender include all genders;
- 1.2.9 "person" includes any individual, partnership, firm, trust, body corporate, government, governmental body, authority, agency, unincorporated body of persons or association;
- 1.2.10 any reference to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over the functions or responsibilities of such public organisation;
- 1.2.11 references to "Party" means a party to this Agreement and references to "Parties" shall be construed accordingly;

- 1.2.12 all monetary amounts are expressed in Pounds Sterling;
- 1.2.13 references to the word "includes" or "including" are to be construed without limitation;
- 1.2.14 the obligations of any Party under this Agreement are to be performed at that Party's own cost and expense;
- 1.2.15 terms used in this Agreement that are defined in the Education D&B Agreement or the Project Documents shall have the meanings given to them in the Education D&B Agreement or the Project Documents, as appropriate.

2. Termination Notice And Authority Termination

2.1 Contractor's Warranties and Undertakings

The Contractor warrants and undertakes to the Authority that it has complied with and fulfilled and shall continue to comply with and fulfil its duties and obligations arising under or by virtue of the Construction Contract, provided that (during the period prior to expiry of the [relevant] Defects Liability Period (as defined in the Education D&B Agreement)), the Authority shall only be entitled to make a claim against the Contractor under this Clause 2.1 (*Contractor's Warranties and Undertakings*) if the Education D&B Agreement has terminated and in any case shall not be entitled to do so during the Step-in Period or after the Construction Contract has been novated under Clause 4 (*Novation*).

2.2 Liability of Contractor

Any liability arising from any claim for breach of the warranty under or pursuant to Clause 2.1 (*Contractor's Warranties and Undertakings*) shall be in addition to and without prejudice to any other present or future liability of the Contractor to the Authority (including, without prejudice to the generality of the foregoing, any liability in negligence) and shall not be released, diminished or in any other way be affected by any independent enquiry into any relevant matter which may be made or carried out by or on behalf of the Authority by any person nor by any action or omission of any person whether or not such action or omission might give rise to an independent liability of such person to the Authority provided always that the Contractor shall owe no greater duties or obligations to the Authority under this Agreement than it owes or would have owed to D&B Co under the Construction Contract. Without prejudice to Clause 12 (*Aggregate Liability*), the Contractor shall be entitled in any action or proceedings brought by the Authority under this Agreement to rely on any limitation or exclusion of liability in the Construction Contract and to raise equivalent rights in defence of liability (but excluding set-offs and counterclaims) as it would have against D&B Co under the Construction Contract.

2.3 Termination Notice

- 2.3.1 The Contractor undertakes not to terminate the Construction Contract on account of an Event of D&B Co Default without first giving the Authority not less than [◆] Business Days' prior written notice specifying the grounds for that termination.
- 2.3.2 Any such notice, other than one given in circumstances where there is no default under the Construction Contract by D&B Co or the Contractor, shall be a "**Termination Notice**".
- 2.3.3 Notwithstanding any provision of the Construction Contract to the contrary, on termination of the Education D&B Agreement by the Authority, the Parties agree that the Construction Contract shall not come to an end except in accordance with the terms of this Agreement.

3. STEP-IN AND STEP-OUT

3.1 Step-in Notice

- 3.1.1 If the Authority has terminated the Education D&B Agreement in accordance with the terms of the Education D&B Agreement or if the Authority has received a Termination Notice, then subject to the provisions of this Agreement, the Authority may give written notice to the Contractor (a "**Step-in Notice**") of the intention of the Authority to issue a Step-in Undertaking on a specified date (the "**Proposed Step-in Date**") provided that such Proposed Step-in Date shall be:
- (a) no later than [◆] Business Days after termination of the Education D&B Agreement where this has been terminated by the Authority; and
 - (b) no earlier than the date falling [◆] Business Days prior to the date of expiry of the Termination Notice and no later than the date of expiry of the Termination Notice where a Termination Notice has been given by the Contractor.
- 3.1.2 Without prejudice to Clause 3.2.5, unless the Contractor otherwise consents, only one (1) Step-in Notice may be given during the period of this Agreement. Subject to Clause 5.1 (*Rights of Termination*) below, the Contractor shall not be entitled to terminate the Construction Contract until after the Proposed Step-in Date.

3.2 Notice of Obligations and Step-in Undertaking

- 3.2.1 Within [◆] Business Days of receipt of any Step-in Notice, the Contractor shall give written notice to the Authority of any sums of

which the Contractor has actual knowledge which are due and payable but unpaid by D&B Co and of any other material obligations or liabilities, of which the Contractor has actual knowledge, which should have been performed or discharged by D&B Co under the Construction Contract, in each case, as at the date of the Step-in Notice.

3.2.2 The Contractor shall inform the Authority in writing as soon as reasonably practicable of:

- (a) any change in such sums, obligations or liabilities referred to in Clause 3.2.1; and
- (b) any further sums, obligations or liabilities thereafter falling due and payable but unpaid or falling due for performance or discharge and unperformed or undischarged (as the case may be);

in each case of which the Contractor has actual knowledge, before the Step-in Date.

3.2.3 The Contractor shall give the Authority the information referred to in Clauses 3.2.1 and 3.2.2 in good faith and may not give any further notifications pursuant to Clause 3.2.2 less than [◆] Business Days prior to the Proposed Step-in Date. The Authority shall not be required to assume any liability under a Step-in Undertaking for any outstanding obligations or liabilities of D&B Co to the Contractor which are not notified to the Authority pursuant to Clauses 3.2.1 or 3.2.2.

3.2.4 Not later than the Proposed Step-in Date the Authority shall decide if it is prepared to issue a Step-in Undertaking. If it does so decide, the Authority shall promptly give the Contractor written notification of such decision. The Authority shall deliver to the Contractor on the Proposed Step-in Date, a written undertaking in form and substance agreed with the Contractor (both the Authority and the Contractor acting reasonably) (the "**Step-in Undertaking**"), incorporating a Clause in terms similar to Clause 11 (*Default Interest*) (but only to the extent that there will not be double counting of default interest accruing under the Construction Contract and this Agreement), and undertaking to the Contractor:

- (a) to pay or procure the payment to the Contractor, within [◆] Business Days of demand by the Contractor, of any sum due and payable but unpaid by D&B Co to the Contractor under the Construction Contract before the Step-in Date and which has been notified by the Contractor to the Authority in accordance with Clause 3.2.1 or 3.2.2;
- (b) to perform or discharge or procure the performance or discharge of any unperformed or undischarged obligations of

D&B Co under the Construction Contract which shall have fallen due for performance or discharge before the Step-in Date and which have been notified by the Contractor to the Authority in accordance with Clause 3.2.1 or 3.2.2 within such period as the Contractor may reasonably require;

- (c) to pay or procure the payment of any sum due and payable by D&B Co under the Construction Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to Clauses 3.4 (*Step-Out*) and [4.5.2(b) (*Implementation of Novation*)]) but not, to avoid doubt, any sum due in respect of any Works carried out before the Step-in Date; and
- (d) to perform or discharge or procure the performance or discharge of any obligations of D&B Co under the Construction Contract as a result of any act or omission occurring during the Step-in Period which shall arise from any act or omission occurring after the Step-in Date (but subject to Clauses 3.4 (*Step-Out*) and 4.5.2(b) (*Implementation of Novation*)) but not, to avoid doubt, to perform or discharge or to procure the performance or discharge of any obligations in respect of any Works carried out before the Step-in Date.

3.2.5 D&B Co shall immediately assign all its rights and powers under the Parent Company Guarantee to the Authority in accordance with Clause [insert reference] of the same. The Guarantor acknowledges and agrees that upon intimation to it of such assignment the Guarantor shall owe its obligations under the Parent Company Guarantee to the Authority to the exclusion of D&B Co (but without prejudice to D&B Co's right to claim thereunder in respect of any course of action arising in respect of the period prior to the assignment) upon the terms and conditions of the Parent Company Guarantee.

3.2.6 If the Authority shall not have issued the Step-in Undertaking on or before the Proposed Step-in Date the Step-in Notice shall be deemed to have been withdrawn and the rights and obligations of the Parties shall be construed as if the Step-in Notice had not been given.

3.3 Restriction of Right of Termination

During or in respect of the Step-in Period, the Contractor confirms to the Authority that it shall continue to observe and perform its duties and obligations under the Construction Contract and shall, without prejudice to Clause 5.1 (*Rights of Termination*), only be entitled to exercise its rights of termination under the Construction Contract:

3.3.1 by reference to an Event of D&B Co Default arising during the Step-in Period provided that no event of default by D&B Co under the Education D&B Agreement (whether resulting in termination of the

Education D&B Agreement or otherwise, and notwithstanding that it has occurred during the Step-in Period) shall entitle the Contractor to exercise such rights of termination during the Step-in Period; or

- 3.3.2 if the Authority, in breach of the terms of the Construction Contract, fails to pay when due any amount owed to the Contractor or fails to perform or discharge when falling due for performance or discharge any obligation under the Step-in Undertaking or fails to procure such payment or performance or discharge; or
- 3.3.3 if such rights of termination arise in circumstances where there is no default under the Construction Contract by the Authority or the Contractor.

3.4 Step-Out

- 3.4.1 The Authority may, at any time, give the Contractor at least [thirty (30)] days' prior written notice to terminate the Step-in Period on a date specified in the notice (the "**Step-out Date**").
- 3.4.2 The Authority shall give the Contractor at least [thirty (30)] days' prior written notice that (subject to Clause 4.4.2) the Step-in Period will end due to the occurrence (subject to Clause 4.7 (*Extension of Step-In Period*)) of the first anniversary of the Step-in Date;

provided that:

- (a) the Authority has performed and discharged in full or procured the performance and discharge in full of any obligations of D&B Co under the Construction Contract in relation to the maintenance of records and the provision of reports during the Step-in Period so as to permit the Contractor to monitor the performance of D&B Co's other obligations under the Construction Contract; and
- (b) all liability under the Step-in Undertaking pursuant to any claims made up to the date specified in either Clause 3.4.1 or Clause 3.4.2 (as the case may be) shall have been fully and unconditionally discharged,

the Authority shall be released from the Step-in Undertaking on the expiry of the Step-in Period in accordance with Clauses 3.4.1 and 3.4.2. Such release shall not affect the continuation of D&B Co's obligations towards the Contractor under the Construction Contract.

- 3.4.3 On expiry or termination of the Step-in Period pursuant to Clauses 3.4.1 and/or 3.4.2 any rights and powers under the Parent Company Guarantee which have been assigned to the Authority pursuant to Clause 3.2.5 shall be re-assigned to D&B Co.

4. NOVATION

4.1 Proposed Substitute

At any time that the Authority is entitled to give a Step-in Notice pursuant to Clause 3.1 (*Step-in Notice*) or at any time during the Step-in Period the Authority may give notice (a "**Proposed Novation Notice**") to the Contractor that it wishes itself or another person (a "**Proposed Substitute**") to assume, by way of sale, transfer or other disposal, the rights and obligations of D&B Co under the Construction Contract and specifying a date (the "**Proposed Novation Date**"):

- 4.1.1 falling not later than [fifteen (15)] Business Days after termination of the Education D&B Agreement where this has been terminated by the Authority;
- 4.1.2 falling not later than the expiry of the Termination Notice where a Proposed Novation Notice is given by the Authority at a time when it is entitled to give a Step-in Notice pursuant to Clause 3.1 (*Step-in Notice*); and
- 4.1.3 falling not later than [twenty-eight (28)] Business Days after the date of the Proposed Novation Notice, where a Proposed Novation Notice is given during a Step-in Period.

Save as provided in Clause 4.4 (*Consent Withheld*), only one (1) Proposed Novation Notice may be given during the period of this Agreement. Without prejudice to Clauses 3.3 (*Restriction of Right of Termination*) and Clause 5.1 (*Rights of Termination*), the Contractor shall not be entitled to terminate the Construction Contract during the notice period specified in a Proposed Novation Notice.

4.2 Information for Consent to Novation

If the Proposed Novation Notice specifies the Authority as the Proposed Substitute, the Contractor's consent to the novation shall be deemed to have been given automatically. Where the Proposed Substitute is not the Authority, a novation in accordance with a Proposed Novation Notice shall only be effective if the Contractor consents to that novation in writing in accordance with Clause 4.3 (*Grant of Consent*) and Clause 5.1 (*Rights of Termination*) the Authority shall (as soon as practicable) supply the Contractor with the following information:

- 4.2.1 the name and registered address of the Proposed Substitute;

- 4.2.2 the names of the Shareholders in the Proposed Substitute and the share capital owned by each of them;
- 4.2.3 the names of the directors and the secretary of the Proposed Substitute;
- 4.2.4 details of the means by which it is proposed to finance the Proposed Substitute (including the extent to which such finance is committed and any conditions precedent as to its availability for drawing); and
- 4.2.5 the resources (including contractual arrangements) which are to be available to the Proposed Substitute to enable it to perform its obligations under the Construction Contract.

4.3 Grant of Consent

The Contractor may withhold or delay consent to a novation only where the Proposed Substitute is not the Authority and the Authority has failed to show to the Contractor's satisfaction (acting reasonably) that:

- 4.3.1 the Proposed Substitute has the legal capacity, power and authorisation to become a party to and perform the obligations of D&B Co under the Construction Contract; and
- 4.3.2 the technical competence and financial standing of and the technical and financial resources available to the Proposed Substitute are sufficient to perform the obligations of D&B Co under the Construction Contract.

The Contractor shall notify the Authority in writing, within [five (5)] Business Days of the later of receipt of a Proposed Novation Notice and all information required under Clause 4.2 (*Information for Consent to Novation*), as to whether or not it has decided to grant such consent (together with an explanation of its reasons if it has decided to withhold its consent).

4.4 Consent Withheld

If, in accordance with Clause 4.3 (*Grant of Consent*), the Contractor withholds its consent to a Proposed Novation Notice, the Authority shall be entitled to give one or more subsequent Proposed Novation Notices, pursuant to the provisions of Clause 4.1 (*Proposed Substitute*), containing changed particulars relating to the same Proposed Substitute or particulars relating to another Proposed Substitute which (where the replacement Proposed Substitute is not the Authority) the Authority has good cause to believe would fulfil the requirements of Clauses 4.3.1 and 4.3.2, provided that only one Proposed Novation Notice may be outstanding at any one time, and provided further that:

- 4.4.1 where a Step-in-Notice has not been issued, any revised Proposed Novation Date shall be a date falling no later than the date specified in Clause 4.1.1 or 4.1.2 as appropriate; and
- 4.4.2 if the Proposed Novation Notice was served during the Step-in Period, any revised Proposed Novation Date shall be a date falling not later than [] Business Days after the date of the revised Proposed Novation Notice.

4.5 Implementation of Novation

- 4.5.1 If the Contractor consents to a novation pursuant to a Proposed Novation Notice (whether automatically or otherwise), then on the Proposed Novation Date and without prejudice to Clause 5.1 (*Rights of Termination*) D&B Co shall:
- (a) immediately assign all its rights and powers under the Parent Company Guarantee to the Authority or other Proposed Substitute in accordance with Clause [insert reference] of the same and on the Proposed Novation Date and without prejudice to Clause 5.1 (*Rights of Termination*);
 - (b) subject to the prior performance by D&B Co of its obligations under this Clause 4.5.1(b) the Proposed Substitute shall become a party to the Construction Contract in place of D&B Co and, thereafter, shall be treated as if it was and had always been named as a party to the Construction Contract in place of D&B Co; and
 - (c) the Contractor, D&B Co and the Proposed Substitute shall enter into a novation agreement (the "**Novation Agreement**") and any other requisite agreements, in form and substance satisfactory to the Contractor (acting reasonably), pursuant to which:
 - (i) the Proposed Substitute shall be granted all of the rights of D&B Co under the Construction Contract (including those arising prior to the end of the Step-in Period);
 - (ii) subject to the Contractor giving to the Proposed Substitute within [◆] Business Days of receipt of the Proposed Novation Notice such notice as is referred to in Clause 3.2.1 and to the provisions of Clauses 3.2.2 and 3.2.3, mutatis mutandis, the Proposed Substitute shall assume all of the obligations and liabilities of D&B Co under the Construction Contract (including those arising prior to the end of any Step-in Period and those arising during the period of the Proposed Novation Notice);

- (iii) the Guarantor acknowledges and agrees that it shall owe its obligations under the Parent Company Guarantee to the Authority to the exclusion of D&B Co (but without prejudice to D&B Co's right to claim thereunder in respect of any course of action arising in respect of the period prior to the novation) upon the terms and conditions of the Parent Company Guarantee,

provided that the Contractor will not be in breach of any of its obligations under this Agreement if the Proposed Substitute does not enter into one or other of such agreements.

4.5.2 On and after the Novation Effective Date:

- (a) the Contractor shall owe its obligations under the Construction Contract (whether arising before, on or after such date) to the Proposed Substitute and the receipt, acknowledgement or acquiescence of the Proposed Substitute shall be a good discharge; and
- (b) if the Authority shall have entered into a Step-in Undertaking, the Authority will be released from the Step-in Undertaking, provided that:
 - (i) all obligations of the Authority under the Step-in Undertaking which have accrued up to the Novation Effective Date and are identifiable as at that date shall have been fully and unconditionally discharged; and
 - (ii) the Authority has performed and discharged in full or procured the performance and discharge in full of the obligations of D&B Co under the Construction Contract in relation to the maintenance of records and the provision of reports during the Step-in Period up to the Novation Effective Date so as to permit the Contractor to monitor the performance of D&B Co's other obligations under the Construction Contract.

4.5.3 The Authority and the Contractor shall use all reasonable endeavours to agree and the Authority shall use reasonable endeavours to procure that the Proposed Substitute agrees any amendments to the Construction Contract necessary to reflect Clause 3.2.2 and the fact that the Education D&B Agreement may have terminated at the time of the Novation Effective Date.

4.6 Termination After Novation

After the Novation Effective Date the Contractor shall only be entitled to exercise its rights of termination under the Construction Contract:

- 4.6.1 in respect of any Event of D&B Co Default arising after that date in accordance with the Construction Contract; or
- 4.6.2 if the Proposed Substitute does not discharge the obligations and liabilities assumed by it under Clause 4.5.1(c) which relate to matters arising prior to the end of the Step-in Period within [◆] Business Days following the Novation Effective Date.

4.7 Extension of Step-In Period

As at the date of the first anniversary of the Step-in Date, if the Step-in Period has not previously ended, and:

- 4.7.1 the Authority is in the course of conducting discussions in good faith with a Proposed Substitute (the novation to whom has been approved by the Contractor whether automatically or otherwise in accordance with Clause 4.3 (*Grant of Consent*)), the Step-in Period shall be extended and shall continue until such date as is proposed by the Authority and agreed by the Contractor; or
- 4.7.2 a contract has been entered into between the Authority and a Proposed Substitute (which has been approved by the Contractor in accordance with Clause 4.3 (*Grant of Consent*)) as at such date, the Step-in Period shall be extended and shall continue until the date such contract comes into force, provided that such date shall not be later than [◆] Business Days after the last date of execution of such contract.

5. RIGHTS AND OBLIGATIONS UNDER THE CONSTRUCTION CONTRACT

5.1 Rights of Termination

If:

- 5.1.1 no Step-in Notice or Proposed Novation Notice is given before a Termination Notice expires or within [◆] Business Days after termination of the Education D&B Agreement by the Authority; or
- 5.1.2 a Step-in Undertaking is not issued on the Proposed Step-in Date; or
- 5.1.3 the Step-in Notice is withdrawn or, pursuant to Clause 3.2.6, deemed to have been withdrawn; or
- 5.1.4 the Step-in Period ends before the occurrence of the Novation Effective Date; or

- 5.1.5 in the absence of a Step-in Undertaking, the Contractor withholds its consent to a novation pursuant to a Proposed Novation Notice, in accordance with Clause 4.3 (*Grant of Consent*), and does not subsequently grant consent to a novation in accordance with Clause 4.4 (*Consent Withheld*) on or before the Proposed Novation Date; or
- 5.1.6 in the absence of a Step-in Undertaking, the obligations of the Proposed Substitute set out in Clause 4.5 (*Implementation of Novation*) are not performed on the Proposed Novation Date; or
- 5.1.7 the Contractor is entitled to terminate the Construction Contract under Clause 3.3 (*Restriction of Right of Termination*) or 4.6 (*Termination After Novation*); or
- 5.1.8 the Authority exercises its right to Step-out under Clause 3.4.1,

the Contractor shall, on and from the Step-out Date, be entitled to:

- 5.1.9 exercise all of its rights under the Construction Contract and act upon any and all grounds for termination available to it in relation to the Construction Contract whenever occurring; and/or
- 5.1.10 pursue any and all claims and exercise any and all rights and remedies against D&B Co.

5.2 D&B Co's Obligations to Continue

Until completion of a novation pursuant to Clause 4.5 (*Implementation of Novation*) (unless the terms of such novation expressly preserve an obligation or liability of D&B Co), D&B Co shall continue to be liable for all its obligations and liabilities, whenever occurring, under or arising from the Construction Contract notwithstanding:

- 5.2.1 the service of a Step-in Notice or the issue of a Step-in Undertaking or the expiry of the Step-in Period or the release of a Step-in Undertaking; or
- 5.2.2 the service of a Proposed Novation Notice; or
- 5.2.3 any other provision of this Agreement.

6. REVOCATION OF NOTICES

A Termination Notice and a Step-in Notice may each be revoked (in writing to the recipient) by the Party giving them before the expiry of their respective notice periods. Upon any such

revocation, the rights and obligations of the Parties shall be construed as if the relevant notice had not been given.

7. ASSIGNMENT

7.1 Binding on Successors and Assignees

This Agreement shall be binding on and shall enure to the benefit of the Parties and their respective successors and permitted assignees. In the case of the Authority, its successors shall include any person to which the Welsh Ministers, in exercising their statutory powers to transfer property, rights and liabilities of the Authority upon the Authority ceasing to exist, transfers the rights and obligations of the Authority under this Agreement.

7.2 Restriction on Assignment

No Party shall assign or transfer any part of its respective rights or obligations under this Agreement without the prior consent of the others (such consent not to be unreasonably withheld or delayed), provided that:

7.2.1 D&B Co shall not assign this Agreement to any party other than a party to whom D&B Co's interests in the Education D&B Agreement and Construction Contract are assigned in accordance with the Education D&B Agreement and Construction Contract, respectively;

7.2.2 the Authority shall be entitled, without the consent of any other Party, to transfer all its rights and obligations hereunder, to any person to whom it assigns or otherwise disposes of the benefit of the Education D&B Agreement in accordance with Clause 45 (*Sub-Contracting and Assignment*) of the Education D&B Agreement and, otherwise, with D&B Co's and the Contractor's consent (not to be unreasonably withheld or delayed);

7.2.3 nothing in this sub-clause shall restrict the rights of the Welsh Ministers to effect a statutory transfer;

7.2.4 the Contractor shall assign this Agreement to any party to whom it assigns the Construction Contract (in accordance with the terms of that agreement);

7.3 No Loss

The Contractor agrees that it shall not at any time assert that any permitted assignee in terms of this Agreement is precluded from recovering any loss resulting from any breach of this Agreement by reason that such assignee is not an original party to this Agreement or that no loss or a different loss has been suffered by such assignee.

8. CONFIDENTIALITY

- 8.1 The parties shall be bound to observe, *mutatis mutandis*, the terms of Clause [insert reference] of the Construction Contract with respect to any information or document referred to in Clause [insert reference] of the Construction Contract which shall come into its possession pursuant to this Agreement.
- 8.2 The Contractor agrees that the Authority shall be entitled to disclose the terms of this Agreement in accordance with Clause 49 (*Confidentiality*) of the Education D&B Agreement.

9. NOTICES

- 9.1 Any notice or other communication given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by first class recorded post or emailed to the party named therein at the address or email address of such party shown in this Agreement or such other address or email address as such party may by notice or other communication in writing nominate for the purpose of service.

- 9.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

9.2.1 if delivered by hand at the time of delivery; or

9.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting,

provided that, in either case, a notice or other communication received on a non-Business Day or after 5pm in the place of receipt shall be deemed to be received at 9am on the next following Business Day in such place; or

- 9.3 Notices given by email shall be deemed to have been received:

9.3.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the relevant email address specified in Clauses 9.4 to 9.7 (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

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

and provided no error message indicating failure has been received by the sender and provided that within twenty-four (24) hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post

or delivered by hand to the intended recipient in accordance with the provisions of this Clause 9 (*Notices*) and where such notice is addressed to the Authority, copied to [♦]¹⁶¹.

- 9.4 Any notice to be given to the [Authority] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing to the relevant party by the [Authority].
- 9.5 Any notice to be given to [D&B Co] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by [D&B Co].
- 9.6 Any notice to be given to the [Contractor] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Contractor].
- 9.7 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.

10. PAYMENTS AND TAXES

10.1 Payments

All payments under this Agreement to any Party shall be made in Pounds Sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified to the other Parties from time to time.

10.2 VAT

- 10.2.1 All amounts stated to be payable by any Party under this Agreement shall be exclusive of any VAT properly payable in respect of the supplies to which they relate.
- 10.2.2 Each Party shall pay any VAT properly payable hereunder in respect of any supply made to it under this Agreement, provided that it shall first have received a valid tax invoice in respect of that supply which complies with the requirements of Part III Value Added Tax Regulations 1995.

¹⁶¹ Insert Welsh Government details.

10.3 Deductions from payments

All sums payable by a Party to any other Party under this Agreement shall be paid free and clear of all deductions or withholdings whatsoever in respect of taxation, save as may be required by Law.

11. DEFAULT INTEREST

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

12. AGGREGATE LIABILITY

Notwithstanding any other provision of this Agreement, the Contractor's aggregate liability from time to time under this Agreement and the Construction Contract shall not at any time exceed its maximum liability as stated in the Construction Contract.

13. PROFESSIONAL INDEMNITY INSURANCE

13.1 The Contractor by this Agreement covenants with the Authority that it has at its own cost taken out, or procured the taking out of, professional indemnity insurance with reputable insurers carrying on business in the European Union with a limit of indemnity of not less than £[♦],000,000 ([♦] million pounds) [on an each and every claim basis][in the annual aggregate] with at least one (1) annual reinstatement, in relation to the Works, provided always that:

13.1.1 such insurance shall be in place from the commencement of the Works until no less than[:

(a)]in respect of the [Main] Works twelve (12) years after the Actual Completion Date or[; and

(b) in respect of the Post Completion Works, twelve (12) years after the Actual Post Completion Works Date,]

or in either case if earlier, after the date of termination of the Construction Contract;

13.1.2 the insurance premiums in respect of the insurance shall at all times be the responsibility of the Contractor; and

13.1.3 if such insurance is not available to the Contractor (and/or design and build contractors engaged in projects of a similar scope, size, nature and complexity as the Contractor) at commercially reasonable

rates and terms (excluding any increase in premiums attributable to the actions, omissions, errors or defaults of the Contractor), the Contractor and the Authority will meet and the Contractor will outline the steps it intends to take to manage such risks. If the steps proposed by the Contractor are not acceptable to the Authority (acting reasonably), the Contractor and the Authority shall agree an alternative method of managing such risk.

- 13.2 The Contractor will, upon request, provide the Authority with reasonable evidence that the policy referred to in this Clause 13 (*Professional Indemnity Insurance*) is in full force and effect in accordance with the requirements of this Clause 13 (*Professional Indemnity Insurance*).

14. THIRD PARTY RIGHTS

It is agreed that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provisions contained herein (whether under the Contracts (Rights of Third Parties) Act 1999 or otherwise) except for any person to whom the benefit of this Agreement is assigned or transferred in accordance with Clause 7 (*Assignment*).

15. AGENCY

15.1 No Delegation

No provision of this Agreement shall be construed as a delegation by the Authority of any of its statutory authority to any other Party.

15.2 No Agency

Save as otherwise provided in this Agreement, no other Party shall be or be deemed to be an agent of the other Parties nor shall any party hold itself out as having authority or power to bind the other parties in any way.

15.3 Independent Contractor

The Parties shall, at all times, be independent contractors and nothing in this Agreement shall be construed as creating any partnership between the Parties or any relationship of employer and employee between the Parties.

16. WHOLE AGREEMENT

- 16.1 This Agreement (when read together with the Education D&B Agreement, the Construction Contract and the Parent Company Guarantee) contains or expressly refers to the entire agreement between the Parties with respect to the specific subject matter of this Agreement and expressly excludes any warranty, condition or other undertaking implied at Law or by custom and supersedes all previous

agreements and understandings between the Parties with respect thereto and each of the Parties acknowledges and confirms that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement.

16.2 Nothing in this Agreement is intended to or shall operate so as to exclude or limit any liability for fraud or fraudulent misrepresentation.

17. WAIVER

Failure by any Party at any time to enforce any provision of this Agreement or to require performance by the other Parties of any provision of this Agreement shall not be construed as a waiver of such provision and shall not affect the validity of this Agreement or any part of it or the right of the relevant Party to enforce any provision in accordance with its terms.

18. SEVERABILITY

If any condition, Clause or provision of this Agreement not being of a fundamental nature, is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Agreement shall not be affected thereby.

19. COSTS AND EXPENSES

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

20. AMENDMENTS

No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Parties.

21. COUNTERPARTS

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

22. GOVERNING LAW AND JURISDICTION

22.1 Law

This Agreement shall be governed by and construed in all respects in accordance with the laws of England and Wales.

22.2 Jurisdiction

The Parties each submit to the jurisdiction of the Courts of England and Wales as regards any claim or matter arising in relation to this Agreement.

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

SECTION 2

KEY SUB-CONTRACTOR COLLATERAL AGREEMENT

COLLATERAL WARRANTY

AMONG:

[THE AUTHORITY] having its principal offices at [♦] (the "**Beneficiary**" which expression shall include its successors in title or permitted assignees under this Agreement and/or the Beneficiary's appointee);

and

[D&B Co], a company incorporated in [Scotland/England and Wales/Northern Ireland] under the Companies Acts (Registered Number [♦]) and having its Registered Office at [♦] ("**D&B Co**" which expression shall include its successors in title or permitted assignees under this Agreement);

and

[♦] **LIMITED**, a company incorporated in [Scotland/England and Wales/Northern Ireland] under the Companies Acts (Registered Number [♦]) and having its Registered Office at [♦] (the "**Contractor**" which expression shall include its successors in title or permitted assignees under this Agreement);

and

[♦] **LIMITED**, a company incorporated in [Scotland/England and Wales/Northern Ireland] under the Companies Acts (Registered Number [♦]) and having its Registered Office at [♦] (the "**Consultant**").

WHEREAS:

- (A) The Beneficiary and D&B Co have entered into an agreement for the design and build of [*insert name of facilities*] (the "**Project**") on or about the date hereof (the "**Education D&B Agreement**").
- (B) D&B Co and the Contractor have entered into a contract (the "**Construction Contract**") on or about the date hereof for the design and construction of the Project (the "**Contract Works**").
- (C) The Contractor has entered or intends to enter into an agreement with the Consultant whereby the Consultant will provide certain [design] services (the "**Services**") in connection with the Project (the "**Appointment**") as more particularly described in the Appointment.
- (D) It is a condition of the Appointment that the Consultant enters this Agreement with the Beneficiary.
- (E) The Beneficiary shall be entitled to rely and is deemed to have relied on the Consultant's reasonable skill, care and diligence in respect of all matters covered by this Agreement insofar as they relate to the Services provided by the Consultant under the Appointment.

NOW IT IS AGREED as follows:

1. WARRANTY AND UNDERTAKING

- 1.1 The Consultant warrants and undertakes to the Beneficiary that it has complied and will continue to comply with all the terms and obligations under or arising out

of the Appointment on the Consultant's part to be performed and observed and shall complete the Services in accordance with the Appointment.

1.2 Without prejudice to Clause 1.1 (*Warranty And Undertaking*) of this Agreement, the Consultant further warrants and undertakes to the Beneficiary that:

1.2.1 it has exercised and will continue to exercise all the due skill, care and diligence to be expected from a properly qualified and competent consultant experienced in providing design services on projects similar in nature, size and complexity to the Project in:

(a) the [design] of the Contract Works;

(b) the specification of goods and materials for the Contract Works, and in particular in ensuring that it has not and will not specify for use in relation to the Contract Works any products or materials not in conformity with relevant British or European standards or Codes of Practice or which are at the time of specification generally known within the United Kingdom to an experienced designer of such as the Contract Works to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used; and

(c) the performance of the Services to the Contractor under the Appointment.

1.2.2 the final [design] and all materials and goods specified therein will correspond as to description, quality and condition with the requirements of the Construction Contract; and

1.2.3 the final [design] will at practical completion or its equivalent under the Construction Contract, as the case may be, comply with all relevant legislation and Good Industry Practice.

1.3 The Consultant shall not without first giving the Beneficiary not less than twenty eight (28) days written notice exercise or seek to exercise any rights it may have to determine its employment under the Appointment or treat it as having been determined by the Contractor (which expression in this Clause shall include the appointment of a liquidator, receiver, administrator, administrative receiver or manager of the Contractor) or to discontinue performance of any service or obligations thereunder.

2. INSURANCE

2.1 The Consultant shall maintain throughout the duration of provision of the Services and for a period of twelve (12) years after the date of practical completion or its equivalent under the Construction Contract, professional indemnity insurance in an

amount of not less than [♦] million pounds (£[♦],000,000) sterling on an each and every claim basis and for any one (1) occurrence or series of occurrences arising out of any one (1) event with an insurer of good repute carrying on business in the European Union provided always that such insurance is available at rates which are commercially reasonable to consultants.

- 2.2 In determining whether or not insurance is available as aforesaid, the financial characteristics and claims' record of the Consultant shall be ignored.
- 2.3 The Consultant shall immediately inform the Beneficiary if such insurance ceases to be available at rates which are commercially reasonable in order that the Consultant and the Beneficiary can consider alternative means of best protecting their respective positions in respect of the Project in the absence of such insurance provided that the Beneficiary shall be entitled to require the Consultant to maintain such lesser amount of Professional Indemnity Insurance as is available to the Consultant at rates which are commercially reasonable.
- 2.4 As and when it is reasonably requested to do so by the Beneficiary the Consultant shall produce for inspection documentary evidence satisfactory to the Beneficiary (acting reasonably) that its professional indemnity insurance is being maintained.
- 2.5 The Consultant confirms that this Agreement has been disclosed to and has been approved by the Consultant's professional indemnity insurers or underwriters.
- 2.6 Should the Consultant be in breach of any of its obligations under this Clause 2 (*Insurance*), the Beneficiary may itself insure against any risk with respect to which the breach shall have occurred and may recover such sum or sums from the Consultant as a debt.

3. COPYRIGHT

- 3.1 The Consultant hereby grants to the Beneficiary or its appointee and all those authorised by the Beneficiary an irrevocable, transferable, non-exclusive and royalty-free licence (which shall be capable of assignment) to use and reproduce all information (whether or not stored in computer systems), drawings, models, bills of quantities, specifications, schedules, details, plans, programmes, budgets, reports, calculations or other documents, work or things including all applicable passwords or access codes whatsoever provided or to be provided by the Consultant in connection with the Services (the "**Documents**") for such purposes as the Beneficiary may at its sole discretion require.
- 3.2 Such licence shall carry the right to grant sub-licences and shall subsist notwithstanding that the Appointment is terminated or the obligations and duties there under have been completed. For the avoidance of doubt, the grant of such licence or sub-licences shall not impose any additional liability on the Consultant.
- 3.3 The Consultant shall on reasonable demand provide to the Beneficiary or its appointee and those authorised by the Beneficiary additional copies of any documents on receipt of reasonable copying costs. The Consultant will not be liable for any use by the Beneficiary or any appointee or sub-licensee of any of the

Documents for any purpose other than that for which the same were prepared and provided by the Consultant or for any improper or negligent use by the Beneficiary or any appointee or sub-licensee.

- 3.4 The Consultant agrees to indemnify and keep indemnified the Beneficiary from and against all loss, damage, cost, expense, liability or claim in respect of breach of the copyright or other intellectual property rights of any third party caused by or arising out of the carrying out of the Services or the use of the licence.

4. ASSIGNMENT

- 4.1 This Agreement may be assigned in whole or in part by the Beneficiary to any successor to the Beneficiary's interest in the Project or any part thereof without the consent of the Consultant being required and such assignment shall be effective upon written notice thereof being given to the Consultant. No assignment of this Agreement by any other party shall be permitted.
- 4.2 The Consultant agrees that it shall not at any time assert that any permitted assignee in terms of this Agreement is precluded from recovering any loss resulting from any breach of this Agreement by reason that such assignee is not an original party to this Agreement or that no loss or a different loss has been suffered by such assignee.

5. NO WAIVER OR VARIATION

- 5.1 No failure, approval, act or forbearance on the part of the Beneficiary in respect of any right of the Beneficiary pursuant to this Agreement shall constitute any waiver of any right of the Beneficiary under or arising out of this Agreement nor relieve the Consultant of any of its duties or obligations under or arising out of this Agreement.
- 5.2 The Consultant will not seek to modify or vary any of the obligations for which it is responsible under the Appointment in any respect if that modification or variation will be detrimental to the Beneficiary or affects the Beneficiary's rights or obligations under the Education D&B Agreement or affects the Consultant's obligations under this Agreement.

6. EQUIVALENT RIGHTS

The obligations of the Consultant under this Agreement shall be no greater in extent or quantity than if the Beneficiary had been named as joint employer with the Contractor under the Appointment. The Consultant shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation in the Appointment and to raise the equivalent rights in defence of liability as it would have against the Contractor under the Appointment (other than counterclaim, set-off or to state a defence of no loss or a different loss has been suffered by the Contractor).

7. NOTICES

7.1 Any notice or other communication given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by first class recorded post or emailed to the party named therein at the address or email address of such party shown in this Agreement or such other address or email address as such party may by notice or other communication in writing nominate for the purpose of service.

7.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

7.2.1 if delivered by hand at the time of delivery; or

7.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting,

provided that, in either case, a notice or other communication received on a non-Business Day or after 5pm in the place of receipt shall be deemed to be received at 9am on the next following Business Day in such place.

7.3 Notices given by email shall be deemed to have been received:

7.3.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the relevant email address specified in Clauses [7.4 to 7.7] (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

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

and provided no error message indicating failure has been received by the sender and provided that within twenty-four (24) hours of transmission of a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by hand to the intended recipient in accordance with the provisions of this Clause 7 (*Notices*) and where such notice is addressed to the Authority, copied to [♦¹⁶²].

7.4 Any notice to be given to the [Authority] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party or address or email address as notified in writing to the relevant party by the [Authority].

¹⁶² Insert Welsh Government details.

- 7.5 Any notice to be given to [D&B Co] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by [D&B Co].
- 7.6 Any notice to be given to the [Contractor] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Contractor].
- 7.7 Any notice to be given to the [Consultant] should be marked for the attention of [♦] and delivered to [♦] or emailed to [♦] or such other party address or email address as notified in writing to the relevant party by the [Consultant].
- 7.8 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.
- 7.9 The definitions of words and phrases used in this Agreement shall be those set out in the Construction Contract and Appointment except where expressly defined in this Agreement.
- 7.10 This Agreement shall be governed by and construed in accordance with the Laws of England and Wales and the parties hereto submit to the exclusive jurisdiction of the Courts of England and Wales.
- 7.11 This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.
- 7.12 It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that save to the extent expressly provided in this Agreement no provision of this Agreement is intended to or does confer upon any third party any benefit or right enforceable at the option of that third party or any liability whatsoever to any third party.

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

SCHEDULE 9
INDEPENDENT TESTER CONTRACT¹⁶³

AGREEMENT

AMONG:

- (1) [AUTHORITY] (the "**Authority**");
- (2) [D&B CO] ("**D&B Co**");
- (3) [INDEPENDENT TESTER] (the "**Independent Tester**"); and
- (4) [CONTRACTOR] (the "**Contractor**").

WHEREAS:

- (A) D&B Co and the Authority have entered into an agreement for the design and construction of [details of facilities] at the Site (the "**Project**") (the "**D&B Agreement**") under the terms of which they have jointly agreed to appoint an independent tester.
- (B) D&B Co has entered into the Construction Contract with the Contractor for the development of [details of facilities] at the Site.
- (C) The Independent Tester is an independent adviser willing to provide services to D&B Co and the Authority.
- (D) D&B Co and the Authority have jointly agreed to engage the Independent Tester to carry out the duties and obligations ascribed to the Independent Tester in the D&B Agreement upon the terms of this Agreement.

IT IS AGREED as follows:

1. INTERPRETATION

- 1.1 Unless the context otherwise requires, words and expressions defined in the D&B Agreement have the same meanings in this Agreement as in the D&B Agreement.
- 1.2 The headings in this Agreement do not affect its interpretation.
- 1.3 Unless the context otherwise requires, all references to Clauses and Appendices are references to clauses of and appendices to this Agreement.

¹⁶³ Tailoring will be required to this contract on a sector specific basis. The Independent Tester Contract must be publicly tendered during stage 2 of the New Project Approval Process under the SPA. The evaluation criteria must recognise that all Key Personnel must have a minimum of 10 years' experience of completion testing in the relevant sector.

2. APPOINTMENT

- 2.1 D&B Co and the Authority jointly appoint the Independent Tester to perform the obligations and tasks which are ascribed to the Independent Tester under the D&B Agreement and which are set out in Appendix 1 upon the terms and conditions set out below. The Contractor is a party to this Agreement solely to make the commitments on its part as expressly made in this Agreement and, for the avoidance of doubt, the Independent Tester shall have no liability to the Contractor¹⁶⁴.
- 2.2 The Independent Tester shall provide the services under Clause 2.1 (*Appointment*) above (the "**Services**") independently, fairly and impartially to and as between D&B Co and the Authority in relation to the D&B Agreement at such times and at such locations as the parties shall agree from time to time. Whilst the Independent Tester shall take account of any representations made by D&B Co and the Authority and the Contractor (as appropriate) the Independent Tester shall not be bound to comply with any representations made by any of them in connection with any matter on which the Independent Tester is required to exercise his professional judgement.
- 2.3 The Independent Tester shall, as far as it is in its reasonable control, ensure that the Services and Varied Services are carried out by the Key Personnel listed in Appendix 3 only (the "**Key Personnel**"). In the event that, due to matters outwith the Independent Tester's control, it is necessary for there to be a change in any Key Personnel, the Independent Tester shall by written notice to the Authority and D&B Co propose a suitable substitute for approval, taking into account the experience of the Key Personnel. Such appointment shall be subject to the approval of D&B Co and the Authority (not to be unreasonably withheld or delayed).

3. SERVICES AND VARIED SERVICES

- 3.1 Subject to the prior written agreement of the Authority and D&B Co to the costs thereof, the Independent Tester shall carry out and perform any additional and/or varied services required for the implementation of the Project reasonably required by the Authority and D&B Co which are not included in, or which are omitted from, the Services (the "**Varied Services**") on the same terms as required for the Services pursuant to Clause 2.2 (*Appointment*). If the Independent Tester shall at any time be required to perform Varied Services, it shall give to the Authority and D&B Co a written quote of the cost thereof (taking into account any reduction in work or other expense which might also occur as a result of the circumstances giving rise to the Varied Services) pursuant to Clause 5.7 (*Fee*).
- 3.2 The written agreement by the Authority and D&B Co pursuant to Clause 3.1 (*Services And Varied Services*) shall state whether (and where applicable in what proportions) the Authority and/or D&B Co will be responsible for the payment of

¹⁶⁴ It has been suggested on some projects that the Contractor should receive the benefit of a duty of care from the Independent Tester (whether under this agreement or through a collateral warranty). Authorities should consider the implications fully and seek advice from their legal advisers on this point. Authorities' interests are likely to be prejudiced as a result. Issues that need to be considered include: whether this would increase the fee; whether the financial liability of the IT would be diluted (e.g. consider any cap on liability); whether the IT's liability to the Authority may be prejudiced as a result of a claim made by the Contractor; whether there could be any adverse impact on the resources of the IT; whether the Contractor's remedy should lie against D&B Co in the event of any claim; and other project-specific considerations.

the fee agreed for the Varied Services. The Independent Tester acknowledges that the liability of D&B Co and the Authority to pay the Independent Tester for the Varied Services shall be several and not joint.

- 3.3 Where a change to the Project occurs pursuant to the terms of the D&B Agreement (whether by virtue of a Delay Event, Compensation Event, Variation, change to the Programme or otherwise) which may materially impact on the Services or otherwise on the Independent Tester, the Authority and D&B Co shall promptly notify the Independent Tester of such change. The Independent Tester shall within [◆] Business Days of receiving such notification, notify the Authority and D&B Co of the impact of such change, if any, on the Services or otherwise, including whether such change gives rise to any Varied Services and the provisions of this Clause 3 (*Services And Varied Services*) shall apply accordingly.
- 3.4 The Independent Tester shall promptly and efficiently provide the Services and the Varied Services:
- 3.4.1 with the reasonable care, skill and diligence to be expected of a properly qualified and competent professional adviser who has held himself out as competent and experienced in rendering such services for projects of a similar size, nature, scope and complexity to the Project; and
- 3.4.2 in accordance with all applicable Law.
- 3.5 All instructions to the Independent Tester must be signed and given jointly by the Authority's Representative and D&B Co's Representative or such other person appointed pursuant to Clause 8 (*Representatives*) of the D&B Agreement and, for the avoidance of doubt, the Independent Tester shall not act in accordance with any instructions given to him by either the Authority or D&B Co (or any other person) not given in accordance with the provisions of this Clause 3.5 (*Services And Varied Services*).
- 3.6 The Independent Tester shall comply with all reasonable instructions given to it by D&B Co and the Authority pursuant to Clause 3.5 (*Services And Varied Services*) except and to the extent that the Independent Tester reasonably considers that any such instructions vary or might vary the Services or its authority or responsibilities under this Agreement or prejudices or might prejudice the exercise by the Independent Tester of its professional judgement in accordance with Clauses 2.2 (*Appointment*) and 3.4 (*Services And Varied Services*) above. The Independent Tester shall promptly confirm in writing to D&B Co and the Authority whether or not it shall comply with any such instruction setting out the grounds upon which the decision is made.
- 3.7 The Authority, D&B Co and the Contractor agree to co-operate with and provide reasonable assistance to the Independent Tester to familiarise the Independent Tester with all necessary aspects of the Project to enable the Independent Tester to carry out its obligations under this Agreement.
- 3.8 The Independent Tester shall be deemed to have full knowledge of the provisions of the D&B Agreement and the Construction Contract, as such as relates to the

Services or Varied Services and shall be deemed to be aware of and to have taken full account of all the undertakings and warranties, both expressed and implied, on the part of D&B Co and the Authority which are set out in the D&B Agreement provided always that true and accurate copies have been delivered to the Independent Tester.

- 3.9 Subject to Clause 3.10 (*Services And Varied Services*), the Independent Tester shall use the following partners, directors or employees: [insert names of individuals] in connection with the performance of the Services and any Varied Services and such persons' services shall be available when necessary and for so long as may be necessary to ensure the proper performance by the Independent Tester of the Services and any Varied Services. Such persons shall have full authority to act on behalf of the Independent Tester for all purposes in connection with the Services and any Varied Services.
- 3.10 The Independent Tester may by written notice to the Authority and D&B Co replace the staff identified in Clause 3.9 (*Services And Varied Services*) taking into account the need for liaison, continuity, level of qualification and availability of personnel in respect of the Project. Such replacement shall be subject to approval in writing by D&B Co and the Authority (not to be unreasonably withheld or delayed).

4. DURATION

- 4.1 The Services shall commence on the date of this Agreement¹⁶⁵.
- 4.2 The parties hereby agree that this Agreement governs all of the Services (including the Varied Services, if any) provided by the Independent Tester in relation to the Project whether before or after the date hereof.

5. FEE

- 5.1 D&B shall pay to the Independent Tester a fee of [INSERT FEE] for the Services provided under this Agreement. The fee is exclusive of value added tax and inclusive of disbursements. The Independent Tester shall issue an invoice to D&B Co on a monthly basis in accordance with Appendix 2 Section 1 (*Schedule of Drawdown of Fees*) (the "**Application for Payment**"). The date on which the Application for Payment is received by D&B Co shall constitute the due date (the "**Due Date**"). The final date for payment by D&B Co shall be thirty (30) days after the Due Date (the "**Final Date**"). If Varied Services are provided then they shall be paid for in accordance with the agreement between the Independent Tester and the Authority and D&B Co pursuant to Clause 3.1 and 3.2 (*Services And Varied Services*) and paid for in accordance with the provisions of this Clause 5 (*Fee*).
- 5.2 Not later than five (5) days after the Due Date is ascertained in accordance with Clause 5.1 (*Fee*), D&B Co shall give written notice to the Independent Tester stating the amount which D&B Co considers to be or have been due at the Due Date and the basis on which the amount is calculated (the "**Payment Notice**"). It is

¹⁶⁵ Authorities to amend according to specific requirements.

immaterial that the sum referred to in this notice may be zero. If D&B Co fails to give a Payment Notice in accordance with this Clause 5.2 (*Fee*) and the Independent Tester has given an Application for Payment in accordance with Clause 5.1 (*Fee*), subject to any Pay Less Notice given under Clause 5.3 (*Fee*), the sum to be paid to the Independent Tester shall be the sum specified in the Application for Payment.

- 5.3 Where D&B Co intends to pay less than the sum stated as due pursuant to this Agreement, D&B Co shall, not later than two (2) days before the relevant Final Date, give a written notice to the Independent Tester (a "**Pay Less Notice**"). Such Pay Less Notice shall specify both the sum that D&B Co considers to be due to the Independent Tester at the date the notice is given and the basis on which that sum is calculated. It is immaterial that the sum referred to in this Clause 5.3 (*Fee*) may be zero. Where any Pay Less Notice is given, the payment to be made on or before the relevant Final Date shall be not less than the amount stated as due in such notice.
- 5.4 If D&B Co fails to pay a sum, or any part of it, due to the Independent Tester under this Agreement by the relevant Final Date, D&B Co shall, in addition to any unpaid amount that should properly have been paid, pay the Independent Tester simple interest on that amount from the Final Date until the actual date of payment at the Default Interest Rate.
- 5.5 If D&B Co fails to pay any amount properly due pursuant to this Agreement by the relevant Final Date and the failure continues for twenty-one (21) days after the Independent Tester has given notice to D&B Co of its intention to suspend performance of all or any of the Services or Varied Services and the ground or grounds on which it is intended to suspend performance, the Independent Tester may suspend performance of any or all of its obligations until payment is made in full. [Any period of suspension of the Services or Varied Services in accordance with this Clause 5.5 (*Fee*) shall be disregarded in computing any contractual time limit to complete work directly or indirectly affected by the exercise of the rights conferred by this Clause 5.5 (*Fee*), or as the case may be and the time for completion of such work shall be extended by a period equal to the period of suspension.]¹⁶⁶ Where the Independent Tester exercises its right of suspension under this Clause 5.5 (*Fee*), it shall be entitled to a reasonable amount in respect of costs and expenses reasonably incurred by it as a result of the exercise of that right. Any such costs and expenses shall be included in the Independent Tester's next Application for Payment and the Independent Tester shall, with its application, submit such details of the costs and expenses as are reasonably necessary to enable the Independent Tester's entitlement to be ascertained.
- 5.6 Without prejudice to Clause 3.5 (*Services And Varied Services*), neither the Authority nor D&B Co shall issue instructions or do anything which does or is reasonably likely materially to increase the fees payable to the Independent Tester without the prior approval of the other (such approval not to be unreasonably withheld or delayed).
- 5.7 As soon as the Independent Tester becomes aware of the same and before acting on the same the Independent Tester shall inform the Authority and D&B Co of any instructions given to him pursuant to Clause 3.5 (*Services And Varied Services*)

¹⁶⁶ Authorities to consider whether this or similar drafting is necessary for compliance with the Housing Grants and Construction Act 1996, as amended.

which will or could reasonably be expected to increase the fees payable to the Independent Tester under the terms of this Agreement. The Independent Tester shall if requested by either D&B Co or the Authority provide both the Authority and D&B Co with as detailed an estimate as is reasonably practicable of the increase to the fees payable to it if it carries out such instructions. The estimate of increased fees shall be based upon the rates contained in Appendix 2, Section 2 (*Schedule of Daily Rates*).

6. LIMITATIONS ON AUTHORITY

6.1 The Independent Tester shall not:

6.1.1 make or purport to make any alteration or addition to or omission from the design of the Facilities (including, without limitation, the setting of performance standards) or issue any instruction or direction to any contractor or professional consultant employed or engaged in connection with the Project; or

6.1.2 (unless both D&B Co and the Authority consent in writing) consent or agree to any waiver or release of any obligation of D&B Co or the Authority under the D&B Agreement or of any contractor or professional consultant employed or engaged in connection with the Project.

6.2 For the avoidance of doubt, the Independent Tester shall not express an opinion on and shall not interfere with or give any advice, opinion or make any representation in relation to any matters which are beyond its role and responsibilities under this Agreement.

7. TERMINATION

7.1 D&B Co and the Authority may by joint notice in writing (a "**Joint Notice**") immediately terminate this Agreement if the Independent Tester:

7.1.1 is in breach of any of the terms of this Agreement which, in the case of a breach capable of remedy, shall not have been remedied by the Independent Tester within twenty-one (21) days of receipt by the Independent Tester of a Joint Notice specifying the breach and requiring its remedy;

7.1.2 is incompetent, guilty of gross misconduct and/or any material failure, negligence or delay in the provision of the Services and/or its other duties under this Agreement;

7.1.3 fails or refuses after written warning to provide the Services and/or its other duties under this Agreement reasonably and as properly required of him; or

- 7.1.4 is subject to an event analogous to any of the events set out in Clause 33.1.1 (*Insolvency*) of the D&B Agreement.
- 7.2 If the D&B Agreement is rescinded, terminated or repudiated for any reason and, notwithstanding that the validity of such rescission, termination or repudiation may be disputed, this Agreement may be terminated by Joint Notice and with immediate effect.
- 7.3 Following any termination of this Agreement, but subject to any set-off or deductions which D&B Co or the Authority may be entitled properly to make as a result of any breach of this Agreement by the Independent Tester, the Independent Tester shall be entitled to be paid in full and final settlement of any valid claim which the Independent Tester may have in consequence thereof for any fees due under Clause 5 (*Fee*) above in respect of the Services or Varied Services carried out in accordance with this Agreement prior to the date of termination.
- 7.4 Termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the date of termination (including the right of D&B Co and the Authority to recover damages from the Independent Tester).
- 7.5 If this Agreement is terminated in accordance with Clause 7.1 (*Termination*), D&B Co and the Authority shall use reasonable endeavours to engage an alternative Independent Tester within thirty (30) days, subject to Law and public procurement rules. If within such period D&B Co and the Authority are unable to procure the appointment of an alternative Independent Tester on reasonable commercial terms, the Independent Tester shall pay to D&B Co and/or the Authority, as the case may be, any reasonable incremental loss, damage or extra costs suffered by each of them.
- 7.6 If D&B Co fails to make a payment of any undisputed sum to the Independent Tester within [4] Business Days of the expiry of any notice issued pursuant to Clause 5.5 (*Fee*) in respect of such sum, the Independent Tester may issue a further written notice to the Authority and D&B Co specifying that the payment remains outstanding (the "**Second Notice**") and if payment is not made within [44] Business Days of receipt of the Second Notice the Independent Tester may issue a further written notice terminating this Agreement with immediate effect. Failure by D&B Co to pay, following receipt of a Second Notice pursuant to this Clause 7.6 (*Termination*), shall be the Independent Tester's sole ground for terminating this Agreement by reason of breach of this Agreement by the Authority and/or D&B Co.
- 7.7 Termination of this Agreement shall not affect the continuing rights and obligations of D&B Co, the Authority and the Independent Tester under Clauses 6 (*Limitations On Authority*), 8 (*Confidential Information And Copyright*), 9 (*Professional Indemnity Insurance*), 18 (*Dispute Resolution Procedure*) and this Clause or under any other Clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

8. CONFIDENTIAL INFORMATION AND COPYRIGHT

- 8.1 The Independent Tester shall treat as secret and confidential and shall not at any time for any reason disclose or permit to be disclosed to any person or otherwise

make use of or permit to be made use of any unpublished information relating to D&B Co's or the Authority's or the Contractor's (if appropriate) technology or other know-how business plans or finances or any such information relating to a subsidiary, supplier, customer or client of D&B Co or the Authority or the Contractor (if appropriate) where the information was received during the period of this Agreement except as may be reasonably necessary in the performance of the Services or Varied Services. Upon termination of this Agreement for whatever reasons the Independent Tester shall offer to deliver up to D&B Co or the Authority (as appropriate) all working papers, computer disks and tapes or other material and copies provided to or prepared by him pursuant either to this Agreement or to any previous obligation owed to D&B Co or the Authority provided always that the Independent Tester shall be entitled to retain copies of all such items where such offer is accepted.

- 8.2 The obligation to maintain confidentiality does not apply to any information or material to the extent that the Independent Tester is compelled to disclose any such information or material by law or any regulatory or Government authority.
- 8.3 The copyright in all reports, and other documents produced by the Independent Tester in connection with the Project shall remain vested in the Independent Tester but the Independent Tester grants to D&B Co and Authority and their nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such reports, and other documents and to reproduce the information contained in them for any purpose related to the Project including (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Project. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties.
- 8.4 The Independent Tester shall not be liable for use by any person of the documents, (including reports, details, plans, specifications, schedules, computer programs, software, consents and any other papers, works, reports and inventions produced by the Independent Tester) for any purpose other than that for which the same were prepared by or on behalf of the Independent Tester.

9. PROFESSIONAL INDEMNITY INSURANCE

- 9.1 Without prejudice to its obligations under this Agreement, or otherwise at law, the Independent Tester shall maintain professional indemnity insurance with a limit of indemnity of not less than [[+] (£.)]¹⁶⁷ for any one (1) claim in respect of any neglect, error or omission on the Independent Tester's part in the performance of its obligations under this Agreement for the period commencing on the date of this Agreement and expiring twelve (12) years after:

9.1.1 the date of final certification of the Works; or

9.1.2 the termination of this Agreement,

¹⁶⁷ Authorities to take advice from insurance advisers on appropriate level of PII cover for the scheme. The minimum level is £10 million.

whichever is the earlier, provided that such insurance is available in the market place at commercially reasonable rates.

- 9.2 The Independent Tester shall maintain such insurance with reputable insurers carrying on business in the United Kingdom.
- 9.3 Any increased or additional premium required by insurers by reason of the Independent Tester's own claims record or other acts, omissions, matters or things particular to the Independent Tester shall be deemed to be within commercially reasonable rates.
- 9.4 The Independent Tester shall as soon as reasonably practicable inform D&B Co and the Authority if such insurance ceases to be available at commercially reasonable rates in order that the Independent Tester and D&B Co and the Authority can discuss means of best protecting the respective positions of D&B Co and the Authority and the Independent Tester in respect of the Project in the absence of such insurance.
- 9.5 The Independent Tester shall fully co-operate with any measures reasonably required by D&B Co and the Authority including (without limitation) completing any proposals for insurance and associated documents and maintaining such insurance at rates above commercially reasonable rates if D&B Co and the Authority undertake in writing to reimburse the Independent Tester in respect of the net cost of such insurance to the Independent Tester above commercially reasonable rates.
- 9.6 The Independent Tester shall, prior to commencing the provision of the Services and as soon as reasonably practicable following Renewal Dates, produce for inspection by D&B Co and the Authority documentary evidence that such insurance is being properly maintained.
- 9.7 The above obligations in respect of professional indemnity insurance shall continue notwithstanding termination of this Agreement for any reason whatsoever, including (without limitation) breach by D&B Co and the Authority.

10. LIMITATION OF LIABILITY

- 10.1 With the exception of liability for death, personal injury and/or any other liability that cannot lawfully be excluded or limited, the Independent Tester's maximum [aggregate] liability to all parties, under or in connection with this Agreement, whether in contract or in tort, or for breach of statutory duty is limited to £[◆]¹⁶⁸ million.
- 10.2 [Notwithstanding anything to the contrary stated elsewhere in this Agreement, the parties hereby expressly agree that the Independent Tester shall have no liability

¹⁶⁸ Authorities to consider appropriate cap in the context of the specific project and scope of service. The cap should be set out at a minimum level of £10 million.

to any party under or in connection with this Agreement for any claim or claims related to terrorism, asbestos or toxic mould.]¹⁶⁹

- 10.3 No action or proceedings under or in connection with this Agreement shall be commenced against the Independent Tester after the expiry of twelve (12) years from the earlier of: (a) the date of final certification of the Works; and (b) the termination of this Agreement.

11. SUB-CONTRACTOR LOSSES AND NO LOSS AVOIDANCE

- 11.1 Without prejudice to Clause 10 (*Limitation Of Liability*) the Independent Tester hereby acknowledges and accepts (a) that a breach or failure on the part of the Independent Tester could have adverse financial consequences for the Sub-Contractors (or any of them) and (b) any losses, damages, costs and/or other liabilities suffered or incurred by the Sub-Contractors (or any of them) (as the case may be) arising from or in connection with any breach or failure on the part of the Independent Tester under this Agreement shall, for the purposes of this Agreement and notwithstanding the provisions of any Sub-Contract, be deemed to be losses, damages, costs and/or liabilities suffered or incurred by D&B Co arising from or in connection with such breach or failure.
- 11.2 Where the Independent Tester would otherwise be liable to make a payment by way of compensation to D&B Co including amounts which, in turn, comprise compensation to any Sub-Contractor which is payable by D&B Co and/or which would be payable by way of compensation to any Sub-Contractor by D&B Co the Independent Tester shall not be entitled to withhold, reduce or avoid any such payment to D&B Co in reliance (in whole or in part) on the fact that payment of the amount which is or would be due from D&B Co to the Sub-Contractor or the entitlement of the Sub-Contractor to receive payment of such amount (as a result of the circumstances giving rise to the Independent Tester's obligation to pay such compensation) is conditional on receipt by D&B Co of such amount from the Independent Tester.

12. NOTICES

- 12.1 Any notice or other communication given under this Agreement shall be deemed to be duly given if it is delivered by hand or sent by first class recorded post or emailed to the party named therein at the address or email address of such party shown in this Agreement or such other address or email address as such party may by notice or other communication in writing nominate for the purpose of service.
- 12.2 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

12.2.1 if delivered by hand at the time of delivery; or

¹⁶⁹ This may be appropriate where the IT's insurance cover excludes liability for these occurrences. Authorities to check.

12.2.2 if posted upon the earlier of (i) actual receipt, and (ii) [three (3)] Business Days after posting,

provided that, in either case, a notice or other communication received on a non-Business Day or after 5pm in the place of receipt shall be deemed to be received at 9am on the next following Business Day in such place; or

12.3 Notices given by email shall be deemed to have been received:

12.3.1 at the time the email enters the Information System of the intended recipient designated by them to receive electronic notices pursuant to this Agreement (as identified by the relevant email address specified in Clauses [12.4 to 12.8] (*Notices*)), if sent on a Business Day between the hours of 9am and 4pm; or

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

and provided no error message indicating failure has been received by the sender and in the case of a notice issued pursuant to Clause 7 (*Termination*) provided that within twenty-four (24) hours of transmission of a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by hand to the intended recipient in accordance with the provisions of this Clause 12 (*Notices*) and where such notice issued pursuant to Clause 7 (*Termination*) is addressed to the Authority, copied to [◆¹⁷⁰].

12.4 Any notice to be given to the [Authority] should be marked for the attention of [◆] and delivered to [◆] or emailed to [◆] or such other party or address or email address as notified in writing to the relevant party by the [Authority].

12.5 Any notice to be given to the [D&B Co] should be marked for the attention of [◆] and delivered to [◆] or emailed to [◆] or such other party address or email address as notified in writing to the relevant party by the [D&B Co].

12.6 Any notice to be given to the [Independent Tester] should be marked for the attention of [◆] and delivered to [◆] or emailed to [◆] or such other party address or email address as notified in writing to the relevant party by the [Independent Tester].

12.7 [Any notice to be given to the [Contractor] should be marked for the attention of [◆] and delivered to [◆] or emailed to [◆] or such other party address or email address as notified in writing to the relevant party by the [Contractor].]

¹⁷⁰ Insert Welsh Government details.

- 12.8 Any consent or approval under this Agreement is required to be obtained before the act or event to which it applies is carried out or done and is to be treated as effective only if the consent or approval is given in writing.

13. ASSIGNMENT

- 13.1 The Independent Tester shall not assign or transfer any of its rights or obligations under this Agreement or sub-contract the whole or any part of the Services or the Varied Services.¹⁷¹
- 13.2 Neither D&B Co nor the Authority shall be entitled to assign or transfer any of their respective rights or obligations under this Agreement save that the parties hereby consent to any such assignment or transfer which is contemporaneous to the assignment or transfer of the D&B Agreement and is made to the same assignee or transferee. In the event that the D&B Agreement is novated to a third party, the term "D&B Agreement" shall include any replacement contract arising from such novation.
- 13.3 The Independent Tester shall not be entitled to contend that any person to whom this Agreement is assigned in accordance with Clause 13.2 (*Assignment*) is precluded from recovering under this Agreement any loss incurred by such assignee resulting from any breach of this Agreement (whenever happening) by reason that such person is an assignee and not a named promisee under this Agreement.

14. CUMULATIVE RIGHTS AND ENFORCEMENT

- 14.1 Any rights and remedies provided for in this Agreement whether in favour of D&B Co or the Authority or the Independent Tester are cumulative and in addition to any further rights or remedies which may otherwise be available to the parties.
- 14.2 The duties and obligations of the Independent Tester arising under or in connection with this Agreement are owed to D&B Co and the Authority both jointly and severally and D&B Co and the Authority may accordingly enforce the provisions hereof and pursue their respective rights hereunder in their own name, whether separately or with each other.
- 14.3 D&B Co and the Authority covenant with each other that they shall not waive any rights, remedies or entitlements or take any other action under this Agreement which would or might reasonably be expected to adversely affect the rights, remedies or entitlements of the other without the other's prior written consent, such consent not to be unreasonably withheld or delayed.

¹⁷¹ Where the Independent Tester intends to sub-contract any part of the Services, additional drafting should be included to identify any such sub-contractors and to ensure that the Independent Tester remains liable for the relevant part of the Services. The Authority should consider whether it is appropriate to obtain a warranty from such sub-contractors.

15. WAIVER

The failure of any party at any one time to enforce any provision of this Agreement shall in no way affect its right thereafter to require complete performance by any other party, nor shall the waiver of any breach or any provision be taken or held to be a waiver of any subsequent breach of any provision or be a waiver of the provision itself.

16. SEVERABILITY

In the event that any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, clause or provision shall, to that extent, be omitted from this Agreement and the rest of this Agreement shall stand, without affecting the remaining clauses.

17. VARIATION

A variation of this Agreement is valid only if it is in writing and signed by or on behalf of each party.

18. DISPUTE RESOLUTION PROCEDURE

18.1 All disputes shall be resolved in accordance with terms equivalent (*mutatis mutandis*) to the Dispute Resolution Procedure as set out in the D&B Agreement.

18.2 D&B Co, the Authority and the Independent Tester shall co-operate to facilitate the proper, just, economical and expeditious resolution of any and all such disputes which arise under this Agreement.

19. GOVERNING LAW AND JURISDICTION

Subject to Clause 18 (*Dispute Resolution Procedure*) above, this Agreement shall be governed by and construed in accordance with the laws of England and Wales, and (subject as aforesaid) the parties hereby submit to the non-exclusive jurisdiction of the courts of England and Wales.

20. COUNTERPARTS

This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full original of this Agreement for all purposes.

21. DELIVERY

This Agreement is delivered on the date written at the start of this Agreement.

22. THIRD PARTY RIGHTS

It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that save as expressly set out herein, no provision of this Agreement is intended to or does confer upon any third party any benefit or right enforceable at the option of that third party against any party to this Agreement.

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

APPENDIX 1 SCOPE OF SERVICES - INDEPENDENT TESTER CONTRACT¹⁷²

The Independent Tester shall perform the role of Independent Tester as referred to in Clauses 17 (*Pre-Completion Commissioning and Completion*) and 18 (*Post Completion Commissioning*) (including complying with any time limits specified in such Clauses) and Schedule 5 (*Construction Matters*), Schedule 6 (*The Programme*), Schedule 7 (*Review Procedure*) and Schedule 10 (*Outline Commissioning Programme*) of the D&B Agreement¹⁷³, by providing the following scope of Services:

1. MONTHLY REPORT AND COMPLETION CERTIFICATION

The Independent Tester shall:

- 1.1 During [the Works]¹⁷⁴, attend monthly site progress meetings and provide the Authority and D&B Co with a monthly report on the activities carried out by the Independent Tester and the status of the Project.
- 1.2 Undertake [regular on-site monitoring and inspections (with the aggregate duration of such inspections being [◆] hours a month) (including attendance at the monthly site progress meetings referred to at paragraph 1.1 above)]¹⁷⁵ during the Works, and in the case of completion activities, in accordance with Clauses [17.8 (*Commissioning prior to Completion Date*), 17.10 (*Pre-Completion Inspections*) and 18.4 (*Information*)] of the D&B Agreement¹⁷⁶.
- 1.3 Report on the completion status of the Project, identifying any work that is not compliant with the Authority's Construction Requirements, D&B Co's Proposals, the Approved RDD Items ("**Approved RDD**") and/or the Completion Criteria in accordance with Clause 17.11 (*Pre-Completion Matters*) of the D&B Agreement.
- 1.4 Determine whether the [Main] Works [and/or the Post Completion Works] [is/are] finished or complete in accordance with the Completion Criteria and advise D&B Co and the Authority of the need for any re-testing which may be necessary to demonstrate whether the [Main] Works [and/or the Post Completion Works] for the Project [is]/[are] finished or complete.
- 1.5 [Certify that the ICT Handover Requirements relating to the [Main] Works have been met and issue an ICT Acceptance Certificate in accordance with [◆] of the D&B Agreement.]

¹⁷² Authorities to ensure that the scope of services is appropriate and includes (where relevant) Post Completion Works.

¹⁷³ Authorities to insert any other relevant references.

¹⁷⁴ Authorities and their advisers should consider whether the regularity of progress meetings and monitoring ought to differ in the context of the specific Post Completion Works to be undertaken on the Project and adjust the drafting accordingly.

¹⁷⁵ Develop specifics on a project by project basis. The regularity of inspections should be governed by the capex of the project as follows:

- £5,000,000 - £24,999,999: four (seven hour) days a month (2 visits, monthly meeting, desk study and reporting)
- £25,000,000 - £99,999,999: five (seven hour) days a month (3 visits, monthly meetings, desk study and reporting)
- £100,000,000 upwards: seven (seven hour) days a month (3 visits, monthly meetings, desk study and reporting)

¹⁷⁶ Insert periods here if not included in Completion Criteria. Consider stages before the works are 'closed up'.

- 1.6 Certify the Actual Completion Date [and Actual Post Completion Works Date] and issue [a] Certificate[s] of Practical Completion in accordance with the D&B Agreement.¹⁷⁷
- 1.7 On the same day as the date of issue of the ICT Acceptance Certificate or Certificate of Practical Completion (as applicable), issue a Snagging List [or PCW Snagging List (in the case of a Certificate of Practical Completion in respect of Post Completion Works)] specifying any Snagging Items. Monitor and review rectification of such Snagging Items in accordance with Clauses 17.14 to 17.16 (*Snagging Items*) of the D&B Agreement.
- 1.8 Review the Snagging Programme [or PCW Snagging Programme (as appropriate)] for the rectification of all Snagging Items to be carried out and advise D&B Co and the Authority as appropriate. Identify items that have a lead time of more than twenty (20) Business Days from the date of issue of the Snagging List and advise on the reasonableness of any such longer lead times (up to a maximum period of three (3) months) in accordance with Clauses 17.14 to 17.16 (*Snagging Items*) of the D&B Agreement.
- 1.9 Monitor and report (weekly) on the completion of Snagging Items against the Snagging Programme [or PCW Snagging Programme (as appropriate)]. On satisfactory completion of the Snagging List [or PCW Snagging List (as appropriate)], issue the Snagging Items Completion Certificate in accordance with Clause 17.17 (*Snagging Items*) of the D&B Agreement.
- 1.10 In order to enable the Independent Tester to discharge these primary functions which are to be performed independently, fairly and impartially to and as between D&B Co and the Authority the Independent Tester shall discharge the further duties described below.
- 1.11 [The Independent Tester shall:
- 1.11.1 In accordance with the [relevant] Final Commissioning Programme and no earlier than the date that falls on the date that is [◆] weeks following the Actual Completion Date, carry out the [WiFi Post Completion Tests].
 - 1.11.2 Within five (5) Business Days of any inspection made pursuant to paragraph 1.11.1 above, notify D&B Co and the Authority of any outstanding matters required to be attended to before the WiFi Post Completion Tests can be considered to be completed.
- 1.12 Determine whether the WiFi is finished or complete in accordance with the WiFi PC Criteria and advise D&B Co and the Authority of the need for any re-testing which may be necessary to demonstrate whether the WiFi is finished or complete.

¹⁷⁷ This will include (amongst other things) testing Energy Efficiency against the levels bid (and incorporated within D&B Co's Proposals).

- 1.13 Certify the WiFi Actual Completion Date and issue a Certificate of WiFi Completion¹⁷⁸.]

2. GENERAL

The Independent Tester shall:

- 2.1 Familiarise itself with the D&B Agreement (including the Design Data, the Design Quality Plan, the Construction Quality Plan¹⁷⁹ and any Variations issued from time to time and any other relevant documentation or information referred to in the D&B Agreement and the Construction Contract to the extent necessary to enable it to provide a report to the Authority and D&B Co on any contradictory requirements contained within the same and to be in a position to carry out the Services in accordance with the terms of the D&B Agreement and this Agreement.
- 2.2 Following notification by D&B Co, pursuant to Clauses 17.8 and 17.10 (*Pre-Completion Inspections*) of the D&B Agreement, inspect and comment as required on the Works [and in respect of the Post Completion Works] as required by Clause 17.11 (*Pre-Completion Matters*) of the D&B Agreement.

3. DESIGN AUDIT REVIEW

The Independent Tester shall:

- 3.1 Monitor and report upon the implementation of the Design Quality Plan for the construction, structural and engineering services design for the Project, [on a monthly basis during the Works].
- 3.2 Through sample audit of [twenty-five percent (25%)] of the detailed working drawings and specifications for a range and type of rooms or such greater number as is in his professional judgment appropriate to be selected by the Independent Tester, monitor and verify that they comply with the Approved RDD as described in the D&B Agreement. If in the professional judgment of the Independent Tester, because of the results of its sample or other circumstances a greater than [twenty-five percent (25%)] sampling percentage is appropriate, he shall provide a detailed report in respect of that and, if so agreed (or determined as between D&B Co and the Authority by the Dispute Resolution Procedure) any increase in the percentage sampling resulting in a change in fees will be borne by D&B Co and the Authority as they shall agree or as determined by the Dispute Resolution Procedure.
- 3.3 [Review the detailed design information for any approved design or specification variations for compliance with the performance and quality standards of the D&B Agreement, [insert reference to Equipment Services Contract and any Equipment performance measures] and quality standards as set out in the [refer to Equipment Service Level Specification] and the Quality Plans.]

¹⁷⁸ Where specific post completion commissioning and/ or separate certification is required in respect of the energy efficiency solution on a project the Independent Tester's scope of services should be amended accordingly.

¹⁷⁹ Insert reference to any equipment list or other document as appropriate.

4. PROCEDURE REVIEW

The Independent Tester shall:

- 4.1 Monitor and report on the operation of the quality assurance procedures of the Contractor at [monthly] intervals during the execution of the Works.
- 4.2 The Independent Tester shall familiarise itself with the proposed procedures and programmes for the testing and commissioning of the [Mechanical and Electrical engineering services] prior to the Authority's occupation.
- 4.3 Monitor the procedures for the identification, approval and recording of agreed Variations to the Works in accordance with the D&B Agreement.
- 4.4 Review any samples or mock ups as required by Schedule [◆] and check that they have been approved in accordance with D&B Agreement.

5. CONSTRUCTION REVIEW

The Independent Tester shall:

- 5.1 Visit the Site and monitor the Works for their compliance with the Authority's Construction Requirements, D&B Co's Proposals and the Approved RDD.¹⁸⁰ The frequency and timing of the Independent Tester's visits are dependent on the progress of construction on [the relevant] Site. The Contractor shall agree a programme with the Independent Tester for the inspection of [Key Construction Processes]¹⁸¹ and the completed Works [and the Post Completion Works] and shall give the Independent Tester advance notice of these Works being carried out on the Site.
- 5.2 At least [once a month], randomly check that the Works are being undertaken in accordance with the Authority's Construction Requirements and the Construction Quality Plan that has been agreed by the Authority and D&B Co and report on findings.
- 5.3 Review the written mechanical and electrical engineering services testing and commissioning procedure pursuant to paragraph 4.2 above and through a sample audit of [fifty percent (50%)] undertake selective witnessing of the mechanical and electrical services final testing and commissioning. The Independent Tester shall review [one hundred] percent [(100%)] of all final test certification and reports. If in the professional judgment of the Independent Tester, because of the results of witnessing (or because of other circumstances) a different sampling percentage is appropriate for final testing and commissioning he shall provide a detailed report in

¹⁸⁰ Authorities to insert any other relevant documents.

¹⁸¹ To be defined on a project specific basis. This should include stages of the Works that need to be inspected before being covered over by subsequent activity so that the Independent Tester may satisfy himself that these stages have been constructed in accordance with the Quality Plans, without the need for opening up.

respect of that and any change in the percentage sampling resulting in a change of fees will be borne by D&B Co, the Authority or the Contractor as they shall agree and failing such agreement, as determined by the Dispute Resolution Procedure.

- 5.4 Inspect rectification works which have previously prevented the Independent Tester from certifying the Project as complete.
- 5.5 Check the delivery of hard copies of the relevant operating manuals, relevant approvals, test results, inspection records, "final issue" construction drawings, "as-built" specification and "as-built" drawings to the Authority [and monitor compliance with required "data drops" of the same, pursuant to the Project BIM Agreement and the D&B Agreement].

6. **PARTICIPATION IN DISPUTE RESOLUTION**

In accordance with Clause 3 (*Services And Varied Services*) of the Independent Tester Contract, as and when required by the Authority or D&B Co, the Independent Tester shall participate in the Dispute Resolution Procedure of the D&B Agreement (as such term is defined in the D&B Agreement) and/or the Dispute Resolution Procedure of the Construction Contract (as the case may be) to the extent that such issues under the D&B Agreement which have been referred to the said Dispute Resolution Procedure relate to the Independent Tester's other obligations and tasks as set out in this Appendix 1 and this Agreement.

APPENDIX 2 [↕]

SECTION 1
SCHEDULE OF DRAWDOWN OF FEES

SECTION 2
SCHEDULE OF DAILY RATES

APPENDIX 3 KEY PERSONNEL

SCHEDULE 10¹⁸²

OUTLINE COMMISSIONING PROGRAMME

APPENDIX A COMMISSIONING RESPONSIBILITIES

¹⁸² To be completed on a project specific basis. Consideration should be given to Schedule 10 of the Template MIM Education PA, with appropriate amendments as may be required in the context of this Template Education D&B Agreement.

APPENDIX B COMPLETION CRITERIA

**SCHEDULE 11
EQUIPMENT¹⁸³**

**SECTION 1
GENERAL**

¹⁸³ To be completed on a project specific basis. Consideration should be given to Schedule 11 of the Template MIM Education PA, with appropriate amendments as may be required in the context of this Template Education D&B Agreement.

SCHEDULE 12

INSURANCE REQUIREMENTS¹⁸⁴

SECTION 1

POLICIES TO BE TAKEN OUT BY D&B CO FROM COMMENCEMENT OF THE WORKS AND TO BE MAINTAINED FOR THE PERIODS SPECIFIED IN THIS SCHEDULE 12

Common to each policy in Section 1 (unless stated otherwise):

Insureds:

1. Authority
2. D&B Co
3. Contractor
4. Construction sub-contractors of any tier (where required by contract)
5. Consultants - for their site activities only

each for their respective rights and interests in the Project

1. Contractors' 'All Risks' Insurance (CAR)

1.1 Insured Property

The permanent and temporary works, materials [(including but not limited to equipment supplied by the Authority¹⁸⁵], goods, plant and equipment for incorporation in the Works (other than constructional plant, tools, accommodation and equipment belonging to or the responsibility of the Contractor or the Construction sub-contractors) and all other property used or for use in connection with works associated with the Project (the "**Insured Property**").

¹⁸⁴ Authorities should seek independent advice on the scope and terms of the project insurances on a project specific basis. In relation to Business Interruption cover the Authority should be named as a co-insured party to the extent it has a demonstrable insurable interest. This will be in connection with any additional cost of working insured against under the terms of the policy, and not with respect to any loss of anticipated revenue.

¹⁸⁵ Details (description and reinstatement value) of any such equipment will need to be provided to D&B Co to enable them to include cover under the CAR policy.

1.2 Coverage

"All risks" of physical loss or damage to the Insured Property unless otherwise excluded.

1.3 Sum Insured

At all times an amount not less than the full reinstatement or replacement value of the Insured Property, plus provision to include extensions as appropriate.

1.4 Maximum Deductible

£[♦]¹⁸⁶.

1.5 Territorial Limits

United Kingdom including offsite storage and during inland transit.

1.6 Period of Insurance

From the date of this Agreement until the [later of the [final] Actual Completion Date and the [final] Actual Post Completion Works Date]¹⁸⁷ and thereafter in respect of defects liability until expiry of the [final] twelve (12) months defects liability period.

1.7 Cover Features & Extensions

- 1.7.1 Terrorism
- 1.7.2 Munitions of war clause
- 1.7.3 Additional costs of completion clause
- 1.7.4 Professional fees clause
- 1.7.5 Debris removal clause

¹⁸⁶ It may be appropriate for an Authority to specify a different deductibles in respect of a Site specific risk, such as flood risk, following consultation with its insurance adviser. Authority to determine a maximum deductible level that is commensurate with the risk based on prevailing UK insurance market conditions.

¹⁸⁷ The Authority should populate the period of insurance relative to the requirement in question. The period of insurance should reflect the period that the relevant insurable risk can materialise and take into account any contract specific issues such as phasing.

- 1.7.6 Seventy-two (72) hour clause
- 1.7.7 European Union local authorities clause
- 1.7.8 Free issue materials clause
- 1.7.9 Ten per cent (10%) escalation clause
- 1.7.10 Automatic reinstatement of sum insured clause
- 1.7.11 Loss minimisation

1.8 Principal Exclusions

- 1.8.1 War and related perils (UK market agreed wording)
- 1.8.2 Nuclear/radioactive risks (UK market agreed wording)
- 1.8.3 Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds
- 1.8.4 Wear, tear and gradual deterioration
- 1.8.5 Consequential financial losses
- 1.8.6 Cyber risks
- 1.8.7 Inventory losses
- 1.8.8 Fraud and employee dishonesty
- 1.8.9 DE5/DE3 drop down option

2. Construction Third Party Liability Insurance

2.1 Interest

To indemnify the Insured in respect of all sums that they may become legally liable to pay (including claimant's costs and expenses) as damages in respect of accidental:

- 2.1.1 death, or bodily injury, illness, disease contracted by any person;
- 2.1.2 loss or damage to property;
- 2.1.3 interference to property or any easement right of air, light, water or way or the enjoyment or use thereof by obstruction, trespass, nuisance, loss of amenities, or any like cause.

happening during the Period of Insurance and arising out of or in connection with the Project.

2.2 Limit of Indemnity

Not less than £[♦]m in respect of any one (1) occurrence, the number of occurrences being unlimited, but in the aggregate in respect of pollution liability.¹⁸⁸

2.3 Maximum Deductible

£[♦] for each and every occurrence of property damage. (Personal injury claims will be paid in full).¹⁸⁹

2.4 Territorial Limits

UK and elsewhere in the world in respect of non manual visits.

2.5 Jurisdiction

Worldwide excluding USA and Canada.

2.6 Period of Insurance

As per the Contractors' 'All Risks' Insurance, including the Defects Liability Period.

¹⁸⁸ The Authority should set the Limit of Indemnity by way of an insurable risk review the level specified should be predicated upon:

- The risk profile represented by the Authority requirement in question
- Potential frequency and severity of claims and losses (not the value of the contract) relative to the risk exposure
- Insurance market availability in prevailing insurance market conditions.

¹⁸⁹ Authority to determine a maximum deductible level that is commensurate with risk based on prevailing UK insurance market conditions.

2.7 Cover Features & Extensions

- 2.7.1 Munitions of war
- 2.7.2 Cross liability clause
- 2.7.3 Contingent motor
- 2.7.4 Legal defence costs

2.8 Principal Exclusions

- 2.8.1 Liability for death, illness, disease or bodily injury sustained by employees of the Insured.
- 2.8.2 Liability arising out of the use of mechanically propelled vehicles whilst required to be compulsorily insured by legislation in respect of such vehicles.
- 2.8.3 Liability in respect of predetermined penalties or liquidated damages imposed under any contract entered into by the Insured.
- 2.8.4 Liability in respect of loss or damage to property in the care, custody and control of the Insured but this exclusion is not to apply to all property belonging to the Authority which is in the care, custody and control of another Insured.
- 2.8.5 Events more properly covered under a professional indemnity policy.
- 2.8.6 Liability arising from the ownership, possession or use of any aircraft or marine vessel.
- 2.8.7 Liability arising from seepage and pollution unless caused by a sudden, unintended and unexpected occurrence.
- 2.8.8 Losses indemnified under the CAR policy.

SECTION 2

[POLICIES TO BE TAKEN OUT BY THE AUTHORITY PRIOR TO COMMENCEMENT OF THE WORKS AND TO BE MAINTAINED FOR THE PERIODS SPECIFIED IN THIS SCHEDULE 12¹⁹⁰

Common to all policies in Section 2 (unless stated otherwise):

Insureds

1. Authority
2. D&B Co
3. Contractor
4. Construction sub-contractors of any tier
5. Consultants for their site activities only

each for their respective rights and interests in the Project.

1. Existing Structures Insurance

1.1 Insured Property

Any existing structures owned by the Authority or in respect of which the Authority is responsible and any contents thereof owned by the Authority or for which the Authority is responsible (the "**Insured Property**").

1.2 Coverage

"All risks" of physical loss or damage to the Insured Property unless otherwise excluded.

1.3 Sum Insured

At all times an amount not less than the full reinstatement or replacement value of the Insured Property, plus provision to include as appropriate.

¹⁹⁰ To be considered whether appropriate/ relevant on a project specific basis.

1.4 Maximum Deductible

£[♦]

1.5 Territorial Limits

United Kingdom including offsite storage and during inland transit.

1.6 Period of Insurance

From the date of this Agreement until [the later of the Actual Completion Date and the Actual Post Completion Works Date] and thereafter in respect of the defects liability until expiry of the [final] [twelve 12] months Defects Liability Period.

1.7 Cover Features & Extensions

1.7.1 Terrorism

1.7.2 Capital additional clause

1.7.3 Professional fees clause

1.7.4 Debris removal clause

1.7.5 Seventy-two (72) hour clause

1.7.6 European Union local authorities clause

1.7.7 10% escalation clause

1.7.8 Automatic reinstatement of sum insured clause

1.7.9 Loss minimisation

1.7.10 Pollution and Contamination to the Insured Property arising from an event which itself is not otherwise excluded

1.8 Principal Exclusions

1.8.1 War and related perils (UK market agreed wording)

- 1.8.2 Nuclear/radioactive risks (UK market agreed wording)
- 1.8.3 Pressure waves caused by aircraft and other aerial devices travelling at sonic or supersonic speeds
- 1.8.4 Wear, tear and gradual deterioration
- 1.8.5 Consequential financial losses
- 1.8.6 Cyber risks
- 1.8.7 Inventory losses, fraud and employee dishonesty]

SECTION 3
ENDORSEMENTS¹⁹¹

Unless the context otherwise requires defined terms set out in the following endorsements shall have the meaning set out in the Agreement.

Endorsement 1

Cancellation

1. This policy shall not be cancelled or terminated before the original expiry date is to take effect except in respect of non-payment of premium.

2. The insurer shall by written notice advise the Authority:
 - 2.1 at least thirty (30) days before any such cancellation or termination is to take effect;

 - 2.2 at least thirty (30) days before any reduction in limits or coverage or any increase in deductibles is to take effect; and

 - 2.3 of any act or omission or any event of which the insurer has knowledge and which might invalidate or render unenforceable in whole or in part this policy.

Endorsement 2

Multiple Insured/Non-Vitiation Clause

1. Each of the parties comprising the insured shall for the purpose of this policy be considered a separate co-insured entity, insured on a composite basis, with the words "the insured" applying to each as if they were separately and individually insured provided that the total liability of the insurers under each section of this policy to the insured collectively shall not (unless the policy specifically permits otherwise) exceed the limit of indemnity or amount stated to be insured under that section or policy. Accordingly, the liability of the insurers under this policy to any one insured shall not be conditional upon the due observance and fulfilment by any other insured party of the terms and conditions of this policy or of any duties imposed upon that insured party relating thereto, and shall not be affected by any failure in such observance or fulfilment by any such other insured party.

2. It is understood and agreed that any payment or payments by insurers to any one or more of the insureds shall reduce, to the extent of that payment, insurers' liability to all such parties

¹⁹¹ The endorsements are recommended drafting. Whilst the parties should endeavour to obtain cover in accordance with this wording, if these endorsements are not in practice available, the parties should obtain the best terms reasonably available in the market at the time.

arising from any one (1) event giving rise to a claim under this policy and (if applicable) in the aggregate.

3. Insurers shall be entitled to avoid liability to or (as may be appropriate) claim damages from any insured party in circumstances of fraud misrepresentation non-disclosure or material breach of warranty or condition of this policy (each referred to in this Clause as a "**Vitiating Act**") committed by that insured party save where such misrepresentation non-disclosure or breach of warranty or condition was committed innocently and in good faith.
4. For the avoidance of doubt it is however agreed that a Vitiating Act committed by one insured party shall not prejudice the right to indemnity of any other insured who has an insurable interest and who has not committed the Vitiating Act.
5. Insurers hereby agree to waive all rights of subrogation and/or recourse which they may have or acquire against any insured party (together with their employees and agents) except where the rights of subrogation or recourse are acquired in consequence of a Vitiating Act in which circumstances insurers may enforce such rights against the insured responsible for the Vitiating Act notwithstanding the continuing or former status of the vitiating party as an insured.
6. Notwithstanding any other provision of this policy or any other document or any act and/or omission by any insured party insurers agree that:
 - 6.1 no party other than the Authority has any authority to make any warranty, disclosure or representation in connection with this policy on behalf of the Authority;
 - 6.2 where any warranty, disclosure or representation is required from the Authority in connection with this policy insurers will contact the Authority in writing (in accordance with Endorsement 3 to the Contract) and set out expressly the warranty, disclosure and/or representation required within a reasonable period of time from the Authority (regarding itself); and
 - 6.3 save as set out in a request from insurers to the Authority in accordance with (paragraph 2) above, the Authority shall have no duty to disclose any fact or matter to insurers in connection with this policy save to the extent that for the Authority not to disclose a fact or matter would constitute fraudulent misrepresentation and/or fraudulent non-disclosure.

Endorsement 3

Communications

1. All notices or other communications under or in connection with this policy shall be given to each insured (and the Authority) in writing or by email. Any such notice will be deemed to be given as follows:
 - 1.1 if in writing, when delivered;

1.2 [if by email:

1.2.1 at the time the email enters the information system of the intended recipient designated by them to receive electronic notices pursuant to paragraph 2 below, if sent on a Business Day between the hours of 9am and 4pm; or

1.2.2 by 11am on the next following Business Day, if the email enters the intended recipient's relevant information system after 4pm, on a Business Day but before 9am on that next following Business Day,

and provided no error message indicating failure has been received by the sender and in the case of notices issued pursuant to paragraph 2 of Endorsement 1 of Section 3 (*Endorsements*) of this Schedule 12 (*Insurance Requirements*) provided that within twenty-four (24) hours of transmission a hard copy of the email (signed by or on behalf of the person giving it) is sent by post or delivered by hand to the intended recipient [and, where such notice is addressed to the Authority, copied to [♦¹⁹²].]

2. The postal address and email address of the Authority for all notices under or in connection with this policy are those notified from time to time by the Authority for this purpose to D&B Co at the relevant time. The initial postal address and email address of the Authority are as follows:

The Authority: [♦]

Address: [♦]

Email: [♦]

Attention: The Chief Executive from time to time of the Authority.

3. It is further agreed that a notice of claim given by the Authority or any other insured shall in the absence of any manifest error be accepted by the insurer as a valid notification of a claim on behalf of all insureds.

Endorsement 4

Loss Payee (applicable only to the Physical Damage Policies)

All proceeds of this policy shall be payable without deduction or set-off to the Insurance Proceeds Account.

¹⁹² Insert Welsh Government details.

Endorsement 5

Primary Insurance

It is expressly understood and agreed that this policy provides primary cover for the insured parties and that in the event of loss destruction damage or liability covered by this policy which is covered either in whole or in part under any other policy or policies of insurance effected by or on behalf of any of the insured parties the insurers will indemnify the insured parties as if such other policy or policies of insurance were not in force and the insurers waive their rights of recourse if any against the insurers of such other policy or policies of insurance.

Endorsement 6

Ringfencing

The level of any indemnity available to an insured party under this policy in relation to any claim(s) concerning the Project shall not be affected and/or reduced by any claim(s) unrelated to the Project.

SECTION 4

BROKER'S LETTER OF UNDERTAKING¹⁹³

To: The Authority

Dear Sirs

Agreement dated [♦] entered into between [♦] Limited ("D&B Co") and [♦] (the "Authority") (the "Agreement")

1. We refer to the Agreement. Unless the context otherwise requires, terms defined in the Agreement shall have the same meaning in this letter.
2. We act as insurance broker to D&B Co in respect of the Insurances and in that capacity we confirm that the Insurances which are required to be procured pursuant to Clause 41 (*Insurance*) and Schedule 12 (*Insurance Requirements*) of the Agreement:
 - 2.1 where appropriate name you and such other persons as are required to be named pursuant to the Agreement for their respective interests;
 - 2.2 are, in our reasonable opinion as insurance brokers, as at today's date, in full force and effect in respect of all the matters specified in the Agreement; and
 - 2.3 that all premiums due to date in respect of the Insurances are paid and the Insurances are, to the best of our knowledge and belief, placed with insurers which, as at the time of placement, are reputable and financially sound. We do not, however, make any representations regarding such insurers' current or future solvency or ability to pay claims; and that
 - 2.4 the endorsements set out in Section 3 (*Endorsements*) of Schedule 12 (*Insurance Requirements*) of the Agreement are as at today's date in full force and effect in respect of the Insurances.
3. We further confirm that the attached cover notes confirm this position.

¹⁹³ This is recommended drafting. If agreement to this wording is not in practice achievable, then the parties should agree the best terms reasonably available in the market at the time. D&B Co's broker may wish to limit its liability and include additional liability wording in the Broker's Letter of Undertaking. Whilst this is in principle acceptable, the Authority will need to check that (i) the scope of such additional wording is appropriate (e.g. does not extend to a limitation of liability for fraudulent acts), and (ii) the capped amount is set at a sufficiently high level.

4. Pursuant to instructions received from D&B Co and in consideration of your approving our appointment [or continuing appointment] as brokers in connection with the Insurances, we hereby undertake in respect of the interests of the Authority in relation to the Insurances:

4.1 Notification Obligations

- 4.1.1 to notify you at least thirty (30) days prior to the expiry of any of the Insurances if we have not received instructions from D&B Co to negotiate renewal and in the event of our receiving instructions to renew, to advise you promptly of the details thereof; and
- 4.1.2 to notify you at least thirty (30) days prior to ceasing to act as brokers to D&B Co unless, due to circumstances beyond our control, we are unable to do so in which case we shall notify you as soon as practicable.

4.2 Advisory Obligations

- 4.2.1 to notify you promptly of any default in the payment of any premium for any of the Insurances;
- 4.2.2 to notify you if any insurer cancels or gives notification of cancellation of any of the Insurances, at least thirty (30) days before such cancellation is to take effect or as soon as reasonably practicable in the event that notification of cancellation takes place less than thirty (30) days before it is to take effect;
- 4.2.3 to notify you of any act or omission, breach or default of which we have knowledge which in our reasonable opinion may either invalidate or render unenforceable in whole or in part any of the Insurances or which may otherwise materially impact on the extent of cover provided under the Insurances; and
- 4.2.4 to advise D&B Co of its duties of disclosure to insurers and to specifically advise upon:
- (a) the facts, circumstances and beliefs that should generally be disclosed to insurers; and
 - (b) the obligation not to misrepresent any facts, matters or beliefs to insurers.

4.3 Disclosure Obligations

- 4.3.1 to disclose to insurers all information made available to us from any source and any fact, change of circumstances or occurrence made known to us from any source which in our reasonable opinion is

material to the risks insured against under the Insurances and which properly should be disclosed to insurers as soon as practicable after we become aware of such information, fact, change of circumstance or occurrence whether prior to inception or renewal or otherwise; and

- 4.3.2 to treat as confidential all information so marked or otherwise stated to be confidential and supplied to us by or on behalf of D&B Co or the Authority and not to disclose such information, without the prior written consent of the supplier, to any third party other than those persons who, in our reasonable opinion have a need to have access to such information from time to time, and for the purpose of disclosure to the insurers or their agents in respect of the Insurances in discharge of our obligation set out at Clause 4.3.1 of this letter. Our obligations of confidentiality shall not conflict with our duties owed to D&B Co and shall not apply to disclosure required by an order of a court of competent jurisdiction, or pursuant to any applicable law, governmental or regulatory authority having the force of law or to information which is in the public domain.

4.4 Administrative Obligations

- 4.4.1 to hold copies of all documents relating to or evidencing the Insurances, including but without prejudice to the generality of the foregoing, insurance slips, contracts, policies, endorsements and copies of all documents evidencing renewal of the Insurances, payment of premiums and presentation and receipt of claims;
- 4.4.2 to supply to the Authority and/or its insurance advisers (or the Authority's or its insurance advisers' authorised representatives) promptly on written request copies of the documents set out in Clause 4.4.1 of this letter, and to the extent available, to make available to such persons promptly upon the Authority's request the originals of such documents;
- 4.4.3 to administer the payment of premiums due pursuant to the Insurances such that, in so far as we hold appropriate funds, all such premiums shall be paid to insurers in accordance with the terms of the Insurances;
- 4.4.4 to administer the payment of claims from insurers in respect of the Insurances (the "Insurance Claims") including:
- (a) negotiating settlement of Insurance Claims presented in respect of the Insurances;
 - (b) collating and presenting all information required by insurers in relation to Insurance Claims presented in respect of the Insurances; and

(c) insofar as it is relevant and practicable, liaising with and reporting to each Authority throughout the settlement, payment and administration of such Insurance Claims.

4.4.5 to advise the Authority promptly upon receipt of notice of any material changes which we are instructed to make in the terms of the Insurances and which, if effected, in our opinion as Insurance Brokers would result in any material reduction in limits or coverage or in any increase in deductibles, exclusions or exceptions;

4.4.6 to advise the Authority in advance of any change to the terms of, or any lapse, non-renewal and/or cancellation of any policy maintained in respect of the Insurances; and

4.4.7 to use our reasonable endeavours to have endorsed on each and every policy evidencing the Insurances (when the same is issued) endorsements substantially in the form set out in Section 3 (*Endorsements*) to Schedule 12 (*Insurance Requirements*) of the Agreement.

5. Notification Details

5.1 Our obligations at paragraph 4 of this letter to notify or inform you shall be discharged by providing the requisite information in hard copy to the Authority.

5.2 We shall supply further letters substantially in this form on renewal of each of the Insurances and shall supply copies of such letters to those parties identified to us by the Authority for such purposes.

6. This letter shall be governed by and construed in accordance with the laws of England and Wales.

Yours faithfully

For and on behalf of [D&B Co's broker]

SCHEDULE 13
VARIATION PROCEDURE

SECTION 1
INTERPRETATION

For the purposes of this Agreement, and in particular this Schedule 13 (*Variation Procedure*), unless the context requires otherwise:

- "Authority Works Variation"** means a variation to the Works initiated by the Authority in accordance with this Schedule 13 (*Variation Procedure*);
- "Authority Works Variation Enquiry"** means a Variation Enquiry issued by the Authority pursuant to paragraph 2.1 of Section 2 of Schedule 13 (*Variation Procedure*);
- "Qualifying Variation"** means a Variation for which a Variation Confirmation has been issued and the supplementary agreement referred to in paragraph 4.4 of Section 2 of Schedule 13 (*Variation Procedure*) has become unconditional in all respects;
- "Variation"** means an Authority Works Variation;
- "Variation Confirmation"** has the meaning given in paragraph 4.4 of Section 2 of Schedule 13 (*Variation Procedure*); and
- "Variation Enquiry"** has the meaning given in paragraph 2.1 of Section 2 of Schedule 13 (*Variation Procedure*).

SECTION 2
VARIATIONS

1. General

Subject to receiving the Variation Confirmation issued in accordance with the terms of this Schedule 13 (*Variation Procedure*) and to any Consent which must be obtained or modified being so obtained or modified and subject to the other provisions of this Schedule 13 (*Variation Procedure*), D&B Co shall be under a duty to implement a Variation. D&B Co will not be entitled to any payment or compensation for or in respect of a Variation save as provided in accordance with this Schedule 13 (*Variation Procedure*).

2. Variation Enquiries

2.1 A Variation Enquiry shall be a document issued by the Authority's Representative which:

2.1.1 states on its face that it is a Variation Enquiry; and

2.1.2 specifies the nature of the Authority Works Variation and which of the provisions of the Authority's Construction Requirements and/or D&B Co's Proposals are required to be amended to accommodate the relevant Authority Works Variation.¹⁹⁴

2.2 The Authority's Representative may not issue a Variation Enquiry other than in accordance with the provisions of this Section 2.

3. D&B Co Response to Variation Enquiry

Preliminary Indicative Information

3.1 Prior to giving a notice referred to in paragraph 3.2 of this Section 2:

3.1.1 D&B Co may at its option within ten (10) Business Days of receipt of a Variation Enquiry:

(a) give to the Authority in good faith a preliminary non-binding indication of the estimated cost of implementing the Variation and provide such other information about the Variation as is available to D&B Co and which it believes is useful to the Authority; and

¹⁹⁴ The reference to D&B Co's Proposals has been included to give Authorities flexibility in circumstances where it is not possible to outline the change required solely by reference to the Authority's Construction Requirements. This option should be used on a limited basis (so that, wherever possible, the Authority's Construction Requirements alone are used for this purpose) taking account of risk transfer implications if D&B Co's Proposals are amended by the Authority.

- (b) such information shall include in particular D&B Co's estimated effect on the date when the Actual Completion Date [and/or Actual Post Completion Works Date] will occur;

3.1.2 if D&B Co provides the indication of estimated costs referred to in paragraph 3.1.1(a), the Authority shall within a further five (5) Business Days of its receipt confirm whether or not it wishes D&B Co to proceed to respond to the Variation Enquiry in accordance with provisions of paragraph 3.2.

D&B Co Response

3.2 Within [one (1) month] of receipt of a Variation Enquiry or (if the provisions of paragraph 3.1.2 apply) within [one (1) month] of the Authority confirming that it wishes D&B Co to proceed with responding to the Variation Enquiry or in either case such longer period as may be agreed by the parties or determined in accordance with Schedule 15 (*Dispute Resolution Procedure*) as reasonable given the nature of the Variation Enquiry and all other relevant considerations, D&B Co shall either:

3.2.1 give notice to the Authority's Representative that it objects to the Variation Enquiry stating the grounds of the objection. D&B Co may only object to a Variation Enquiry on one or more of the following grounds:

(a) that implementation of the Variation would materially and adversely affect the health and safety of any person; or

(b) that implementation of the Variation would:

(i) infringe any Law; or

(ii) cause any existing Consent (which is not reasonably likely, on a balance of probabilities, to be capable of modification) to be revoked; or

(iii) require a new Consent which will not (using all reasonable endeavours) be obtainable; or

(iv) have a material and adverse effect on the carrying out of the Works (except those Works which have been specified as requiring to be amended in the Variation Enquiry) in a manner not compensated pursuant to this Schedule 13 (*Variation Procedure*); or

(v) be a departure from Good Industry Practice; or

- (c) that the Authority does not have the legal power or capacity to require the Variation to be implemented or to do anything envisaged by this Schedule 13 (*Variation Procedure*) in respect of, or in connection with, the Variation; or
- (d) that the Variation would, if implemented, result in a change in the essential nature of the Facilities; or
- (e) that the Variation Enquiry does not comply with paragraph 2 of this Section 2; or
- (f) that the information contained in the Variation Enquiry is inadequate to enable D&B Co to respond in accordance with paragraph 3.2.2 below (on the assumption, whether or not the case, that it has no objection under paragraphs (a) to (e));

or

3.2.2 give notice to the Authority's Representative stating:

- (a) the steps which D&B Co proposes to take to implement the Variation giving such level of detail as is reasonable and appropriate in all the circumstances D&B Co's estimated increase or decrease in the Development Amount calculated in accordance with paragraph 1 of Section 3 of this Schedule 13 (*Variation Procedure*) in respect of the Variation having regard to all relevant facts and matters, including any costs (by line item) incurred or to be incurred under paragraph 5 of this Section 2.
- (b) whether, in the view of D&B Co, implementing the Authority Works Variation Enquiry would be likely to prevent the Actual Completion Date from occurring at the Completion Date [or the Actual Post Completion Works Date from occurring at the Post Completion Works Date] (prior to any adjustment being made to the Completion Date [or Post Completion Works Date, as appropriate,] by reason of the implementation or proposed implementation of the Authority Works Variation) and, if so, giving an estimate of the extension of time likely to be required (subject to any further time required to obtain or amend any Consent);
- (c) any Consent which must be obtained or amended for the Variation to be implemented and the latest date by which D&B Co must receive a Variation Confirmation and any such Consent must be obtained or modified for the matters set out in paragraph 3.2.1(b)(i) to paragraph 3.2.1(b)(v) inclusive above to remain valid, such date being a reasonable period of time after service of the notice by D&B Co under this paragraph 3.2.2 to enable the Authority's Representative to consider any matter under paragraph 4.1.3 below; and

- (d) such amendments to the provisions of this Agreement which are necessary as a consequence of the Variation, the objective of such amendments being to ensure that (save for the obligation of the Authority to make payments or altered payments in respect of the Variation or any other adverse consequences for the Authority arising from the Variation itself) the parties are in no better and no worse position in relation to the Project than they would have been in if such Variation had not been implemented.

4. Resolution of Disputes and Variation Confirmation

4.1 Within ten (10) Business Days of receipt of the notice referred to in paragraph 3.2 of this Section 2:

4.1.1 if D&B Co has served a notice under paragraph 3.2.1 but the Authority's Representative does not accept that D&B Co is entitled to object to the Variation Enquiry, the matter may be referred for resolution in accordance with Schedule 15 (*Dispute Resolution Procedure*) and if the Dispute is resolved in favour of the Authority then D&B Co shall forthwith give the notice referred to in paragraph 3.1.2;

4.1.2 if the contents of the notice under paragraph 3.1.2 shall be to the satisfaction of the Authority's Representative he shall so inform D&B Co and the parties shall proceed to agree or determine all the matters referred to in paragraph 4.3 of this Section 2; or

4.1.3 if he wishes to consider further any matter, the Authority's Representative may give notice to that effect to D&B Co provided that if no response is given under paragraph 4.1.2 of this paragraph 4.1 prior to the date referred to in paragraph 3.2, the Variation Enquiry shall be deemed to have been withdrawn; or

4.1.4 if any aspect of a notice under paragraph 3.2.2 shall not be to the Authority's Representative's satisfaction he shall so notify D&B Co and shall specify the alterations to the notice which he would require in order to be so satisfied.

4.2 If the Authority's Representative has given a notice referred to in paragraph 4.1.4 of this Section 2 then, unless agreement has been reached with D&B Co within a further ten (10) Business Days from the date of issue of that notice (in which case the Authority's Representative shall proceed pursuant to paragraph 4.1.2 of this Section 2) or the Authority's Representative withdraws the Variation Enquiry, the outstanding Dispute shall be referred for resolution in accordance with Schedule 15 (*Dispute Resolution Procedure*) to be determined (if the Authority's Representative so requires it) concurrently with any matter referred to in paragraph 4.3 of this Section 2. In seeking to reach agreement and/or in so determining a Dispute pursuant to this paragraph or to paragraph 4.3, the criterion to be applied to resolve any such Dispute (except where another criterion or other criteria are expressly or by implication stated in this Schedule 13 (*Variation Procedure*)) shall be that D&B Co shall be in no worse position in relation to the

Project and the Works after the Variation is implemented than it would have been in had the Variation not been implemented.

4.3 The parties shall meet and seek to agree the matters referred to in paragraphs 4.3.1 and 4.3.2 in relation to the Variation, failing which agreement being reached in a reasonable period of time, either party may refer any matter for resolution in accordance with Schedule 15 (*Dispute Resolution Procedure*). The matters to be agreed or determined are:

4.3.1 in relation to the terms of the Variation:

- (a) any alteration to the Completion Date [or Post Completion Works Date];
- (b) the increase or decrease in the Development Amount calculated in accordance with paragraph 1 of Section 3 of this Schedule 13 (*Variation Procedure*);
- (c) any amendment to the provisions of this Agreement which is referred to in paragraph 3.2.2(d),

in each case occasioned by the Variation; and

4.3.2 the terms of a supplementary agreement under which:

- (a) as required to give effect to the Variation in each case, the Authority's Construction Requirements and/or D&B Co's Proposals are amended; and/or provision is made for the amendment of the as-built drawings and specifications, including room data sheets and other records, drawings, operating and maintenance manuals, the asset register, the health and safety file; and
- (b) the matters referred to in paragraph 4.3 of this Section 2 are fully recorded and given effect as amendments to and/or other variations to the provisions of this Agreement and/or such other documentation as is necessary.

4.4 Upon the agreement or determination of all the matters referred to in paragraph 4.3, and upon any Consent having been modified or obtained, in accordance with paragraph 5 in terms reasonably satisfactory to D&B Co and the Authority, the Authority's Representative shall, by notice (a "**Variation Confirmation**") confirm the Variation. Upon the issue of the Variation Confirmation, the parties shall enter into the supplementary agreement referred to in paragraph 4.3.

4.5 Upon the Variation Confirmation being issued and the supplementary agreement referred to in paragraph 4.4 becoming unconditional in all respects:

4.5.1 the relevant Variation shall be a Qualifying Variation; and

4.5.2 the rights and liabilities of the parties under this Agreement shall be construed accordingly.

5. Consent and Variations

5.1 If it shall be necessary to obtain or amend any Consent¹⁹⁵ in respect of any Variation then D&B Co shall use all reasonable endeavours to obtain and, where the co-operation and involvement of both parties is required, the Authority shall use all reasonable endeavours to assist and co-operate in obtaining, such Consent. The provisions of Clause 11 (*Consents and Planning Approval*) shall apply in relation to Planning Permissions, save that the time taken to obtain such Consent shall be taken into account for the purposes of determining any extension of time and any other amounts payable by the Authority to D&B Co under this Schedule 13 (*Variation Procedure*).

5.2 If it shall not be possible to obtain any such Consent as is referred to in paragraph 5.1 above by the latest date when a Variation Confirmation could be given with regard to the Variation in question in accordance with the notice by D&B Co pursuant to paragraph 3.2.2 of this Section 2 of Schedule 13 (*Variation Procedure*), the Variation Enquiry shall be deemed to be withdrawn and the provisions of paragraph 6 of this Section 2 of Schedule 13 (*Variation Procedure*) shall apply accordingly.

6. Withdrawal

The Authority's Representative may withdraw a Variation Enquiry at any time prior to the issue of a Variation Confirmation, or, in the case of a Variation which requires the obtaining of, or an amendment to any Consent, the date when the last such Consent is granted, whichever shall be later. In the case of a withdrawal or deemed withdrawal the Authority shall pay D&B Co all out of pocket expenses reasonably and properly incurred by D&B Co in connection with the Variation.

¹⁹⁵ Care must be taken to consider whether there will be Consents which, in principle, ought to be obtained by the Authority.

SECTION 3

PAYMENT IN RESPECT OF VARIATIONS

Adjustment to Contract Sum

1. The increase or reduction in the Development Amount arising out of a Qualifying Variation shall be calculated on the basis of a fair and reasonable valuation of the aggregate of any increased design and construction costs (including insurance costs and costs that arise as a consequence of the effect on the regular progress of the Works) less the aggregate of any reduction in design and construction costs which result directly from the Qualifying Variation.
2. Where the effect of a Qualifying Variation is an increase in the Development Amount, then as part of the matters to be agreed pursuant to paragraph 4.3 of Section 2:

2.1 the Authority and D&B Co shall agree:

2.1.1 a payment schedule in respect of the payment of such increase reflecting the amount and timing of the costs to be incurred by the Contractor in carrying out the Qualifying Variation to the extent borne by D&B Co; and

2.1.2 where payment for part of the Qualifying Variation reflects the carrying out of, or specific progress towards, an element within the Qualifying Variation, an objective means of providing evidence confirming that the part of the Qualifying Variation corresponding to each occasion when payment is due under the payment schedule appears to have been duly carried out,

(such payment schedule and evidence to be determined in accordance with Schedule 15 (*Dispute Resolution Procedure*) in the event of the Authority and D&B Co failing to agree as to its terms) provided that where all or any part of the Qualifying Variation is being carried out by a third party under a contract with D&B Co, subject to the terms of any contract between the D&B Co and that third party in relation to the implementation of the Qualifying Variation having been approved by the Authority (such approval not to be unreasonably withheld), the process under Schedule 15 (*Dispute Resolution Procedure*) shall not determine a payment schedule or evidence which would not enable D&B Co to be funded by the Authority in time to make payments to that third party in accordance with its contract with the Authority; and

2.2 the relevant amendments to this Agreement shall reflect that the Authority shall make payment to D&B Co in accordance with the procedures for payment of interim payments in accordance with Clause 29 (*Payment*).

SCHEDULE 14

RECORD PROVISIONS¹⁹⁶

SECTION 1

GENERAL REQUIREMENTS

1. D&B Co shall retain and maintain all the records (including superseded records) referred to in Section 2 (*Records to be Kept*) of this Schedule 14 (*Record Provisions*) in accordance with this Section 1 (*General Requirements*) of this Schedule 14 (*Record Provisions*), the requirements of Good Industry Practice, in chronological order, in a form that is capable of audit and at its own expense. D&B Co shall make such records available for inspection to the Authority where it has reasonable cause for requiring such records, on giving reasonable notice shall provide such facilities as the Authority may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this Schedule 14 (*Record Provisions*).
2. Wherever practical, original records shall be retained and maintained in hard copy form. True copies of the original records may be kept by D&B Co where it is not practicable to retain original records.
3. Those records relating to the Project Operations (including the design, construction and development of the Facilities) shall be retained for the duration of this Agreement.
4. Financial and other records (including without limitation all information provided in support of any Variation) shall be retained and maintained by D&B Co for a period of at least six (6) years after the Actual Completion Date in sufficient detail, in appropriate categories and generally in such a manner to enable D&B Co to comply with its obligations under Clause 51 (*Information and Audit Access*).
5. Where D&B Co wishes to dispose of any records maintained as provided in this Part 1 (*General Requirements*) of this Schedule 14 (*Records to be Kept*) which are more than fifteen (15) years old, or in respect of which the required period for their retention has expired, then D&B Co shall notify the Authority and if, within forty (40) Business Days of such notice, the Authority elects to receive certain of those records, then D&B Co shall deliver up such records to the Authority in the manner and at the location as the Authority shall reasonably specify, and the costs of retaining those records in safe storage and delivering up the same shall be borne by D&B Co.
6. Subject to paragraph 5, for a period of not more than six (6) years following the termination for whatever reason of this Agreement, D&B Co shall retain in safe storage all such records as are referred to in Section 2 of this Schedule 14 (*Record Provisions*) which were in existence at the date of termination of this Agreement. On the expiry of such period or at the earlier request of the Authority (and the Parties acknowledge that such a request shall be deemed to have been issued by the Authority upon the occurrence of any of the events set out in Clause 33 (*D&B Co Events of Default*)) whether prior to or following termination of this Agreement), D&B Co shall deliver up all those records (or where those records are

¹⁹⁶ Section 1 has been included for the purpose of providing a general framework and should be amended to reflect project specifics. The records to be kept by D&B Co are to be determined on a project specific basis, but should as a minimum include those items listed in Section 2.

required by statute to remain with D&B Co or a Contracting Associate of D&B Co, copies thereof) to the Authority in the manner and at the location as the Authority shall reasonably specify. The Authority shall make available to D&B Co all the records D&B Co delivers up pursuant to this paragraph subject to reasonable notice. The costs of retaining those records in safe storage and delivering up the same shall be borne:

- 6.1 by D&B Co where the termination arises as a result of a D&B Co Event of Default; and
 - 6.2 by the Authority where the termination arises for any other cause.
7. Any drawings required to be made or supplied pursuant to this Agreement shall be of a size appropriate to show the detail to be depicted clearly without magnifying aids and shall conform to British Standards 1192 or 308 or equivalent as appropriate. Where by prior agreement the Authority has agreed to accept microfilm, microfiche or other storage media (which must include secure back up facilities), drawings and other documents shall be made or supplied in such form as has been agreed.
8. [♦]¹⁹⁷
9. D&B Co shall use all reasonable endeavours to assist the Authority in its preparation of any report and/or return required pursuant to regulations, directions or guidance applicable to the Authority (in each case as amended, replaced or consolidated from time to time) or as required by external agencies including without limitation, reports and returns regarding the physical condition of the Facilities, health and safety, under the Regulatory Reform (Fire Safety) Order 2005, relating to environmental health or required by the Welsh Ministers, from time to time.
10. D&B Co shall, at the same time as it is required to satisfy each of the reporting obligations to the Authority under the terms of this Agreement (as summarised in the table below) also submit the relevant document or report to WEPCo (addressed to [♦]¹⁹⁸ or such other address as WEPCo may notify D&B Co from time to time) and [the Contract Management Unit] of Welsh Government (addressed to [♦]¹⁹⁹ or such other address as Welsh Government may notify D&B Co from time to time) provided that WEPCo and/or Welsh Government (as applicable) have confirmed their agreement in writing to be subject to the same obligations of confidentiality applicable to the Authority under this Agreement.²⁰⁰

¹⁹⁷ Authorities should consider what, if any other information should be made available by D&B Co (and any relevant holding company or subsidiaries) as to financial status in relation to the period it is carrying out the Works. The approach to such requirements should be considered in the context of the identity of D&B Co.

¹⁹⁸ WEPCo address for email communications to be inserted.

¹⁹⁹ Welsh Government Contract Management Unit email address to be inserted.

²⁰⁰ To be populated on a project specific basis.

DETAIL REQUIRED	CROSS REFERENCE TO PROVISION	REGULARITY	DUE DATE	COMMENT
[♦]	[♦]	[♦]	[♦]	[♦]
[♦]	[♦]	[♦]	[♦]	[♦]
[♦]	[♦]	[♦]	[♦]	[♦]

To the extent that there is any conflict between information in the table above and the relevant provision of this Agreement referred to, the relevant provision of this Agreement shall prevail.

SECTION 2

RECORDS TO BE KEPT

1. This Agreement and the Project Documents including all amendments to such agreements.
2. D&B Co shall at all times maintain a full and easily searchable record of particulars of the costs of performing the Project Operations. This shall require D&B Co to keep (and where appropriate to procure that the sub-contractors shall keep) books of account in accordance with best accountancy practice with respect to this Agreement showing in detail:
 - 2.1 administrative overheads;
 - 2.2 payments to the Sub-Contractors and to sub-contractors;
 - 2.3 capital and revenue expenditure;
 - 2.4 such other items as the Authority may reasonably require to conduct cost audits for verification of cost expenditure or estimated expenditure, for the purpose of Clause 24.12 (*Compensation*), Clause 37 (*Consequences of Termination*) or Schedule 13 (*Variation Procedure*),

and D&B Co shall have (and procure that the Sub-contractors shall have) the books of account evidencing the items listed in paragraphs 2.1 to 2.4 available for inspection by the Authority (and any expert) upon reasonable notice, and shall present a report of these to the Authority as and when requested.

3. All other documents, software or other information expressly referred to in this Agreement.
4. Records relating to the appointment and supersession of the Authority's Representative and D&B Co's Representative.
5. Project Data.
6. Documents, drawings, Design Data or submissions raised in accordance with Schedule 7 (*Review Procedure*).
7. Documents relating to planning applications, consents, refusals and appeals.
8. Records relating to any specialist or statutory inspections of the Facilities, including any roadways.
9. Notices, reports, results and certificates relating to completion of the Works and completion of the commissioning activities (including all documents related to the building warrant).

10. Documents relating to events of Force Majeure, Delay Events, Compensation Events and Relief Events and the consequences of the same.
11. Documents submitted in accordance with Schedule 13 (*Variation Procedure*) and all documents provided in support.
12. Documents related to referrals to the Dispute Resolution Procedure.
13. Tax invoices and records related to Value Added Tax.
14. Records required by Law (including in relation to Health and Safety matters and health and safety files prepared pursuant to CDM Regulations) and all Consents.
15. Documents relating to insurance and insurance claims.
16. All other records, notices or certificates required to be produced and/or maintained by D&B Co pursuant to this Agreement or any Project Document.
17. [Documents related to change in ownership or any interest in any or all of the shares of D&B Co.]²⁰¹
18. [Financial Records, including audited and unaudited accounts of D&B Co and related records.]
19. For the avoidance of doubt, all items listed above should be stored in a secure but easily searchable and retrievable format.

²⁰¹ This provision should be adjusted, as required to align with the Change in Control provisions in Clause 46.

SCHEDULE 15

DISPUTE RESOLUTION PROCEDURE

1. The procedure set out in this Schedule 15 (*Dispute Resolution Procedure*) shall apply to any dispute, claim or difference arising out of or relating to this Agreement ("**Dispute**") except where it has been excluded from this procedure by an express term of this Agreement.
2. This Dispute Resolution Procedure shall not impose any pre-condition on either party or otherwise prevent or delay either party from commencing proceedings in any court of competent jurisdiction in relation to any Dispute in which that party requires either:
 - 2.1 an order (whether interlocutory or final) restraining or requiring the other party from doing any act or compelling the other party to do any act; or
 - 2.2 a judgement for a liquidated sum to which there is no arguable defence.
3. Further, this Dispute Resolution Procedure shall not impose any pre-condition on either party or otherwise prevent or delay either party from commencing proceedings in any court of competent jurisdiction in relation to any Dispute where an Adjudication in accordance with paragraph 6 of this Schedule 15 (*Dispute Resolution Procedure*) has not been commenced or concluded. However, in such circumstances, the parties shall jointly apply to the Court for such proceedings to be stayed until no earlier than twenty-eight (28) days from the provision of a decision to be issued in accordance with paragraph 6.6 of this Schedule 15 (*Dispute Resolution Procedure*)

4. **Liaison Committee**

Subject to paragraph 2 of this Schedule 15 (*Dispute Resolution Procedure*), any Dispute shall first be referred to the Liaison Committee.

5. **Mediation**

- 5.1 The parties may (if both parties so agree) refer the Dispute to mediation on such conditions as may be agreed. Any mediation shall be completed within thirty (30) Business Days of such referral (unless otherwise agreed by the parties) and any agreement arising therefrom shall be recorded in writing and signed by the parties and shall be binding and final to the extent set out in such agreement unless otherwise agreed.
- 5.2 For the avoidance of doubt, mediation shall not be a precondition to the commencement of Adjudication or court proceedings.

6. Adjudication

- 6.1 Any Dispute shall be referred to Adjudication by either party at any time (notwithstanding that other dispute resolution procedures are running concurrently) giving the other party to the Dispute notice of its intention to refer the Dispute to adjudication (the "**Notice of Adjudication**"). The party giving the Notice of Adjudication (the "**Referring Party**") shall by the same means of communication send a copy of the Notice of Adjudication to an adjudicator selected in accordance with paragraph 6.2 below or paragraph 6.14 below (the "**Adjudicator**").
- 6.2 The Adjudicator nominated to consider a Dispute referred to him shall, subject to paragraph 6.14, be selected from the panel of adjudicators (the "**Construction Panel**") appointed in accordance with the following:
- 6.2.1 the first Construction Panel is comprised of the individuals that are named in paragraph 9 (*Panel Members*) of this Schedule 15 (*Dispute Resolution Procedure*);
 - 6.2.2 if any member of either panel resigns or is otherwise no longer available to act as an adjudicator during the term of the Agreement, a replacement expert shall be appointed by D&B Co and the Authority as soon as practicable;
 - 6.2.3 the adjudicator to be appointed to the Construction Panel shall be wholly independent of D&B Co, the Authority, the relevant Sub-Contractor and any of the major competitors of D&B Co or the relevant Sub-Contractor;
 - 6.2.4 if D&B Co and the Authority are unable to agree on the identity of any replacement expert, the President for the time being of the Chartered Institute of Arbitrators Wales Branch shall appoint such adjudicator(s) within seven (7) days of any application for such appointment by either party;
 - 6.2.5 no expert shall be entitled to accept an appointment to the Construction Panel unless he is willing also to be appointed as the adjudicator to adjudicate any dispute which:
 - (a) may arise between D&B Co and the Contractor and raises issues which, in the opinion of D&B Co, are substantially the same as or connected with the Dispute in relation to which he has been appointed; and/or
 - (b) may arise between D&B Co and the Independent Tester and raises issues which, in the opinion of D&B Co, are substantially the same as or connected with the Dispute in relation to which he has been appointed.

- 6.3 In the event that the first panel member approached is unable or unwilling to confirm acceptance of his appointment as Adjudicator or where he fails to respond within two (2) days of the date of the Notice of Adjudication, then the Referring Party shall invite an alternative person from the Construction Panel to act as Adjudicator. In the event that the second panel member is unwilling or unable to confirm acceptance of his appointment as Adjudicator within four (4) days of the date of the Notice of Adjudication or if the parties disagree as to the Construction Panel, then the Referring Party may apply to the President for the time being of the Chartered Institute of Arbitrators Wales Branch who shall within seven (7) days of the date of the Notice of Adjudication, nominate an Adjudicator (who shall also within the same period, confirm acceptance of his appointment as Adjudicator) to determine the Dispute described in the Notice of Adjudication;
- 6.4 The Referring Party shall, within seven (7) days of the date of the Notice of Adjudication, serve its statement of case (the "**Referral Notice**") on the Adjudicator (appointed pursuant to paragraph 6.2) and the other party to the Dispute (the "**Responding Party**"). The Referral Notice shall set out each element of the Referring Party's claim and the relief or remedy sought in sufficient detail so as to enable the Responding Party to understand and, where appropriate, respond to the claim and the Referral Notice shall be accompanied by copies of, or relevant extracts from, this Agreement and such other documents as the Referring Party intends to rely upon. The date of the referral of the Dispute (the "**Referral**") shall be the date of the Referral Notice.
- 6.5 Within seven (7) days of appointment in relation to a particular Dispute, the Adjudicator shall establish the procedure and timetable for the adjudication. The Adjudicator shall have absolute discretion as to how to conduct the adjudication, including whether a meeting is necessary. He shall establish the procedure and timetable subject to any limitation within this Agreement. The parties shall comply with any request or direction of the Adjudicator in relation to the adjudication.
- 6.6 The Adjudicator shall reach a decision on the Dispute within twenty-eight (28) days of the date of the Referral (or such other period as the parties may agree). The Adjudicator may extend the period of twenty-eight (28) days by up to fourteen (14) days with the consent of the Referring Party. Unless the parties otherwise agree, the Adjudicator shall give reasons for his decision. Unless and until the Dispute is finally determined by Court proceedings or by an agreement in writing between the parties, the Adjudicator's decision shall be binding on both parties who shall forthwith give effect to the decision.
- 6.7 The Adjudicator's costs of any reference shall be borne as the Adjudicator shall specify or, in default, equally by the parties. Each party shall bear its own costs arising out of the adjudication, including legal costs and the costs and expenses of any witnesses.
- 6.8 The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an adjudicator and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.
- 6.9 The Adjudicator shall act fairly and impartially and may take the initiative in ascertaining the facts and the Law. The Adjudicator shall have the power to open up, review and revise any opinion, certificate, instruction, determination or decision of whatever nature given or made under this Agreement.

- 6.10 All information, data or documentation disclosed or delivered by a party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by Clause 49 (*Confidentiality*), disclose to any person or company any such information, data or documentation and all such information, data or documentation shall remain the property of the party disclosing or delivering the same and all copies shall be returned to such party on completion of the Adjudicator's work.
- 6.11 The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.
- 6.12 The Adjudicator may on his own initiative or on the request of the Referring Party or Responding Party correct his decision so as to remove a clerical or typographical error arising by accident or omission.
- 6.13 Any correction of a decision shall be made within five (5) days of the date upon which the Adjudicator's decision was delivered to the parties. Any correction of a decision shall form part of the decision.
- 6.14 If any Dispute raises issues which, in the opinion of D&B Co, are substantially the same as or connected with issues raised in a dispute or difference arising out of or relating to any other agreement (all such agreements being referred to as the "**Related Agreements**") between:
- 6.14.1 D&B Co and the Contractor; and/or
- 6.14.2 D&B Co and the Independent Tester,
- which was or has been referred to adjudication (the "**Related Adjudication**") and an adjudicator has already been appointed (the "**Related Adjudicator**") then D&B Co may request that the Dispute be referred to the Related Adjudicator and paragraphs 6.15 to 6.17 shall apply.
- 6.15 Subject to paragraphs 6.16 and 6.17 below, in the event that a Related Adjudicator directs that a Dispute under this Agreement be consolidated with a Related Adjudication with which he is dealing under the Related Agreement, then:
- 6.15.1 with effect from the time of such direction, the Dispute shall be determined by the Related Adjudicator, who shall become the Adjudicator; and
- 6.15.2 such direction shall be binding on D&B Co and the Authority and both of them shall acknowledge the appointment of the Related Adjudicator as the adjudicator of the Dispute, with D&B Co or the Authority (as the case may be) using its best endeavours to procure that the third party who is a party to the Related Agreement shall

with effect from the time of such direction comply with the requirements of the Related Agreement (including if applicable any requirement or direction of the Related Adjudicator appointed under such Related Agreement) as to the future conduct of the determination of the Dispute and the Related Adjudication; and

- 6.15.3 notwithstanding paragraph 6.7, D&B Co and the Authority shall be jointly responsible with the third party who is a party to the Related Agreement for the Related Adjudicator's fees and expenses including those of any specialist consultant appointed under the adjudication procedure in the Related Agreement, in respect of the period in which the Dispute is consolidated with the Related Adjudication pursuant to a direction of the Related Adjudicator ("**Consolidated Adjudication Costs**"). D&B Co and the Authority agree that the Related Adjudicator shall have the discretion to make directions to require D&B Co, the Authority and the third party who is a party to the Related Agreement to pay or make contribution to the Consolidated Adjudication Costs in different proportions. If no such directions are made, D&B Co, the Authority and the third party who is a party to the Related Agreement shall bear the Consolidated Adjudication Costs in equal shares, and if D&B Co, the Authority or the third party has paid more than such equal share, that party or third party shall be entitled to a contribution from the other party, parties or third party, as the case may be.
- 6.16 Notwithstanding anything to the contrary a Dispute under this Agreement may only be consolidated with a Related Adjudication, if the Related Adjudicator receives particulars of the Dispute within ten (10) days of the referral of the Related Adjudication to the Related Adjudicator under the Related Agreement.
- 6.17 Where D&B Co requests that a Dispute under this Agreement be consolidated (in terms of paragraph 6.14) with a Related Adjudication and heard by the Related Adjudicator, the Dispute may only be consolidated where the Authority has previously consented in writing (or is deemed to have consented) to the identity of the Related Adjudicator appointed in respect of the Related Adjudication.
- 6.17.1 Where the Related Adjudicator is on the Construction Panel at the time of the Referral then the Authority shall be deemed to have consented to the appointment of the Related Adjudicator.
- 6.17.2 Subject to paragraph 6.18, the Authority's consent to such request shall not be unreasonably withheld and if the Authority refuses to consent, it must give reasons in writing for its refusal. Should the Authority fail to respond within two (2) Business Days of receipt of such a request it shall be deemed to have consented to the appointment of the Related Adjudicator.
- 6.18 D&B Co shall take all reasonable steps to procure that the Adjudicator appointed in respect of any dispute under a Related Agreement is an individual, who at the time is on the Construction Panel.

7. Court Proceedings

Subject to paragraph 6 (*Adjudication*) all Disputes, to the extent not finally resolved pursuant to the procedures set out in the foregoing provisions of this Schedule 15 (*Dispute Resolution Procedure*), shall be referred to the High Court of Justice of England and Wales.

8. Submissions in Relation to Adjudication

8.1 If any Dispute raises issues which relate to:

8.1.1 any dispute between D&B Co and the Contractor arising under the Construction Contract or otherwise affects the relationship or rights of D&B Co and/or the Contractor under the Construction Contract (the "**Construction Contract Dispute**"); or

8.1.2 any dispute between D&B Co and the Independent Tester arising under the Independent Tester Contract or otherwise affects the relationship or rights of D&B Co and/or the Independent Tester under the Independent Tester Contract (the "**Independent Tester Contract**"),

then D&B Co may include as part of its submissions made to the Adjudicator submissions made by the Contractor or the Independent Tester as appropriate.

8.2 Any submissions made by the Contractor or the Independent Tester shall:

8.2.1 be made within the time limits applicable to the delivery of submissions by D&B Co to the Adjudicator; and

8.2.2 concern only those matters which relate to the Dispute between the Authority and D&B Co arising out of this Agreement or in connection therewith.

8.3 Where the Contractor or the Independent Tester makes submissions in any reference before the Adjudicator, the Adjudicator's costs of such reference shall be borne as the Adjudicator shall specify, or in default, one-third by the Authority and two-thirds by D&B Co.

8.4 The Authority shall have no liability to the Contractor or the Independent Tester arising out of or in connection with any decision of the Adjudicator or in respect of the costs of the Contractor or the Independent Tester in participating in the resolution of any Dispute under this Agreement.

8.5 D&B Co shall not allow the Contractor or the Independent Tester access to any Confidential Information relevant to the issues in dispute between the Authority and D&B Co save where:

- 8.5.1 the Confidential Information is relevant also to the issues relating to the Construction Contract Dispute or the Independent Tester Contract Dispute as the case may be; and
- 8.5.2 D&B Co has first delivered to the Authority a written undertaking from the Contractor and/or the Independent Tester (as appropriate) addressed to the Authority that they shall not use any such Confidential Information otherwise than for the purpose of the dispute resolution proceedings under this Agreement and that they shall not disclose such Confidential Information to any third party other than the Adjudicator or the courts or any professional adviser engaged by the Contractor or Independent Tester (as appropriate) to advise in connection with the Dispute.

9. Panel Members

The Construction and Operational Panel members referred to in paragraph 6 are, as at the date of this agreement, as follows:

[♦]

10. Continuing Obligations

Unless this Agreement has already been repudiated or terminated, the parties shall, (notwithstanding that any Dispute is subject to the Dispute Resolution Procedure set out in this Schedule 15 (*Dispute Resolution Procedure*)), continue to carry out their obligations in accordance with this Agreement.

SCHEDULE 16
CERTIFICATES

[ICT Handover Acceptance Certificate]

Issued by: **Independent Tester – [INSERT NAME]**

Address: [INSERT ADDRESS]

Issued to:

D&B Co: **[INSERT NAME]**

Address: [INSERT ADDRESS]

Authority: **[INSERT NAME]**

Address: [INSERT ADDRESS]

Issue date:

Design and Build Development Agreement between [*insert name of the Authority*] and [*insert name of D&B Co*] dated:

Independent Tester Contract among [*insert name of the Authority*], [*insert name of D&B Co*] and [*insert name of Contractor*] dated:

Under the terms of the above-mentioned Design and Build Development Agreement and Independent Tester Contract, *I/we certify that the ICT Handover Requirements in respect of [*insert name of Facility*] have been met.

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design and Build Development Agreement (except where they are defined specifically in this Certificate).

To be signed by the issuer named above

Signed..... Date

[INSERT NAME OF INDEPENDENT TESTER]

Receipt of this Certificate must be acknowledged by D&B Co's Representative.

Signed..... Date

Name:

Receipt of this Certificate must be acknowledged by Authority's Representative.

Signed..... Date

Name:

*[*delete as appropriate]*

Certificate of Practical Completion

Issued by: Independent Tester – **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issued to:

D&B Co: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Authority: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**.

Issue date:

[*Main Works/ Post Completion Works²⁰²] relating to the Facility named below

Situated at: *[insert name of Facility]*

Design and Build Development Agreement between *[insert name of the Authority]* and *[insert name of D&B Co]* dated:

Independent Tester Contract among *[insert name of the Authority]*, *[insert name of D&B Co]* and *[insert name of Contractor]* dated:

Under the terms of the above-mentioned Design and Build Development Agreement and Independent Tester Contract, *I/we certify that the [*Actual Completion Date of the *[Main] Works was achieved on [♦]]/ [the Actual Post Completion Works Date in respect of the Post Completion Works was achieved on [♦]] and that [building warrant/temporary occupation] approval was achieved on [♦], reference [♦], in respect of *[insert name of Facility]*.

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design and Build Development Agreement (except where they are defined specifically in this Certificate).

To be signed by or for the issuer named above.

Signed.....

[INSERT NAME OF INDEPENDENT TESTER]

**delete as appropriate*

²⁰² Where there is more than one phase of Post Completion Works, the certificate will require to be adjusted accordingly.

Commissioning Completion Certificate

Issued by: Independent Tester – **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issued to:

D&B Co: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Authority: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issue date:

***[[Main] Works]/ [Post Completion Works²⁰³]]** relating to the Facility named below

Situated at: *[insert name of Facility]*

Design and Build Development Agreement between *[insert name of the Authority]* and *[insert name of D&B Co]* dated:

Independent Tester Contract among *[insert name of the Authority]*, *[insert name of D&B Co]* and *[insert name of Contractor]* dated:

Under the terms of the above-mentioned Design and Build Development Agreement and Independent Tester Contract, *I/we certify that the Actual Commissioning End Date in respect of the [* Main Works/ Post Completion Works] at *[insert name of Facility]* was achieved on [♦].

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design and Build Development Agreement (except where they are defined specifically in this Certificate).

To be signed by or for the issuer named above.

Signed.....

[INSERT NAME OF INDEPENDENT TESTER]

**delete as appropriate*

²⁰³ Where there is more than one phase of Post Completion Works, the certificate will require to be adjusted accordingly.

Snagging Items Completion Certificate

Issued by: Independent Tester – **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issued to:

D&B Co: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Authority: **[INSERT NAME]**

Address: **[INSERT ADDRESS]**

Issue date:

***[[Main] Works]/ [Post Completion Works]²⁰⁴** relating to the Facility named below Situated at:
[insert name of Facility]

Design and Build Development Agreement between *[insert name of the Authority]* and *[insert name of D&B Co]* dated:

Independent Tester Contract among *[insert name of the Authority]*, *[insert name of D&B Co]* and *[insert name of Contractor]* dated:

Under the terms of the above-mentioned Design and Build Development Agreement and Independent Tester Contract, *I/we certify that the Snagging Items included on *[Snagging List]/[PCW Snagging List] [Insert List Number.....] have been completed and that the Snagging Completion Date in respect of the Snagging Items identified on issue of the *[Certificate of Practical Completion] [for the *Main Works] [Certificate of Practical Completion for the Post Completion Works] [ICT Handover Acceptance Certificate] was achieved on [♦].

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design and Build Development Agreement (except where they are defined specifically in this Certificate).

To be signed by the issuer named above

Signed..... Date

[INSERT NAME OF INDEPENDENT TESTER]

²⁰⁴ Where there is more than one phase of Post Completion Works, the certificate will require to be adjusted accordingly.

Certificate of Making Good Defects

Issued by: **Independent Tester – [INSERT NAME]**

Address: [INSERT ADDRESS]

Issued to:

D&B Co: **[INSERT NAME]**

Address: [INSERT ADDRESS]

Authority: **[INSERT NAME]**

Address: [INSERT ADDRESS]

Issue date:

[*Main Works/ Post Completion Works]

Design and Build Development Agreement between [*insert name of the Authority*] and [*insert name of D&B Co*] dated:

Independent Tester Contract among [*insert name of the Authority*], [*insert name of D&B Co*] and [*insert name of Contractor*] dated:

Under the terms of the above-mentioned Design and Build Development Agreement and Independent Tester Contract, *I/we certify that all Defects in the Schedule of Defects in respect of the [*Main Works/ Post Completion Works] have been made good.

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design and Build Development Agreement (except where they are defined specifically in this Certificate).

To be signed by the issuer named above

Signed..... Date

[INSERT NAME OF INDEPENDENT TESTER]

Receipt of this Certificate must to be acknowledged by D&B Co's Representative.

Signed..... Date

Name:

Receipt of this Certificate must be acknowledged by the Authority's Representative.

Signed..... Date

Name:

**delete as appropriate*

[Certificate of WiFi Completion

Issued by: Independent Tester – [INSERT NAME]

Address: [INSERT ADDRESS]

Issued to:

D&B Co: [INSERT NAME]

Address: [INSERT ADDRESS]

Authority: [INSERT NAME]

Address: [INSERT ADDRESS]

Issue date:

Situated at: [insert name of Facility]

Design and Build Development Agreement between [insert name of the Authority] and [insert name of D&B Co] dated:

Independent Tester Contract among [insert name of the Authority], [insert name of D&B Co] and [insert name of Contractor] dated:

Under the terms of the above-mentioned Design and Build Development Agreement and Independent Tester Contract, *I/we certify that the WiFi Actual Completion Date for [insert name of Facility] was achieved on [♦].

Capitalised terms used in this Certificate shall have the meaning given to them in the afore-mentioned Design and Build Development Agreement (except where they are defined specifically in this Certificate).

To be signed by the issuer named above

Signed..... Date

[INSERT NAME OF INDEPENDENT TESTER]

*delete as appropriate]

SCHEDULE 17

COMMERCIALLY SENSITIVE INFORMATION

SECTION 1

COMMERCIALLY SENSITIVE CONTRACTUAL PROVISIONS

Column 1 Commercially Sensitive Contractual Provisions	Column 2 For period ending on the date below
Any terms of or figures set out within this Agreement but only insofar as such terms or figures relate to the build up of pricing of the Works, including the prices of the Consultants and any sub-contractors of the Contractor.	From the Commencement Date until the date falling 2 years after the Actual Completion Date

SECTION 2

COMMERCIALLY SENSITIVE MATERIAL

Column 1 Commercially Sensitive Material	Column 2 For period ending on the date below
Information about D&B Co's processes, methodologies, working methods and information relating to the development of new processes and methodologies which amounts to a trade secret or which, if disclosed, could reasonably be considered to provide a commercial advantage to D&B Co's competitors.	From the Commencement Date until the date falling 2 years after the Actual Completion Date

SCHEDULE 18

DEVELOPMENT AMOUNT ANALYSIS

[Insert breakdown of the Development Amount which will dictate the drawdown by D&B Co of the Development Amount over the period of the project]

SCHEDULE 19
PROJECT BANK ACCOUNT

SECTION 1
DEED OF TRUST²⁰⁵

²⁰⁵ To be prepared on a project specific basis in line with Welsh Government Guidance on Project Bank accounts and the provisions of this Template Education D&B Agreement.

SECTION 2

APPLICATION SCHEDULE

Relevant Month	Application Date
[↓]	[↓]
[↓]	[↓]
[↓]	[↓]

SCHEDULE 20

COMMUNITY BENEFITS

SECTION 1

AUTHORITY'S COMMUNITY BENEFITS REQUIREMENTS

Part 1 - Authority's Community Benefit Requirements²⁰⁶

²⁰⁶ To be completed by the Authority, in conjunction with the New Project Request.

Part 2 - Authority's Community Benefit Requirement KPIs²⁰⁷

Key Area of Performance to be reviewed	KPI Target	Lump Sum Payment
Jobs Created (NEET/LT Unemployed)	<i>[Formula: Person weeks per £m invested based on 52/£m capex]</i> <i>Example: 1,820 person weeks for £35m capex]</i>	£500 (indexed) per 52 weeks where placement not provided in whole or in part.
[Training] [and] [apprentices] [(including graduates, work placements, pupil placements)]	<i>[Formula: Person weeks of training provided per £m invested based on 25/£m (included in overall jobs created).]</i> <i>Example: 875 person weeks for £35m capex]</i>	£500 (indexed) per 52 weeks where placement not provided in whole or in part.
School Engagement (STEM)	<i>[Formula: Number of one hour student interactions per £m invested based on 150/£m]</i> <i>Example: 5,250 one hour interactions for £35m capex]</i>	£5 (indexed) per one hour student interaction not provided.
School Engagement (STEM)	<i>[Formula: Hours donated per £m invested based on 10 hours/£m]</i> <i>Example: 350 hours for £35m capex]</i>	£40 (indexed) per hour not provided.
Community	20 community initiatives during the Construction Phase	£1,000 (indexed) per community initiative not provided in whole or in part.
Community	<i>[Formula: Community engagement/communications based on 1 every quarter of planned Construction Phase]</i> <i>Example: 10 engagements for 2.5 year build]</i>	£500 (indexed) per failure to engage/communicate.

²⁰⁷ Table to be completed on a project specific basis with reference to the formulae set out in the table (which should be deleted once project specific values have been developed). KPI target drafting to be further developed to ensure the KPIs are clear and measurable.

SECTION 2

D&B CO'S COMMUNITY BENEFIT METHOD STATEMENTS

Part 1 - ACBR Enhancements and Additional Community Benefit D&B Co Proposals

ACBR Enhancements²⁰⁸				
Target Area	KPI Target	Lump Sum Payment (indexed)	Validation Requirement	Measure for Reporting
Additional Community Benefit D&B Co Proposals²⁰⁹				
Target Area	Construction Phase KPI Target	Lump Sum Payment (indexed)	Validation Requirement	Measure for Reporting

²⁰⁸ Table to be developed in accordance with WEPCo's Community Benefit Requirement KPIs, to reflect D&B Co's proposals for New Projects under the SPA.

²⁰⁹ Table to be developed in accordance with WEPCo's Community Benefit Requirement KPIs, to reflect D&B Co's proposals for New Projects under the SPA.

Part 2 - D&B Co's Community Benefit Method Statements²¹⁰

Section A - Authority's Community Benefit Requirement KPIs

Section B - ACBR Enhancements

Section C - Additional Community Benefit D&B Co Proposals

²¹⁰ To be developed in accordance with WEPCo's Community Benefit Requirement KPIs, to reflect D&B Co's proposals for New Projects following the Tendering Process under the SPA.

Part 3 - Dashboard Template

SCHEDULE 21

JOINT OPERATING PROTOCOL²¹¹

SECTION 1

GENERAL

1. Definitions

In this Schedule (save where Schedule 1 (*Definitions and Interpretation*) provides to the contrary) the following terms shall have the meanings given to them below:

D&B Co ICT Handover Activities Period	has the meaning given in paragraph 6.1 of Section 2 (<i>Construction Phase Access Protocol</i>) of this Schedule 21 (<i>Joint Operating Protocol</i>);
Damage	means the loss or theft of or damage to any ICT Assets;
Deployed	means in respect of a Fixed ICT Asset that its installation and all associated installation tasks have been completed, and “Deployment” shall be construed accordingly;
Deployment Protocol	means the table set out in the Appendix to Section 2 (<i>Construction Phase Access Protocol</i>) of this Schedule 21 (<i>Joint Operating Protocol</i>)
Fixed ICT Assets	those types of ICT Assets indicated as “Fixed” in column 2 of the Deployment Protocol;
ICT Asset Log	has the meaning given to it in paragraph 5.2 of Section 2 (<i>Construction Phase Access Protocol</i>) of this Schedule 21 (<i>Joint Operating Protocol</i>);
Portable ICT Assets	those types of ICT Assets indicated as “Portable” in column 2 of the table set out at the Deployment Protocol; and
Secure Room	[a secure room (or rooms) provided by D&B Co at the Facility [of approximately 100m ² (two classrooms) in Secondary Schools and 50m ² (one classroom) in Primary Schools] for the storage of the ICT Assets.]

²¹¹ The Joint Operating Protocol has been developed primarily in the context of a Schools project and will require specific review in the context of College projects.

2. Compliance with the Joint Operating Protocol

- 2.1 Both parties acknowledge that the purpose of the Joint Operating Protocol is to establish a structure and ongoing process that facilitates joint working and co-operation, pursuant to Clause 5.8 of the Agreement. In particular, in relation to certain specific Project Operations that involve a high level of interface between the Authority and D&B Co in the carrying out of such Project Operations alongside Authority's Commissioning, Authority Post Completion Commissioning and the provision of Authority Services at the Facilities.
- 2.2 The parties agree that if there is any specific conflict, ambiguity, inconsistency or uncertainty in respect of the rights and/or obligations contained in the Joint Operating Protocol with those contained in any other provisions of the Agreement, such rights and obligations shall be additional to and not in substitution for those contained elsewhere in the Agreement and those contained in the Agreement shall, as far as necessary, prevail over those contained in the Joint Operating Protocol.

3. Monitoring Arrangements

The parties acknowledge and agree that the functions of the Liaison Committee set out in Schedule 22 (*Liaison Procedure*) shall include discussion on the effectiveness of the Joint Operating Protocol and any variations proposed by either party.

4. Dispute Resolution

Any disagreement relating to each party's rights or obligations under the Joint Operating Protocol shall be referred for resolution in accordance with Schedule 15 (*Dispute Resolution Procedure*).

SECTION 2

CONSTRUCTION PHASE ACCESS PROTOCOL

1. Construction Phase Access

- 1.1 The Authority acknowledges and agrees that D&B Co's Ancillary Rights allow for a degree of exclusive possession of the Site by D&B Co and D&B Co Parties for the period from the Commencement Date until the Actual Completion Date [in respect of the Main Works] [and/or from the Actual Completion Date until the Actual Post Completion Works Date, in respect of the Post Completion Works Areas]. Both parties acknowledge that these rights are subject to the Beneficial Access rights outlined in paragraph [◆] of Appendix B of Schedule 10 (*Outline Commissioning Programme*), to facilitate Authority's Commissioning in the areas described in [◆] prior to the Actual Completion Date [and the areas described in [◆] prior to the Actual Post Completion Works Date].
- 1.2 The parties agree that the further arrangements set out in paragraphs 2 to 6 below shall apply in respect of the ICT Handover Period, in respect of the installation, testing and integration of ICT Assets.
- 1.3 [The Authority agrees that in exercising its rights under this paragraph 1, the Authority and Authority Parties shall comply with all relevant health and safety procedures, which shall include any relevant construction phase plans and health and safety plans for the construction of the Facilities, the Contractor's Site Rules from time to time and reasonable directions with regard to site safety, traffic management and security intimated by the Contractor's Site Manager from time to time. The parties shall ensure the activities each is responsible for carrying out during the ICT Handover Period are co-ordinated in light of this obligation, through the development of the Final Commissioning Programme.]

2. Hours of Access

- 2.1 During the ICT Handover Period, the Authority and/or any other Authority Party responsible for the installation and commissioning of ICT Assets (the "**ICT Installer**") may commission and install ICT Assets between 8am and 5pm on any Business Day. Without prejudice to Clause 17.1 (*Pre-Completion Commissioning and Completion*), if the ICT Installer requires additional access to the Site beyond these hours on any given Business Day then the Authority shall provide not less than 24 hours' notice of such request to D&B Co, specifying the nature of the access required and the activities proposed to be undertaken by the ICT Installer, and the Authority shall reimburse to D&B Co all additional costs it reasonably and properly incurs as a direct result of providing such additional access. D&B Co shall take all reasonable steps not to impede the ICT Installer(s) in the carrying out of such activities (having regard always to the interactive nature of the activities of the parties and the detailed terms of the Final Commissioning Programme), provided that D&B Co shall be deemed not to be in breach of this paragraph unless it has received notice from the ICT Installer that it is so impeding, and has failed to cease impeding the ICT Installer within one (1) hour of receiving such notice.
- 2.2 The Authority shall and shall ensure that Authority Parties (including the ICT Installer) shall during the ICT Handover Period comply with their obligations under

this Section 2 (*Construction Phase Access Protocol*) of Schedule 21 (*Joint Operating Protocol*). D&B Co shall, and shall ensure that D&B Co Parties shall during the ICT Handover Period, comply with their obligations under this Section 2 (*Construction Phase Access Protocol*) of Schedule 21 (*Joint Operating Protocol*).

3. Access, Installation, Testing and Integration of the ICT Assets

- 3.1 The ICT Installers shall not be entitled to bring ICT Assets into the Facilities at any time during the ICT Handover Period. All ICT Assets will be brought on to the Site by D&B Co in accordance with the provisions of [paragraph [♦] of Section 4 (*Decant Protocol*) of Schedule 11 (*Equipment*)] and the Final Commissioning Programme. For the avoidance of doubt, any new ICT Assets to be procured by the Authority shall be delivered to the Existing Facility and not the Facilities and will be decanted in accordance with [Section 4 (*Decant Protocol*) of Schedule 11 (*Equipment*)].
- 3.2 The ICT Installers shall be permitted to use D&B Co's onsite trolleys (or equivalent) where available and where required to install, test and/or integrate the ICT Assets.
- 3.3 The Authority shall keep D&B Co informed of any Site security risks (or thefts or other similar incidents) and/or damage to the ICT Assets of which the Authority becomes aware.

4. Control of ICT Assets

- 4.1 In respect of an ICT Asset at the Site, such ICT Assets shall be deemed to be within the Authority's control in the following circumstances (the "**Authority Control Period**"):
- 4.1.1 at any time prior to D&B Co commencing the Decant of the ICT Asset from the Existing School;
 - 4.1.2 at any time after an ICT Asset is signed out of the Secure Room by the ICT Installer, until it has been recorded in the ICT Asset Log as having been either:
 - (a) placed back in the Secure Room; or
 - (b) in the case of a Fixed ICT Asset, Deployed, and such placing back or Deployment has occurred;
 - 4.1.3 at any other time when an ICT Asset is removed from the Secure Room by the ICT Installer; and
 - 4.1.4 at any time after the Actual Completion Date for the Facility in question.

4.1.5 The parties agree the following approach to ICT Assets Deployed at the Site:

(a) Fixed ICT Assets - the ICT Installer may leave such ICT Assets in situ once Deployed (for the avoidance of doubt, the Authority shall procure that the ICT Installer shall return all Fixed ICT Assets that are not Deployed to the Secure Room at the end of each day);

(b) Portable ICT Assets - the Authority shall procure that the ICT Installer shall return all Portable ICT Assets to the Secure Room at the end of each day.

4.1.6 The Authority shall be responsible for Damage to any ICT Assets when such ICT Assets are in an Authority Control Period, save where and to the extent that the Damage is caused or contributed to by D&B Co or a D&B Co Party in which case D&B Co shall be responsible for such Damage.

5. Deployment

5.1 D&B Co shall ensure that when ICT Assets are decanted to the Site they are stored in a Secure Room.

5.2 D&B Co shall provide and maintain a log recording and documenting the delivery of ICT Assets to the Site and into the Secure Rooms so that at all times during the ICT Handover Period an accurate and up-to-date record of the contents of the Secure Room and ICT Asset location is maintained (the "**ICT Asset Log**"), provided the Authority shall, or shall procure that the ICT Installer shall, report to D&B Co the ICT Assets being signed in and out of the Secure Room pursuant to paragraphs 4 and 5.3 of this Section 2 (*Construction Phase Access Protocol*) of Schedule 21 (*Construction Phase Access Protocol*) on such deposit/removal. The ICT Asset Log shall be made available to the Authority promptly on reasonable request.

5.3 D&B Co shall ensure that the ICT Asset Log incorporates:

5.3.1 a method of signing in and signing out each of the ICT Assets as such ICT Assets are placed in, removed from and/or returned to the Secure Room; and

5.3.2 the actual date/time of sign-off by D&B Co or the ICT Installer (as applicable) of the completion of the installation or Deployment of the relevant ICT Asset into the relevant location.

5.4 Subject to paragraph 5.3 above, where an ICT Asset is shown in the ICT Asset Log as Deployed it shall for the purposes of this Agreement be taken to be "Deployed".

- 5.5 Nothing in paragraph 5.4 above, shall prevent it being agreed by the parties or determined in accordance with the Dispute Resolution Procedure, following receipt of an ICT Asset Log, that an ICT Asset which was shown in the ICT Asset Log as being Deployed was not in fact Deployed. Where such agreement or determination is made, for the purposes of this Schedule 21 (*Joint Operating Protocol*) the ICT Asset in question shall be treated as having been Deployed from the point at which it was actually Deployed rather than from the point that the ICT Asset Log in question was received.

6. Non Interference by the ICT Installer

- 6.1 The Authority acknowledges that whilst it, or any other party being an ICT Installer, is taking delivery of and installing ICT Assets during the ICT Handover Period D&B Co shall also be at the Site for the purpose of:

6.1.1 undertaking Snagging Items and/or remedying Defects;

6.1.2 [carrying out its obligations pursuant to the Decant Protocol, including the installation and recommissioning of Initial ICT Equipment;]

6.1.3 carrying out any other D&B Co Pre-Completion Commissioning activities set out in and pursuant to the [relevant] Final Commissioning Programme, including (where applicable) carrying out training and handover 'sparkle' cleans; and

6.1.4 carrying out the balancing, testing and/or commissioning of the mechanical and electrical installations at the Facility,

(together the "**D&B Co ICT Handover Period Activities**").

- 6.2 The Authority shall (and shall procure the relevant ICT Installer shall) take all reasonable steps not to impede D&B Co or any D&B Co Party from undertaking D&B Co ICT Handover Period Activities (having regard always to the interactive nature of the activities of the parties and the detailed terms of the [relevant] Final Commissioning Programme).

APPENDIX
DEPLOYMENT PROTOCOL²¹²

The types of ICT Assets relevant to this Section 2 (*Construction Phase Access Protocol*) of this Schedule 21 (*Joint Operating Protocol*) are classified as set out in the table below.

ICT Asset	Fixed or Portable
Learner Laptop	Portable
Learner Station	Fixed
Learner Station Monitor	Fixed
Learner Netbook	Portable
Apple iMac	Fixed
Teacher Laptop	Portable
Teaching Assistant Laptop	Portable
Tablet computers (Inc. Ipod devices) – Learner	Portable
Tablet computers (Inc. Ipod devices)- Staff	Portable
Display Station PC	Fixed
Admin Station	Fixed
Admin Station Monitor	Fixed
Visualiser	Portable
Digital Cameras (still and video)	Portable
Projector + mount + security	Fixed
Whole-Class Teaching Wall Speakers	Fixed
Interactive Whiteboard	Fixed
Integrated Whole Class Teaching system	Fixed
Laptop Trolley (e.g. Notebus 16+)	Portable
Teaching LED/LCD/Plasma display screen, speakers and bracket	Fixed
LED/LCD/Plasma Display for Streaming Media Set Top Box (e.g. OneLan NTB600)	Fixed
Desktop Printer	Fixed
MFD Printer	Fixed
Voting System	Portable
USB Headset	Portable
Rack Mounted Server	Fixed
Video Server	Fixed
Rack Mounted Keyboard/Video/Monitor Switch	Fixed
Disk to Disk to Tape Backup System	Fixed

²¹² To be reviewed and considered on a project specific basis.

SECTION 3

ACCESS TO WORK PROTOCOL²¹³

1. [Definitions

In this Section 3 (*Access to Work Protocol*) of Schedule 21 (*Joint Operating Protocol*) (save where Schedule 1 (*Definitions and Interpretation*) provides to the contrary) the following terms shall have the meanings given to them below:

[◆]

2. Preamble

- 2.1 This Access to Work Protocol governs the arrangements which allow D&B Co or any D&B Co Party to gain access to the Facilities to make good Snagging or Defects or carry out other Project Operations at the Facilities following the Actual Completion Date.

3. Access After the Actual Completion Date

- 3.1 The Authority acknowledges and agrees that D&B Co's Ancillary Rights allow for a non-exclusive licence to remain upon those parts of the Site that D&B Co and/or any D&B Co Party requires access to in order to carry out the Project Operations described at Clause 9.2. Both parties acknowledge that these rights are subject to this Section 3 (*Access to Work Protocol*) of Schedule 21 (*Joint Operating Protocol*).
- 3.2 D&B Co shall schedule the carrying out of Project Operations following the Actual Completion Date outside of the [Core Day]²¹⁴, wherever reasonably possible.

Safeguarding and Appearance

- 3.3 [D&B Co shall procure that any individual required by D&B Co or a D&B Co Party to attend the Site for any purpose after the Actual Completion Date who may reasonably be expected in the course of their employment or engagement to have access to children [,the elderly] and/or vulnerable adults will:

3.3.1 either:

- (a) have successfully completed the appropriate level of clearance from Disclosure and Barring Service check carried out in

²¹³ Protocol to be further developed on a project specific basis.

²¹⁴ To be defined on a project specific basis.

accordance with paragraph 4.2.2 (*Convictions and Disciplinary Action*); or

- (b) [where the relevant individual has disclosed any Convictions or Anti social Behaviour Orders or is found to have any Convictions or Anti social Behaviour Orders following the results of a Disclosure and Barring Service check and the Authority has consented to such individual's engagement or employment in accordance with paragraph 4.3 (*Convictions and Disciplinary Action*), D&B Co shall, provided it has the individual's consent, so inform the [relevant] [School Entity and] the Authority;]

3.3.2 be properly equipped to undertake the relevant task in a safe and professional manner;

3.3.3 have undergone specific induction training;

3.3.4 be trained and appropriately qualified to undertake the relevant task;

3.3.5 have a photo identification badge clearly displayed at all times while at the Facilities; and

3.3.6 at all times while at the Facilities be dressed in such a manner as to be easily identified as a D&B Co Party.

- 3.4 In the event that any individual required by D&B Co or a D&B Co Party to attend on Site does not meet the requirements of paragraph 3.3, D&B Co shall procure that, unless the Authority has consented to such individual's engagement or employment in accordance with paragraph 4.3 (*Convictions and Disciplinary Action*) and the individual has provided evidence of such consent upon attending the Facility, they are accompanied at all times while on Site by a member of the D&B Co 's or a D&B Co Party's staff who has been properly employed or engaged in accordance with paragraphs 4.2 and 4.3 (*Convictions and Disciplinary Action*).

4. Convictions and Disciplinary Action

4.1 [[♦]].

4.2 D&B Co (to the extent permitted by Law) shall procure that all potential staff or persons performing any of the Project Operations following the Actual Completion Date and who may reasonably be expected in the course of their employment or engagement to have access to children[, the elderly] and/or vulnerable adults²¹⁵:

4.2.1 are questioned concerning their Convictions; and

²¹⁵ Project specific tailoring required in this paragraph 4 to refer to the relevant user group.

- 4.2.2 D&B Co and the Contractor obtains a check of the most extensive available kind made with the Disclosure and Barring Service of such persons.
- 4.3 D&B Co shall procure that no person who may reasonably be expected in the course of their employment or engagement to have access to children[, the elderly] and or vulnerable adults, who discloses any Convictions, or who appears on a Barred List following the results of a Disclosure and Barring Service check, in either case of which D&B Co, or the Contractor is aware or ought to be aware is employed or engaged in the provision of the Project Operations following the Actual Completion Date without the Authority's prior written consent (such consent not to be unreasonably withheld or delayed).
- 4.4 Subject always to having the prior written consent of the relevant individual D&B Co shall procure that the Authority is kept advised at all times of any person employed or engaged by D&B Co or the Contractor in the provision of the Project Operations who may reasonably be expected in the course of their employment or engagement to have access to children[, the elderly] and/or vulnerable adults and following the Actual Completion Date who, subsequent to his/her commencement of such employment or engagement, receives a Conviction of which D&B Co the Contractor becomes aware or whose previous Convictions become known to D&B Co.
- 4.5 The Authority shall have the rights to refuse admittance to, or require the removal of such person(s). D&B Co shall procure the immediate removal of those person(s) from the Facilities either:
- 4.5.1 at the Authority's request (where the relevant information has been provided to the Authority); and
- 4.5.2 in all cases where the relevant information has not been provided to the Authority.
- 4.6 In the event that D&B Co is notified at any time that any person employed or engaged by D&B Co or a D&B Co Party in carrying out the Project Operations and who may reasonably be expected in the course of their employment or engagement to have access to children[, the elderly] and/or vulnerable adults is included on a Barred List, is a barred person, is subject to verification procedures by the Disclosure and Barring Service or, is making representations to the Disclosure and Barring Service (pursuant to the Safeguarding Vulnerable Groups Act 2006), then save where the Authority's consent is obtained pursuant to paragraph 4.3, it shall immediately remove or procure the removal of that person or persons from the Facilities and shall not permit their return to the Facilities in the course of their employment or engagement for, without prejudice to the preceding provisions of this Clause, so long as such person is no longer on a Barred List, not a barred person and where relevant, verification procedures or representations have concluded with the Disclosure and Barring Service.

5. Process for the Issue of an Access to Work Permit and Safeguarding

- 5.1 The parties agree and acknowledge that [the School Entity/ Authority (through the relevant appointed personnel)] shall be responsible for the issue of Access to Work Permits to D&B Co or a D&B Co Party in respect of access to the Facility in accordance with this Access to Work Protocol.
- 5.2 Without prejudice to any of D&B Co's other obligations under this Agreement, in the event that D&B Co or a D&B CO Party require to access [the Facilities after the Actual Completion Date]²¹⁶ in order to perform its obligations under this Agreement, D&B Co shall no less than [Ten (10)]Business Days prior to the proposed access date notify the Authority's Representative, [and the Facility's Representative] of the planned date and work to be undertaken and will submit an application for an Access to Work Permit(s) for the work in question.
- 5.3 The Facility Representative shall be entitled either to issue an Access to Work Permit (in writing) to D&B Co or (where required to avoid disruption to the Authority Services) to reject D&B Co's application (either in whole or in part) in accordance with this Access to Work Protocol within [two (2) Business Days]. Where the [[relevant] Facility Representative and/or Facility Liaison Person] fails to respond to D&B Co's application within [two (2) Business Days], the [[relevant] Facility Representative and Facility Liaison Persons] will be deemed to have consented to D&B Co's application in whole and to have issued an Access to Work Permit.]
- 5.4 [Where the [[relevant] Facility Representative and/or Facility Liaison Persons] do not consent to D&B Co's application, they shall promptly advise D&B Co of the earliest possible time when an Access to Work Permit may be issued.

²¹⁶ The provisions for issuing Access to Work Permits will require review on a project specific basis. For example, access to certain parts of a Site to complete programmed Post Completion Works may not require this process to be followed.

SCHEDULE 22
LIAISON PROCEDURE²¹⁷

²¹⁷ To be prepared on a project specific basis addressing the provisions of Clause 8.10 and Schedule 21 (*Joint Operating Protocol*) of this Template Education D&B Agreement and by incorporation and adaptation of the provisions of the Liaison Procedure set out in Schedule 24 of the Template MIM Education PA (as appropriate).

SCHEDULE 23
PLANNING RESPONSIBILITIES MATRIX

SCHEDULE 24
D&B CO INFORMATION



Llywodraeth Cymru
Welsh Government

WEP Strategic Partnering Delivery Model

Template WEPCo Shareholders' Agreement

ITPDSB Version (Standard Form Version 1.3)

TEMPLATE WEPCO SHAREHOLDERS' AGREEMENT

VERSION 1

IMPORTANT NOTICE

This is the first version of the Welsh Education Partnership ("**WEP**") Strategic Partnering Delivery Model standard form of WEPCo Shareholders' Agreement, the intention of which is to minimise the time and costs of dealing with legal issues relating to the WEP Strategic Partnering Delivery Model.

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

1. This is the Template WEPCo Shareholders' Agreement (the "**Template WEPCo Shareholders' Agreement**") as referred to in and set out in Section 3 of Schedule 7 (*Template Project Agreement*) of the Strategic Partnering Agreement ("**SPA**"). Under the terms of the SPA, the parties are obliged to use this Template WEPCo Shareholders' Agreement in conjunction with the SPA, subject to the amendments described below.
2. All footnotes (and optional drafting) should be used/deleted as appropriate and in accordance with the guidance contained therein. It should be noted other derogations to the Template WEPCo Shareholders' Agreement are strongly discouraged and it is expected Welsh Government approval will be strictly limited to changes that represent value for money and are required for project specific reasons, or to reflect changing Welsh Government guidance or demonstrable changing market circumstances.
3. Clause and paragraph numbering should be preserved through the use of lettered additions and "not used" deletions. Automatic numbering and hyperlinked cross references should be maintained.
4. All parties are reminded that the WEP Strategic Partnering Delivery Model is a true partnering arrangement and the value of further debate over insubstantial issues should be considered in this light.
5. The Template WEPCo Shareholders' Agreement is not a replacement for independent, specialist advice and the Shareholders must ensure that they have taken appropriate legal, financial and technical advice before using it.
6. Should you have any questions on the draft you are asked to contact MIMEducation@gov.wales

DATED

20◆

[PRIVATE SECTOR DELIVERY PARTNER] (1)

[WGCO LIMITED] (2)

[WEPCO/COMPANY] (3)

**WEPCO SHAREHOLDERS'
AGREEMENT RELATING TO
THE WEP STRATEGIC
PARTNERING DELIVERY
MODEL**

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**WEP STRATEGIC PARTNERING DELIVERY MODEL TEMPLATE WEP CO SHAREHOLDERS'
AGREEMENT**

THIS AGREEMENT is made on

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Among:

- (1) **[Private Sector Delivery Partner]**¹ (Company No. ◆) whose registered office is at ◆
(PSDP);
- (2) **[WGCo Limited]**² (Company No. ◆) whose registered office is at ◆ (**WGCo**); and
- (3) **[Name of WEP Co/Company]**³ (Company No. ◆) whose registered office is at ◆
(**Company**).

Background:

- (A) Pursuant to this Agreement the PSDP and WGCo have agreed to subscribe for shares in the Company [and to advance monies to the Company (as debt)] and, on completion of the subscriptions referred to in clause 4.1 (*Initial subscriptions of Shares*), and completion of advances referred to in clause 4.2 (*Shareholder Debt*) the Shares held by each of those parties [and the amount of Shareholder Debt advanced to the Company by each of those parties] will be as set out in the Data Sheet.
- (B) The Company is a limited liability company registered in [England and Wales].
- (C) The Company has been established for the sole purpose of providing (or procuring) the Services described in the Strategic Partnering Agreement.
- (D) The parties have agreed that the respective rights and obligations of Shareholders in the Company shall be governed by the provisions of this Agreement and that the Company Business shall be conducted in accordance with the provisions of this Agreement.

IT IS AGREED:

1. Definitions and interpretation

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

¹ **Parties - PSDP.** For ease of reference, this standard form anticipates the "PSDP" being a single company. It is recognised that the "PSDP" may comprise a number of parties. In this case this standard form will require amendment.

² **Parties - WGCo.** The identity of this entity is to be confirmed. Beyond the initial funding commitment pursuant to clause 4 of this Agreement, as with the PSDP, there will not be any recourse against the shareholders.

³ **Company** - This document has been drafted on the premise that the Company is registered in England and Wales.

2. Commencement and duration

Conditions precedent

2.1 The obligations set out in clause 13.7 (*Confidentiality*) shall commence:

- (a) in relation to the Founder Shareholders and the Company, on the execution of this Agreement; and
- (b) in relation to any person becoming a Shareholder after the date of this Agreement (a "**New Shareholder**"), on the execution of the Deed of Adherence.

2.2 Save as set out in clause 2.1 (*Conditions precedent*), this Agreement shall come into effect:

- (a) in relation to Founder Shareholders and the Company, on the completion of the matters set out in clause 4.1 (*Initial subscriptions of Shares*); and
- (b) in relation to a New Shareholder, on the registration of the New Shareholder as a Shareholder in the Company.

Termination in relation to a party ceasing to hold Shares in the Company

2.3 Immediately following the earlier of the termination of this Agreement and it ceasing to hold any Shares in the Company, a party shall cease to have any rights or obligations under this Agreement save for:

- (a) its obligations under clause 5.8 and 5.9 (*Composition of the Company Board and the right to appoint Directors*);
- (b) its rights and obligations under clause 8.16 (*Provision of information to Shareholders and designated third parties*), clause 11 (*Disputes*) and clause 13 (*Miscellaneous*);
- (c) its liability for any breaches prior to it ceasing to hold any Shares;
- (d) any rights or cause of action that arose prior to it ceasing to hold any Shares; and
- (e) its rights to receive any payment in connection with the transfer of its Shares.

Termination

2.4 Save as provided in clause 2.3 (*Termination in relation to a party ceasing to hold Shares in the Company*) this Agreement shall continue in full force and effect until the earliest of the following dates:

- (a) the date on which the Company is wound up; or
- (b) the date on which all the Shareholders agree in writing to terminate this Agreement.

2.5 [If termination occurs the Company shall (if not already in liquidation) be placed into voluntary liquidation in accordance with clause 12 (*Winding Up*) and, after payment of liabilities, its assets shall be distributed to the Shareholders in the same proportions as the Shareholders' holdings of shares at the time of the determination.]

3. The business of the Company and details of the Company

3.1 The business of the Company is to provide (or procure) the Services.

3.2 Details of the Company following the share subscriptions referred to in clause 4 (*Funding of the Company and financial matters*) and board appointments referred to in clause 5 (*The Board of the Company*) will be as detailed in Schedule 2 (*Details of the Company*).

4. Funding of the Company and financial matters

Initial subscriptions of Shares

4.1 Immediately upon the execution of this Agreement by each of the parties, the parties shall take or procure to be taken the following steps either by themselves or at meetings of the Company Board or of the members of the Company to the extent not already taken:

- (a) the parties shall procure that the necessary Company Board and/or shareholder resolutions in respect of the Company are passed to adopt the Company Articles with immediate effect;
- (b) the following subscriptions shall be made in the capital of the Company:
 - (i) the PSDP shall subscribe for the number of B Shares as set out opposite its name in the Data Sheet; and
 - (ii) WCo⁴ shall subscribe for the number of A Shares as set out opposite its name in the Data Sheet,

following which the Company shall deliver the relevant definitive share certificates in relation to the allotment of such Shares and shall insert the names of the allottees in the register of members of the Company.

4.2 *[Shareholder Debt]*

[In respect of Shareholder Debt:

- (a) the PSDP undertakes to advance to the Company the amount of Shareholder Debt as set out opposite its name in the Data Sheet; and
- (b) WCo undertakes to advance to the Company the amount of Shareholder Debt as set out opposite its name in the Data Sheet,

following which the Company shall deliver any relevant certificates in relation to such Shareholder Debt and shall insert the names of the Shareholders in the relevant registers.]⁵

Further capital required for the Company

4.3

- (a) No Shareholder shall be required to subscribe for any further Shares or to provide any additional funding for the Company (or guarantees or indemnities on behalf of the Company or any other WEP Company) which, for the avoidance of doubt, shall include any additional funding by way of shareholder loans and/or required to increase the working capital requirements of any WEP Company or advancing or

⁴ **Clause 4.1(b)(ii)– Level of WCo investment.** The intended level of the WCo investment will be 20% of the issued share capital/debt.

⁵ It is envisaged this will be in the form of loan notes.

making available any Indebtedness to any WEP Company. For the avoidance of doubt, neither approval of:

- (i) the Business Plan or any change from time to time;
- (ii) a Stage 2 Submission;
- (iii) any increase in the Indebtedness of any WEP Company; or
- (iv) any other matter pursuant to this Agreement,

shall bind or commit any Shareholder to subscribe for Shares or to provide any additional funding for the Company (or any guarantee or indemnity on behalf of the Company or any other WEP Company) which, for the avoidance of doubt, shall include any additional funding by way of shareholder loans and/or required to increase the working capital requirements of any WEP Company or advancing or making available any Indebtedness to any WEP Company unless that Shareholder has expressly agreed in writing to do so.

- (b) The Company shall not allot any Shares to any person (other than a Shareholder) unless that person has first executed a Deed of Adherence in the form set out in Schedule 4 (*Deed of Adherence*).
- (c) If, in the opinion of the Company Board, the Company requires further funding, the Company Board shall, having consulted with the Shareholders in accordance with clauses 6.8 to 6.11 (*Shareholders' Forum*), determine how the Company should obtain such additional funding, whether by way of the allotment of Shares, by obtaining additional debt finance, or such other means as the Company Board may determine.
- (d) If the Company Board determines to allot further Shares, such Shares shall (except to the extent that all the Shareholders otherwise agree in writing) be allotted in accordance with the provisions of sub-clauses (e) to (i) below.
- (e) On the allotment of Shares, the number of Shares in each class offered for allotment by the Company shall be pro rata the number of Shares in each class then in issue.
- (f) If the Company Board determines to allot Shares in the Company, the Company Board shall, of the Shares to be allotted, first offer each class of Shares pro rata to those persons' existing holdings of Shares in that class ("**first offer**").
- (g) To the extent that any first offer is not accepted by some of the persons in the relevant category, the Company Board shall offer the remaining Shares in that class to the persons in that category who have accepted that first offer pro rata to their existing holdings of Shares ("**second offer**"). To the extent that any second offer is not accepted by some of the persons in any category, but is accepted by other persons in that category, the Company Board shall make such subsequent offers *mutatis mutandis* to those persons who have accepted the second offer and (if one subsequent offer fails to achieve the allotment of all the Shares in that class) any subsequent offers (if any), until all the Shares belonging to that class have been accepted by persons in that category or (failing acceptance) until there are no persons in that category willing to take further Shares.
- (h) To the extent that any first, second offer and any subsequent offers made pursuant to sub-clause (g) above (as applicable) fail to achieve the allotment of all the Shares in any class the Company Board shall offer the remaining Shares to the holder of the other class of shares, pro rata to their holdings following the first, second and any

subsequent offers (as applicable) ("**third offer**"). To the extent that any third offer is not accepted by some of the persons in that category, but is accepted by other persons in that category, the Company Board shall make such subsequent offers mutatis mutandis to those persons who have accepted the third offer and (if one subsequent offer fails to achieve the allotment of all the Shares) any subsequent offers (if any), until all the Shares have been accepted or (failing acceptance) until there are no persons in that category willing to take further Shares.

- (i) To the extent that the third offer and any subsequent offers in relation to any class of Shares are not accepted, the Company Board may offer the remaining Shares to any Suitable Third Party.

Offers to Allot

4.4 Each offer shall be made by the Company Board by notice in writing (an "**Offer to Allot**") and in the case of Shareholders shall be served at their address for service set out in clause 13.18 (*Notices*) and on New Shareholders at the address for service notified to the Company by such New Shareholder.

- (a) Each Offer to Allot shall:
 - (i) specify the total number of Shares which are on offer;
 - (ii) specify the number of Shares for which the recipient of the Offer to Allot may subscribe;
 - (iii) specify the price per Share and the date when the price shall be payable (which may be expressed by reference to the expiry of a specified period after the receipt of notices of acceptance in respect of all the Shares offered for allotment or (if later) expiry of the last of the Offers to Allot required to be issued);
 - (iv) specify the period during which the Offer to Allot will remain open for acceptance, which for a first offer shall be seven (7) Business Days after the date of service of the Offer to Allot and for all other offers five (5) Business Days after the date of service of the Offer to Allot; and
 - (v) contain a statement to the effect that the Offer to Allot shall not be deemed to be accepted until the Company Board has either received notices of acceptance in respect of all the Shares offered for allotment or, having received notices of acceptance in respect of less than all the Shares offered for allotment, has elected to issue such Shares notwithstanding that notices of acceptance have not been received in respect of all the Shares offered for allotment.
- (b) After the expiry of each Offer to Allot the Company Board shall as soon as practicable make such additional offers as may be necessary in accordance with this clause 4 (*Funding of the Company and financial matters*). For the avoidance of doubt, the Company Board shall not be under any obligation to make an offer to a Suitable Third Party under clause 4.3.
- (c) Any Shares issued pursuant to the procedures set out in this clause 4 shall be designated as the same class of Shares as the Shares already held by the relevant allottee. If the relevant allottee is not already a Shareholder the Shares shall, unless agreed otherwise by the Shareholders together holding a majority of the A Shares and the Shareholders together holding a majority of the B Shares, be designated as A

Shares where the allottee is a public sector or third sector body or as B Shares where the allottee is a private sector body.

- (d) Each of the Shareholders agrees to approve any resolution put to a general meeting of the Company to renew the authority of the Directors to allot Shares in the Company.

Additional Shareholder Debt

4.5 The provisions of clause 4.3 (*Further capital required for the Company*) and clause 4.4 (*Offers to Allot*) relating to any additional issue of Shares shall apply with the necessary changes to any further issue of/borrowing of Shareholder Debt.

4.6 Without prejudice to clause 4.3, but subject to clause 4.8, each Shareholder shall advance the amount of Shareholder Debt set out against its name in each Stage 1 Submission approved and submitted by the Company under the Strategic Partnering Agreement in accordance with any timetable for such subscription or advance set out in the Stage 1 Submission.

4.7 Notwithstanding clause 4.5 (*Additional Shareholder Debt*), where:

- (a) the Project to be implemented pursuant to a Stage 2 Submission requires subordinated debt to be provided to any WEP Company; and/or
- (b) there is any other proposal for Shareholder Debt to be provided to any WEP Company;

the Company shall ensure that each of the Shareholders is given the option to agree to:

- (c) advance monies (in aggregate equal to the required amount) as Shareholder Debt on a pari passu basis pro rata to their respective holding of Shares; or
- (d) have one or more of its Associates (or in the case of the B Shareholder, one or more of the B Shareholder Members or its or their respective Associates) provide such advances wholly or partially in their place.

Where a Shareholder (or any related party listed in clause 4.7(d) in place of that Shareholder) does not exercise its option under this clause 4.7 in respect of the full amount referred to in clause 4.7, the balance shall be offered, as an option on like terms to this clause 4.7, to the remaining Shareholders holding Shares of the same class first (pro rata to their holdings) and thereafter to the other Shareholders, on a basis consistent with the table at clause 4.3 (and on the basis that the sequence of offers, and the terms and conditions of such offers, shall reflect (so far as reasonably appropriate) the provisions of clause 4.3(f) to 4.3(i) and clause 4.4).

4.8 Where clause 4.7 applies, no Stage 2 Submission shall be made in respect of any Project which requires the provision of funds which would constitute Shareholder Debt unless:

- (a) the provisions of clause 4.7 have been complied with (except to the extent that all the Shareholders have otherwise agreed in writing); and
- (b) there is attached to such Stage 2 Submission a written agreement from all relevant Shareholders who are to advance Shareholder Debt in terms of the Stage 2 Submission to the making of such Stage 2 Submission including the requirement for such Shareholder Debt to be so provided by them (or their respective Associates or, in the case of the B Shareholder, one or more of the B Shareholder Members or its or their respective Associates).

5. The Board of the Company

Composition of the Company Board and the right to appoint Directors

- 5.1 Without prejudice to any right of the Shareholders to appoint Alternates under clause 5.4 and a Chairman under clause 5.11, the Shareholders shall be entitled in accordance with the Company Articles to nominate and appoint (and the Company shall procure that such persons are appointed by Company Board resolution) persons as Directors of the Company and to require the removal of such persons from office as set out below:
- (a) the Shareholder[s] holding the majority of the A Shares shall be entitled to nominate and appoint one Director (the “**A Director**”) and to remove the A Director from office; and
 - (b) the Shareholder[s] holding a majority of the B Shares shall be entitled to nominate and appoint [three] Directors (each a “**B Director**”) and to remove B Directors from office.
- 5.2 The persons nominated and appointed by the parties to act as initial Directors are:
- (a) the A Director: [*Insert name*]; and
 - (b) the B Directors: [*Insert names*].
- 5.3 Any Director who is not an employee of the Company shall be appointed upon the terms and conditions set out in Schedule 9 (*Letters of appointment of Nominated Directors*) or such other terms as the Company Board may agree from time to time.
- 5.4 The Shareholders nominating and appointing each of the Directors pursuant to clause 5.1 shall in addition be entitled, in accordance with the Company Articles, to nominate and appoint one (1) person as an Alternate and to replace such person(s) as an Alternate from time to time (provided such Alternate shall be registered as a Director at Companies House).
- 5.5 Subject to:
- (a) clauses 5.6, 5.7 and the Articles, the quorum for Company Board meetings shall comprise one A Director and at least [two] B Directors (or their respective Alternates). At Company Board meetings each Director shall have one vote; and
 - (b) the Articles, if a Shareholder has more than one (1) Director appointee under clause 5.1 (*Composition of the Company Board and the right to appoint Directors*) but not all of such appointees (or their Alternates) are present at the Board meeting then the other Director(s) present appointed by that Shareholder shall be entitled to vote each relevant absent Director's vote.
- 5.6 If within thirty (30) minutes of the time for the relevant meeting there is not a quorum of Directors in attendance (in accordance with clause 5.5) at a Company Board meeting called in accordance with this clause 5 (*The Board of the Company*), then (unless the relevant Director(s) have given written waiver(s) in relation to his/her attendance) such meeting shall be adjourned in accordance with article [◆] of the Company Articles and when reconvened, such adjourned meeting called in accordance with this clause 5 to discuss substantially the same business shall, subject to the provisions of article [◆] of the Company Articles, be deemed to be quorate notwithstanding the fact that the relevant number of Director appointed by holders of Shares of that class may not be present.

- 5.7 If the holders of any class of Share fail to appoint the number of Directors it is required to appoint to satisfy the applicable quorum requirements under clause 5.5, then, if a Company Board meeting is called in accordance with this clause 5 and notice of the meeting is given to each of the holders of Shares of that class as if they were Directors, the meeting shall be deemed to be quorate notwithstanding the fact that the relevant number of Director(s) appointed by holders of Shares of that class may not be present.
- 5.8 If the holders of any class of Shares elect to remove any person nominated by them as a Director (the "**Outgoing Director**") then:
- (a) if the Outgoing Director is an employee and/or officer of any Shareholder, that Shareholder shall procure that the Outgoing Director vacates office without any claim against the Company for loss of office or otherwise and the Shareholder shall indemnify the Company against all losses, liabilities and costs which the Company may incur arising out of, or in connection with, any claim by the Outgoing Director for wrongful, unfair or constructive dismissal or redundancy or other loss arising out of the Outgoing Director's removal or loss of office; and
 - (b) if the Outgoing Director is not an employee and/or officer of any Shareholder, the holders of that class of Shares shall procure that the Outgoing Director vacates office without any claim against the Company for loss of office or otherwise and such holders of Shares shall indemnify the Company against all losses, liabilities and costs which the Company may incur arising out of, or in connection with, any claim by the Outgoing Director for wrongful, unfair or constructive dismissal or redundancy or other loss arising out of such Outgoing Director's removal or loss of office.
- 5.9 If any Shareholder (an "**Outgoing Shareholder**") ceases to hold Shares in the Company and:
- (a) the Outgoing Shareholder is the sole holder of the class of Shares which the Outgoing Shareholder holds and any Director appointed by virtue of the Outgoing Shareholder's holding of such Shares is an employee and/or officer of the Outgoing Shareholder or has been nominated as a Director by the Outgoing Shareholder pursuant to clause 5.1; or
 - (b) the Outgoing Shareholder is not the sole holder of the class of Shares which the Outgoing Shareholder holds but any Director appointed by the holders of such class of Shares is an employee and/or officer of the Outgoing Shareholder, or has been appointed as a Director pursuant to clause 5.1 by the Outgoing Shareholder as a holder of a majority of the relevant class of Shares,
- the Outgoing Shareholder shall procure that any such Director vacates office without any claim against the Company for loss of office or otherwise and the Outgoing Shareholder shall indemnify the Company against all losses, liabilities and costs which the Company may incur arising out of, or in connection with, any claim by such Director for wrongful, unfair or constructive dismissal or redundancy or other loss arising out of such Director's removal or loss of office.
- 5.10 Where a Director exercises or fails to exercise his voting rights in contravention of this Agreement, the Shareholders nominating that Director shall remove that Director from office and the Shareholders shall co-operate with each other as appropriate to revise and rectify the consequences of that Director's actions or omissions. In the event of such removal the provisions of clause 5.8 shall apply.

5.11

- (a) If the Shareholders unanimously agree to appoint an independent non-executive Chairman then the Chairman shall be appointed either on an annual basis or on such occasions as the Shareholders (acting in their absolute discretion) may unanimously agree, and the period of appointment shall be for such time as the Shareholders may unanimously agree (acting in their absolute discretion) from time to time. The Chairman appointed shall be a Director and his/her appointment shall be in addition to the appointments of Directors referred to in clause 5.2 (*Composition of the Company Board and the right to appoint Directors*). If a Chairman is unable to attend any meeting of the Company Board or of the Shareholders of the Company the Directors in attendance shall appoint one (1) of their number as the chair for that meeting to act in his/her place. An independent non-executive Chairman appointed under this sub-clause (a) shall not have a vote at either Company Board or Shareholder meetings.
- (b) If the Shareholders do not agree unanimously to appoint an independent non-executive Chairman under sub-clause (a) within one (1) month of the date of this Agreement then the Chairman shall be one (1) of the Directors appointed in accordance with clause 5.1 (*Composition of the Company Board and the right to appoint Directors*) who shall act as Chairman for six (6) months and thereafter the role of Chairman shall rotate every six (6) months between a Director appointee of each class of Shareholder by each class of Shareholder drawing lots, provided that such appointee shall not hold the role of Chairman for more than six (6) months in any twelve (12) month period. A Director appointed as Chairman under this sub-clause (b) shall not have a second vote by reason of his/her appointment as Chairman.

5.12 Resolutions of the Company Board shall be determined by a simple majority of votes cast for or against each resolution in accordance with this Agreement.

5.13 Unless otherwise agreed by all of the Directors, not less than ten (10) Business Days' notice (or such other period of notice as may be agreed from time to time by all of the Directors) of each meeting of the Company Board specifying the date, time and place of the meeting shall be given to all Directors at the relevant time. All meetings of the Shareholders and of the Company Board shall take place at such location as the Company Board shall agree and the Shareholders shall use all reasonable endeavours to procure that their respective Directors attend each such meeting and to procure that a quorum (in accordance with the provisions contained in this clause 5 and in the Company Articles) is present at each such meeting of which due notice has been given.

5.14 Unless otherwise agreed by the Company Board:

- (a) meetings of the Company Board shall be held not less than [quarterly] on such dates as they may agree (and failing such agreement on such day as the Chairman shall decide);
- (b) a telephone conference call or video conference or a combination of the same, at which all participants are able to speak to and hear each of the other participants and at which for all times at that meeting a quorum of the Directors is able to so participate, shall be valid as a meeting of the Company Board;
- (c) a resolution in writing signed by all the Directors entitled to receive notice of a Company Board meeting and vote at that meeting shall be as valid and effectual as if it had been passed at a meeting of the Company Board duly convened and held; and

- (d) any Director shall by notice to the Company and each other Director be entitled to convene a meeting of the Company Board on not less than ten (10) Business Days' notice.
- 5.15 Unless otherwise agreed by all of the Directors, all papers for meetings of the Company Board will be sent to all Directors not less than five (5) Business Days prior to the relevant meeting and, unless otherwise agreed by all of the Directors, draft minutes of meetings of the Company Board will be sent to each Director as soon as practicable after the holding of the relevant meeting.
- 5.16 [Notwithstanding any other provisions of this Agreement or of the Company Articles, if a Shareholder (the "**Relevant Shareholder**") is in material breach of its obligations under this Agreement or the Articles the Director(s) appointed by it shall be disenfranchised from voting at Company Board meetings unless and until that breach is remedied and no approval shall be required of the Relevant Shareholder's Directors for any Reserved Matter Board Approval matters. If there is a dispute as to whether a Relevant Shareholder is in material breach of its obligations under this Agreement then, pending determination, the Relevant Shareholder shall be deemed to be in material breach if each other class of Shareholders (excluding the Relevant Shareholder) each confirm in writing to the Relevant Shareholder that they consider the Relevant Shareholder to be in material breach setting out the basis of that breach, however the Relevant Shareholder may then refer the question of whether it is in material breach to the dispute resolution procedure in clause 11 (*Disputes*).]

Director remuneration

- 5.17 The Company shall pay Director remuneration as set out in clause 5.18 (*Director remuneration*). Any increase in any such remuneration other than in accordance with clause 5.18 (*Director remuneration*) is a Reserved Matter Board Approval.
- 5.18 The role of Director of the Company shall attract remuneration of £[◆]⁶ per annum (Index Linked). Such fee shall be due to the relevant Director, pro rata, monthly in arrears, from the date of his/her appointment and is payable within thirty (30) days of receipt of an invoice by the Company in respect of such fee.
- 5.19 In addition to the remuneration set out at clause 5.18 (*Director remuneration*), the Directors may be paid reasonable travelling and other expenses properly incurred by them in connection with their attendance at meetings of the Company Board, general meetings, meetings of committees of the Company Board or otherwise in connection with the carrying out of their duties.

Director's power to authorise conflict situations

- 5.20 Provided that a Director has disclosed any interest he/she may have in accordance with the Companies Act 2006, and any conflict or potential conflict has been authorised under the provisions of this clause 5 (*The Board of the Company*), then that Director may vote at a meeting of the Company Board or of a committee of Directors on a resolution or participate in any unanimous decision concerning any matter in which he/she is interested, and (whether or not he/she votes or participates) he/she may be counted in the quorum when that resolution or matter is considered.

⁶ **Clause 5.17 - Director remuneration.** Note that agreement is required on the initial level Director remuneration. It will be set at bid stage and this will be required to be in line with corporate good practice. In respect of travel expenses this is expected to be standard class for train travel etc.

- 5.21 A Director shall be entitled to abstain from voting or to absent himself/herself from all or any part of any meeting in relation to any matter where he/she considers that to vote for or against a matter may put him/her in breach of his/her duties to the Company (whether at Law or by reference to any code of conduct, good governance procedures or otherwise) and if he/she so abstains or absents himself/herself then he/she shall not be in breach of his/her duties as a Director under sections 172 to 174 of the Companies Act 2006 in relation to the matter in question.
- 5.22 Any Director shall be entitled from time to time to disclose to the Shareholder responsible for his/her appointment such information concerning the business and affairs of the Company as he/she shall at his/her discretion see fit.
- 5.23 A Director who to his/her knowledge is in any way, whether directly or indirectly, interested in a transaction or arrangement or proposed transaction or arrangement with the Company shall declare the nature of his/her interest at a meeting of the Directors in accordance with the Companies Act 2006.
- 5.24 Subject to clause 6.2(*Reserved Matters*), for the purposes of section 175 of the Companies Act 2006, the Directors shall have the power to authorise, on such terms (including as regards duration and revocation) and subject to such limits or conditions (if any) as they may determine (a "**Conflict Authorisation**"), any matter proposed to them which would, or might, if not so authorised, constitute or give rise to a situation in which a Director (a "**Relevant Director**") has, or can have, a direct or indirect interest which conflicts, or possibly may conflict, with the interests of the Company (a "**Conflict Situation**"). Any Conflict Authorisation shall extend to any actual or possible conflict of interest which may reasonably be expected to arise out of the Conflict Situation so authorised.
- 5.25 Unless otherwise agreed between the Shareholders in writing and notwithstanding clauses 5.5 to 5.7), the quorum for any meeting (or part of a meeting) of the Company Board whilst it is considering the grant, alteration or revocation of a Conflict Authorisation shall be at least one (1) Director for each class of Shareholder provided that a Relevant Director shall not be counted in the quorum for such meeting.
- 5.26 Where Directors give a Conflict Authorisation:
- (a) the terms of the Conflict Authorisation shall be recorded in writing (but the authorisation shall be effective whether or not the terms are so recorded);
 - (b) the Directors may revoke or vary such authorisation at any time but this will not affect anything done by the Relevant Director prior to such revocation or variation in accordance with the terms of such authorisation; and
 - (c) the Relevant Director shall be obliged to act in accordance with any terms, limits or conditions to which such Conflict Authorisation is made subject.
- 5.27 Any terms to which a Conflict Authorisation is made subject ("**Conflict Authorisation Terms**") may include (without limitation to clause 5.24 (*Director's power to authorise conflict situations*)) provision that:
- (a) where the Relevant Director obtains (other than in his/her capacity as a Director of the Company or as its employee or agent or, if the Directors so decide, in any other capacity that would otherwise oblige him/her to disclose it to the Company) information that is confidential to a third party, he/she will not be obliged to disclose it to the Company or to use it directly or indirectly for the benefit of the Company or in performing his/her duties as a Director of the Company in circumstances where to do so would amount to a breach of a duty of confidence owed to that third party;

- (b) the Relevant Director may (but shall be under no obligation to) absent himself/herself from the discussion of, and/or the making of decisions relating to, the relevant matter (whether at any meeting of the Company Board or otherwise) and be excused from reviewing documents and information prepared by or for the Company Board to the extent that they relate to that matter; and
- (c) the Relevant Director be excluded from the receipt of documents and information, the participation in discussion and/or the making of decisions (whether at Directors' meetings or otherwise) related to the relevant matter,

and anything done (or omitted to be done) by the Relevant Director in accordance with any such provision (or otherwise in accordance with any Conflict Authorisation Terms given under this clause 5.27 (*Director's power to authorise conflict situations*)) will not constitute a breach by him of his/her duties under sections 172 to 174 of the Companies Act 2006.

5.28 Subject to this clause 5.28 and clause 6.2 (*Reserved Matters*) but without prejudice to clause 5.24 and 5.25 (*Director's power to authorise conflict situations*) (inclusive), authorisation is given by the Shareholders for the time being on the terms of this Agreement to each Director in respect of any Conflict Situation that exists as at the date of this Agreement or that subsequently arises where (in either case):

- (a) the Director is an employee or director of, or shareholder or member with a [controlling/substantial] interest in, a counterparty to a Project Document with any [WEP Company or Project Service Provider] ("**Counterparty**"); or
- (b) the Director has been appointed as a director of the Company on the nomination of the Counterparty; or
- (c) the Director is an employee, director, appointee of, or member with a [controlling/substantial] interest in, a body (i) which holds a [controlling/substantial] interest in the Counterparty; or (ii) in which the Counterparty has a [controlling/substantial] interest; or (iii) which is an Associate of the Counterparty,

and on the basis that a "**substantial interest**" shall be taken to be an interest which confers an entitlement to [ten per cent (10%)]⁷ or more of the voting rights at general meetings of the relevant body or [ten per cent (10%)] or more of the distributable profits of the relevant body ("**Project Document Conflict Authorisation**").

5.29 The Conflict Authorisation Terms applicable to the Project Document Conflict Authorisation ("**Project Document Conflict Authorisation Terms**") are automatically set by this clause 5.29 (*Director's power to authorise conflict situations*) so that the Director concerned:

- (a) is not obliged to disclose to the Company information that is confidential to a third party obtained by him/her (other than in his/her capacity as a Director of the Company or as its employee or agent or, if the Directors so decide, in any other capacity that would otherwise oblige him/her to disclose it to the Company) in any situation to which the Project Document Conflict Authorisation applies, nor to use any such information directly or indirectly for the benefit of the Company or in performing his/her duties as a Director of the Company, in circumstances where to do so would amount to a breach of a duty of confidence owed to that third party; or
- (b) may (but shall be under no obligation to):

⁷ **Clause 5.28 - Conflicts.** To be considered on a project by project basis of the proposed investment structure.

- (i) absent himself/herself from the discussions of, and/or the making of decisions; and/or
 - (ii) make arrangements not to receive documents and information,
- relating to the Conflict Situation concerned,

and the Company will not treat anything done (or omitted to be done) by the Director concerned in accordance with the Project Document Conflict Authorisation Terms as a breach by him of his/her duties under sections 172 to 174 of the Companies Act 2006.

6. Management of Company affairs

Management of the Businesses

- 6.1 The parties shall exercise all rights and powers available to them in relation to the Company to procure that (in so far as they are able to do so) at all times during the term of this Agreement:
- (a) the business of the Company shall consist exclusively of the Company Business;
 - (b) with the exception of those matters requiring Shareholder or Board approval pursuant to clause 6.2 (*Reserved Matters*), all the business of the Company, other than routine day-to-day business, shall be undertaken and transacted by the Directors;
 - (c) no payment will be made by the Company and no cheque or payment instruction of the Company shall be signed other than in accordance with the mandates (general or specific) and procedures authorised by the Company Board from time to time;
 - (d) the Company will, if it requires any approval, consent or licence for the carrying on of its business in the places and in the manner in which it is from time to time carried on or proposed to be carried on, use all reasonable endeavours to obtain and maintain the same in full force and effect;
 - (e) the Company shall both put in place and maintain appropriate procedures and training to comply with the requirements of the Bribery Act 2010;
 - (f) the Company will conduct its Business and affairs in a proper and efficient manner and for its own benefit and in accordance with the Business Plan; and
 - (g) the Company shall not carry out any activity which would or could render the holding of Shares by any Founder Shareholder unlawful provided that where a proposed change of Law would render such shareholding unlawful such Founder Shareholder will use its reasonable endeavours to take such steps as are necessary to allow it to continue lawfully to hold its Shares and, if it is unable to do so the relevant Founder Shareholder will notify the other Shareholders who shall convene a joint meeting of the Company Board and the SPB to take place as soon as is practicable after such notice. The purpose of such meeting is to discuss and, if possible, agree amendments to this Agreement which do not prejudice the interests of the Shareholders or the Company but which allow the relevant Founder Shareholder to continue to participate in the Company as a Shareholder following the proposed change of Law. If following the meeting of the Company Board and the SPB a solution has not been agreed which allows the relevant Founder Shareholder to continue lawfully to participate in the Company as a Shareholder following the proposed change of Law, the relevant Founder Shareholder shall be deemed to have served a Deemed Transfer Notice under the provisions of the Company Articles with

effect from the date no later than [six (6)] months before the coming into force of the relevant proposed change of Law.

Reserved Matters

- 6.2 Subject to clause 6.5 (*Shareholders' and Company undertakings*), each of the parties hereby undertakes to the other to procure that the Reserved Matters listed in Schedule 8 (*Reserved Matters*) shall not be carried out:
- (a) in the case of those matters ticked in the second column ("Shareholder") without the prior written approval of each Material Shareholder; or
 - (b) in the case of those Reserved Matter Board Approval matters ticked in the third column (entitled "Board") without the prior written approval of [a Director appointed by each of the Material Shareholders] [all of the Directors who have been appointed by the Material Shareholders],

and each of the Shareholders shall use their respective rights and powers to procure, so far as they are each able, that no such Reserved Matter is carried out unless the required approval has been given.

- 6.3 Not used

Manner of giving Shareholder approval⁸

- 6.4

- (a) Subject to sub-clause (b) and to sub-clause (c) of this clause 6.4 (*Manner of giving Shareholder approval*), the written approvals required from Shareholders referred to in clause 6.2(*Reserved Matters*) may be given and signed for and on behalf of a Material Shareholder by a Director nominated by it under clause 5.1 (*Composition of the Company Board and the right to appoint Directors*).
- (b) Notwithstanding the provisions of clause 5 (*The Board of the Company*), if at a Company Board meeting (the "**Original Meeting**"), a matter arises for resolution which a Director reasonably considers gives rise to a conflict of interest between his/her duty to his/her appointor/employer and his/her duty as a Director to promote the success of the Company he/she shall, upon declaring such conflict, be entitled to abstain from casting his/her vote and to refer the relevant matter back to the relevant class of Shareholder whose decision on the resolution shall be substituted for the decision of the abstaining Director PROVIDED THAT (except in the case of a matter which is Reserved Matter Board Approval matter) such decision is notified to the company secretary of the Company in writing and is received by him/her within five (5) Business Days of the date of the Original Meeting at which the Relevant Director notified his/her intention to make such referral. If no decision is received from the Shareholder within such period, the requisite Company Board approval shall be capable of being given by one (1) Director appointed by each of the other classes of

⁸ **Clause 6.4 – Reserved Matters approval/flexibility.** This clause has been drafted on the basis that, in the normal course, Reserved Matters would be dealt with by the relevant Company Board appointees giving approval or otherwise (as the case may be) under clause 6.4(a). However, in terms of director's duties, sub-clause (b) addresses conflict of interest situations where the Company Board appointee is conflicted and where the matter can then be referred to the relevant Shareholder for approval (or otherwise), thereby removing the relevant director from having any obligation to vote for or against the relevant matter. Finally sub-clause 6.4(c) allows a Shareholder to opt in and out of these arrangements should it wish to do so.

Shareholders (the "**Other Directors**") and shall be so given if at the Original Meeting the Other Directors resolved to pass the resolution in question.

- (c) The Shareholders of a majority of each class of Shares may opt out of the mechanism in sub-clause (a) and sub-clause (b) by giving notice under this sub-clause (c) to the other parties. The effect of the notice shall be that, for any matter requiring approval by that class of Shareholder, that approval will only then be deemed to have been given when that class of Shareholder has given its specific approval in writing to that matter. A class of Shareholder may opt back in to the mechanism in sub-clause (a) and sub-clause (b) by notice in writing to the other parties under this sub-clause (c).
- (d) Notwithstanding the provisions of clause 5 (*The Board of the Company*), if a Director considers he/she has a conflict of interest between his/her duty to his/her appointor/employer and his/her duty as a Director to promote the success of the Company in relation to any matter other than (i) Claims (where clause 6.7 (*[Step-aside provisions]*) applies); and (ii) the decision to issue a Provisional Transfer Notice (where clause 10.6 (*Tax compliance*) applies); then he/she may refer the matter to his/her appointor for approval or otherwise and, if given in writing, the Shareholder approval shall be valid in place of the Director approval.

Shareholders' and Company undertakings

- 6.5 Each Shareholder undertakes to each of the other Shareholders that, in its capacity as a Shareholder, it will:
 - (a) act in a manner that is consistent with and shall exercise all voting rights and other powers of control available to it in relation to the Company so as to procure (insofar as it is able by the exercise of such rights and powers) that the Company complies with the provisions of the Project Documents; and
 - (b) generally act in a manner that will promote the Business and the best interests of the Company and act at all times in good faith towards the other Shareholders.
- 6.6 Without prejudice to the provisions of clause 6.4 (*Manner of giving Shareholder approval*), the Company and the PSDP undertake to the other parties hereto to use their respective reasonable endeavours to enforce the terms of the Supply Chain Agreements.

[Step-aside provisions]⁹

- 6.7 Notwithstanding any provision to the contrary in this Agreement or the Company Articles:
 - (a) If the WCo Director(s) (the "**Independent Director(s)**") so decide it is reasonable to conclude that the PSDP or any Associate of the PSDP will issue Proceedings in respect of any Claim against the Company:
 - (i) the Independent Director(s) shall be entitled to defend such Claim in the name and at the expense of the Company;
 - (ii) each of the Directors appointed by the PSDP ("**PSDP Directors**") shall not be entitled to (and the PSDP shall procure that each of the PSDP Directors shall not) make (or participate in making) any decisions, attend or vote at

⁹ **Clause 6.7- Step aside provisions.** Drafting assumes a single PSDP and may be amended where there are two (2) distinct sponsor entities and conflict of one would not necessarily result in a conflict situation for the other.

meetings of the Company Board or otherwise take any action on behalf of the Company in respect of the defence by the Company of such Claim nor shall they be entitled to any Company Board papers or other papers or information in relation to such Claim; and

- (iii) the quorum at any Company Board meeting convened to consider any such Claim shall be one (1) Independent Director.
- (b) If the A Shareholder or any Associate of the A Shareholder asserts that the Company has any Claim against the PSDP and/or an Associate of the PSDP:
- (i) the Independent Director shall be entitled to determine if and when to pursue such Claim in the name and at the expense of the Company by the issue of Proceedings by the Company against the PSDP and/or Associate of the PSDP;
 - (ii) each of the PSDP Directors shall not be entitled to any Company Board papers or other papers or information in relation to such Claim nor shall they be entitled to (and the PSDP shall procure that each of the PSDP Directors shall not) make (or participate in making) any decisions, attend or vote at meetings of the Company Board or otherwise take any action on behalf of the Company in respect of:
 - (A) any decision pursuant to sub-clause (b)(i) to issue Proceedings in respect of a Claim; and/or
 - (B) once Proceedings have been issued in respect of a Claim, the pursuance of that Claim by the Company; and
 - (iii) the quorum at any Company Board meeting convened in relation to any consideration of making a Claim (sub-clause (b)(i)) and after the issue of Proceedings in relation to the relevant Claim shall be the Independent Director appointed by the A Shareholders.
- (c) For the purposes of this clause 6.7 (*Step-aside provisions*), "**Claim**" shall mean a claim of any nature, whether for breach of contract, in tort, breach of statutory duty or otherwise.
- (d) ¹⁰The provisions of sub-clauses (a) to (c) shall apply, if a simple majority of Directors (other than the WCo Director(s)) so decide, with the necessary changes having been made:
- (i) in the case of sub-clause (a), if it is reasonable to conclude that WCo will issue Proceedings in respect of a Claim against the Company as if references to the PSDP are references to WCo and references to the PSDP Directors are references to the WCo Director(s); or
 - (ii) in the case of sub-clause (b), if a Claim against WCo is asserted by a B Shareholder or an Associate of a B Shareholder and/or if Proceedings are

¹⁰ **Clause 6.7 - Step-aside provisions.** Sub-clause (d) recognises the commercial context of there being proceedings between the Company and the relevant authority in allowing for the initiation and then conduct of any such proceedings to be with the Shareholders (excluding WCo) even though there is no legal reason/conflict which would otherwise preclude them from participating.

then issued by the Company against WCo as if references to the PSDP are references to WCo.^{11]}

Shareholders' Forum

- 6.8 In support of the Company's business objectives, the parties agree to establish a shareholders' forum ("**Shareholders' Forum**"). The Shareholders' Forum will be chaired by the Chairman and will consist of representatives from each of the Shareholders.
- 6.9 The Shareholders' Forum will meet [four (4)] times a year with the Company Board to review:
- (a) the effectiveness of the Company in fulfilling the objects;
 - (b) the past and future business activities of the Company;
 - (c) the performance by all parties of their respective obligations under this Agreement and the Strategic Partnering Agreement, having particular regard to the partnering principles contained in clause 2.3 of the Strategic Partnering Agreement; and
 - (d) the Directors' response to any queries previously raised by the Shareholders' Forum.
- 6.10 The Shareholders' Forum will send a report at least once per year to each of the parties to this Agreement and the Strategic Partnering Agreement. The first Shareholders' Forum meeting will be in the fourth quarter of calendar year 20[]¹². The Shareholders' Forum will have the option of meeting more frequently if required, subject to the consent of the Company Board. The Directors shall provide all information reasonably required for the Shareholders' Forum to conduct an effective review in accordance with clause 6.9.
- 6.11 The Shareholders' Forum will not have any executive authority over the Company, the purpose of the Shareholders' Forum being to allow the Shareholders to make representations to the Company Board and each other on the Company's and each other's performance in relation to this Agreement. However, the Shareholders shall each procure that the Directors shall carefully consider the conclusions of the Shareholders' Forum in formulating their plans for the Company.

7. Distributions

- 7.1 Subject to clause 6.2 (*Reserved Matters*) the parties shall procure (insofar as permitted by Law) that, subject to any restrictions imposed pursuant to the [Funding Agreements] and subject to the working capital and other financial requirements of the Company, the Company shall distribute all amounts which are lawfully available for distribution by the Company to the Shareholders by way of dividend on the Shares in the Company but only after payment of any interest and principal which is then due and payable, in order of priority, in relation to any Shareholder Debt by the Company.

¹¹ **Clause 6.7- Step-aside provisions.** If the Company is party to a contract with an Associate of another Shareholder, analogous provisions would be inserted with respect to Claims relating to that contract.

¹² Insert year.

8. Budgeting, Business Planning and financial matters

The Business Plan (including the Annual Budget)

8.1

- (a) The first Business Plan,¹³ relating to the Company Business in the first financial year following the date specified in the Data Sheet and each subsequent financial year through to the end of the fifth financial year of the Company, has been approved by the Shareholders and comprises Schedule 3 (*Agreed Form Business Plan*) to this Agreement ("**Business Plan**"). The Business Plan shall be reviewed by the Company Board at least every six (6) months and updated for each financial year in accordance with the provisions of sub-clause (b).
- (b) No earlier than three (3) months and no later than one (1) month before the end of each financial year of the Company, the Company will prepare and circulate to Shareholders a refreshed draft of the proposed Business Plan for the next five financial years, including capital expenditure and cash flow projections for the Company and its subsidiaries ("**Draft Business Plan**") for approval by the Shareholders. The Draft Business Plan (with such amendments as are agreed by the Shareholders to it) will become the Business Plan in place of the then current Business Plan upon the start of the financial year to which it relates or, if later, the date of its approval.

- 8.2 The Annual Budget for each financial year shall form part of the Business Plan. The Annual Budget shall be reviewed by the Company Board at least every three (3) months. From the end of the second financial year following the end of the Lock in Period the Annual Budget shall include relevant lifecycle costs and an implementation programme.

Working Capital

- 8.3 Each of the Working Capital Providers shall make the proportion of the Working Capital Facility to be provided by them in accordance with the terms of the Working Capital Agreement available to the Company in accordance with the provisions of the Working Capital Agreement and agree that (subject to the requirements of the Company Articles, this Agreement and the Working Capital Agreement) the Company shall be free to utilise the Working Capital Facility as the Directors see fit to fund the working capital requirements of the Company.
- 8.4 On or around the date falling six (6) months after the date of this Agreement and thereafter on or around each anniversary of the date of this Agreement, the Company Board shall meet to discuss the Working Capital Requirements of the Company and, on the basis of the discussions at that meeting, shall (within a reasonable period after the meeting) provide the Shareholders with recommendations on:
- (a) using any of the Working Capital Facility to the extent it has not been drawn down to meet the working capital requirements of the Company and/or has not been identified as being required to be drawn down to meet the working capital requirements of the Company in the current Business Plan;
 - (b) increasing or decreasing the Working Capital Limit; and/or

¹³ **Clause 8 – Business Plan.** The Business Plan will be a key part of the overall proposals to be put forward by the PSDP in terms of the financials, expected running costs and general details on the general operations of the Company and an agreed version appended to this Agreement.

- (c) repaying any or all sums drawn down under the Working Capital Facility.
- 8.5 Any decision to take any of the actions referred to in clauses 8.4(a) to 8.4(c) shall, subject to the Working Capital Agreement, require a recommendation of the Company Board and the prior written consent of:
 - (a) the Shareholders holding together a majority of the A Shares; and
 - (b) the Shareholders holding together a majority of the B Shares.
- 8.6 In the event and to the extent that any party or parties whose approval is required under clause 8.5 in respect of a decision under clauses 8.4(a) or 8.4(b) declines to give approval in relation to any particular use of the Working Capital Facility provided by it/them which is proposed under the relevant recommendation(s) issued by the Company Board in pursuance of clause 8.3, that party or parties may request the Company Board in writing to give consideration to some alternative use of that Working Capital Facility. Any such request shall be valid if issued by or on behalf of the holders of a majority of the Shares of the relevant class or classes.
- 8.7 Following receipt of a written request of the nature referred to in clause 8.6, the Company Board shall meet to discuss the request and the Shareholders shall procure that the Company Board use reasonable endeavours to accommodate the request, subject to the Company Board being satisfied that the implementation of that request would be in the interests of the Company.
- 8.8 Throughout the period prior to repayment in full of the Working Capital Facility, any payments by the Company during a given month (excluding for this purpose payments of a nature which would not be taken into account in determining Working Capital Requirements) which are funded to any extent by any part of the Working Capital Facility shall be deemed to be funded under the Working Capital Facility on a pro rata basis to sums drawn down from each of the Working Capital Providers.
- 8.9 Where sums are drawn down under the Working Capital Facility pursuant to the Working Capital Agreement the amounts received from the Working Capital Providers shall carry interest in accordance with paragraph 3.1 (*Interest*) of the Working Capital Agreement.
- 8.10 If a Working Capital Provider ceases to hold any Shares, then (subject to clause 8.11 and article [9.2(f)] of the Company Articles):
 - (a) the Company shall repay to that Working Capital Provider the amount of the Working Capital Facility advanced by that Working Capital Provider (to the extent not previously repaid);
 - (b) that Working Capital Provider shall cease to be a Working Capital Provider and the transferee of its shares shall be a Working Capital Provider in its place; and
 - (c) where the PSDP ceases to hold shares the Company shall release the relevant guarantor(s) from any future liability in relation to the guarantee referred to in clause 8.12, save in respect of antecedent breach.
- 8.11 The Company's obligation under clause 8.10 shall apply only where the transferee(s) of the relevant Shares undertake(s), in terms of the relevant Deed(s) of Adherence:
 - (a) to make available the same Working Capital Provider's Individual Commitment provided for in Schedule 10 (*Working Capital Agreement*) as those provided by the party which is ceasing to hold the Shares; and

- (b)
 - (i) (in the case of a transferee of A Shares only) to pay (on that date) to the Company an amount equal to all sums already advanced to the Company under the Working Capital Facility provided by the holders of A Shares (to the extent such sums are due to be repaid on the existing A Shareholder ceasing to hold Shares); or
 - (ii) (in the case of a transferee of B Shares only) to provide (on the date on which the transfer of the Shares is completed):
 - (A) a guarantee in accordance with the provisions of clause 8.12 (as read with clause 8.13); and
 - (B) payment (on that date) to the Company of an amount equal to all sums already advanced to the Company under the Working Capital Facility provided by the holders of B Shares (to the extent such sums are due to be repaid on the existing B Shareholder ceasing to hold Shares).

8.12 The PSDP shall, on or prior to the date of this Agreement procure a guarantee or guarantees in favour of the Company for an amount equal to their [Individual Commitment], in a form and from an entity or entities reasonably acceptable to the Company.

8.13 With reference to clause 8.12:

- (a) the guarantees shall be in favour of the Company to pay to the Company on demand the unpaid balance of every sum owing due or payable by the PSDP from time to time pursuant to clauses 8.3 to 8.11 (inclusive) of, and Schedule 10 (*Working Capital Agreement*) to, this Agreement (the "**Guaranteed Amount**") to the extent that the Guaranteed Amount remains unpaid and outstanding at any time after the last date of execution of this Agreement under and in accordance with the provisions of this Agreement, but on the basis that:
 - (i) the Company shall be required to notify the guarantors of the failure of the PSDP to make the payments due in accordance with clauses 8.3 to 8.11 (inclusive) and Schedule 10(*Working Capital Agreement*) to this Agreement;
 - (ii) a claim under the guarantee may only be made five Business Days from the issue of the notification referred to in clause 8.13(a)(i) above to pay the amount unpaid referred to in clause 8.13(a)(i) above;
 - (iii) the guarantors shall be jointly and severally liable for the amount unpaid referred to in clause 8.13(a)(i) above; and
- (b) none of the B Directors (or their Alternates) shall be entitled to (and the B Shareholders shall procure that each of the B Directors and their Alternates shall not) make (or participate in making) any decision relating to:
 - (i) the acceptability of:
 - (A) the form of guarantee referred to in that clause; or
 - (B) the entities issuing it; or
 - (ii) the enforcement of the guarantees by the Company,

and the quorum requirements at any meeting of the Company Board in respect of which any such decision is to be made shall, in respect of that decision, be taken to be satisfied if the A Director (or its respective Alternate) is present.

Financial records

8.14

- (a) The Shareholders shall use reasonable endeavours to procure that the Company shall keep proper books of account and make true and complete entries of all its dealings and transactions of and in relation to its Business.
- (b) The Company shall keep proper books of account and make true and complete entries of all its dealings and transactions of and in relation to its Business.

Provision of information to Shareholders and designated third parties

8.15

- (a) The Company shall supply each of the Shareholders with the Transparency Information as detailed in Part A of Schedule 7 (*Transparency Information and Commercially Sensitive Information*) relating to the Company with the relevant period set out therein.
- (b) Each Shareholder shall provide to each other Shareholder the information as detailed in Part B of Schedule 7 (*Transparency Information and Commercially Sensitive Information*) within the relevant period set out therein.
- (c) [Where WCo is a Shareholder, each of the Company and each other Shareholder will use its reasonable endeavours to assist WCo in its preparation of any report required by a government department from time to time, which relates in whole or in part to a Project.]
- (d) The Company shall, as soon as reasonably practicable, notify the Shareholders promptly of any litigation, arbitration or administration proceedings raised against it.

8.16 Notwithstanding the provisions of clause 13.7 (*Confidentiality*):

- (a) each Shareholder may (but only once the relevant Shareholder has made the intended Recipient aware of that Shareholder's obligations of confidentiality under this Agreement (and in the case of the intended Recipients in (v) and (vi)) below has obtained a written undertaking from that intended Recipient agreeing with that Shareholder and for the benefit of all other Shareholders and the Company, to comply with such obligations of confidentiality as though it were a party to this Agreement) disclose any information received from the Company or any Director, to:
 - (i) in the case of the PSDP, any holding company of the PSDP;
 - (ii) any Shareholder in it;
 - (iii) any director or other officer of, adviser to, trustee or manager of, or investor or prospective investor in its Shareholder's Group;
 - (iv) the Shareholder's investment adviser and any of its other professional advisers;

- (v) any member or prospective member of the Shareholder's Group;
 - (vi) potential purchasers of any of that Shareholder's interest in the Company; and
 - (vii) any person to whom it is required by Law or a regulatory authority or body or by the Project Documents to be disclosed.
- (b) where WGC Co is a Shareholder, WGC Co may disclose and use any Transparency Information in such manner and for such purposes as it may determine from time to time, including reports and reviews of the performance of MIM projects generally or specifically in respect of the Project and in relation to any audit, accounting or other review or scrutiny by any government or public body where WGC Co considers it appropriate to make some or all of such information available; and
- (c) where WGC Co is a Shareholder, the Company shall permit all records referred to in clause 8.14 (*Financial records*) and/or clause 8.15(a) to 8.15(d) (*Provision of information to Shareholders and designated third parties*) to be examined and copied from time to time by WGC Co or by any person to whom WGC Co notifies the Company that it wishes to have access to any such documents, records or information under sub-clause 8.16(b).

*Tax matters*¹⁴

8.17

- (a)
- (i) Each Shareholder shall use its reasonable endeavours to ensure that the Company is treated by all relevant authorities as being resident for taxation and other purposes in the United Kingdom¹⁵.
 - (ii) [other tax provisions to be agreed]
- (b) To the extent that any tax losses arise, the Shareholders shall agree (each acting reasonably) from time to time as the losses arise, how the losses shall be treated. The Shareholders agree, if so requested by a Shareholder, to discuss a mechanism for the obtaining of relief for a proportionate share of trading losses of each of the Shareholders and other amounts eligible for relief from corporation tax by virtue of group-relief provisions by the Company or a Shareholder and compensation in accordance with Law. Each Shareholder agrees that no such mechanism shall be approved by the Company without the approval of the other Shareholders (acting reasonably and having regard to ensuring that there is no adverse impact on the success of the Company).

¹⁴ **Clause 8.17 - tax matters.** The parties may wish to insert bespoke drafting in this clause, to regulate matters of importance to the Company and the Shareholders. The drafting may cover matters such as VAT grouping, transfer pricing, group payment arrangements, worldwide debt cap issues etc and, generally, organisational arrangements for the Company tax compliance and administration. Bidders are required to summarise the bespoke arrangements they propose when submitting bids.

¹⁵ **Clause 8.17–tax matters.** The taxation provisions have been drafted on the premise that the Company is tax resident in the United Kingdom.

9. Restrictions on share transfers

Restrictions on transfers of Shares in the Company

9.1

- (a) Except in relation to any transfer of Shares permitted by article [◆]¹⁶ [(*Transfer – Permitted Transfers*)], of the Company Articles, all transfers of Shares shall be subject to the rights of first refusal¹⁷ set out in the Company Articles.
- (b) Each party undertakes to transfer Shares only in accordance with this Agreement and the Company Articles and to procure that only transfers made in accordance with this Agreement and the Company Articles are registered.
- (c) Each Shareholder undertakes to comply with any restrictions on the transfer of Shares contained in the Project Documents.
- (d) [Other than a transfer which occurs as a result of clause 9.3, article [◆] or article [◆] (*Compulsory Transfers*) of the Company Articles, no Shares or any interest therein shall be transferred and the Directors shall not register any transfer of Shares unless a percentage of any Affected Shareholder Debt as is equal to the percentage of Shares which are being transferred (as compared with the total Shares held by the Transferor at the time) is also transferred by the transferor (or other holder of the Affected Shareholder Debt) to the transferee (or its Associate). Where the transferor holds tranches or forms of Affected Shareholder Debt to which differing terms apply, the transferor must transfer an equal percentage of the total amount of each tranche or form of Affected Shareholder Debt.]
- (e) No Shareholder shall sell or transfer any Shares to any person other than another Shareholder unless that person has first executed a Deed of Adherence in the form set out in Schedule 4 (*Deed of Adherence*). Each of the parties shall execute any such Deed of Adherence in respect of a transfer of Shares made in accordance with this Agreement and the Company Articles. The Company shall not register any transfer in accordance with this Agreement and the Company Articles unless the transferee (other than a Shareholder) has first executed a Deed of Adherence in the form set out in Schedule 4 (*Deed of Adherence*). No Shareholder (which, for the avoidance of doubt includes the WGCo) shall, except with the prior written consent of all the Shareholders:
 - (i) grant any option over any Shares (or any interest, whatsoever, legal or beneficial, in any Shares); or
 - (ii) enter into any agreement in respect of the votes attached to any Shares, provided that nothing in this sub-clause (e) shall restrict or prevent: the Company from granting a Security Interest over its Shares.
- (f) No Shareholder shall be entitled to give a Transfer Notice if it (or, if it is a company, any of its Associates) is at that time in material breach of this Agreement or in breach

¹⁶ **Clause (a)**

- **Restrictions on transfer of shares.** The Company Articles shall permit transfers within groups of companies, including specifically any member of the WGCo Group to another member of the WGCo Group. WGCo will carry out diligence on the Company Articles.

¹⁷ **Clause 9.1**

- **Permitted transfers.** The mechanism must be "first refusal" – i.e. a seller being able to sell to a third party at or above an "offer price" if the other shareholders have had the opportunity to buy at that price and have decided not to.

of any Project Document to which it is a party, save with the written consent of the Shareholders holding the majority in each class of A Shares and B Shares. Nothing in this sub-clause (f) shall prevent the service of a Transfer Notice which a Shareholder is required to give in accordance with the Company Articles or the giving of a Deemed Transfer Notice in accordance with the Company Articles.

- (g) The Company shall procure that each share certificate issued by it will carry the following statement:

"Any disposition, transfer, charge of or dealing in any other manner in the securities represented by this certificate is restricted by the Articles of Association of [Company] Limited and by a Shareholders' Agreement dated [♦] 20[♦] and made between [PSDP], [WGCo] and [Company] Limited".

- (h) A Shareholder may not transfer any Share to any person who is, at the time of transfer, a Restricted Person.
- (i) [No Shareholder shall restrict the transfer of Shares to the Finance Parties, or resist the registration of Shares on the enforcement by the Finance Parties of security, in either case validly undertaken in accordance with the Funding Agreements, and the Shareholders shall procure (as far as they are able) that the Company Board shall not decline the registration of such a transfer.]

9.2 Subject to the provisions of this clause 9 and the Company Articles:

- (a) a Shareholder other than the B Shareholder may transfer any Share to a Suitable Third Party; and
- (b) the B Shareholder may transfer all (but not some) of the B Shares to a Suitable Third Party.

Events of Default and deemed transfers

9.3 Subject to clause 9.8, notwithstanding the provisions of the Company Articles, the Shareholders agree that if any of the following events occur:

- (a) the occurrence of an Insolvency Event in respect of the B Shareholder or the B Shareholder commits a material breach of this Agreement which, if such breach is capable of remedy, the B Shareholder has failed to remedy within twenty (20) Business Days of written notice given to the B Shareholder by the Shareholders holding together a majority of the A Shares requiring the B Shareholder to remedy the same (or within such longer period as may be specified in such notice);
- (b) a Material Default is deemed to have occurred and no Default Termination Notice has been given pursuant to clause 23.12 of the Strategic Partnering Agreement within twenty (20) Business Days of the Material Default and such Material Default has not been remedied within twenty (20) Business Days of the expiry of such period;
- (c) there is a PSDP Change in Ownership during the Lock In Period without the consent of the Shareholders holding a majority of the A Shares which is not remedied within twenty (20) Business Days of the occurrence of such PSDP Change of Ownership;
- (d) the B Shareholder or a B Shareholder Member is a Restricted Person or an Associate of an Restricted Person and there has not been a transfer of the affected Shares to a Suitable Third Party in terms permitted by the Company Articles and this Agreement within twenty (20) Business Days of written notice given to the B Shareholder by the

Shareholders holding together a majority of the A Shares requiring the B Shareholder to remedy the same (or within such longer period as may be specified in such notice);

- (e) the occurrence of an Insolvency Event in respect of a B Shareholder Member which is not remedied (in accordance with the terms of clause 9.8) within twenty (20) Business Days of its occurrence;
- (f) a breach by the Company of clause 2.6.4(b) of the Working Capital Agreement which is not remedied within thirty (30) days of its occurrence; or
- (g) a failure by the PSDP to pay any amount required under the Working Capital Agreement, or procure payment pursuant to the guarantees referred to in clause 8.12 (*Working Capital*), within twenty (20) Business Days of the due date following the drawdown notice;

such event shall be a "**Transfer Event**" in respect of the B Shareholder for the purposes of article [◆] of the Company Articles.

- 9.4 Where a Deemed Transfer Notice is deemed given pursuant to article [◆] of the Company Articles (including pursuant to clause 9.3) in respect of B Shares, such Deemed Transfer Notice shall also be deemed to offer, by way of transfer, any outstanding B Shareholder Debt. Any person acquiring some or all of the B Shares pursuant to the provisions of this clause 9.4 and the Company Articles shall also have the right to (but shall not be required to) acquire a proportion of the B Shareholder Debt equal to the proportion that the B Shares being acquired represents to the total issued B Shares (and the B Shareholder shall transfer such B Shareholder Debt) in accordance with the terms of the relevant Shareholder Loan Agreement(s), this Agreement and the Company Articles. Where the outstanding B Shareholder Debt was advanced in tranches or forms to which differing terms apply, the right to acquire B Shareholder Debt shall be deemed to be a right to acquire an equal percentage of the total amount of each tranche or form of B Shareholder Debt.
- 9.5 This clause 9.5 is an additional arrangement as referred to in article [◆] of the Company Articles and applies where all or any of the Shares of the Defaulting Member are offered for sale pursuant to the provisions of clause 9.6 and clause 9.7 in which case the price to be paid for the Defaulting Member's Remaining Shares and any Defaulting Member's remaining B Shareholder Debt (which for the avoidance of doubt includes any remaining Affected Shareholder Debt) (together the "**Defaulting Member's Remaining B Shareholder Debt**") shall be as determined in accordance with clauses 9.6 and 9.7 and Schedule 5 (*Sale Agent*).
- 9.6 If on the expiry of the Offer Notice served in respect of a Deemed Transfer Notice relative to B Shares, the holders of the A Shares have not purchased all of the Defaulting Member's Shares then a notice (an "**Instruction to Sell Notice**") shall be deemed to have been served on the Defaulting Member requiring the Defaulting Member to sell all of its remaining Shares (the "**Defaulting Member's Remaining Shares**") and the Defaulting Member's Remaining B Shareholder Debt (if any) and the Defaulting Member and the other Shareholders shall jointly appoint a sale agent ("**Sale Agent**") who shall be instructed in accordance with Schedule 5 (*Sale Agent*) to find a purchaser for all (but not some only) of the Defaulting Member's Remaining Shares and/or the Defaulting Member's Remaining B Shareholder Debt (the Defaulting Member's Remaining Shares and the Defaulting Member's Remaining B Shareholder Debt together being the "**Investment**") at a price for such Shares and such Defaulting Member's Remaining B Shareholder Debt not less than the price at which such Shares and such Defaulting Member's Remaining B Shareholder Debt were offered to the holders of the A Shares pursuant to clauses 9.3 and 9.4 and article [◆] of the Company Articles.

- 9.7 If no Qualifying Bid is received from a Suitable Third Party in respect of all the Defaulting Member's Remaining Shares within the sixty (60) Business Day period referred to in Schedule 5 (*Sale Agent*) or the whole of the Defaulting Member's Remaining Shares have not been sold to a Suitable Third Party in accordance with and within the time periods set out in Schedule 5 (*Sale Agent*), then:
- (a) the holders of the A Shares shall be entitled by notice in writing to the Defaulting Member to elect to purchase the Defaulting Member's Remaining Shares whereupon the Defaulting Member shall forthwith transfer to the holders of the A Shares making the election pro rata to their holdings of Shares all (but not some only) of the Defaulting Member's Remaining Shares for an aggregate consideration (given that the market is deemed to have determined that the value of the Defaulting Member's Remaining Shares is nil) equal to the par value of the Defaulting Member's Remaining Shares; or
 - (b) the holders of the A Shares shall be entitled by notice in writing to the Defaulting Member to require that the Company be wound up in accordance with clause 12 (*Winding Up*) (in which case the Defaulting Member undertakes to the other Shareholders to vote in favour of any resolution(s) to wind up the Company).
- 9.8 The B Shareholder may propose, as part of any express rectification or remedy rights in relation to any potential Transfer Event in respect of the B Shareholder (a "**Potential Default**") and within the time period specified in relation to any such right to remedy the Potential Default, the replacement of a B Shareholder Member or the Associate of any B Shareholder Member (a "**Responsible Shareholder**") as a shareholder (direct or indirect) in the B Shareholder where the B Shareholder considers such Responsible Shareholder to be responsible for the Potential Default.
- 9.9 The A Shareholders shall consider any proposal made by the B Shareholder pursuant to clause 9.8 in good faith and, in the case of a Potential Default under clause 9.3(e) shall, and in all other cases may accept the proposal:
- (a) if they reasonably consider that the replacement would remedy the Potential Default; and/or
 - (b) if they consider (in their absolute discretion) that the effect of the replacement would be such as to allow the Company to operate in future in compliance with the requirements of this Agreement and the Strategic Partnering Agreement.
- 9.10 For the avoidance of doubt, where the Potential Default is a Material Default under the Strategic Partnering Agreement and the A Shareholders give written notice to the B Shareholder that they accept a proposal made by the B Shareholder under clause 9.8 in accordance with clause 9.9 and the replacement is effected then (unless otherwise agreed in writing between the A Shareholders and the B Shareholder) such replacement of the Responsible Shareholder shall have the effect (in relation to that Potential Default only or as may otherwise be agreed in writing between the A Shareholders and B Shareholder¹⁸) of deeming a reinstatement notice to have been given by the Participants pursuant to the Strategic Partnering Agreement.

¹⁸ The intention here in relation to "... or as may otherwise be agreed..." is that the removal of the Responsible Shareholder could be agreed as being a remedy on an absolute basis in relation to the Relevant Default or on a less absolute basis so that, for example, should the removal not effectively cure the default within an agreed time period, a Deemed Transfer Notice would still be deemed given.

Lock In Periods

9.11

- (a) **Shares in the Company.** Subject always to clause 9.1(h) (*Restrictions on transfers of Shares in the Company*), each Shareholder agrees that it shall not transfer or dispose of any interest in or over or right attaching to any of its Shares except by a transfer:
- (i) in the case of a B Shareholder, to a transferee at any time after the expiry of the Lock In Period (as defined in sub-clause (a)); and
 - (ii) in respect of all Shareholders, at any time to a transferee permitted in accordance with articles [◆] of the Company Articles,

9.12 but always subject to sub-clauses

(i) to (ii) above, otherwise in accordance with the provisions of the Company Articles and this clause 9 (*Restrictions on share transfers*).

- (a) For the purposes of this Agreement, **Lock In Period** means the period of [three (3)] years from and including the date of this Agreement.

9.13 Where, during the Lock In Period, the holder of any shares in the PSDP is an Associate of:

- (a) [*insert name of relevant company with respect to first Initial PSDP Shareholder and company number*¹⁹] and that holder ceases to be an Associate of [*insert name and company number*] it shall be a breach of clause 9.3(c) (*Events of Default and deemed transfers*) if the shares in the PSDP held by that holder are not within twenty (20) Business Days of that holder ceasing to be an Associate of [*insert relevant name and company number*], transferred to [*insert relevant name and company number*] or an Associate of [*insert relevant name and company number*];
- (b) [*repeat as necessary to capture consortium members within the PSDP*].

9.14 The PSDP shall inform the other parties as soon as reasonably practicable (and in any event within twenty (20) Business Days) of any PSDP Change in Ownership occurring.

9.15 The Company may, not more than twice in any calendar year, or at any time when a Material Default is outstanding, request that the PSDP inform it, as soon as reasonably practicable and in any event within twenty (20) Business Days of such request, of any PSDP Change in Ownership. The Company shall exercise the right referred to in this clause 9.15 where requested to do so by the holders of a majority of the A Shares.

9.16 For the purposes of:

- (a) clauses 9.3(c) and 9.3(d) (*Events of Default and deemed transfers*) and clauses 9.14 and 9.15, any change in the legal or beneficial ownership of any shares in any company that are listed on recognised investment exchanges (as defined in Section 285 of the Financial Services and Markets Act 2000);

¹⁹ For each consortium member, this clause should identify the appropriate company, LLP or partnership which was the subject of pre-qualification. The change of control provisions in clause 9.3 (*Events of Default and deemed transfers*) are designed to ensure that such company, LLP or partnership (or its subsidiary undertakings) retain their interest in the PSDP during the lock in period. By virtue of clause 9.16, transfers of ownership in the identified company, LLP or partnership would not however give rise to any breach of the provisions in clause 9.3.

- (b) clause 9.3(c) (*Events of Default and deemed transfers*), but subject always to clause 9.13, any transfer of shares in the PSDP by an Initial PSDP Shareholder to an Associate of such transferor or further transfers from such Associate to another Associate of such Initial PSDP Shareholder or to the Initial PSDP Shareholder; and
- (c) clause 9.3(c) (*Events of Default and deemed transfers*), any:
 - (i) transfer of shares or change in control over the exercise of voting rights conferred on those shares or the control over the right to appoint or remove directors in:
 - (A) [insert name of relevant company with respect to first Initial PSDP Shareholder and company number]; and/or
 - (B) [repeat as necessary to capture corporate consortium members within the PSDP]; and/or
 - (ii) [change in the members of or voting rights in [*identify name of any LLP with respect to second Initial PSDP Shareholder*]]²⁰,
 and/or their respective members,

shall be disregarded.

10. Warranties and undertakings

Warranties by WGCo

- 10.1 WGCo warrants and represents to each of the other parties at the date of this Agreement that:
- (a) it is duly incorporated under the laws of England and Wales;
 - (b) it has the corporate power to enter into and to exercise its rights and perform its obligations under the Project Documents to which it is a party;
 - (c) each Project Document to which it is a party constitutes, or will when executed constitute, legal, binding and enforceable obligations on it;
 - (d) it has taken all necessary action to authorise the execution of and the performance of its obligations under the Project Documents to which it is a party (and in the case of a Project Document executed after the date of this Agreement it will take all necessary action to authorise the execution of such Project Document);
 - (e) no claim is being asserted and no Proceedings are presently in progress, or, to the best of its knowledge pending or threatened against it or any of its assets which will or might have a material adverse effect on its ability to perform its obligations under those Project Documents to which it is a party;
 - (f) it is not subject to any contractual obligation, compliance with which will be likely to have a material adverse effect on its ability to perform its obligations under the Project Documents to which it is a party; and

²⁰ Delete where there is no relevant LLP within the Initial PSDP Shareholders. Where there is a partnership, appropriate drafting will require to be inserted.

- (g) no Proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge are threatened) for its winding-up or for its dissolution or for the appointment of a receiver, administrative receiver, liquidator, administrator or similar officer in relation to any of its assets or revenue.

Warranties by the PSDP and the Company

10.2 The PSDP and the Company each severally warrant and represent to each of the other parties at the date of this Agreement that:

- (a) it is duly incorporated under the laws of England and Wales²¹ and has the corporate power to enter into and to exercise its rights and perform its obligations under the Project Documents to which it is a party;
- (b) each Project Document to which it is a party constitutes, or will when executed constitute legal, binding and enforceable obligations on it;
- (c) it has taken all necessary action to authorise the execution of and the performance of its obligations under the Project Documents to which it is a party (and in the case of a Project Document executed after the date of this Agreement it will take all necessary action to authorise the execution of such Project Document);
- (d) no claim is being asserted and no Proceedings are presently in progress or, to the best of its knowledge pending or threatened against it or any of its assets which will or might have a material adverse effect on its ability to perform its obligations under those Project Documents to which it is a party;
- (e) it is not subject to any contractual obligation, compliance with which will be likely to have a material adverse effect on its ability to perform its obligations under the Project Documents to which it is a party;
- (f) no Proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge, are threatened) for its winding-up or for its dissolution or for the appointment of a receiver, administrative receiver, liquidator, administrator or similar officer in relation to any of its assets or revenue; and
- (g) it has complied with and currently complies with all relevant anti-bribery and corruption laws applicable to its business and operations including (without limitation) the provisions of the Bribery Act 2010.

Warranties by the Company

10.3 The Company warrants and represents to each of the other Shareholders at the date of execution of this Agreement that the Company is a newly incorporated company and has not traded prior to the date of this Agreement.

Tax compliance

10.4 Each Shareholder (other than the A Shareholder) represents and warrants to each of the other parties that, as at the date of this Agreement, it has notified the Company in writing of any Occasions of Tax Non-Compliance or any litigation that it is involved in that is in connection with any Occasions of Tax Non-Compliance.

²¹ **Clause 10.2(a) - Warranties.** To be amended if any of the parties are not incorporated in England and Wales.

- 10.5 If at any time an Occasion of Tax Non-Compliance occurs in relation to a Shareholder, the Shareholder shall:
- (a) notify the Company in writing of such fact within five (5) Business Days of its occurrence; and
 - (b) promptly provide to the Company:
 - (i) details of the steps which the Shareholder is taking to address the Occasion of Tax Non-Compliance and to prevent the same from recurring, together with any mitigating factors that it considers relevant; and
 - (ii) such other information in relation to the Occasion of Tax Non-Compliance as the Company may reasonably require.

- 10.6 If:
- (a) the representation and warranty given by a Shareholder pursuant to clause 10.4 (*Tax compliance*) is untrue; and/or
 - (b) the Shareholder commits a material breach of its obligation to notify the Company of any Occasion of Tax Non-Compliance as required by clause 10.5 (*Tax compliance*),

and, in either case, the Shareholder fails to provide details of proposed mitigating factors which, in the reasonable opinion of the Company Board, are acceptable, then the Company shall be entitled to give a notice to that Shareholder (a "**Provisional Transfer Notice**") and the provisions of clause 10.7 (*Provisional Transfer Notices*) shall then apply.

Provisional Transfer Notices

- 10.7 If a Shareholder receives a Provisional Transfer Notice:
- (a) it shall have ninety (90) days to effect the transfer of its Shares to a Suitable Third Party;
 - (b) in relation to any such transfer:
 - (i) the pre-emption and transfer provisions in this Agreement and the Company Articles shall apply;
 - (ii) if the Shares are transferred to a Suitable Third Party then the other Shareholders shall take (or procure) all steps reasonably requested of them by the transferring Shareholder to enable any such transfer to be effected and registered; and
 - (c) if the Shareholder has not effected the transfer of its Shares to a Suitable Third Party within the ninety (90) day period referred to (or such longer period as may be agreed by the Company) then the same shall constitute a material breach of this Shareholders' Agreement in respect of that Shareholder.

11. Disputes

- 11.1 If there is a disagreement or dispute arising between two (2) or more of the parties in connection with this Agreement (a "**Dispute**"), the parties shall use all reasonable endeavours to resolve the matter on an amicable basis. A matter or action requiring approval as a Reserved Matter not receiving the necessary approval shall not constitute a Dispute. If one (1) party serves formal written notice on one (1) or more of the others that a Dispute has

arisen and the parties are unable to resolve the Dispute within a period of twenty (20) Business Days from the service of such notice, then the Dispute shall be referred to the respective Chief Executives, Managing Directors or, in the case of WGCo, [◆] (as the case may be) of each of the parties who shall attempt to resolve the Dispute within the following twenty (20) Business Days (the "**Second Consideration Period**"). No recourse to arbitration or litigation by any party against any other under this Agreement shall take place unless and until such procedure has been followed.

- 11.2 If the Chief Executives or Managing Directors (as the case may be) of the parties are unable to resolve a Dispute within the Second Consideration Period, then a "**Deadlock**" shall be deemed to have arisen following the expiry of the Second Consideration Period or such earlier date on which the parties agree that Deadlock has arisen (the "**Deadlock Date**"). Any Deadlock shall be dealt with in accordance with clause 11.3 (*Disputes*).
- 11.3 If a Deadlock has arisen, then any party shall be entitled to refer the Dispute to a third party expert (the "**Expert**") who shall, unless otherwise agreed, be an independent expert with knowledge of and experience in matters relating to public private partnerships, [*project/sector relevant subject matter – defence, health, waste, education etc.*] and construction and development. The identity of the Expert shall be agreed between the parties within ten (10) Business Days of the Deadlock Date or, failing such agreement, shall be appointed by the President from time to time of the Institute of Chartered Accountants in England and Wales or any successor thereto and the fees and expenses of the Expert in making his/her determination shall be borne in such proportions as the Expert shall determine.
- 11.4 The parties shall co-operate with each other and with the Expert in an attempt to resolve the Dispute and Deadlock amicably. The decision of the Expert (appointed as set out above) shall not be binding unless the parties agree otherwise in advance of referring any Dispute to the Expert. Following the Expert's decision any party may, unless the parties have agreed that the Expert's decision shall be binding, issue legal proceedings in relation to the subject matter of the Dispute. Where the parties agree that the Expert's decision shall be binding, the decision of the Expert (appointed as set out above) as to the Dispute or Deadlock shall (except in the case of manifest error) be final and binding on all the parties for all purposes and (subject only to their fiduciary duties as Directors) the parties and their respective appointees on the Company Board shall execute all such documents and do and take all such action as may be necessary or reasonably desirable to give effect to and/or implement the said decision as promptly as reasonably practicable after the date of the same being so determined. For the purposes of this clause 11 (*Disputes*), any consent required from any party to implement the decision of the Expert made in accordance with the above provisions shall be deemed to have been given.

12. Winding Up

- 12.1 If the Shareholders pass a resolution pursuant to this Agreement or otherwise to wind up the Company by way of a members' voluntary winding-up they shall procure that the liquidator is a member of the Institute of Chartered Accountants in England and Wales acceptable to all the Shareholders and in default of agreement nominated at the request of any Shareholder by the President from time to time of the Institute of Chartered Accountants.
- 12.2 Except to the extent each party has contractual obligations to the contrary, the Shareholders shall prove in the winding-up of the Company to the maximum extent permitted by Law for all sums due or to fall due to them respectively from the Company and shall exercise all rights of set-off and generally do all such other acts and things as may be available to them in order to obtain the maximum receipts and recoveries.
- 12.3 To the extent that any or all of the Shareholders do not receive satisfaction in full in the winding-up of the Company of all sums due or to fall due to them the aggregate shortfall

between all sums due or to fall due to the Shareholders and all amounts actually recovered by the Shareholders from the Company or its liquidator (whether by direct payment or the exercise of any right of set-off or otherwise) shall be calculated and apportioned between the Shareholders in the same proportions as the Shareholders hold Shares at the time of the determination. The Shareholders shall make such contributions to each other as are necessary to procure that the Shareholders bear the aggregate amount of such shortfall in such proportions.

13. Miscellaneous

- 13.1 Unless the Shareholders together holding a majority of the A Shares and the Shareholders together holding a majority of the B Shares agree otherwise, on the establishment of any WEP Company other than the Company, the parties shall procure that the necessary Company Board and/or shareholder resolutions in respect of such WEP Company are passed to adopt the WEP Company Articles with immediate effect.
- 13.2 Unless the Shareholders together holding a majority of the A Shares and the Shareholders together holding a majority of the B Shares agree otherwise, the entering into of any contract or agreement by any WEP Company other than the Company shall require the approval of the board of directors of such WEP Company.

Announcements

- 13.3 No announcement, communication or circular concerning or relating to the subject matter of this Agreement shall be made or despatched by any of the parties without the prior written consent of the other parties to the form and text of such announcement.
- 13.4 Clause 13.3 does not apply to an announcement, communication or circular required by Law, the UK Listing Authority, the London Stock Exchange, the Panel on Takeovers & Mergers or by any governmental body or authority to which any of the party is subject **PROVIDED THAT** in that event the party required to make or send such announcement, communication or circular shall, where practicable first consult with the other parties as to the form or content of such announcement.

13.5 Not Used.

13.6 Not Used.

Confidentiality

13.7

- (a) Subject to clause 8.16(b)(*Provision of information to Shareholders and designated third parties*), during the term of this Agreement and after termination or expiry of the Agreement for any reason whatsoever, a party receiving information from another party shall:
- (i) keep Confidential Information (as defined in clause 13.9) confidential;
 - (ii) not disclose Confidential Information to any other person other than with the written consent of the party disclosing such information or in accordance with sub-clauses (b) to (d); and
 - (iii) not use Confidential Information for any purpose other than the performance of its obligations under this Agreement and the other Project Documents.

- (b) During the term of this Agreement, a party receiving information from another party may, subject to the provisions of clause 8.16(a) to 8.16(c) (*Provision of information to Shareholders and designated third parties*), disclose Confidential Information to its employees, contractors, sub-contractors, agents and advisers under conditions of confidentiality in each case to the extent that it is reasonably necessary for the purposes of this Agreement, or any other Project Document and may disclose Confidential Information to its funders, prospective funders, prospective shareholders of the Company or prospective purchasers of its assets under conditions of confidentiality. In each case the permitted recipient of such Confidential Information shall be known as a "**Recipient**".
- (c) The party receiving information from another party shall so far as practicable procure that each Recipient is made aware of and complies with all that receiving party's obligations of confidentiality under this Agreement as if the Recipient were a party to this Agreement.
- (d) Without prejudice to sub-clause (b), the obligations contained in sub-clauses (a) to (c) shall not apply to:
- (i) any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under the Agreement for the performance of those obligations;
 - (ii) any matter which a party can demonstrate is already, or becomes, generally available and in the public domain otherwise than as a result of a breach of any of the provisions in sub-clauses (a) to (c);
 - (iii) any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of Law or, if not having the force of Law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
 - (iv) any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
 - (v) any provision of information to the parties' own professional advisers or insurance advisers or to lenders in respect of the Project or such lender's professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Company to enable it to carry out its obligations under this Agreement or may wish to acquire shares in the Company in accordance with the provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
 - (vi) any disclosure for the purposes of:
 - (A) the examination and certification of the Company's accounts;
 - (B) any examination pursuant to the Public Audit (Wales) Act 2004 of the economy, efficiency and effectiveness with which any Participant has used its resources;

- (C) complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies;
- (D) any disclosure required to be made to the Auditor General for Wales or the Wales Audit Office; or
- (E) (without prejudice to the generality of sub-clause (d)(iii) above) compliance with the FOIA and/or the Environmental Information Regulations,

provided that, for the avoidance of doubt, neither sub-clause (d)(vi)(E) nor sub-clause (d)(iii) above shall permit disclosure of Confidential Information otherwise prohibited by sub-clauses (a) to (c) above where that information is exempt from disclosure under Section 41 of the FOIA.

(e)

- (i) Where disclosure is permitted under sub-clause (d), other than sub-clauses (d)(ii), (iii), (iv) and (v), the party providing the information shall procure that the Recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.
- (ii) For the purposes of the Public Audit (Wales) Act 2004, the Wales Audit Office may examine such documents as he/she may reasonably require which are owned, held or otherwise within the control of the Company and may require the Company to produce such oral or written explanations as he/she considers necessary.
- (iii) The parties acknowledge that the Wales Audit Office has the right to publish details of the Agreement (including Commercially Sensitive Information) in its relevant reports.

13.8 The provisions of clause 13.7 (*Confidentiality*) are without prejudice to the application of the Official Secrets Act 1911 to 1989.

13.9 For the purposes of clause 13.7 (*Confidentiality*), "**Confidential Information**" means:

- (a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, commercially sensitive intellectual property rights and know-how of any party and all personal data and special categories of personal data within the meaning of the Data Protection Laws; and
- (b) Commercially Sensitive Information.²²

Freedom of Information

13.10

- (a) The parties acknowledge that WGCo is subject to the requirements of the FOIA and the Environmental Information Regulations and the Company shall facilitate WGCo's

²²

Clause 13.9(b) – Commercially Sensitive Information. Any information or classes of information that the parties agree should be treated as Commercially Sensitive Information should be included in Schedule 7, Part C entitled Commercially Sensitive Information. The parties should be mindful of guidance on this issue when agreeing which information should be categorised as commercially sensitive. Broad blanket categorisations are not appropriate.

compliance with its Information disclosure requirements pursuant to the same in the manner provided for in sub-clauses (b) to (g) and to clause 13.11 (inclusive) below. For the purpose of sub-clauses (b) to (g) and clause 13.11 (inclusive) only **"Information"** has the meaning given to it under section 84 of the FOIA.

- (b) Where WGC0 receives a Request for Information in relation to Information that the Company is holding on behalf of WGC0, WGC0 shall transfer to the Company such Request for Information that it receives as soon as practicable and in any event within [five (5)] Business Days of receiving a Request for Information and the Company shall:
- (i) provide WGC0 with a copy of all such Information in the form that WGC0 requires as soon as reasonably practicable and in any event within [ten (10)] Business Days (or such other period as WGC0 may acting reasonably specify) of WGC0's request; and
 - (ii) provide all necessary assistance as reasonably requested by WGC0 in connection with any such Information, to enable WGC0 to respond to a Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.
- (c) Following notification under sub-clause (b) and up until such time as the Company and the Shareholders (other than WGC0) has provided WGC0 with all the Information specified in sub-clause (b)(i), the Company may make representations to WGC0 as to whether or not or on what basis Information requested should be disclosed, and whether further Information should reasonably be provided in order to identify and locate the Information requested, provided always that WGC0 shall be responsible for determining at its absolute discretion:
- (i) whether the Information is exempt from disclosure under the FOIA and the Environmental Information Regulations;
 - (ii) whether the Information is to be disclosed in response to a Request for Information,
- and in no event shall the Company respond directly or allow its subcontractors to reply directly to a Request for Information unless expressly authorised to do so by WGC0.
- (d) The Company shall ensure that all Information held on behalf of WGC0 is retained for disclosure for at least [six (6)] years from the date it is acquired and shall permit WGC0 (as appropriate) to inspect such Information as requested from time to time.
- (e) The Company shall transfer to WGC0 any Request for Information received by the Company as soon as practicable and in any event within two (2) Business Days of receiving it.
- (f) The Company acknowledges that any lists provided by it listing or outlining Confidential Information, are of indicative value only and that WGC0 may nevertheless be obliged to disclose Confidential Information in accordance with sub-clause (d) above.
- (g) If WGC0 makes a request to the Company pursuant to sub-clause (b)(ii) the Company shall, as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform WGC0 of the Company's estimated costs of complying with the request to the extent these would be recoverable if incurred by WGC0 under section 12(1) of the FOIA and the Fees Regulations. Where such costs

(either on their own or in conjunction with WGCo's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in section 12(1) of the FOIA and as set out in the Fees Regulations WGCo shall inform the Company in writing whether or not it still requires the Company to comply with the request and where it does require the Company to comply with the request the ten (10) Business Days period for compliance shall be extended by such number of additional days for compliance as WGCo is entitled to under section 10 of the FOIA. In such case, WGCo shall notify the Company of such additional days as soon as practicable after becoming aware of them and shall reimburse the Company for such costs as the Company incurs in complying with the request to the extent WGCo is itself entitled to reimbursement of such costs in accordance with its own FOIA policy from time to time.

13.11 The Company acknowledges that (notwithstanding the provisions of clause 13.7 (*Confidentiality*) WGCo may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under Part I of the Freedom of Information Act 2000 (or such equivalent as may from time to time be applicable in Wales) ("**the Code**"), be obliged under the FOIA, or the Environmental Information Regulations to disclose Information concerning the Company:

- (a) in certain circumstances without consulting with the Company; or
- (b) following consultation with the Company and having taken their views into account,

provided always that where this clause 13.11 applies, WGCo shall, in accordance with the recommendations of the Code, draw this to the attention of the Company prior to any disclosure.

Governing law and Jurisdiction

13.12

- (a) Subject to the provisions of clause 11 (*Disputes*), this Agreement and any non-contractual obligations arising out of or in connection with it shall be considered as a contract made in England and Wales and shall be subject to the laws of England and Wales.
- (b) The parties agree that the courts of England and Wales shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of those courts.

Further assurance

13.13 Each party will:

- (a) execute any document;
- (b) use all reasonable endeavours to procure that any third party (where necessary) executes any deed or document; and

do anything reasonably necessary to implement and give full effect to the terms of this Agreement.

Costs

13.14 Each party shall bear its own costs and expenses in relation to the drafting, negotiating, execution and implementation of this Agreement and the Project Documents.

Insurance

13.15

- (a) The Company shall take out and maintain with reputable insurers all insurances required to be maintained by Law and such other prudent insurances against such risks as are normally insured against by businesses carrying on activities similar to those of the Company Business and (without prejudice to the generality of the foregoing) shall insure its assets which are of an insurable nature for their full replacement or reinstatement value. The Company shall comply with its obligations under the Project Documents in respect of insurance.
- (b) Each Shareholder shall ensure that any directors and officers liability insurance taken out by such Shareholder extends to any Directors nominated and appointed by such Shareholder.

Assignment

13.16

- (a) Subject always to clause 9 (*Restrictions on share transfers*), this Agreement can be transferred by a Shareholder to a permitted transferee or successor. This Agreement, shall be binding on, and shall ensure to the benefit of, each of the parties and their respective permitted transferees and successors. In the case of WGCo its successors shall include any person to whom the Welsh Government transfers the property, rights and obligations of WGCo.
- (b) Save as permitted by sub-clause (a) and clause 9 (*Restrictions on share transfers*), no party shall assign, transfer, sub contract or otherwise dispose of any interest in this Agreement.

Entire agreement

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

Notices

13.18

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

<i>If to the PSDP</i>	
For the attention of	

Address	
Email	
<i>If to WGCo</i>	
For the attention of	
Address	
Email	
<i>If to the Company</i>	
For the attention of	
Address	
Email	

- (b) Any party to this Agreement may change its nominated address or email address by prior notice to the other parties.
- (c) Notices given by post shall be effective upon the earlier of (i) actual receipt, and (ii) five (5) Business Days after mailing. Notices delivered by hand shall be effective upon delivery. Notices given by email shall be deemed to have been received (unless there is an error message returned to that email):
- (i) within two (2) hours after sending, if sent on a Business Day between the hours of 9am and 4pm; or
 - (ii) by 11am on the next following Business Day, if sent after 4pm, on a Business Day but before 9am on that next following Business Day.

Contracts (Rights of Third Parties) Act 1999

13.19 It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provisions contained in this Agreement.

Waiver – no waiver unless in writing

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

Severability

13.21 If any provision of this Agreement shall be declared invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability or legality of the remaining provisions of this Agreement.

No partnership or agency

- 13.22 (a) Nothing in this Agreement shall be construed as creating a partnership.
- (b) No party shall be deemed to be an agent of any other party and no party shall hold itself out as having authority or power to bind any other party in any way.

Amendments

- 13.23 This Agreement may not be varied except by an agreement in writing executed as a deed by duly authorised representatives of the parties.

Executed as a deed by the parties or their duly authorised representatives on the date of this Agreement.

Schedule 1 Definitions and Interpretation

1. Definitions

1.1 In this Agreement, unless the context otherwise requires:

A Director has the meaning given to it in clause 5.1(a);

A Shares means the [*insert number*] 'A' Ordinary Shares of £1 each in the capital of the Company, together with any further shares issued from time to time and classified as A Shares or which, on transfer, are reclassified as A Shares;

A Shareholder means the holder of A Shares from time to time;

Affected Shareholder Debt means:

- (a) where a transferor or potential transferor of Shares under this Agreement and the Company Articles is not the B Shareholder, Shareholder Debt the creditor of which is the Shareholder in question and/or an Associate of that Shareholder; and
- (b) where a transferor or potential transferor of Shares under this Agreement and the Company Articles is the B Shareholder, Shareholder Debt the creditor of which is the B Shareholder and/or an Associate of the B Shareholder and/or a B Shareholder Member and/or an Associate of a B Shareholder Member;

Agreement means this Shareholders' Agreement including the Schedules;

Alternate has the meaning given to it in Article 1.1 of the Company Articles;

Annual Budget means the annual budget forming part of the Business Plan;

Approved Project has the meaning given to it in the Strategic Partnering Agreement;

Associate²³ means:

- (a) in respect of any person which is a body corporate:
 - (i) any undertaking of which that body corporate is a Director or partner;
 - (ii) any undertaking in the same group as such body corporate; and
 - (iii) any employee or Director of that body corporate or of any undertaking in the same group;
- (b) in respect of any person which is a partnership that is a legal person under the law by which it is governed:
 - (i) any undertaking of which that partnership is a Director or partner;
 - (ii) any employee of or partner in that partnership; and

²³ **Schedule 1 Definitions – Associate.** The definition of Associate to be considered at bid stage in accordance with the relevant facts and in the context of the relevant PSDP group structure to ensure the definition is appropriate/wide enough.

- (iii) any person who is an Associate of a partner in that partnership;
- (c) in respect of any person which is a partnership which is not a legal person under the law by which it is governed, any person who is an Associate of any of the partners,

provided that, for the purposes of clauses [◆] only, any partnership which would otherwise qualify as an Associate of the B Shareholder or a B Shareholder Member shall not constitute an Associate unless the B Shareholder, the B Shareholder Member or one of their respective Associates is beneficially entitled to 50% or more of the profits and/or assets of such partnership. In this definition in relation to a limited liability partnership for "Director" read "member" and **Associated** shall be construed accordingly;

B Director has the meaning given to it in clause 5.1(b) (*Composition of the Company Board and the right to appoint Directors*);

B Shareholder means the holder of B Shares from time to time;

B Shareholder Debt means all outstanding Shareholder Debt, the creditor of which is the B Shareholder and/or an Associate of the B Shareholder and/or a B Shareholder Member and/or an Associate of a B Shareholder Member;

B Shareholder Member means the shareholders, members or partners from time to time of the B Shareholder, being as at the date of this Agreement, the Initial PSDP Shareholders;

B Shares means the [*insert number*] 'B' Ordinary Shares of £1 each in the capital of the Company, together with any further shares issued from time to time and classified as B Shares or which, on transfer, are reclassified as B Shares;

Business means the Company Business;

Business Day means a day other than a Saturday, Sunday or a bank holiday in England and Wales;

Business Plan has the meaning given to it in clause 8.1(a) (*The Business Plan (including the Annual Budget)*);

Chairman means such independent non-executive Director or other Director as may be appointed from time to time to act as Chairman of the Company Board pursuant to clause 5.11 (*Composition of the Company Board and the right to appoint Directors*);

Claim has the meaning given to it in clause 6.7(c) (*[Step-aside provisions]*);

Code has the meaning given to it in clause 13.11 (*Freedom of Information*);

Commercially Sensitive Information means any information detailed in Part C of Schedule 7 (*Transparency Information and Commercially Sensitive Information*);

Company Articles means the articles of association of the Company in the format set out in Schedule 6 (*The Articles of Association of the Company*) as amended from time to time;

Company Board means the board of Directors from time to time of the Company as constituted in accordance with this Agreement and the Company Articles;

Company Business means the business of the Company as described in clause 3.1 (*The business of the Company and details of the Company*) and such other business as the Shareholders may from time to time agree should be carried on by the Company;

Confidential Information has the meaning given to it in sub-clause 13.9 (*Confidentiality*);

Conflict Authorisation has the meaning given to it in clause 5.24 (*Director's power to authorise conflict situations*);

Conflict Authorisation Terms has the meaning given to it in clause 5.27 (*Director's power to authorise conflict situations*);

Conflict Situation has the meaning given to it in clause 5.24 (*Director's power to authorise conflict situations*);

Counterparty has the meaning given to it in clause 5.28(a) (*Director's power to authorise conflict situations*);

Data Protection Laws means Regulation (EU) 2016/679 (General Data Protection Regulation), as supplemented by the Data Protection Act 2018;

Data Sheet means the document in the Agreed Form containing details about the Company including, inter alia, subscriptions by the parties for Shares [and details of any Shareholder Debt advanced to the Company], Directors details and other administrative matters;

Deadlock has the meaning given to it in clause 11.2 (*Disputes*);

Deadlock Date has the meaning given to it in clause 11.2 (*Disputes*);

Deed of Adherence means a deed in substantially the same form as the draft set out at Schedule 4 (*Deed of Adherence*);

Deemed Transfer Notice has the meaning given to it in the Company Articles;

Defaulting Member means the B Shareholder following the occurrence of a Transfer Event in relation to the B Shareholder or a B Shareholder Member;

Defaulting Member's Remaining Shares has the meaning given to it in clause 9.6 (*Events of Default and deemed transfers*);

Defaulting Member's Remaining B Shareholder Debt has the meaning given to it in clause 9.5 (*Events of Default and deemed transfers*);

Directors means:

- (a) the directors of the Company as nominated by the relevant parties from time to time and appointed pursuant to clause 5.1 (*Composition of the Company Board and the right to appoint Directors*) and Article 36 (*Appointment of Directors*);
- (b) any Alternate (in that capacity):
 - (i) save where expressly stated otherwise in this Agreement or the Articles; and
 - (ii) save for the purpose of clauses 5.1 to 5.3 (*Composition of the Company Board and the right to appoint Directors*), 5.17 to 5.19 (*Director Remuneration*) and 6.5(b) (*Reserved Matters*); and
- (c) a Chairman (in that capacity):

- (i) save where expressly stated otherwise in this Agreement or the Articles;
- (ii) save for the purpose of clauses 5.1 to 5.3 (*Composition of the Company Board and the right to appoint Directors*); and
- (iii) subject always to Article 27.5 (*Voting at Board Meetings*).

and **Director** shall mean any of them;

Dispute has the meaning given to it in clause 11.1 (*Disputes*);

DOTAS means the Disclosure of Tax Avoidance Schemes rules which require a promoter of tax schemes to tell HM Revenue & Customs, and or any relevant tax authority with jurisdiction in Wales of any specified notifiable arrangements or proposals and to provide prescribed information on those arrangements or proposals within set time limits as contained in Part 7 of the Finance Act 2004 and in secondary legislation made under vires contained in Part 7 of the Finance Act 2004 and as extended to National Insurance Contributions by the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868 made under s.132A Social Security Administration Act 1992;

Draft Business Plan has the meaning given to it in sub-clause 8.1(b) (*The Business Plan (including the Annual Budget)*);

Environmental Information Regulations means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such regulations;

Expert has the meaning given to it in clause 11.3 (*Disputes*);

Fees Regulations means The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004;

[**Finance Parties** means [◆];]

Founder Shareholders means the Shareholders who entered into this Agreement on the date on which it was signed;

FOIA means the Freedom of Information Act 2000 and any subordinate legislation (as defined in section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such Act;

Funding Agreements has the meaning given to it in the Strategic Partnering Agreement;

General Anti-Abuse Rule means:

- (a) the legislation in Part 5 of the Finance Act 2013; and
- (b) any future legislation introduced into parliament to counteract tax advantages arising from abusive arrangements to avoid national insurance contributions;

Guaranteed Amount has the meaning given in clause 8.13(a) (*Working Capital*);

Halifax Abuse Principle means the principle explained in the CJEU Case C-255/02 Halifax and others;

Indebtedness means any obligation for the payment or repayment of money, whether joint or several, actual or contingent, in respect of:

- (a) moneys borrowed or raised (including the capitalised value of obligations under financial leases and hire purchase agreements and deposits), debit balances at bank accounts and interest and other charges thereon or in respect thereof;
- (b) any liability under any debenture, bond, note, loan stock, commercial paper or other security or under acceptance or documentary credit, bill discounting or note purchase facilities;
- (c) any liability in respect of the deferred acquisition cost of property, assets or services to the extent payable after the time of acquisition or possession thereof by the party liable;
- (d) any guarantee or other assurance against financial loss in respect of any of the indebtedness specified in this definition;
- (e) any cost or liability under any interest rate or currency hedging agreement; and
- (f) any other transaction having the commercial effect of the borrowing or raising of money.

Independent Director has the meaning given to it in clause 6.7(a) (*Step-aside provisions*);

Index Linked means in relation to any amounts or sums, such amounts or sums as adjusted on each anniversary of the date of this Agreement in accordance with the following formula:

Amount or sum x (RPIXd / RPIX0)

Where RPIXd is the value of the Retail Prices Index (All Items Excl Mortgage Interest) published or determined with respect to the month most recently preceding the relevant anniversary of the date of this Agreement and RPIX0 is the value of the Retail Prices Index (All Items Excl Mortgage Interest) in respect of [◆];

Individual Commitment has the meaning given in Schedule 10 (*Working Capital Agreement*);

Insolvency Event has the meaning given to it in the Strategic Partnering Agreement;

Initial PSDP Shareholders means [◆];

Information has the meaning given to it in clause 13.10 (*Freedom of Information*);

Instruction to Sell Notice has the meaning given to it in clause 9.6 (*Events of Default and deemed transfers*);

Investment has the meaning given to it in clause 9.6 (*Events of Default and deemed transfers*);

Law has the meaning given to it in the Strategic Partnering Agreement;

Lock In Period has the meaning given to it in clause 9.12(a) (*Lock In Periods*);

Material Default means the occurrence of an SPA Material Default as referred to in clause 23.12 of the Strategic Partnering Agreement;

Material Shareholder means any Shareholder holding fifteen per cent (15%) or more of the issued Share capital;

MIM means the Welsh Government's Mutual Investment Model;

New Shareholder has the meaning given to it in sub-clause 2.1(b) (*Conditions precedent*);

Occasion of Tax Non-Compliance means:

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

[Offer Notice has the meaning given in the Company Articles;]

Offer to Allot has the meaning given to it in sub-clause 4.4 (*Offers to Allot*);

Original Meeting has the meaning given to it in sub-clause 6.4(b) (*Manner of giving Shareholder approval*);

Other Directors has the meaning given to it in sub-clause 6.4(b) (*Manner of giving Shareholder approval*);

Outgoing Director has the meaning given to it in sub-clause 5.8 (*Composition of the Company Board and the right to appoint Directors*);

Outgoing Shareholder has the meaning given to it in sub-clause 5.9 (*Composition of the Company Board and the right to appoint Directors*);

Participants has the meaning given to it in the Strategic Partnering Agreement;

Personal Data has the meaning given to it in the Data Protection Laws, and refers to personal data processed by any party in connection with its respective rights and obligations under this Agreement;

Potential Default has the meaning given to it in clause 9.8 (*Events of Default and deemed transfers*);

Proceedings means any adjudication, litigation, arbitration or administrative proceedings;

Project has the meaning given to it in the Strategic Partnering Agreement;

Project Agreement has the meaning given to it in the Strategic Partnering Agreement;

Project Agreement Counterparty has the meaning given to it in the Strategic Partnering Agreement;

[Project Documents means this Agreement, the Strategic Partnering Agreement, the Project Agreements, the Supply Chain Agreements and the Funding Agreements;]

Project Document Conflict Authorisation has the meaning given to it in clause 5.28 (*Director's power to authorise conflict situations*);

Project Document Conflict Authorisation Terms has the meaning given to it in clause 5.29 (*Director's power to authorise conflict situations*);

Project Service Provider has the meaning given to it in the Strategic Partnering Agreement;

Provisional Transfer Notice has the meaning given to it in clause 10.6 (*Tax compliance*);

PSDP Change in Ownership means:

- (a) any sale, transfer or disposal of any legal, beneficial or equitable interest in any or all of the shares in the PSDP (while it is the B Shareholder) or any B Shareholder Member which is a company including the control over the exercise of voting rights conferred on those shares or the control over the right to appoint or remove directors;
- (b) any change in the members of any B Shareholder Member which is a limited liability partnership or any change the voting rights in relation to such limited liability partnership;
- (c) any change in the partners of any B Shareholder Member which is a partnership or a limited partnership or any change in the voting rights in relation to such partnership or limited partnership; and/or

any other arrangements that have or may have or which result in the same effect as paragraph (a), (b) or (c) above;

PSDP Directors has the meaning given to it in clause 6.7(a)(ii) (*[Step-aside provisions]*);

Qualifying Bid has the meaning given to it in Schedule 5 (Sale Agent);

Recipient has the meaning given to it in sub-clause 13.7(b) (*Confidentiality*);

Relevant Director has the meaning given to it in clause 5.24 (*Director's power to authorise conflict situations*);

[Relevant Shareholder has the meaning given to it in clause 5.16 (*Composition of the Company Board and the right to appoint Directors*);]

Relevant Tax Authority means HM Revenue & Customs, or, if applicable, a tax authority in the jurisdiction in which the Shareholder and the Company is ordinarily based for the purpose of carrying out its business;

Request for Information shall have the meaning given to it in the FOIA or the Environmental Information Regulations as relevant;

"Reserve Account" means the account set up in the name of the Company for the purposes of holding payments under the Working Capital Agreement;

Reserved Matter Board Approval means those matters listed in Schedule 8 (*Reserved Matters*) and ticked in the third column (entitled "Board"), which shall not be carried out without prior approval in accordance with clause 6.2(b)(*Reserved Matters*);

Reserved Matters means those matters listed in Schedule 8 (*Reserved Matters*);

Responsible Shareholder has the meaning given to it in clause 9.8 (*Events of Default and deemed transfers*);

Restricted Person means either:

- (a) any person who has a material interest in the manufacture, production, sale or distribution of [pornography,] or [arms and weapons] or [the production of tobacco products and/or alcoholic beverages];
- (b) a person who poses, or could pose [(in the reasonable opinion of WGCo)] a threat to national security;
- (c) [any person whose tax returns submitted on or after 1 October 2012 have been found to be incorrect as a result of:
 - (i) HM Revenue and Customs successfully challenging it under the General Anti-Abuse Rule or the Halifax Abuse Principle;
 - (ii) the Relevant Tax Authority challenging it under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule or the Halifax Abuse Principle; and/or
 - (iii) the failure of an avoidance scheme which the person was involved in and which was, or should have been, notified under the DOTAS or any equivalent or similar regime in a jurisdiction in which the person is established;]

Sale Agent has the meaning given to it in clause 9.6;

Schedules means Schedules 1 (*Definitions and Interpretation*) to 10 (*Working Capital Agreement*) attached to this Agreement;

Security Interest means any mortgage, pledge, lien, charge, assignment, encumbrance, right of set-off, guarantee, title transfer or retention arrangement or security interest whatsoever, howsoever created or arising, including any "flawed asset" arrangement and "secured" will be construed accordingly;

Second Consideration Period has the meaning given to it in clause 11.1 (*Disputes*);

Services has the meaning given to it in the Strategic Partnering Agreement;

Shares means the issued Shares of any class referred to in Schedule 2 (*Details of the Company*) together with any further shares issued from time to time pursuant to clause 4 (*Funding of the Company and financial matters*);

[Shareholder Loan Agreement means, where Shareholder Debt has been advanced or otherwise made available to any WEP Company, the agreement between that WEP Company and the relevant Shareholder(s) setting out the terms on which that Shareholder Debt has

been advanced or otherwise made available to that WEP Company [and includes the Working Capital Agreement];]

Shareholder Debt means any Indebtedness (other than share capital) advanced or otherwise made available to any WEP Company by a Shareholder, a B Shareholder Member or an Associate of a Shareholder or of a B Shareholder Member;

Shareholders means the parties to this Agreement (except for the Company) and such other persons who may become shareholders in the Company from time to time as permitted by this Agreement and the Company Articles and Shareholder means any one (1) of them;

Shareholders' Forum has the meaning given in clause 6.8 (*Shareholders' Forum*);

Shareholder's Group means:

- (a) in relation to a Shareholder which is a company, the Shareholder and each of its Associates; and
- (b) in the case of WGCo each Associate of WGCo and each member of WGCo Group;

SPB means the Strategic Partnering Board, as defined in the Strategic Partnering Agreement;

Stage 2 Submission has the meaning given to it in the Strategic Partnering Agreement;

Strategic Partnering Agreement means the strategic partnering agreement between the Company and [◆] dated on or around [◆];

Suitable Third Party means any person who is not a Restricted Person;

Supply Chain Agreements means has the meaning given to it in the Strategic Partnering Agreement;

Transfer Event has the meaning given to it in clause 9.3 (*Events of Default and deemed transfers*);

Transfer Notice has the meaning given to it in the Company Articles;

Transparency Information means the information described in Part A and Part B of Schedule 7 (*Transparency Information and Commercially Sensitive Information*) and, for the avoidance of doubt, in no circumstances shall any Transparency Information constitute Commercially Sensitive Information whether or not listed in Part C of Schedule 7 (*Transparency Information and Commercially Sensitive Information*);

WEP Company means the Company, together with any of its subsidiaries from time to time, each individually referred to as a WEP Company;

[WEP Company Articles means the articles of association of any WEP Company (other than the Company) in the form set out in [◆] (*Articles of any WEP Company (other than the Company)*) as amended from time to time;]

[Working Capital Agreement means the working capital agreement set out in Schedule 10 (*Working Capital Agreement*);]

Working Capital Facility means the working capital facility set out in Schedule 10 (*Working Capital Agreement*);

"Working Capital Limit" has the meaning given in paragraph 2.1 of Schedule 10 (*Working Capital Agreement*);

Working Capital Providers means [◆];

Working Capital Requirement means, in respect of any period, the maximum working capital requirement of the Company during that period, disregarding for this purpose any sums paid or received by the Company which form part of the capital costs of a specific project or represent capital payments to fund a specific project or represent capital investment in an individual WEP Company (other than the Company);

WGCo means [◆];

WGCo Director means a Director appointed by WGCo or the WGCo Group; and

WGCo Group means:

- (a) any Associate of WGCo;
- (b) the Welsh Ministers or any agency, subsidiary or other body owned or controlled by the Welsh Ministers; and/or
- (c) any public sector body, third sector body or quasi autonomous non-governmental organisation who assumes and/or undertakes (whether as successor or otherwise) some or all of the functions exercised by WGCo or the Welsh Ministers.

1.2 Interpretation

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

- (a) The headings and marginal notes and references to them in this Agreement shall be deemed not to be part of this Agreement and shall not be taken into consideration in the interpretation of this Agreement.
- (b) Except where the context expressly requires otherwise, references to clauses, sub-clauses, paragraphs, sub-paragraphs, parts and Schedules are references to clauses, sub-clauses, paragraphs, sub-paragraphs and parts of and Schedules to this Agreement and references to Sections, Appendices and Attachments (if any) are references to Sections, Appendices and Attachments to or contained in this Agreement.
- (c) The Schedules to this Agreement (including any Attachments thereto) are an integral part of this Agreement and a reference to this Agreement includes a reference to the Schedules. In the event of any inconsistency between the provisions of the body of this Agreement and the Schedules, the body of this Agreement shall take precedence.
- (d) Words importing persons shall, where the context so requires or admits, include individuals, firms, partnerships, trusts, corporations, governments, governmental bodies, authorities, agencies, unincorporated bodies of persons or associations and any organisations having legal capacity.
- (e) Where the context so requires words importing the singular only also include the plural and vice versa and words importing the masculine shall be construed as including the feminine or the neuter or vice versa.

- (f) The language of this Agreement is English. All correspondence, notices, and information shall be in English.
- (g) References to any Law are to be construed as references to that Law as from time to time amended or to any Law from time to time replacing, extending, consolidating or amending the same.
- (h) References to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the functions and responsibilities of such public organisation.
- (i) The words in this Agreement shall bear their natural meaning. The parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore, be construed contra proferentem.
- (j) Reference to **parties** means the parties to this Agreement and references to a **party** mean one of the parties to this Agreement.
- (k) In construing this Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word other or including or in particular shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
- (l) Reference to a document being in **Agreed Form** is a reference to the form of the relevant document agreed between the parties and for the purpose of identification initialled by each of them or on their behalf.
- (m) Where this Agreement states that an obligation shall be performed **no later than** or **within** or **by** a stipulated date or event which is a prescribed number of Business Days after a stipulated date or event, the latest time for performance shall be midnight on the last Business Day for performance of the obligations concerned.
- (n) A reference to a **subsidiary** or **holding company** is to be construed in accordance with section 1159 of the Companies Act 2006.
- (o) If there is a conflict between the terms of this Agreement and the Company Articles, the terms of this Agreement shall prevail and, if there is such a conflict, the Shareholders shall procure at the request of any of the Shareholders any modification reasonably required to be made to the Company Articles as shall be necessary to remedy such conflict.
- (p) A person, being a company, shall be **controlled** by another person if that other person owns a majority of the voting equity of that person or controls the majority of the votes at meetings of the board of directors of that person.
- (q) Save where stated to the contrary, references to any agreement or document include (subject to all relevant approvals and any other provisions of this Agreement concerning amendments to agreements or documents) a reference to that agreement or document as amended, supplemented, substituted, novated or assigned.
- (r) References to a **month** [in clauses 8.3 to 8.13 (*Working Capital*)] shall mean a calendar month.
- (s) A reference in this Agreement to matters being agreed by the Directors shall only include Alternates (acting in that capacity) where he/ she is participating in a decision

in place of a Director appointed pursuant to clause 5.1 (*Composition of the Boards and the right to appoint Directors*).

**Schedule 2
Details of the Company**

The Company

Name:	◆ Limited	
Registered Office:	◆	
Registered Number:	◆	
Shareholders:	Shareholder	Shares
	PSDP	◆
	WGCo	◆
Initial Directors:	Shareholder Appointor	Initial Director appointee
	PSDP	◆
	PSDP	◆
	PSDP	◆
	WGCo	◆
Secretary:	◆	

Schedule 3
Agreed Form Business Plan

(Budgeting, Business Planning and financial matters)

The provisions of this paragraph shall apply in respect of each Draft Business Plan prepared from time to time and submitted to the Shareholders for approval. The minimum requirements for an acceptable Business Plan will include:

- (a) the income forecasts for the Company, based on projects expected to be developed in the forthcoming year;
- (b) the costs budget for the Company (including salaries, overheads and consultants fees);
- (c) capital requirements of the Company and how these will be met; and
- (d) business objectives and targets to be met by the Company in meeting its obligations under this Agreement and the Strategic Partnering Agreement.

The Business Plan should not be used as a means of sidestepping the consent matters in clause 6.2 (*Reserved Matters*). Any matters in the Business Plan which are in the nature of matters where Shareholders consent is being provided upfront by virtue of the Business Plan must:

- (a) be specific;
- (b) be such that it is not reasonably practicable to seek the consent required at the time in question; and
- (c) be specifically set out in a section at the start of the Business Plan so that, in the review of the Draft Business Plan, the nature and extent of any deemed consent matters can be easily identified and considered by the Shareholders in deciding whether or not to approve the Draft Business Plan.

[To be inserted]

**Schedule 4
Deed of Adherence**

THIS DEED OF ADHERENCE is made the day of 201[◆]

BY [◆] of [◆] ("**Covenantor**") in favour of the persons whose names are set out in the Schedule to this Deed and is supplemental to the shareholders' agreement dated [◆] 201[◆] made by (1) [PSDP], (2) [WGCo], and (3) [Company] ("**Shareholders' Agreement**").

Terms defined in the Shareholders' Agreement shall bear the same meanings herein.

It is agreed

1. In consideration of the Covenantor being accepted as a party for the purposes of the Shareholders' Agreement by the parties thereto, as from [insert date] ("**Adherence Date**") the Covenantor hereby confirms that it shall be a party to the Shareholders' Agreement as if they had originally been referred to in the Shareholders' Agreement as [◆] and agrees to be bound by all of the relevant provisions of the Shareholders' Agreement from the Adherence Date.
2. The Covenantor warrants and represents to each of the persons whose names are set out in the Schedule to this Deed, that the Covenantor is a Suitable Third Party.
3. The Covenantor makes all those warranties and representations, which are listed in full at clause 10.2 (*Warranties by the PSDP and the Company*) and clause 10.4 (*Tax compliance*) of the Shareholders' Agreement, to each of the persons whose names are set out in the Schedule to this Deed.
4. This Deed is governed by the law of England and Wales.

In witness whereof this Deed has been executed by the Covenantor and is intended to be and is hereby delivered on the date first above written.

SCHEDULE

[Parties to Shareholders' Agreement including those who have executed earlier deeds of adherence].

Schedule 5 Sale Agent

1. In this Schedule 5 (*Sale Agent*) (subject to paragraph 8):

Closing Date has the meaning given to it in paragraph 6;

Purchaser has the meaning given to it in paragraph 6;

Qualifying Bid means a bid for all of the Defaulting Member's Remaining Shares [(whether or not including a bid to purchase all or any of the Defaulting Member's Remaining B Shareholder Debt) or, in the case of paragraph 9, the Defaulting Member's Remaining B Shareholder Debt]:

(a) is accompanied by each of the following:

- (i) an acknowledgement addressed to all of the holders of the A Shares to the effect that the bidder has carried out its own due diligence and in offering to purchase the Investment has not relied on (and an undertaking that it will not rely on) any warranty, statement, undertaking or representation (whether negligent or innocent) made by or on behalf of any holder of the A Shares;
- (ii) a confirmation that if its bid is successful it will enter a Deed of Adherence and pay the Sale Agent's fees;
- (iii) a confirmation of funding for the purchase of such Defaulting Member's Remaining Shares [and any Defaulting Member's Remaining B Shareholder Debt] forming part of such bid and its ability to complete the payment for and the transfer of the Investment within the time period specified in paragraph 6; and

(b) is from a Suitable Third Party which is not Associated with the B Shareholder or any B Shareholder Member;

Reserve Bid has the meaning given to it in paragraph 9(a); and

Reserve Tenders has the meaning given to it in paragraph 9.

2. If the parties are unable to agree on the identity of the Sale Agent within twenty (20) Business Days of the issue of the Instruction to Sell Notice (as defined in clause 9.6 of this Agreement), the Sale Agent shall thereafter be appointed on the application of any party by the President of the Institute of Chartered Accountants in England and Wales with the party making the application requesting that the appointment be made within twenty (20) Business Days of the date the party makes the application referred to.
3. The Defaulting Member shall provide the Sale Agent with all such information as the Sale Agent may request in relation to the Investment and the Sale Agent shall invite tenders from Suitable Third Parties to purchase the Investment.
4. The Defaulting Member and the Sale Agent shall comply with the Financial Services and Markets Act 2000 and all other legislation which may apply from time to time in relation to the offer for sale of the Investment.
5. The Defaulting Member shall take all necessary action to ensure that the Investment has the widest possible market, and shall not do anything which might limit the number of potential bidders for the Investment and shall ensure that it has provided all necessary information to

the Sale Agent to enable the Sale Agent to offer the Investment for sale within fifteen (15) Business Days of the appointment of the Sale Agent.

6. The Defaulting Member shall accept the highest Qualifying Bid which is received by the Sale Agent (with the relevant Suitable Third Party being referred to as the "**Purchaser**") by the end of sixty (60) Business Days from the Instruction to Sell Notice (the "**Closing Date**") and shall take all steps necessary to complete the transfer of its Defaulting Member's Remaining Shares [and any Defaulting Member's Remaining B Shareholder Debt] to the Purchaser within ten (10) Business Days of the Closing Date.
7. Should the Purchaser fail to complete the transfer of the Shares [and any Defaulting Member's Remaining B Shareholder Debt] to the Purchaser within ten (10) Business Days of the Closing Date then the Sale Agent shall remarket the Investment and the procedure referred to in paragraphs 3 to this paragraph 7 shall be followed until either the Investment has been sold to a purchaser or no Qualifying Bid is received by the relevant Closing Date.
8. [Where more than one Qualifying Bid is received, the Sales Agent shall consider the extent to which such bid includes the Defaulting Member's Remaining B Shareholder Debt, and shall compare the price offered for the Defaulting Member's Remaining Shares only for the purposes of determining the highest bid.]
9. [Notwithstanding the provisions of paragraphs 1 to 8, the Sale Agent shall also invite tenders (**Reserve Tenders**) from Suitable Third Parties for the Defaulting Member's Remaining B Shareholder Debt only²⁴ and the provisions of paragraphs 1 to 8 shall apply with necessary changes having been made as if references to the "Investment" were in each case solely to the Defaulting Member's Remaining B Shareholder Debt and subject to the variations in this paragraph 9. In such event:
 - (a) where the aggregate consideration offered pursuant to a Qualifying Bid comprising a Reserve Tender (a "**Reserve Bid**") is greater than under the highest Qualifying Bid which is not a Reserve Bid, or the only Qualifying Bids are Reserve Bids, then the highest Reserve Bid shall be accepted by the Defaulting Member and the sale and transfer of the Defaulting Member's Remaining B Shareholder Debt shall be effected in accordance with the provisions of paragraphs 1 to 7.
 - (b) In all other cases the provisions of paragraphs 1 to 8 above shall apply as if this paragraph 9 had not applied.]
10. [Where a Reserve Bid is accepted pursuant to sub-paragraph 9(a), then the provisions of clause 9.7 shall apply in respect of the Defaulting Member's Remaining Shares.]

²⁴

Schedule 5 – Sale Agent. This mechanism in Schedule 5 (*Sale Agent*) allows for offers for the Loan Notes only on the basis that this flexibility may add some liquidity and enhance the value received in a default transfer scenario.

Schedule 6
The Articles of Association of the Company
[To be inserted]

**Schedule 7
Transparency Information²⁵ and Commercially Sensitive Information**

Part A Information to be provided by the Company

Ref	Information	Last date for provision of information

Part B Information to be provided by the Shareholders

Ref	Information	Last date for provision of information

Part C Commercially Sensitive Information

Ref	Information	Applicable Period
	[Note – to be added if/as required]	

²⁵ **Schedule 7 - Transparency Information.** To be developed.

Schedule 8 Reserved Matters²⁶

Reference	Shareholder	Board	Reserved Matter
A			Financial
A1	✓		The approval of any change to the dividend policy set out in clause 7 (<i>Distributions</i>) which would adversely affect any Material Shareholder.
A2	✓		The making of any political donation.
A3	✓		The Company giving any deed of guarantee or indemnity involving a potential liability of £[100,000] (Index Linked) or more which in the reasonable opinion of a Material Shareholder is not required for the proper operation of the Company.
B			Shares/Shareholder Debt and constitutional
B1	✓		Any amendment to the Memorandum or Articles of the Company, which would adversely affect any Material Shareholder.
B2	✓		A change in the status of the Company from a limited company to a public limited company or from a company limited by shares to any other form of legal entity which would adversely affect any Material Shareholder or the Company.
B3	✓		A listing of the Company's share capital which would adversely affect any Material Shareholder or the Company.
C			Management, control, Directors and employees
C1	✓		Moving the central management and control of the Company or the Company's tax residence outside the UK.
C2		✓	The approval of (and any change to) Company policies which affect the potential statutory liability of Directors (e.g. anti-bribery and corruption, health and safety, non-discrimination).
C3		✓	Any increase in the payment of fees or remuneration to Directors to the Company save as expressly provided under this Agreement.
C4		✓	Conflict Authorisation to a Conflict Situation pursuant to clause 5.24 (<i>Director's</i>

²⁶ **Schedule 8 – Reserved Matters.** Welsh Government reserves the right to add further Reserved Matters into Schedule 8 following further discussion with ONS. The approach will be confirmed during dialogue. Three other important general points: (1) the items in this table must be included as a bid compliance matter; (2) a bidder/PSDP may suggest additional items for consideration/evaluation during the bid process, including a category of matters that are reserved for approval by a further distinct category of Shareholder (provided these do not cut across the effect of the compliance matters listed above); and provided always (3) no separate Reserved Matter or Reserved Matter type issues Lists are to be included which operate to exclude a particular Shareholder from voting or which remove all Shareholder voting rights on specific matters.

Reference	Shareholder	Board	Reserved Matter
			<i>power to authorise conflict situations).</i>
D			Other WEP Company related Reserved Matters
D1	<i>Approval level as per the relevant item</i>		In relation to each WEP Company (other than the Company) each of the above Reserved Matters in this table shall also be a Reserved Matter in relation to that WEP Company (as if references to the Company were references to WEP Company).

Schedule 9
Letters of appointment of Nominated Directors

[Insert Name and Address of the Director]

[◆] 20[◆]

Dear [◆]

YOUR APPOINTMENT AS A DIRECTOR OF [INSERT NAME OF THE COMPANY] LIMITED (THE "COMPANY")

Thank you for accepting your appointment to become a director of the Company. We note that you have been appointed by [*insert name of appointing shareholder*].

Your appointment is made pursuant to and is subject to the terms and conditions set out in the Shareholders Agreement dated [◆] between, amongst others, [◆] (the "**Shareholders' Agreement**"). Your appointment (and the continuation of it) is also subject always to the Articles of Association from time to time of the Company ("**Articles**"), a copy of the current version of which accompanies this letter.

Terms defined in the Shareholders Agreement shall bear the same meanings in this letter of appointment.

1. Time Commitment

- 1.1 We anticipate that your normal commitment to the Company will include attendance at Company Board meetings (anticipated to be at intervals of [◆] months), [meetings of any committees of the Company Board of which you are a member] and any general meetings of the members of the Company. You will be required to consider all relevant papers prior to each Company Board meeting.
- 1.2 By accepting this appointment, you confirm that you are able to allocate sufficient time to meet the expectations of your role.

2. Roles and Duties

- 2.1 As a director you will be a member of the Company Board. The Company Board is responsible for overall supervision and control of the activities of the Company.
- 2.2 It is your duty as a director of the Company to take decisions (and exercise your other powers and responsibilities as a director) in good faith and in such a way as you consider is in the best interests of the Company.
- 2.3 The directors of the Company are required to use all reasonable endeavours to ensure that they are:
- (a) complying at all times with the Shareholders Agreement and in particular the needs for shareholder consents under clause 6.2(*Reserved Matters*) and any corporate governance protocol which the Company adopts;

- (b) exercising proper control over the Company's services, activities, assets, staff and consultants;
- (c) procuring that the Company acts in accordance with its articles of association;
- (d) conducting the Company's affairs with honesty and integrity;
- (e) managing prudently the Company's resources, including public and private money which is invested in the Company;
- (f) procuring that conditions attached to offers of grants/loans are adhered to;
- (g) ensuring adequate record keeping and adhering to all administrative requirements imposed by company legislation and other relevant legislation; and
- (h) complying with all applicable statutes, rules and regulations.

2.4 In your role as a director, you will also be required to:

- (a) participate constructively in decision making within the Company Board;
- (b) [act as a member of such committees of the Company Board (for example the audit or remuneration committees) as may reasonably be required]²⁷;
- (c) deal with any special responsibilities which may reasonably be assigned to you by the Company Board;
- (d) constructively challenge and contribute to the development of company policy and strategy;
- (e) scrutinise the performance of management and contractors in meeting agreed goals and objectives and monitor the reporting of performance;
- (f) maintain a sound system of internal control to safeguard the investment of members and other stakeholders in the Company and the Company's assets;
- (g) satisfy yourself that financial information is accurate and that financial controls and systems of risk management are robust and defensible;
- (h) comply with all reasonable directions and regulations of the Company;
- (i) fulfil the role of director of each WEP Company (other than the Company) and the terms of this letter apply to each such directorship on like terms; and
- (j) act at all times in accordance with the Articles, the Shareholders Agreement, any corporate governance protocol which the Company adopts and any obligations imposed on directors by law.

2.5 If you strongly disagree with a decision of the Company Board, you are entitled to have your dissent recorded in the minutes of the relevant meeting, however you must not actively undermine action which has been decided upon by majority vote at a Company Board meeting.

²⁷

Insert if appropriate

2.6 [In addition, you will have the responsibilities as set out in the Director – Specification of Role a copy of which is attached in the Schedule to this letter of appointment.]

3. Committee

3.1 You may be asked to serve on any committee of the Company Board as the Company Board may require from time to time. In the event that you are requested to serve on any such committee, you will be provided with details of the committee's terms of reference, any specific responsibilities this will entail and any fees that may be involved.]

4. Fees and Expenses

4.1 [The role of Director of the Company shall attract remuneration of £[◆]²⁸ per annum (Index Linked). Such fee payable to you shall be due, pro rata, monthly in arrears, from the date of your appointment and is payable within thirty (30) days of receipt of an invoice by the Company.]

5. Conflicts of Interest

5.1 As a Director of the Company you should ensure, so far as is reasonably possible, that other Directors of the Company act in the interests of the Company.

5.2 As a Director of the Company you must put the interests of the Company before your own interests or those of any other person or organisation. In particular, please note that:

- (a) you should attempt to avoid conflicts or possible conflicts between your personal interests and the interests of the Company. If a conflict or possible conflict arises you must put the interests of the Company first;
- (b) where there is a conflict between the interests of the Company and the interests of one or more of *[insert name of each shareholder appointing the Director]* (who are responsible for your appointment as a Director), you must put the Company's interests first; and
- (c) where there is a conflict or a possible conflict between the interests of the Company and another organisation with which you are affiliated or connected, you must declare this interest to the other Directors at the earliest opportunity in order that it can be authorised in advance either by the members of the Company or the Directors. In addition you must be aware of your obligations set out in the Shareholders' Agreement and in particular clauses 5.20 to 5.29 (*Director's power to authorise conflict situations*) of the Shareholders Agreement.

6. Ceasing to be a Director

6.1 Your appointment as a director will automatically cease in the event that:

- (a) you resign as director;
- (b) *[insert anything in addition set out in the Articles]*.

6.2 Shareholders holding a majority of [◆] Shares may give a notice to the Company in accordance with clause 5.8 (*Composition of the Company Board and the right to appoint Directors*) of the Shareholders Agreement removing you from office:

²⁸ **Clause 4.1- Directors remuneration.** Note that agreement is required on the initial level Director remuneration. It will be set at bid stage and this will be required to be in line with corporate good practice. In respect of travel expenses this is expected to be standard class for train travel etc.

- (a) in accordance with clause of the Shareholders Agreement there cease to be any holders of [◆] Shares in the Company; or
 - (b) Shareholders holding a majority of [◆] Shares remove you from office in accordance with clause 5.8 (*Composition of the Company Board and the right to appoint Directors*) of the Shareholders Agreement on the basis that you exercised your voting rights, or otherwise acted or omitted to act, in contravention of the Shareholders Agreement.
- 6.3 In the event that any matter specified in any of paragraphs 6.1 or 6.2 above occurs you will resign immediately from all offices held by you in the Company and any subsidiary of the Company.
- 6.4 In particular, in signing this letter, you acknowledge that your office is subject to the terms of the Shareholders Agreement and the Articles and may be terminated as permitted under their terms and that upon termination you will vacate office in relation to the Company forthwith without raising any claim whatsoever against the Company in relation to your vacation of office (otherwise than in respect of any properly incurred and unpaid expenses due to you up to the date you vacate your office).
- 6.5 In the event that you fail to resign from office you hereby authorise the Company Secretary to appoint some person in your name and on your behalf to execute all documents necessary to bring about such resignations.
- 6.6 On termination of your appointment, you agree that you will promptly return to the Company Secretary all papers and property of the Company which are in your possession.
- 7. Insurance**
- 7.1 The Company [proposes to obtain][has obtained] directors' and officers' liability insurance and intends to maintain such cover for the full term of your appointment. The indemnity limit is £[◆]. A copy of the policy document will be available in due course.
- 8. Indemnity**
- 8.1 Subject to the provisions of the Companies Act 2006 and the Articles, as a Director you shall be indemnified out of the assets of the Company against any liability incurred by you in defending any proceedings, whether civil or criminal, alleging liability for negligence, default, breach of duty or breach of trust in relation to the affairs of the Company and in which judgment is given in your favour, or in which you are acquitted, or in connection with any application in which relief is granted to you by the court.
- 9. Confidentiality**
- 9.1 All information acquired during your appointment is confidential to the Company and should not be disclosed to any third parties or used for any reason other than in the interests of the Company, either during or after your appointment. You will not, whether during your appointment or after its termination, except in the proper performance of your duties or as required by law, use or divulge, and shall use all reasonable endeavours to prevent the use or disclosure of any trade or business secrets or any information concerning the business or finances of the Company or of any dealings, transactions or affairs of the Company or any client, customer or supplier of the Company which comes to your knowledge during the course of your appointment. You will also comply with the provisions of clause 13.7 (*Confidentiality*) of the Shareholders Agreement as if it applied to you.
- 9.2 For the avoidance of doubt, you shall be entitled to share information you obtain by virtue of your role with the holders of [*insert class*] Shares, so long as this does not run counter to the provisions regarding conflicts of interest outlined above.

We should be grateful if you would accept these terms by signing and returning to us the attached copy of this letter.

Yours sincerely

.....
For and on behalf of [**INSERT NAME OF THE COMPANY**] Limited

I agree to the above terms of appointment as a Director.

.....
[**DIRECTOR'S SIGNATURE**]

**Schedule 10
Working Capital Agreement²⁹**

1. Definitions & Interpretation

1.1 In this Working Capital Agreement, the following terms will have the following meanings:-

"Event of Default" means any of the following:

- (a) any of the events or circumstances in clause [2.4 (*Termination*)] of this Agreement;
- (b) a failure by the Company to make any repayment to a Working Capital Provider in accordance with paragraph 4 of this Working Capital Agreement where such failure has not been rectified within ten (10) Business Days of the date that such repayment was due to be made; or
- (c) the occurrence of an Insolvency Event in respect of the Company (but not, for the avoidance of doubt, any other WEP Company);

"Individual Commitment" means, in respect of a given Working Capital Provider, the commitment of that Working Capital Provider as set out in paragraph 2.2 of this Working Capital Agreement as may be adjusted from time to time in accordance with paragraph 2.3 of this Working Capital Agreement;

"Reserve Account" means the account set up in the name of the Company for the purposes of holding payments under this Working Capital Agreement; and

"Working Capital Limit" has the meaning given in paragraph 2.1 of this Working Capital Agreement.

2. Working Capital Facility

2.1 Without prejudice to [paragraph 2.3 and 4.1 of this Working Capital Agreement], the total limit applicable to the Working Capital Facility to be provided by the Working Capital Providers hereunder shall be [£◆]³⁰ (the "**Working Capital Limit**").

2.2 Each Working Capital Provider shall, on a several basis and not jointly, make available funds forming part of the Working Capital Limit in accordance with this Working Capital Agreement in the following amounts:

Working Capital Provider	Working Capital Provider's Individual Commitment
	[£◆] ³¹

2.3 Subject to Article [9.2(f)], a Working Capital Provider's Individual Commitment shall be:

²⁹ To be aligned with Bidder solution, including the working capital plan to be submitted pursuant to Section F1 (WEPCo working capital and resourcing plan of Annex 9 of Volume 1 of the ITPDSB)

³⁰ To be populated for Final Bid

³¹ To be populated for Final Bid

- 2.3.1 increased or decreased pro rata to the number of Shares held by that Working Capital Provider as compared with the aggregate number of Shares in issue; and
- 2.3.2 increased or decreased pro rata to the overall Working Capital Limit determined by the Company from time to time pursuant to this Agreement,

provided that the Individual Commitment of any Working Capital Provider shall only be increased where that Working Capital Provider has expressly so agreed in writing to such increase.

- 2.4 When drawing under or otherwise utilising the Working Capital Facility, the Company must comply with:
 - 2.4.1 the Working Capital Limit in aggregate;
 - 2.4.2 each Working Capital Provider's Individual Commitment; and
 - 2.4.3 the requirement for drawing under or other utilisation of Working Capital Providers' Individual Commitments to be done on a pro rata basis (proportionate to the percentage of the relevant Working Capital Provider's shareholding in the Company)

All other provisions of this Working Capital Agreement relating to the level of drawing or utilisation of the Working Capital Facility shall be subject to this paragraph 2.4.

- 2.5 Subject to the provisions of clauses 8.3 to 8.7 (*Working Capital*) of this Agreement ³², the Working Capital Facility shall be, and shall only be capable of being utilised for the purposes of providing working capital for the Company as the Directors see fit in accordance with the provisions of the Company Articles and this Agreement.

2.6 **Availability**

- 2.6.1 The Working Capital Facility shall be available for drawing by the Company from the [date of this Agreement] until [*insert date 5 years from date of Shareholders Agreement*]. Following [*insert date 5 years from date of Shareholders Agreement*] the Working Capital Facility will cease to be available unless the holders of a majority of the A Shares and the holders of a majority of the B Shares have agreed in writing to its renewal or extension.
- 2.6.2 Without prejudice to clause 8.4(c) of this Agreement, the Working Capital Facility shall be repaid in full:
 - (a) on or before [*insert date 5 years from date of Shareholders Agreement*] (subject always to paragraph 2.6.4 of this Working Capital Agreement); or
 - (b) on such later date as may be agreed in writing by the Company, the holders of a majority of the A Shares and the holders of a majority of the B Shares; or
 - (c) if earlier, on the occurrence of an Event of Default.

Save to the extent agreed in writing by the Company, the holders of a majority of the A Shares and the holders of a majority of the B Shares, if the Working Capital Facility is not repaid by [*insert date 5 years from date of Shareholders Agreement*],

³² Bidders should adjust drafting as appropriate to their solution in the event that the PSDP is not providing working capital.

then the full amount of the Working Capital Facility shall be due and payable on that date.

2.6.3 [Not Used]³³

2.6.4 Without prejudice to clause 8.4(c) (*Working Capital*) of this Agreement and paragraph 2.6.2 of this Working Capital Agreement, the Company may and shall, where the Directors so resolve in accordance with this Agreement and the Company Articles, repay all or any amounts drawn or deemed to be drawn (and not repaid) under the Working Capital Facility from the Working Capital Providers from time to time at any time without penalty prior to [insert date 5 years from date of Shareholders Agreement] or later date as referred to in paragraph 2.6.2(b) or the occurrence of any Event of Default, provided that:

- (a) [where repayments are made pursuant to this paragraph 2.6.4 , the Working Capital Limit and the Individual Commitments of any such Working Capital Provider shall remain unaffected and any amounts so repaid shall be available for redrawing as part of the Working Capital Facility in accordance with the terms of this Agreement; and]
- (b) repayments shall be made to each Working Capital Provider pro rata to sums drawn down from that Working Capital Provider pursuant to paragraph 2.4.3 of this Working Capital Agreement.

For the avoidance of doubt, the prior written consent of the Shareholders pursuant to clause 8.5 (*Working Capital*) of this Agreement shall not require to be sought in respect of any proposal to repay amounts pursuant to this paragraph 2.6.4 of this Working Capital Agreement.]³⁴

2.6.5 Nothing in this Working Capital Agreement shall prevent repayments to a Working Capital Provider in pursuance of clause 8.10 (*Working Capital*) (as read with clause 8.11 (*Working Capital*)) of this Agreement.

2.7 Drawdown Process

2.7.1 In order to require a drawdown under the Working Capital Facility, the Company shall deliver to a Working Capital Provider a drawdown notice in the form set out in Appendix 1 to this Schedule 10 (*Working Capital Agreement*) and complying with the requirements of Appendix 1 to this Schedule 10 (*Working Capital Agreement*). Unless an Event of Default has occurred, provided the requirements of the drawdown notice have been met, the Working Capital Provider shall make payment of the amount requested in the drawdown notice to the Reserve Account on a date falling not later than five (5) Business Days after the date of the drawdown notice.

2.7.2 [On the date of completion under clause 2.2 of this Agreement, the Company shall be deemed to have issued a drawdown notice for £[•] from the PSDP and £[•] from the WCo Working Capital Provider and the Working Capital Providers shall

³³ Where a revolving facility is not envisaged as provided for in para 2.6.4 (a) that provision should be deleted. Bidder specific drafting may be included here.

³⁴ PSDP may elect to delete this paragraph. In such circumstances the drafting will require to reflect a requirement for any repayment of Working Capital other than in accordance with paragraph 2.6.2 or Clause 8.4(c), to be a Reserved Matter.

transfer these amounts deemed to have been drawn down to the Reserve Account on or before completion of this Agreement under clause 2.2 of this Agreement.]³⁵

3. Interest

- 3.1 The rate of interest applicable to the Working Capital Facility for all amounts drawn and outstanding under the Working Capital Facility at any time shall be, subject always to clause 8.9 (Working Capital) of this Agreement, in respect of all other sums drawn under the Working Capital Facility and paid to the Company the rate of [◆]% per annum.

4. Payments

- 4.1 All payments by the Company to the Working Capital Provider under this Schedule 10 (*Working Capital Agreement*) shall be in cleared funds and made free and without deduction of Tax unless the Company is required by law to make a payment subject to deduction or withholding of Tax, in which case the amount payable by the Company will be sufficiently increased to ensure that Working Capital Provider receives and retains a net sum equal to that which it would have received and retained were no deduction or withholding made. If a Working Capital Provider subsequently receives a Tax credit which is referable to the increased payment and which enhances its position, then the relevant Working Capital Provider will reimburse the Company sufficient to redress the position up to the amount received so long as by so doing the relevant Working Capital Provider does not prejudice receipt or retention of the Tax credit.
- 4.2 All payments of interest due to a Working Capital Provider will be paid semi-annually (on 31 December and 30th June) to the relevant Working Capital Provider as directed by the relevant Working Capital Provider. Interest shall be calculated in respect of all amounts drawn down from the Working Capital Facility and provided by each individual Working Capital Provider under this Agreement and payable to the relevant Working Capital Provider in accordance with paragraph 3.1 of this Working Capital Agreement.
- 4.3 All payments to be made by the Company under this Working Capital Agreement shall be calculated and be made without (and free and clear of any deduction for) set-off or counterclaim.
- 4.4 All sums of interest will accrue on a daily basis on the amount paid into the Reserve Account and be calculated on the basis of a year of 365 days and, in any such case, for the actual number of days elapsed. Interest shall continue to accrue on sums due following a decree or judgement as well as before it, and at the same rate.
- 4.5 Any determination by a Working Capital Provider of any amount of principal, interest, commission or charges or an applicable interest rate owed to such Working Capital Provider shall, in the absence of manifest error, be conclusive and binding on the Company.
- 4.6 Where the due date for payment of any amount under this Working Capital Agreement is not a Business Day then (without affecting subsequent payment dates) actual payment will be required on the next Business Day.

5. Indemnity

- 5.1 The Company will at all times on demand indemnify the Working Capital Providers against all actions, suits, Proceedings, claims, demands, liabilities, costs, expenses, losses, damages and charges whatsoever (except those arising as a result of the gross negligence or wilful misconduct of the relevant Working Capital Provider) which may occur in relation to

³⁵ Noting these amounts should be proportionate and no greater than the Individual Commitments contained in paragraph 2.2. Bidders to complete in Final Bid.

or arising out of any utilisations of the Working Capital Facility made available under this Agreement.

- 5.2 The Company will pay the Working Capital Providers the amount of all payments made (whether directly or by way of set-off, counterclaim or otherwise) and all losses, costs or expenses suffered or incurred from time to time by the Working Capital Providers arising under any liability which the Working Capital Providers have incurred (directly or indirectly) in relation to any utilisations of the Working Capital Facility.
- 5.3 The liability of the Company under paragraphs 5.1 and 5.2 of this Working Capital Agreement shall not be affected by any time being given or by anything being done or not done by the Working Capital Providers.

Appendix 1

From: [WEPCo]
To: [Working Capital Provider]

Address:

Attention:

Date:

Dear Sirs

Working Capital Facility between [] and [WEPCo] dated [●] (the "Working Capital Facility")

1 We refer to the Working Capital Facility. This is a drawdown notice. Terms defined in the Shareholders Agreement between, amongst others, the Working Capital Providers and the Company dated [] have the same meaning in this drawdown notice.

2 We request an advance under the Working Capital Facility on the following terms:

Amount: [●]

3 Proposed drawdown date: [●] (or, if that is not a Business Day, the next Business Day).

4 The proceeds of this Advance should be credited to the Reserve Account [*details*].

5 This drawdown notice is irrevocable.

6 [We attach to this drawdown notice a schedule detailing the amount of working capital required by us and [the anticipated expenditure for which that working capital will be required/the expenditure which has been funded from sums standing to the credit of the Reserve Account.]

7 We confirm that this drawdown notice is for an amount that is equal to []% of the expenditure referred to in paragraph 6 above, such proportion being equal to the proportion of shares held by [the PSDP]/[WGCo]³⁶ in the Company.

Yours faithfully

Director
For and on behalf of
[WEPCo]

³⁶ To be selected as appropriate for a drawdown notice to the PSDP or the WGCo Working Capital Provider and relevant percentage of the aggregate advance .

Executed and delivered as a **DEED** by **[PSDP]**)
acting by its duly authorised signatories:)
)

Director

Director/Secretary*

OR

Executed and delivered as a **DEED** by **[PSDP]**)
acting by its duly authorised signatory:)
)

Director

In the presence of:

Witness Signature:

Name:

Address

Executed and delivered as a **DEED** by)
[WELSH GOVERNMENT COMPANY)
LIMITED] acting by its duly authorised)
signatories:)

Director

Director/Secretary*

OR

Executed and delivered as a **DEED** by)
[**WELSH GOVERNMENT COMPANY**)
LIMITED] acting by its duly authorised)
signatory:

.....
Director

In the presence of:

Witness Signature:

Name:

Address

Executed and delivered as a **DEED** by)
[**COMPANY**] **LIMITED** acting by its duly)
authorised signatories:)

.....
Director

.....
Director/Secretary*

OR

Executed and delivered as a **DEED** by)
[**COMPANY**] **LIMITED** acting by its duly)
authorised signatory:)

.....
Director

In the presence of:

Witness Signature:

Name:

Address

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol



Llywodraeth Cymru
Welsh Government

WEP Strategic Partnering Delivery Model

Template Project Co Shareholders' Agreement

ITPDSB Version (Standard Form Version 1.3)

TEMPLATE PROJECT CO SHAREHOLDERS' AGREEMENT

VERSION 1

IMPORTANT NOTICE

This is the first version of the Welsh Education Partnership ("**WEP**") Strategic Partnering Delivery Model standard form of Project Co Shareholders' Agreement, the intention of which is to minimise the time and costs of dealing with legal issues relating to WEP Strategic Partnering Delivery Model.

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

1. This is the Template Project Co Shareholders' Agreement (the "**Template Project Co Shareholders' Agreement**") as referred to in and set out in Section 4 of Schedule 7 (*Template Project Agreement*) of the Strategic Partnering Agreement ("**SPA**"). Under the terms of the SPA, the parties are obliged to use this Template Project Co Shareholders' Agreement on all Mutual Investment Model (MIM) projects, subject to the amendments described below.
2. All footnotes (and optional drafting) should be used/deleted as appropriate and in accordance with the guidance contained therein. It should be noted derogations to the Template Project Co Shareholders' Agreement are strongly discouraged and it is expected Welsh Government approval will be strictly limited to changes that represent value for money and are required for project specific reasons, or to reflect changing Welsh Government guidance or demonstrable changing market circumstances. Further, in the case of matters which may adversely affect an "off-balance sheet" statistical classification by ONS/EUROSTAT, project teams are advised to read EPEC/EUROSTAT's Guide before contacting Welsh Government for approval. Any derogations that, in the opinion of Welsh Government, may adversely affect an "off-balance sheet" statistical classification will not be permitted.
3. Clause and paragraph numbering should be preserved through the use of lettered additions and "not used" deletions. Automatic numbering and hyperlinked cross references should be maintained.
4. All parties are reminded that the WEP Strategic Partnering Delivery Model is a true partnering arrangement and the value of further debate over insubstantial issues should be considered in this light.
5. The Template Project Co Shareholders' Agreement is not a replacement for independent, specialist advice and the Shareholders must ensure that they have taken appropriate legal, financial and technical advice before using it.
6. Should you have any questions on the draft you are asked to contact MIMEducation@gov.wales

DATED

20◆

[PRIVATE SECTOR DELIVERY PARTNER] (1)

[WGCO LIMITED] (2)

[HOLD CO] (3)

[PROJECT CO] (4)

**PROJECT CO
SHAREHOLDERS'
AGREEMENT RELATING TO
[NAME OF PROJECT] AND
THE WEP STRATEGIC
PARTNERING DELIVERY
MODEL**

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**WEP STRATEGIC PARTNERING DELIVERY MODEL TEMPLATE PROJECT CO
SHAREHOLDERS' AGREEMENT**

THIS AGREEMENT is made on

20◆

Among:

- (1) **[Private Sector Delivery Partner]**¹ (Company No. ◆) whose registered office is at ◆
(**PSDP**);
- (2) **[[WGCo Limited]**² (Company No. ◆) whose registered office is at ◆] (**WGCo**);
- (3) **[Name of Hold Co]**³ (Company No. ◆) whose registered office is at ◆ (**Company** or **Hold Co**); and
- (4) **[Name of Project Co]** (Company No. ◆) whose registered office is at ◆ (**Project Co**).

Background:

- (A) Pursuant to this Agreement the PSDP and WGCo have agreed to subscribe for shares in the Company and to advance monies to the Company (as debt) and, on completion of the subscriptions referred to in clause 4.1 (*Initial subscriptions of Shares*), and completion of advances referred to in clause 4.2 (*Shareholder Debt*) the Shares held by each of the parties and the amount of Shareholder Debt advanced to Project Co by each of the parties will be as set out in the Data Sheet.
- (B) The Company is a limited liability company registered in [England and Wales].
- (C) The Shareholders have agreed to establish the Company as a jointly owned company which is intended to carry on the business of a holding company in the manner set out in this Agreement.
- (D) Project Co is a limited liability company registered in [England and Wales]. Project Co is a wholly owned subsidiary of the Company established for the purposes of Project Co entering into the Project Documents to which it is to be a party and undertaking the Project.⁴
- (E) The parties have agreed that the respective rights and obligations of Shareholders in the Company shall be governed by the provisions of this Agreement and that the Company and Project Co Businesses shall be conducted in accordance with the provisions of this Agreement.

IT IS AGREED:

¹ **Parties - PSDP.** For ease of reference, this standard form anticipates the "PSDP" being a single company. It is recognised that the "PSDP" may comprise a number of parties. In this case this standard form will require amendment.

² **Parties - WGCo.** Subject to due diligence on a project by project basis, Welsh Government shall invest. The identity of this entity is to be confirmed. Beyond the initial funding commitment pursuant to clause 4 of this Agreement, as with the PSDP, there will not be any recourse against the shareholders.

³ **Parties – Company and Project Co.** This document has been drafted on the premise that the Company and Project Co are companies which are registered in England and Wales.

⁴ **Recital D – Formation of Project Co and the Company.** The PSDP is expected to set up the Company and Project Co.

1. Definitions and interpretation

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

2. Commencement and duration

Conditions precedent

2.1 The obligations set out in clause 12.1 (*Confidentiality*) shall commence:

- (a) in relation to the Founder Shareholders, the Company and Project Co, on the execution of this Agreement; and
- (b) in relation to any person becoming a Shareholder after the date of this Agreement (a **New Shareholder**), on the execution of the Deed of Adherence.

2.2 Save as set out in clause 2.1 (*Conditions precedent*), this Agreement shall come into effect:

- (a) in relation to Founder Shareholders, the Company and Project Co, on the completion of the matters set out in clause 4.1 (*Initial subscriptions of Shares*); and
- (b) in relation to a New Shareholder, on the registration of the New Shareholder as a shareholder in the Company.

Termination in relation to a party ceasing to hold Shares in the Company

2.3 Immediately following the earlier of the termination of this Agreement and it ceasing to hold any Shares in the Company, a party shall cease to have any rights or obligations under this Agreement save for:

- (a) its obligations under clause 5.3 (*Removal of/change to nominated Directors*);
- (b) its rights and obligations under clause 8.4(c) (*Provision of information to Shareholders and designated third parties*) and clause 12 (*Miscellaneous*);
- (c) its liability for any breaches prior to it ceasing to hold any Shares;
- (d) any rights or cause of action that arose prior to it ceasing to hold any Shares; and
- (e) its rights to receive any payment in connection with the transfer of its Shares,

shall not be affected.

Termination

2.4 Save as provided in clause 2.3 (*Termination in relation to a party ceasing to hold Shares in the Company*) this Agreement shall continue in full force and effect until the earliest of the following dates:

- (a) the date on which the Company is wound up; or
- (b) the date on which all the Shareholders agree in writing to terminate this Agreement.

2.5 [If termination occurs the Company shall (if not already in liquidation) be placed into voluntary liquidation in accordance with clause 11 (*Winding Up*) and, after payment of liabilities, its

assets shall be distributed to the Shareholders in the same proportions as the Shareholders' holdings of shares at the time of the determination.]

3. The business of the Company and Project Co and details of the Company and Project Co

3.1

- (a) The business of the Company is to act as the holding company of Project Co.
- (b) The business of Project Co is to carry out or procure the carrying out of the Welsh Mutual Investment Model project relating to [details of the relevant MIM project] (**Project**).

3.2 Details of the Company and Project Co following the share subscriptions referred to in clause 4 (*Funding of the Company and the Project Co and financial matters*) and board appointments referred to in clause 5 (*The Boards of the Company and Project Co*) will be as detailed in Schedule 2 (*Details of the Company and the Project Co*).

4. Funding of the Company and the Project Co and financial matters⁵

Initial subscriptions of Shares

4.1 Immediately upon the execution of this Agreement by each of the parties, the parties shall take or procure to be taken the following steps either by themselves or at meetings of the Board or of the members of the Company/Project Co (as appropriate) to the extent not already taken:

- (a) the parties shall procure that the necessary board and/or shareholder resolutions in respect of the Company and Project Co are passed to adopt the Hold Co Articles and the Project Co Articles with immediate effect;
- (b) the following subscriptions shall be made in the capital of the Company:
 - (i) the PSDP shall subscribe for the number of Shares as set out opposite its name in the Data Sheet; and
 - (ii) WGCo⁶ shall subscribe for the number of Shares as set out opposite its name in the Data Sheet,
- (c) the Company shall subscribe for the number of shares in Project Co as set out opposite its name in the Data Sheet,⁷

⁵ **Clause 4 – Funding.** If an equity bridge is to be used or Shareholder Debt is to be invested by instalments, the mechanics will need to be set out in the Equity Subscription Agreement. If there is no equity bridge, an Equity Subscription Agreement may not be required and appropriate amendments may be required to this Agreement. It should be assumed that WGCo will invest on the same market terms and at the same times as other Shareholders and the detail included in an Equity Subscription Agreement.

⁶ **Clause 4.1(b)(ii) – Level of WGCo investment.** The intended level of the WGCo investment will be stated in the procurement documentation at the outset of the procurement. The procurement documentation will provide further information regarding the manner in which WGCo shall undertake due diligence. Any holding will always be a minority interest and no higher than 20% of issued share capital/debt, so WGCo will not be entitled to appoint more than one (1) Director to each of Project Co and Hold Co.

⁷ **Clause 4.1(c) - Wholly Owned Subsidiary.** Project Co shall be a wholly owned subsidiary of the Company.

following which the Company and Project Co shall deliver the relevant definitive share certificates in relation to the allotment of Shares pursuant to sub-clause (b) and sub-clause (c) and shall insert the names of the allottees in the register of members.

Shareholder Debt

4.2 In respect of Shareholder Debt:

- (a) the PSDP undertakes to advance the amount of Shareholder Debt as set out opposite its name in the Data Sheet by way of subscribing for Hold Co Loan Notes in accordance with the terms of the Equity Subscription Agreement;
- (b) WCo undertakes to advance the amount of Shareholder Debt as set out opposite its name in the Data Sheet by way of subscribing for Hold Co Loan Notes in accordance with the terms of the Equity Subscription Agreement; and
- (c) Hold Co undertakes to on-loan the amount equivalent to the subscription monies of the Shareholder Debt received pursuant to clause 4.2(a) to 4.2(b) (*Shareholder Debt*) to Project Co in accordance with the terms of the Equity Subscription Agreement and the On-Loan Agreement⁸,

following which Hold Co and Project Co (as applicable) shall deliver any relevant certificates in relation to the Shareholder Debt advanced pursuant to sub-clauses (a) to (b) and shall insert the names of the Shareholders in the Register (as such term is defined in the Hold Co Loan Note Instrument).

Further capital required for the Company and for Project Co

4.3

- (a) No Shareholder shall be required to subscribe for any further Shares or to provide any additional funding for the Company (or guarantees or indemnities on behalf of the Company) which, for the avoidance of doubt, shall include any additional funding by way of shareholder loans and/or required to increase the working capital requirements of the Project Co. The same provisions shall apply in respect of Hold Co, such that Hold Co shall not be required to subscribe for any further Shares or to provide any additional funding for Project Co.
- (b) The Company and Hold Co shall not allot any Shares contrary to any restrictions imposed pursuant to the Project Documents.
- (c) The Company shall not allot any Shares to any person (other than a Shareholder) unless that person has first executed a Deed of Adherence in the form set out in Schedule 4 (*Deed of Adherence*).⁹
- (d) If, in the opinion of the Hold Co Board (or the Project Co Board as the case may be), the Company (or the Project Co) requires further funding, the Hold Co Board (or the Project Co Board) shall determine how the Company (or Project Co) should obtain such additional funding, whether by way of the allotment of shares, by obtaining

⁸ **Clause 4.2(a) - On-Loan Agreement.** The On-Loan Agreement will be the subject of WCo due diligence and must represent like for like terms injection of capital at Company and Project Co level.

⁹ **Clause 4.3(c) - Deed of Adherence.** The Articles and Project Documents must provide that Project Co shall always be a wholly owned subsidiary of Hold Co.

additional debt finance, or such other means as the Hold Co Board (or Project Co Board) may determine.

- (e) If the Board determines to allot further Shares, such Shares shall be allotted in accordance with the provisions of sub-clauses (f) to (h) below.
- (f) Subject to the provisions of clause 4.4 (*Offers to Allot*), if the Directors determine to allot Shares in the Company, the Directors shall, of the Shares to be offered, first offer the Shares to the Shareholders pro rata to each Shareholder's existing holdings of Shares (**first offer**).
- (g) To the extent that any Shares are not accepted under the first offer the Directors shall offer the remaining Shares to the Shareholders who have accepted that first offer pro rata to their holdings of Shares following the first offer (**second offer**). To the extent that any second offer is not accepted by any such Shareholder but is accepted by other Shareholders, the Directors shall make such subsequent offers with the necessary changes having been made to those persons who have accepted the second offer until all of the Shares have been accepted or, failing acceptance, until there are no persons willing to take further Shares whereupon the Directors may offer the remaining Shares to any Suitable Third Party.
- (h) A Shareholder may accept a first offer, or any other offer made to it, in whole or in part.

Offers to Allot

4.4 Each offer shall be made by the Board by notice in writing (an **Offer to Allot**) and in the case of Shareholders shall be served on Founder Shareholders at their address for service set out in clause 12.8 (*Notices*) and on New Shareholders at the address for service notified to the Company by such New Shareholder.

- (a) Each Offer to Allot shall:
 - (i) specify the total number of Shares which are on offer;
 - (ii) specify the number of Shares for which the recipient of the Offer to Allot may subscribe;
 - (iii) specify the price per Share;
 - (iv) specify the period during which the offer will remain open for acceptance, which for a first offer shall be fifteen (15) Business Days after the date of service of the Offer to Allot and for all other offers five (5) Business Days after the date of service of the Offer to Allot; and
 - (v) contain a statement to the effect that the offer shall not be deemed to be accepted until the Board has either received notices of acceptance in respect of all the Shares available for allotment or, having received notices of acceptance in respect of less than all the Shares offered for allotment, has elected to issue such Shares notwithstanding that notices of acceptance have not been received in respect of all the Shares offered for allotment.
- (b) After the expiry of each Offer to Allot the Board shall as soon as practicable make such additional offers as may be necessary in accordance with this clause 4 (*Funding of the Company and the Project Co and financial matters*).

- (c) Each of the Shareholders agrees to approve any resolution put to a general meeting of the Company to renew the authority of the Directors to allot Shares in the Company.

Additional Shareholder Debt

- 4.5 The provisions of clause 4.3 (*Further capital required for the Company and for Project Co*) and clause 4.4 (*Offers to Allot*) relating to any additional issue of Shares shall apply with the necessary changes to any further issue of/borrowing of Shareholder Debt.

5. The Boards of the Company and Project Co

Composition of the Boards and the right to appoint Directors

5.1

- (a) Each of the Boards shall consist of not less than three (3) Directors, to be appointed in accordance with this Agreement and the Hold Co Articles and the Project Co Articles (as the case may be).
- (b) The Shareholders shall be entitled in accordance with the Hold Co Articles and this Agreement to nominate and appoint in writing persons as Directors of the Company and to remove such persons from office. Any Shareholder holding [fifteen per cent (15%)]¹⁰ or more of the issued Share capital (a **Material Shareholder**) shall be entitled to nominate one (1) Director for every [fifteen per cent (15%)] of the issued Share capital of the Company held by it, PROVIDED THAT WGCo (and any member of the WGCo Group to whom WGCo transfers all but not part of its Shares in the Company) shall, for as long as it holds issued Share capital in the Company, be entitled to nominate and appoint in writing one (1) person as a Director of the Company and to remove such person from office, irrespective of whether it holds [fifteen per cent (15%)] of the issued Share capital of the Company.
- (c) The persons nominated and appointed by the parties to act as the initial Directors for the purposes of sub-clause (b) are as set out in Schedule 2 (*Details of the Company and the Project Co*).
- (d) In addition to its rights to nominate and appoint Directors under sub-clause (b), each RTAD Shareholder shall be entitled in accordance with the Articles, to nominate and appoint in writing one (1) person as an Alternate to each of its Director appointees and to replace any such person(s) as an Alternate from time to time (provided such Alternate shall be registered as a Director at Companies House).
- (e) The parties shall procure that the Directors of the Company (and any Alternate(s)) appointed or removed in accordance with this clause 5 (*Composition of the Boards and the right to appoint Directors*) shall also be appointed and removed, as the case may be, as Directors/Alternate(s) of Project Co.

¹⁰ **Clause 5.1(b) – Percentage of Shareholding.** The percentage will need to be determined on a transaction by transaction basis but shall never be more than 20%. See footnote 7. WGCo will never have the right to appoint more than one (1) Director.

Quorum requirements for Board meetings

5.2

- (a) Subject to the Articles, sub-clauses (b) and (c), clause 6.5 (*Step-aside provisions*) and clause 5.14 (*Director's power to authorise conflict situations*), the quorum for Board meetings of the Company and Project Co respectively shall comprise [one (1) WG Co Director and [two (2)] PSDP Directors (or their respective Alternates) .
- (b) If within thirty (30) minutes of the time for the relevant meeting there is not a quorum of Directors in attendance (in accordance with sub-clause (a)) at a meeting of Directors called in accordance with this clause 5.2 (*Quorum requirements for Board meetings*), then (unless the relevant Director(s) have given written waiver(s) in relation to his/her attendance) such meeting shall be adjourned in accordance with article [26.6] [*Quorum for Board Meetings*] of the Hold Co Articles and when reconvened such adjourned meeting shall, subject to the provisions of article [◆] [*Quorum for Board Meetings*] of the Hold Co Articles or article [◆] [*Quorum for Board Meetings*] of the Project Co Articles (as appropriate), be deemed to be quorate notwithstanding the fact that the relevant number of Director(s) appointed by that RTAD Shareholder may not be present.
- (c) If a RTAD Shareholder fails to appoint and maintain in office the relevant number of Directors it is required to appoint to satisfy the quorum requirements in sub-clause (a) then, if a meeting of the Directors is called in accordance with this clause 5.2 (*Quorum requirements for Board meetings*) and notice of the meeting is given to that RTAD Shareholder as if it were a Director, the meeting of Directors shall be deemed to be quorate notwithstanding the fact that the relevant number of Director(s) appointed by that RTAD Shareholder to form a quorum under sub-clause (a) may not be present.

Removal of/change to nominated Directors

5.3

- (a) If an RTAD Shareholder (the **Appointing Shareholder**) removes any person nominated by it as a Director (such a Director being an **Outgoing Director**) then the Appointing Shareholder shall procure that the Outgoing Director vacates office without any claim to the Company for loss of office or otherwise relating to the Outgoing Director's vacation of office and the Appointing Shareholder shall indemnify the Company against all losses, liabilities and costs which the Company may incur arising out of, or in connection with, any claim by the Outgoing Director for wrongful or unfair dismissal or redundancy or other loss arising out of the Outgoing Director's removal from or loss of office.
- (b) If any Material Shareholder ceases to be a Material Shareholder or WGCo ceases to hold any Shares (an **Outgoing Shareholder**) and any Director has been nominated as a Director by the Outgoing Shareholder pursuant to clause 5.1 (*Composition of the Boards and the right to appoint Directors*), the Outgoing Shareholder shall procure that any such Director vacates office without any claim to the Company for loss of office or otherwise relating to such Director's vacation of office and the Outgoing Shareholder shall indemnify the Company against all losses, liabilities and costs which the Company may incur arising out of, or in connection with, any claim by such Director for wrongful or unfair dismissal or redundancy or other loss arising out of such Director's removal from or loss of office.

- (c) The provisions of sub-clause (a) and sub-clause (b) above apply with the necessary changes in relation to Project Co Directors as if references to the Company were references to Project Co.

Chairman of the Board

5.4

- (a) There shall be a Chairman of the Hold Co Board and the Project Co Board appointed or nominated in accordance with either sub-clause (b) or sub-clause (c) as the case may be.
- (b) If the Shareholders unanimously agree to appoint an independent non-executive Chairman then the Chairman shall be appointed either on an annual basis or on such occasions as the Shareholders (acting in their absolute discretion) may unanimously agree, and the period of appointment shall be for such time as the Shareholders may unanimously agree (acting in their absolute discretion) from time to time. The Chairman appointed shall be a Director and his/her appointment shall be in addition to the appointments of Directors referred to in clause 5.1 (*Composition of the Boards and the right to appoint Directors*). If a Chairman is unable to attend any meeting of the Board or of the Shareholders of the Company/Project Co the Directors in attendance shall appoint one (1) of their number as the chair for that meeting to act in his/her place. An independent non-executive Chairman appointed under this sub-clause (b) shall not have a vote at either Board or Shareholder meetings.
- (c) If the Shareholders do not agree to appoint an independent non-executive Chairman under sub-clause (b) within one (1) month of the date of this Agreement then the Chairman shall be one (1) of the Directors appointed in accordance with clause 5.1 (*Composition of the Boards and the right to appoint Directors*) who shall act as Chairman for six (6) months and thereafter the role of Chairman shall rotate every six (6) months between a Director appointee of each Material Shareholder (by agreement between the Material Shareholders) or, failing agreement, then by the Material Shareholders drawing lots (provided that a Material Shareholder appointee shall not hold the role of Chairman for more than six (6) months in any eighteen (18) month period). A Director appointed as Chairman under this sub-clause (c) shall not have a second vote by reason of his/her appointment as Chairman.

Board meetings and Board voting¹¹

5.5

- (a)
 - (i) Resolutions of the Board shall be determined by a simple majority of votes cast for or against each resolution.
 - (ii) Subject to the Articles, sub-clause (a)(iii), clause 5.4(b) and (c) (*Chairman of the Board*) and clause 6.5 (*Step-aside provisions*), at Board meetings each Director (other than an independent non-executive Chairman appointed under clause 5.4(b) (*Chairman of the Board*)) shall have one (1) vote.

¹¹ **Clause 5.5 - director voting.** The standard form documents are drafted on the basis of votes per director/Alternate. If other voting mechanics (e.g. director appointees having voting rights in the percentages of their appointees) then the PSDP/Bidder will need to put forward any such changes (rationale and detail) for consideration as part of the bid process.

- (iii) Subject to the Articles, if a Material Shareholder has more than one (1) Director appointee under clause 5.1 (a) (*Composition of the Boards and the right to appoint Directors*) but not all of such appointees (or their Alternates) are present at the Board meeting then the other Director(s) present appointed by that Material Shareholder shall be entitled to vote each relevant absent Director's vote.
- (b) Unless otherwise agreed by all of the Directors, not less than ten (10) Business Days' notice (or such other period of notice as may be agreed from time to time by all of the Directors) of each meeting of the Board specifying the date, time and place of the meeting shall be given to all Directors. All meetings of the Board shall take place at such location as the Board shall agree and the RTAD Shareholders shall use all reasonable endeavours to procure that their respective Directors attend each such meeting and to procure that a quorum (in accordance with the provisions contained in this clause 5 (*The Boards of the Company and Project Co*) and in the Articles) is present at each such meeting of which due notice has been given.
- (c) Unless otherwise agreed by the Board:
 - (i) meetings of the Directors shall be held not less than quarterly on such dates as they may agree (and failing such agreement on such day as the Chairman shall decide);
 - (ii) a telephone conference call or video conference or a combination of the same, at which all participants are able to speak to and hear each of the other participants and at which for all times at that meeting a quorum of the Directors is able to so participate, shall be valid as a meeting of the Directors;
 - (iii) a resolution (which may be in counterparts) in writing signed by all the Directors entitled to receive notice of a meeting and vote at the meeting shall be as valid and effectual as if it had been passed at a meeting of Directors duly convened and held; and
 - (iv) any Director shall by notice to the Company and each other Director be entitled to convene a meeting of the Directors on not less than ten (10) Business Days' notice.
- (d) Unless otherwise agreed by all of the Directors, all papers for meetings of the Board will be sent to all Directors not less than five (5) Business Days prior to the relevant meeting and, unless otherwise agreed by all of the Directors, draft minutes of meetings of the Board will be sent to each Director as soon as practicable after the holding of the relevant meeting.
- (e) The provisions of sub-clauses (a) to (d) shall apply with necessary changes as if references to the Company were references to Project Co.
- (f) Unless otherwise agreed by all of the Directors, a meeting of the Project Co Board shall follow immediately after a meeting of the Hold Co Board.
- (g) Notwithstanding any other provisions of this Agreement or of the Articles, if a Shareholder (the Relevant Shareholder) is in material breach of its obligations under this Agreement or the Articles the Directors appointed by it shall be disenfranchised from voting at Board meetings unless and until that breach is remedied and no approval shall be required of the Relevant Shareholder's Directors for any Reserved Matter Board Approval matters. If there is a dispute as to whether a Relevant Shareholder is in material breach of its obligations under this Agreement then, pending determination, the Relevant Shareholder shall be deemed to be in material

breach if the Material Shareholders (excluding the Relevant Shareholder) each confirm in writing to the Relevant Shareholder that they consider the Relevant Shareholder to be in material breach setting out the basis of that breach.

Director remuneration

- 5.6 The Company and Project Co shall pay Director remuneration as set out in clause 5.7 (*Director remuneration*). Any increase in any such remuneration other than in accordance with clause 5.7 (*Director remuneration*) is a Reserved Matter.
- 5.7 The role of Director of the Company and Project Co shall attract remuneration of £[◆]¹² per annum (Index Linked). Such fee shall be due, pro rata, monthly in arrears, from the date of his/her or her appointment and is payable within thirty (30) days of receipt of an invoice by the Company and/or Project Co, as appropriate.
- 5.8 In addition to the remuneration set out at clause 5.7 (*Director remuneration*), the Directors may be paid reasonable travelling and other expenses properly incurred by them in connection with their attendance at meetings of the Board, general meetings, meetings of committees of the Board or otherwise in connection with the carrying out of their duties.

Director's power to authorise conflict situations

- 5.9 Provided that a Director has disclosed any interest he/she may have in accordance with the Companies Act 2006, and any conflict or potential conflict has been authorised under the provisions of this clause 5 (*The Boards of the Company and Project Co*), then that Director may vote at a meeting of Directors or of a committee of Directors on a resolution or participate in any unanimous decision concerning any matter in which he/she is interested, and (whether or not he/she votes or participates) he/she may be counted in the quorum when that resolution or matter is considered.
- 5.10 A Director shall be entitled to abstain from voting or to absent himself/herself from all or any part of any meeting in relation to any matter where he/she considers that to vote for or against a matter may put him/her in breach of his/her duties to the Company (whether at Law or by reference to any code of conduct, good governance procedures or otherwise) and if he/she so abstains or absents himself/herself then he/she shall not be in breach of his/her duties as a Director under sections 172 to 174 of the Companies Act 2006 in relation to the matter in question.
- 5.11 Any Director shall be entitled from time to time to disclose to the RTAD Shareholder responsible for his/her appointment such information concerning the business and affairs of the Company as he/she shall at his/her discretion see fit.
- 5.12 A Director who to his/her knowledge is in any way, whether directly or indirectly, interested in a transaction or arrangement or proposed transaction or arrangement with the Company shall declare the nature of his/her interest at a meeting of the Directors in accordance with the Companies Act 2006.
- 5.13 Subject to clause 6.2 (*Reserved Matters*), for the purposes of section 175 of the Companies Act 2006, the Directors shall have the power to authorise, on such terms (including as regards duration and revocation) and subject to such limits or conditions (if any) as they may determine (a **Conflict Authorisation**), any matter proposed to them which would, or might, if

¹² **Clause 5.7 - Directors remuneration.** Note that agreement is required on the initial level Director remuneration. It will be set on a project specific basis and this will be required to be in line with corporate good practice. In respect of travel expenses this is expected to be standard class for train travel etc.

not so authorised, constitute or give rise to a situation in which a Director (a **Relevant Director**) has, or can have, a direct or indirect interest which conflicts, or possibly may conflict, with the interests of the Company (a **Conflict Situation**). Any Conflict Authorisation shall extend to any actual or possible conflict of interest which may reasonably be expected to arise out of the Conflict Situation so authorised.

5.14 Unless otherwise agreed between the Shareholders in writing and notwithstanding clause 5.2 (*Quorum requirements for Board meetings*), the quorum for any meeting (or part of a meeting) of the Directors whilst it is considering the grant, alteration or revocation of a Conflict Authorisation shall be at least one (1) Director for each RTAD Shareholder provided that a Relevant Director shall not be counted in the quorum for such meeting.

5.15 Where Directors give a Conflict Authorisation:

- (a) the terms of the Conflict Authorisation shall be recorded in writing (but the authorisation shall be effective whether or not the terms are so recorded);
- (b) the Directors may revoke or vary such authorisation at any time but this will not affect anything done by the Relevant Director prior to such revocation or variation in accordance with the terms of such authorisation; and
- (c) the Relevant Director shall be obliged to act in accordance with any terms, limits or conditions to which such Conflict Authorisation is made subject.

5.16 Any terms to which a Conflict Authorisation is made subject (**Conflict Authorisation Terms**) may include (without limitation to clause 5.13 (*Director's power to authorise conflict situations*)) provision that:

- (a) where the Relevant Director obtains (other than in his/her capacity as a Director of the Company or as its employee or agent or, if the Directors so decide, in any other capacity that would otherwise oblige him/her to disclose it to the Company) information that is confidential to a third party, he/she will not be obliged to disclose it to the Company or to use it directly or indirectly for the benefit of the Company or in performing his/her duties as a Director of the Company in circumstances where to do so would amount to a breach of a duty of confidence owed to that third party;
- (b) the Relevant Director may (but shall be under no obligation to) absent himself/herself from the discussion of, and/or the making of decisions relating to, the relevant matter (whether at any meeting of the Directors or otherwise) and be excused from reviewing documents and information prepared by or for the Directors to the extent that they relate to that matter; and
- (c) the Relevant Director be excluded from the receipt of documents and information, the participation in discussion and/or the making of decisions (whether at Directors' meetings or otherwise) related to the relevant matter,

and anything done (or omitted to be done) by the Relevant Director in accordance with any such provision (or otherwise in accordance with any Conflict Authorisation Terms given under this clause 5.16 (*Director's power to authorise conflict situations*)) will not constitute a breach by him of his/her duties under sections 172 to 174 of the Companies Act 2006.

5.17 Subject to this clause 5.17 and clause 6.2 (*Reserved Matters*) but without prejudice to clause 5.13 and 5.14 (*Director's power to authorise conflict situations*) (inclusive), authorisation is given by the Shareholders for the time being on the terms of this Agreement to each Director in respect of any Conflict Situation that exists as at the date of this Agreement or that subsequently arises where (in either case):

- (a) the Director is an employee or director of, or shareholder or member with a [controlling/substantial] interest in, a counterparty to a Project Document with the Company or Project Co (**Counterparty**); or
- (b) the Director has been appointed as a director of the Company or Project Co on the nomination of the Counterparty; or
- (c) the Director is an employee, director, appointee of, or member with a [controlling/substantial] interest in, a body (i) which holds a [controlling/substantial] interest in the Counterparty; or (ii) in which the Counterparty has a [controlling/substantial] interest; or (iii) which is an Associate of the Counterparty,

and on the basis that a "**substantial interest**" shall be taken to be an interest which confers an entitlement to [ten per cent (10%)]¹³ or more of the voting rights at general meetings of the relevant body or [ten per cent (10%)] or more of the distributable profits of the relevant body (**Project Document Conflict Authorisation**).

5.18 The Conflict Authorisation Terms applicable to the Project Document Conflict Authorisation (**Project Document Conflict Authorisation Terms**) are automatically set by this clause 5.18 (*Director's power to authorise conflict situations*) so that the Director concerned:

- (a) is not obliged to disclose to the Company information that is confidential to a third party obtained by him/her (other than in his/her capacity as a Director of the Company or as its employee or agent or, if the Directors so decide, in any other capacity that would otherwise oblige him/her to disclose it to the Company) in any situation to which the Project Document Conflict Authorisation applies, nor to use any such information directly or indirectly for the benefit of the Company or in performing his/her duties as a Director of the Company, in circumstances where to do so would amount to a breach of a duty of confidence owed to that third party; or
- (b) may (but shall be under no obligation to):
 - (i) absent himself/herself from the discussions of, and/or the making of decisions; and/or
 - (ii) make arrangements not to receive documents and information, relating to the Conflict Situation concerned,

and the Company will not treat anything done (or omitted to be done) by the Director concerned in accordance with the Project Document Conflict Authorisation Terms as a breach by him of his/her duties under sections 172 to 174 of the Companies Act 2006.

5.19 The provisions of clauses 5.9 to 5.19 (*Director's power to authorise conflict situations*) (inclusive) shall apply with all necessary changes as if references to the Company were references to Project Co.

¹³ **Clause 5.17 - Conflicts.** To be considered on a project by project basis of the proposed investment structure.

6. Management of Company and Project Co affairs

Management of the Businesses

6.1 The parties shall exercise all rights and powers available to them in relation to the Company and Project Co to procure that (in so far as they are able to do so) at all times during the term of this Agreement:

- (a) the business of the Company shall consist exclusively of the Hold Co Business;
- (b) the business of Project Co shall consist exclusively of the Project Co Business;
- (c) with the exception of:
 - (i) matters for which responsibility is expressly delegated by the Project Co Board to the officers of Project Co; and
 - (ii) those matters requiring Reserved Matter Board Approval or Shareholder approval pursuant to clause 6.2 (*Reserved Matters*),

all the business of the Company and Project Co, other than routine day-to-day business, shall be undertaken and transacted by the Directors;

- (d) no payment will be made by the Company or Project Co and no cheque or payment instruction of either the Company or Project Co shall be signed other than in accordance with the mandates (general or specific) and procedures authorised by the respective Boards from time to time;
- (e) the Company/Project Co will, if it requires any approval, consent or licence for the carrying on of its business in the places and in the manner in which it is from time to time carried on or proposed to be carried on, use all reasonable endeavours to obtain and maintain the same in full force and effect; and
- (f) the Company and Project Co shall both put in place and maintain appropriate procedures and training to comply with the requirements of the Bribery Act 2010.

Reserved Matters

6.2 Subject to clause 6.4 (*Shareholders' and Company undertakings*) each of the parties hereby undertakes to the other to procure that the Reserved Matters listed in Schedule 8 (*Reserved Matters*) shall not be carried out:

- (a) in the case of those matters ticked in the second column ("Shareholder") without the prior written approval of each Material Shareholder; or
- (b) in the case of those Reserved Matter Board Approval matters ticked in the third column (entitled "Board") without the prior written approval of [a Director appointed by each of the Material Shareholders] [all of the Directors who have been appointed by the Material Shareholders]¹⁴,

¹⁴ **Clause 6.2(b) - Reserved Matters.** Option for the parties to decide on in terms of what is considered the most appropriate structure for the relevant project.

and each of the Shareholders shall use their respective rights and powers to procure, so far as they are each able, that no such Reserved Matter is carried out unless the required approval has been given.

*Manner of giving Shareholder approval*¹⁵

6.3

- (a) Subject to sub-clause (b) and to sub-clause (c) of this clause 6.3 (*Manner of giving Shareholder approval*), the written approvals required from Shareholders referred to in clause 6.2 (*Reserved Matters*) may be given and signed for on behalf of a Material Shareholder by a Director nominated by it under clause 5.1 (*Composition of the Boards and the right to appoint Directors*).
- (b) Notwithstanding the provisions of clause 5 (*The Boards of the Company and Project Co*), if at a Board meeting (the **Original Meeting**), a matter arises for resolution which a Director reasonably considers gives rise to a conflict of interest between his/her duty to his/her appointor/employer and his/her duty as a Director to promote the success of the Company/Project Co he/she shall, upon declaring such conflict, be entitled to abstain from casting his/her vote and to refer the relevant matter back to the relevant Shareholder whose decision on the resolution shall be substituted for the decision of the abstaining Director PROVIDED THAT (except in the case of a matter which is Reserved Matter Board Approval matter) such decision is notified to the company secretary in writing and is received by him/her within five (5) Business Days of the date of the Original Meeting at which the Relevant Director notified his/her intention to make such referral. If no decision is received from the Shareholder within such period, the requisite Board approval shall be capable of being given by one (1) Director appointed by each of the other Material Shareholders (the **Other Directors**) and shall be so given if at the Original Meeting the Other Directors resolved to pass the resolution in question.
- (c) A Material Shareholder may opt out of the mechanism in sub-clause (a) and sub-clause (b) by giving notice under this sub-clause (c) to the other parties. The effect of the notice shall be that, for any matter requiring Shareholder approval, that approval will only then be deemed to have been given when that Material Shareholder has given its specific approval in writing to that matter. A Material Shareholder may opt back in to the mechanism in sub-clause (a) and sub-clause (b) by notice in writing under this sub-clause (c).
- (d) Notwithstanding the provisions of clause 5 (*The Boards of the Company and Project Co*), if a Director considers he/she has a conflict of interest between his/her duty to his/her appointor/employer and his/her duty as a Director to promote the success of the Company/Project Co in relation to any matter other than (i) Claims (where clause 6.5 (*Step-aside provisions*), applies); and (ii) the decision to issue a Provisional Transfer Notice (where clause 10.6 (*Tax compliance*) applies); then he/she may refer the matter to his/her appointor for approval or otherwise and, if given in writing, the Shareholder approval shall be valid in place of the Director approval.

¹⁵

Clause 6.3 – Reserved Matters approval/flexibility. This clause has been drafted on the basis that, in the normal course, Reserved Matters would be dealt with by the relevant Board appointees giving approval or otherwise (as the case may be) under clause 6.3(a). However, in terms of director's duties, sub-clause (b) addresses conflict of interest situations where the board appointee is conflicted and where the matter can then be referred to the relevant Shareholder for approval (or otherwise), thereby removing the relevant director from having any obligation to vote for or against the relevant matter. Finally sub-clause (c) allows a Shareholder to opt in and out of these arrangements should it wish to do so.

Shareholders' and Company undertakings

- 6.4 Each Shareholder undertakes to each of the other Shareholders that, in its capacity as a Shareholder, it will not act and shall not exercise its voting rights and other powers of control available to it in relation to the Company and Project Co so as to cause (insofar as it is able by the exercise of such rights and powers) Project Co to breach the provisions of the Project Documents to which it is a party.

[Step-aside provisions]¹⁶

- 6.5 Notwithstanding any provision to the contrary in this Agreement or the Articles:
- (a) if the WCo Director(s) (the “**Independent Director(s)**”) so decide it is reasonable to conclude that the PSDP or any Associate of the PSDP will issue Proceedings in respect of any Claim against the Company/Project Co:
 - (i) the Independent Directors shall be entitled to defend such Claim in the name and at the expense of the Company/Project Co;
 - (ii) each of the Directors appointed by the PSDP (**PSDP Directors**) shall not be entitled to (and the PSDP shall procure that each of the PSDP Directors shall not) make (or participate in making) any decisions, attend or vote at meetings of the Board or otherwise take any action on behalf of the Company/Project Co in respect of the defence by the Company/Project Co of such Claim nor shall they be entitled to any Board papers or other papers or information in relation to such Claim; and
 - (iii) the quorum at any Board meeting of the Company/Project Co convened to consider any such Claim shall be one (1) Independent Director nominated by each RTAD Shareholder other than the PSDP.
 - (b) If an RTAD Shareholder or Associate of an RTAD Shareholder (other than the PSDP) asserts that the Company or Project Co has any Claim against the PSDP and/or an Associate of the PSDP:
 - (i) the Independent Directors shall be entitled to determine if and when to pursue such Claim in the name and at the expense of the Company/Project Co by the issue of Proceedings by the Company/Project Co against the PSDP and/or Associate of the PSDP;
 - (ii) each of the PSDP Directors shall not be entitled to any Board papers or other papers or information in relation to such Claim nor shall they be entitled to (and the PSDP shall procure that each of the PSDP Directors shall not) make (or participate in making) any decisions, attend or vote at meetings of the Board or otherwise take any action on behalf of the Company/Project Co in respect of:
 - (A) any decision pursuant to sub-clause **Error! Reference source not found.** to issue Proceedings in respect of a Claim; and/or
 - (B) once Proceedings have been issued in respect of a Claim, the pursuance of that Claim by the Company/Project Co; and

¹⁶ **Clause 6.5 - Step aside provisions.** Drafting assumes a single PSDP and may be amended where there are two (2) distinct sponsor entities and conflict of one would not necessarily result in a conflict situation for the other.

- (iii) the quorum at any board meeting of the Company/Project Co convened in relation to any consideration of making a Claim (sub-clause **Error! Reference source not found.**) and after the issue of Proceedings in relation to the relevant Claim shall be one (1) Independent Director appointee of each RTAD Shareholder (other than the PSDP).
- (c) For the purposes of this clause 6.5 (*Step-aside provisions*), **Claim** shall mean a claim of any nature, whether for breach of contract, in tort, breach of statutory duty or otherwise.
- (d) The provisions of sub-clauses **Error! Reference source not found.** to **Error! Reference source not found.** shall apply, if a simple majority of Directors (other than the WGCo Directors) so decide, with the necessary changes having been made:
 - (i) in the case of sub-clause **Error! Reference source not found.**, if it is reasonable to conclude that WGCo will issue Proceedings in respect of a Claim against the Company/Project Co as if references to the PSDP are references to WGCo and references to the PSDP Directors are references to the WGCo Director(s); or
 - (ii) in the case of sub-clause **Error! Reference source not found.**, if a Claim against WGCo is asserted by a Material Shareholder or an Associate of a Material Shareholder and/or if Proceedings are then issued by the Company/Project Co against WGCo as if references to the PSDP are references to WGCo]¹⁷

7. Distributions

7.1 Subject to clause 6.2 (*Reserved Matters*) the parties shall procure (insofar as permitted by Law) that, subject to any restrictions imposed pursuant to the Project Documents and subject to the working capital and other financial requirements of Project Co (e.g. budgeted expenditure and maintenance reserves) as determined by the Project Co Directors:

- (a) Project Co shall distribute all amounts which are lawfully available for distribution by the Project Co to the Company by way of dividend on the Shares in Project Co but only after payment of any interest and principal which is then due and payable, in order of priority, in relation to any Shareholder Debt by the Project Co under the relevant On-Loan Agreement; and
- (b) the Company shall distribute all amounts which are lawfully available for distribution by the Company to the Shareholders by way of dividend on the Shares in the Company but only after payment of any interest and principal which is then due and payable, in order of priority, in relation to any Shareholder Debt by the Company under the Hold Co Loan Note Instrument. The dividend payable per Share shall be calculated pro-rata to the total number of Shares.

¹⁷ **Clause 6.5 - Step-aside provisions.** If Project Co (or the Company) is party to a contract with an Associate of another Shareholder, analogous provisions would be inserted with respect to Claims relating to that contract. Step-Aside approach remains subject to further review by Development Bank for Wales and policy consideration.

8. Budgeting, Business Planning and financial matters

The Business Plan (including the Annual Budget)

8.1

- (a) The first Business Plan¹⁸ relating to the Hold Co Business and the Project Co Business covering the period from the date specified in the Data Sheet through to the end of the first financial year of the Company has been approved by the Shareholders and comprises Schedule 3 (*Agreed Form Business Plan*) to this Agreement. The Business Plan shall be reviewed by the Board at least every six (6) months and updated for each financial year in accordance with the provisions of sub-clause (b).
- (b) No earlier than three (3) months and no later than one (1) month before the end of each financial year of the Company, the Company will prepare and circulate to Shareholders a draft of the proposed Business Plan for the next financial year (**Draft Business Plan**) for approval by the Shareholders. The Draft Business Plan (with such amendments as are agreed by the Shareholders to it) will become the Business Plan in place of the then current Business Plan upon the start of the financial year to which it relates or, if later, the date of its approval.

- 8.2 The Annual Budget for each financial year shall form part of the Business Plan. The Annual Budget shall be reviewed by the Board at least every three (3) months. From the end of the second financial year following the end of the Lock-in Period (as defined in clause 9.7(c)(*Lock In Periods*)) the Annual Budget shall include relevant lifecycle costs and an implementation programme.

Financial records

8.3

- (a) The Shareholders shall use reasonable endeavours to procure that each of the Company and Project Co shall keep proper books of account and make true and complete entries of all its dealings and transactions of and in relation to its Business.
- (b) The Company shall (and shall procure that Project Co shall) keep proper books of account and make true and complete entries of all its dealings and transactions of and in relation to their Businesses.

Provision of information to Shareholders and designated third parties

8.4

- (a)
 - (i) The Company shall supply in respect of the Company, and shall procure that Project Co shall supply in respect of the Project Co, each of the Shareholders with the Transparency Information as detailed in Part A of Schedule 7 (*Transparency Information and Commercially Sensitive Information*) relating to the Company/Project Co with the relevant period set out therein.

¹⁸ **Clause 8 – Business Plan.** The Business Plan will be a key part of the overall proposals to be put forward by the PSDP in terms of the financials, expected running costs and general details on the general operations of the Company/Project Co and an agreed version appended to this Agreement. It is thereafter an operational matter and so the approval of subsequent versions and its approval from time to time is not a Reserved Matter.

- (ii) Each Shareholder shall provide to each other Shareholder the information as detailed in Part B: of Schedule 7 (*Transparency Information and Commercially Sensitive Information*) within the relevant period set out therein.
 - (iii) Where WCo is a Shareholder, each of the Company, Project Co and each other Shareholder will use its reasonable endeavours to assist WCo in its preparation of any report required by a government department from time to time, which relates in whole or in part to the Project.
- (b) The Company shall and shall procure that Project Co shall, as soon as reasonably practicable, notify the Shareholders promptly of any litigation, arbitration or administration proceedings raised against it.
- (c) Notwithstanding the provisions of clause 12.1 (*Confidentiality*):
- (i) each Shareholder may (but only once the relevant Shareholder has made the intended Recipient aware of that Shareholder's obligations of confidentiality under this Agreement (and in the case of the intended Recipients in (D) and (E)) has obtained a written undertaking from that intended Recipient agreeing with that Shareholder and for the benefit of all other Shareholders and the Company and the Project Co, to comply with such obligations of confidentiality as though it were a party to this Agreement) disclose any information received from the Company, Project Co or any Director, to:
 - (A) any shareholder in it;
 - (B) any director or other officer of, adviser to, trustee or manager of, or investor or prospective investor in its Shareholder's Group;
 - (C) the Shareholder's investment adviser and any of its other professional advisers;
 - (D) any member or prospective member of the Shareholder's Group;
 - (E) potential purchasers of any of that Shareholder's interest in the Company and/or Project Co; and
 - (F) any person to whom it is required by Law or a regulatory authority or body or by the Project Documents to be disclosed.
 - (ii) where WCo is a Shareholder, WCo may disclose and use any Transparency Information in such manner and for such purposes as it may determine from time to time, including reports and reviews of the performance of MIM projects generally or specifically in respect of the Project and in relation to any audit, accounting or other review or scrutiny by any government or public body where WCo considers it appropriate to make some or all of such information available; and
 - (iii) where WCo is a Shareholder, the Company shall permit (and shall procure that Project Co shall permit) all records referred to in clause 8.3 (*Financial records*) and/or clause 8.4(a) (*Provision of information to Shareholders and designated third parties*) to be examined and copied from time to time by WCo or by any person to whom WCo notifies the Company that it wishes to have access to any such documents, records or information under sub-clause (b)(ii).

*Tax matters*¹⁹

8.5

- (a)
- (i) Each Shareholder shall use its reasonable endeavours to ensure that both the Company and Project Co are treated by all relevant authorities as being resident for taxation and other purposes in the United Kingdom²⁰.
 - (ii) [other tax provisions to be agreed]
- (b) To the extent that any tax losses arise, the Shareholders shall agree (each acting reasonably) from time to time as the losses arise, how the losses shall be treated. The Shareholders agree, if so requested by a Shareholder, to discuss a mechanism for the obtaining of relief for a proportionate share of trading losses of each of the Shareholders and other amounts eligible for relief from corporation tax by virtue of group-relief provisions by the Company or Project Co or a Shareholder and compensation in accordance with Law. Each Shareholder agrees that no such mechanism shall be approved by the Company or Project Co without the approval of the other Shareholders (acting reasonably and having regard to ensuring that there is no adverse impact on the success of the Company and Project Co).

9. Restrictions on share transfers

Restrictions on transfers of Shares in the Company

9.1

- (a) Except in relation to any transfer of Shares permitted by Article [◆]²¹ [(*Transfer and Transmission of Shares*)], in the Hold Co Articles, all transfers of Shares shall be subject to the rights of first refusal²² set out in the Hold Co Articles.
- (b) Each party undertakes to transfer Shares only in accordance with this Agreement and the Hold Co Articles and to procure that only transfers made in accordance with this Agreement and the Hold Co Articles are registered.
- (c) Each Shareholder undertakes to comply with any restrictions on the transfer of Shares contained in the Project Documents.
- (d) No Shareholder shall sell or transfer any Shares to any person other than another Shareholder unless that person has first executed a Deed of Adherence in the form set out in Schedule 4 (*Deed of Adherence*). Each of the parties shall execute any

¹⁹ **Clause 8.5 - tax matters.** The parties may wish to insert bespoke drafting in this clause, to regulate matters of importance to the Company and the Shareholders. The drafting may cover matters such as VAT grouping, transfer pricing, group payment arrangements, worldwide debt cap issues etc and, generally, organisational arrangements for the Company and Project Co tax compliance and administration. Bidders are required to summarise the bespoke arrangements they propose when submitting bids.

²⁰ **Clause 8.5 –tax matters.** The taxation provisions have been drafted on the premise that Hold Co and Project Co are tax resident in the United Kingdom.

²¹ **Clause 9.1(a) - Restrictions on transfer of shares.** The Articles shall permit transfers within groups of companies, including specifically any member of the WCo Group to another member of the WCo Group. WCo will carry out diligence on the Articles.

²² **Clause 9.1(a) – Permitted transfers.** The mechanism must be "first refusal" – i.e. a seller being able to sell to a third party at or above an "offer price" if the other shareholders have had the opportunity to buy at that price and have decided not to.

such Deed of Adherence in respect of a transfer of Shares made in accordance with this Agreement and the Hold Co Articles. The Company shall not register any transfer in accordance with this Agreement and the Hold Co Articles unless the transferee (other than a Shareholder) has first executed a Deed of Adherence in the form set out in Schedule 4 (*Deed of Adherence*). However, the provisions of this clause 9.1(d) (*Restrictions on transfers of Shares in the Company*) shall not apply to any Finance Party enforcing its security in accordance with clause 9.1(j) (*Restrictions on transfers of Shares in the Company*).

- (e) No Shareholder (which, for the avoidance of doubt includes the WGCo) shall, except with the prior written consent of all the Shareholders:
- (i) grant any option over any Shares (or any interest, whatsoever, legal or beneficial, in any Shares); or
 - (ii) enter into any agreement in respect of the votes attached to any Shares (other than in any shareholders' agreement entered into between the shareholders of any company which is a Material Shareholder which does not conflict with the terms of this Agreement),

provided that nothing in this sub-clause (e) shall restrict or prevent:

- (A) the Company from granting a security interest over its shares in Project Co to a funder of the Project Co in relation to a project; or
 - (B) arrangements between WGCo, Welsh Government and the Authority from time to time and the other Shareholders shall be entitled to assume that the actions of WGCo as Shareholder and of the Directors appointed by the WGCo as Shareholder are binding and made with the requisite authority. The other Shareholders and Directors shall not be required to make further enquiry as to any such authority or the nature of the arrangements (if any) between WGCo, Welsh Government and the Authority.
- (f) No Shareholder shall be entitled to give a Transfer Notice if it (or, if it is a company, any of its Associates excluding Project Co) is at that time in material breach of this Agreement. Nothing in this sub-clause (f) shall prevent the service of a Transfer Notice which a Shareholder is required to give in accordance with the Hold Co Articles or the giving of a Deemed Transfer Notice in accordance with the Articles.
- (g) Each of the Company and Project Co shall procure that each share certificate issued by it will carry the following statement:
- "Any disposition, transfer, charge of or dealing in any other manner in the securities represented by this certificate is restricted by the Articles of Association of [Company] Limited and by a Shareholders' Agreement dated [♦] 20[♦] and made between [PSDP], [WGCo], [Company] Limited and [Project Co] Limited".*
- (h) A Shareholder may not transfer any Share to any person who is, at the time of transfer, a Restricted Person.
- (i) [No Shareholder wishing to transfer Shares (**Transferring Shareholder**) may do so unless it transfers (or procures the transfer of) an equivalent proportion (relative to the number of Shares that the Transferring Shareholder holds) of any Shareholder Debt held by it or any member of the Shareholder's Group to the proposed transferee. The

Transferring Shareholder must elect to include reference to both Shares and Shareholder Debt (where relevant) in a Transfer Notice.]²³

- (j) No Shareholder shall restrict the transfer of Shares to the Finance Parties, or resist the registration of Shares on the enforcement by the Finance Parties of security, in either case validly undertaken in accordance with the Funding Agreements, and the Shareholders shall procure (as far as they are able) that the Board shall not decline the registration of such a transfer.

Events of Default and deemed transfers

9.2 Notwithstanding the provisions of the Hold Co Articles, if an Event of Default occurs in relation to a Shareholder (**Defaulting Shareholder**) which:

- (a) if capable of remedy, has not been remedied within twenty (20) Business Days of the Shareholder in default becoming aware of the Event of Default (or such longer period as the other Shareholders may notify in writing to the Defaulting Shareholder) (the **Remedy Period**) then the Defaulting Shareholder shall be deemed, at the end of the Remedy Period; or
- (b) is incapable of remedy, then the Defaulting Shareholder shall be deemed immediately upon the Event of Default occurring,

to have given a Deemed Transfer Notice in respect of all the Shares held by it (**Default Shares**) in accordance with the provisions of the Hold Co Articles.

Shareholder Debt

9.3

- (a) Where a Deemed Transfer Notice is deemed given pursuant to clause 9.2 (*Events of Default and deemed transfers*), such Deemed Transfer Notice shall also be deemed to offer, by way of transfer, any Shareholder Debt outstanding to the Defaulting Shareholder in the Company (**Defaulting Shareholder Debt**). Any person acquiring some or all of the Default Shares pursuant to the provisions of this clause 9 (*Restrictions on share transfers*) and the Hold Co Articles shall be required to accept a transfer to it of an equal proportion of the Defaulting Shareholder Debt (and the Defaulting Shareholder shall transfer such Defaulting Shareholder Debt in accordance with the terms of the Hold Co Loan Note Instrument and this Agreement). Except where sub-clause (b) applies, the price for the Defaulting Shareholder Debt shall be the price agreed between the non-defaulting Shareholders and the Defaulting Shareholder or, if a market valuation of the Default Shares is requested in accordance with the Articles, then the parties shall require and procure that such market valuation shall also value the Defaulting Shareholder Debt and the transfer of the Defaulting Shareholder Debt shall be at the Market Value as so determined.
- (b) This sub-clause (b) applies where the Default Shares are offered for sale pursuant to the provisions of clause 9.4 (*Appointment of the Sale Agent in certain circumstances*) in which case the price to be paid for the Defaulting Shareholder Debt shall be as determined in accordance with clause 9.4 (*Appointment of the Sale Agent in certain circumstances*) and Schedule 5 (*Sale Agent*).

²³ Welsh Government Education team are considering stapling provisions from a policy perspective and wish to discuss with bidders.

Appointment of the Sale Agent in certain circumstances

- 9.4 If on the expiry of the Deemed Transfer Notice, the non-defaulting Shareholders have not purchased all of the Default Shares and accompanying Defaulting Shareholder Debt then a notice (an **Instruction to Sell Notice**) shall be deemed to have been served on the Defaulting Shareholder requiring the Defaulting Shareholder to sell such Default Shares and any such Defaulting Shareholder Debt and the Defaulting Shareholder and the other Shareholders shall jointly appoint a sale agent (**Sale Agent**) who shall be instructed in accordance with Schedule 5 (*Sale Agent*) to find a purchaser for such Default Shares and any Defaulting Shareholder Debt (the Default Shares and any such Defaulting Shareholder Debt together being the **Investment**).
- 9.5 If no Qualifying Bid (as defined in Schedule 5 (*Sale Agent*)) is received from a Suitable Third Party within the sixty (60) Business Day period referred to in paragraph 6 of Schedule 5 (*Sale Agent*) or the Investment has not been sold to a Suitable Third Party in accordance with and within the time periods set out in Schedule 5 (*Sale Agent*), then the non-defaulting Shareholders shall be entitled by notice in writing to the Defaulting Shareholder either:
- (a) subject to clause 9.6 (*Appointment of the Sale Agent in certain circumstances*), to elect to purchase the Investment whereupon the Defaulting Shareholder shall forthwith transfer to the non-defaulting Shareholders making the election pro rata to their holdings of Shares all (but not some only) of the Investment for an aggregate consideration (given that the market is deemed to have determined that the value of the Investment is nil) equal to the par value of the Default Shares only; or
 - (b) to require that the Company be wound up in accordance with clause 11 (*Winding Up*) (in which case the Defaulting Shareholder undertakes to the other Shareholders to vote in favour of any resolution(s) to wind up the Company).
- 9.6 Notwithstanding clause 9.5(a) (*Appointment of the Sale Agent in certain circumstances*), any non-defaulting Shareholder shall be entitled to purchase its entitlement to the Investment in its own name and/or by procuring that a Suitable Third Party purchases any part of that entitlement not purchased by that Shareholder provided that:
- (a) the identity of that Suitable Third Party is disclosed to the other non-defaulting Shareholders when it makes an election under clause 9.5(a) (*Appointment of the Sale Agent in certain circumstances*); and
 - (b) no non-defaulting Shareholder reasonably objects in writing within five (5) Business Days of being notified to the identity of the proposed Suitable Third Party on the grounds that the proposed Suitable Third Party is a direct competitor to the non-defaulting Shareholder making the objection.²⁴

Lock In Periods

- 9.7
- (a) **Shares in the Company.** Subject always to clause 9.1(h) (*Restrictions on transfers of Shares in the Company*), each Shareholder agrees that it shall not transfer or dispose of any interest in or over or right attaching to any of its Shares except by a transfer:

²⁴ **Clause 9.6 – WGC Co purchase of the Investment.** WGC Co needs the flexibility to purchase a proportion of the shares only, with WGC Co procuring a Suitable Third Party purchaser for any remainder. (WGC Co expects to remain in a minority position).

- (i) to a transferee at any time after the expiry of the Lock In Period (as defined in sub-clause (c));
- (ii) at any time to a transferee permitted in accordance with Articles [◆] of the Hold Co Articles; or
- (iii) in the case of WGCo, WGCo (and any member of the WGCo Group to whom WGCo transfers all but not part of its Shares in the Company) may transfer any interest (or part thereof) to a transferee at any time, including, for the avoidance of doubt during the Lock In Period (as defined in sub-clause (c)),

but always subject to sub-clauses (a)(i) to (ii) above, otherwise in accordance with the provisions of the Hold Co Articles and this clause 9 (*Restrictions on share transfers*).

- (b) **Shares in the PSDP.** No transfer of any legal or beneficial interest in any share capital of [*identify superior holdings in the PSDP*] (each an **Original PSDP Shareholder**) in the PSDP or change in the control over the exercise of voting rights conferred by shares held by the Original PSDP Shareholders in the PSDP shall be made or effected before the expiry of the Lock In Period.
- (c) For the purposes of this Agreement, **Lock In Period** means the period from and including the date of this Agreement up to and including the end of the Project Co Lock In Period.

10. Warranties and undertakings

Warranties by WGCo

10.1 WGCo warrants and represents to each of the other parties at the date of this Agreement that:

- (a) it is duly incorporated under the laws of England and Wales;
- (b) it has the corporate power to enter into and to exercise its rights and perform its obligations under the Project Documents to which it is a party;
- (c) each Project Document to which it is a party constitutes, or will when executed constitute, legal, binding and enforceable obligations on it;
- (d) it has taken all necessary action to authorise the execution of and the performance of its obligations under the Project Documents to which it is a party (and in the case of a Project Document executed after the date of this Agreement it will take all necessary action to authorise the execution of such Project Document);
- (e) no claim is being asserted and no Proceedings are presently in progress, or, to the best of its knowledge pending or threatened against it or any of its assets which will or might have a material adverse effect on its ability to perform its obligations under those Project Documents to which it is a party;
- (f) it is not subject to any contractual obligation, compliance with which will be likely to have a material adverse effect on its ability to perform its obligations under the Project Documents to which it is a party; and
- (g) no Proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge are threatened) for its winding-up or for its dissolution or for the appointment of a receiver, administrative receiver, liquidator, administrator or similar officer in relation to any of its assets or revenue.

Warranties by the PSDP, the Company and the Project Co

- 10.2 The PSDP, the Company and the Project Co each severally warrant and represent to each of the other parties at the date of execution of this Agreement that:
- (a) each of them is duly incorporated under the laws of England and Wales²⁵ and has the corporate power to enter into and to exercise its rights and perform its obligations under the Project Documents to which it is a party;
 - (b) each Project Document to which it is a party constitutes, or will when executed constitute legal, binding and enforceable obligations on each of them;
 - (c) each of them has taken all necessary action to authorise the execution of and the performance of their obligations under the Project Documents to which they are respectively parties (and in the case of a Project Document executed after the date of this Agreement will take all necessary action to authorise the execution of that Project Document);
 - (d) no claim is being asserted and no litigation, arbitration or administrative proceeding is presently in progress or, to the best of its knowledge pending or threatened against any of them or any of their assets which will or might have a material adverse effect on their ability to perform their obligations under the Project Documents;
 - (e) none of them is subject to any contractual obligation, compliance with which will be likely to have a material adverse effect on their ability to perform their obligations under the Project Documents;
 - (f) no proceedings or other steps have been taken and not discharged (nor, to the best of their knowledge, are threatened) for the winding-up of any of them or for their dissolution or for the appointment of a receiver, administrative receiver, liquidator, administrator or similar officer in relation to any of their assets or revenue; and
 - (g) each of them has complied with and currently complies with the all relevant anti-bribery and corruption laws applicable to its business and operations including (without limitation) the provisions of the Bribery Act 2010.

Warranties by the PSDP, the Company and the Project Co

- 10.3 The PSDP, the Company and the Project Co each severally warrant and represent to each of the other Shareholders at the date of execution of this Agreement that each of the Company and Project Co are newly incorporated companies and have not traded prior to the date of this Agreement.

Tax compliance

- 10.4 Each Shareholder (other than WGCo) represents and warrants that, as at the date of this Agreement, it has notified the Company and Project Co in writing of any Occasions of Tax Non-Compliance or any litigation that it is involved in that is in connection with any Occasions of Tax Non-Compliance.
- 10.5 If at any time an Occasion of Tax Non-Compliance occurs in relation to a Shareholder, the Shareholder shall:

²⁵ **Clause 10.2(a) - Warranties.** To be amended if any of the parties are not incorporated in England and Wales.

- (a) notify each of the Company and Project Co in writing of such fact within five (5) Business Days of its occurrence; and
- (b) promptly provide to each of the Company and Project Co:
 - (i) details of the steps which the Shareholder is taking to address the Occasion of Tax Non-Compliance and to prevent the same from recurring, together with any mitigating factors that it considers relevant; and
 - (ii) such other information in relation to the Occasion of Tax Non-Compliance as the Company and Project Co may reasonably require.

10.6 If:

- (a) the warranty given by a Shareholder pursuant to clause 10.4 (*Tax compliance*) is untrue; and/or
- (b) the Shareholder commits a material breach of its obligation to notify the Company and Project Co of any Occasion of Tax Non-Compliance as required by clause 10.5 (*Tax compliance*) or the Authority under the analogous provisions of the Authority Project Agreement,

and, in either case, the Shareholder fails to provide details of proposed mitigating factors which, in the reasonable opinion of the Project Co Board, are acceptable, then Project Co shall be entitled to give a notice to that Shareholder (a **Provisional Transfer Notice**) and the provisions of clause 10.7 (*Provisional Transfer Notices*) shall then apply.

Provisional Transfer Notices

10.7 If a Shareholder receives a Provisional Transfer Notice:

- (a) it shall have ninety (90) days to effect the transfer of its Shares and Shareholder Debt to a Suitable Third Party;
- (b) in relation to any such transfer:
 - (i) the pre-emption and transfer provisions in this Agreement and the Articles shall apply;
 - (ii) if the Shares and Shareholder Debt are transferred to a Suitable Third Party then the other Shareholders shall take (or procure) all steps reasonably requested of them by the transferring Shareholder to enable any such transfer to be effected and registered; and
- (c) if the Shareholder has not effected the transfer of its Shares and Shareholder Debt to a Suitable Third Party within the ninety (90) day period referred to (or such longer period as may be agreed by Project Co) then the same shall constitute an Event of Default in respect of that Shareholder.

11. Winding Up

- 11.1 If the Shareholders pass a resolution pursuant to this Agreement or otherwise to wind up the Company by way of a members' voluntary winding-up they shall procure that the liquidator is a member of the Institute of Chartered Accountants in England and Wales acceptable to all the Shareholders and in default of agreement nominated at the request of any Shareholder by the President from time to time of such Institute.

11.2 Except to the extent each party has contractual obligations to the contrary, the Shareholders shall prove in the winding-up of the Company to the maximum extent permitted by Law for all sums due or to fall due to them respectively from the Company and shall exercise all rights of set-off and generally do all such other acts and things as may be available to them in order to obtain the maximum receipts and recoveries.

11.3 To the extent that any or all of the Shareholders do not receive satisfaction in full in the winding-up of the Company of all sums due or to fall due to them the aggregate shortfall between all sums due or to fall due to the Shareholders and all amounts actually recovered by the Shareholders from the Company or its liquidator (whether by direct payment or the exercise of any right of set-off or otherwise) shall be calculated and apportioned between the Shareholders in the same proportions as the Shareholders hold Shares at the time of the determination. The Shareholders shall make such contributions to each other as are necessary to procure that the Shareholders bear the aggregate amount of such shortfall in such proportions.

12. Miscellaneous

Confidentiality

12.1

- (a) Subject to clause 8.4(c)(ii) (*Provision of information to Shareholders and designated third parties*), during the term of this Agreement and after termination or expiry of the Agreement for any reason whatsoever, a party receiving information from another party shall:
- (i) keep Confidential Information (as defined in sub-clause (e)) confidential;
 - (ii) not disclose Confidential Information to any other person other than with the written consent of the party disclosing such information or in accordance with sub-clauses (b) to (d); and
 - (iii) not use Confidential Information for any purpose other than the performance of its obligations under this Agreement and the other Project Documents.
- (b) During the term of this Agreement, a party receiving information from another party may, subject to the provisions of clause 8.4 (*Provision of information to Shareholders and designated third parties*), disclose Confidential Information to its employees, contractors, sub-contractors, agents and advisers under conditions of confidentiality in each case to the extent that it is reasonably necessary for the purposes of this Agreement, or any other Project Document and may disclose Confidential Information to its funders, prospective funders, prospective shareholders of the Company or prospective purchasers of its assets under conditions of confidentiality. In each case the permitted recipient of such Confidential Information shall be known as a **Recipient**.
- (c) The party receiving information from another party shall so far as practicable procure that each Recipient is made aware of and complies with all that receiving party's obligations of confidentiality under this Agreement as if the Recipient were a party to this Agreement.
- (d) Without prejudice to sub-clause (b), the obligations contained in sub-clauses (a) to (c) shall not apply to:

- (i) any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under the Agreement for the performance of those obligations;
- (ii) any matter which a party can demonstrate is already, or becomes, generally available and in the public domain otherwise than as a result of a breach of any of the provisions in sub-clauses (a) to (c);
- (iii) any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of Law or, if not having the force of Law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- (iv) any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- (v) any provision of information to the parties' own professional advisers or insurance advisers or to lenders in respect of the Project or such lender's professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Company and/or Project Co to enable it to carry out its obligations under this Agreement or may wish to acquire shares in the Company and/or Project Co in accordance with the provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- (vi) any disclosure for the purposes of:
 - (A) the examination and certification of the Company's or the Project Co's accounts;
 - (B) any examination pursuant to the Public Audit (Wales) Act 2004 of the economy, efficiency and effectiveness with which the Authority has used its resources;
 - (C) complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies;
 - (D) any disclosure required to be made to the Auditor General for Wales or the Wales Audit Office; or
 - (E) (without prejudice to the generality of sub-clause (d)(iii) above) compliance with the FOIA and/or the Environmental Information Regulations,

provided that, for the avoidance of doubt, neither sub-clause (d)(vi)(E) nor sub-clause (d)(iii) above shall permit disclosure of Confidential Information otherwise prohibited by sub-clauses (a) to (c) above where that information is exempt from disclosure under Section 41 of the FOIA.

(e)

- (i) Where disclosure is permitted under sub-clause (d), other than sub-clauses (d)(ii), (iii), (iv) and (v), the party providing the information shall

procure that the Recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.

- (ii) For the purposes of the Public Audit (Wales) Act 2004, the Wales Audit Office may examine such documents as it may reasonably require which are owned, held or otherwise within the control of the Company and/or Project Co and may require the Company and/or Project Co to produce such oral or written explanations as he/she considers necessary.
- (iii) The parties acknowledge that the Wales Audit Office has the right to publish details of the Agreement (including Commercially Sensitive Information) in its relevant reports.
- (iv) The provisions of this clause 12.1 (*Confidentiality*) are without prejudice to the application of the Official Secrets Act 1911 to 1989.
- (v) For the purposes of this clause 12.1 (*Confidentiality*), **Confidential Information** means:
 - (A) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, commercially sensitive intellectual property rights and know-how of any party and all personal data and special categories of personal data within the meaning of the Data Protection Laws; and
 - (B) Commercially Sensitive Information.²⁶

Freedom of Information

- (f) References in sub-clauses (f) to (m) to the Company shall apply also to Project Co with the necessary changes. The parties acknowledge that WGC0 is subject to the requirements of the FOIA and the Environmental Information Regulations and the Company shall facilitate WGC0's compliance with its Information disclosure requirements pursuant to the same in the manner provided for in sub-clauses (f) to (m) (inclusive) below. For the purpose of sub-clauses (f) to (m) (inclusive) only **Information** has the meaning given to it under section 84 of the FOIA.
- (g) Where WGC0 receives a Request for Information in relation to Information that the Company is holding on behalf of WGC0, WGC0 shall transfer to the Company such Request for Information that it receives as soon as practicable and in any event within [five (5)] Business Days of receiving a Request for Information and the Company shall:
 - (i) provide WGC0 with a copy of all such Information in the form that WGC0 requires as soon as reasonably practicable and in any event within [ten (10)] Business Days (or such other period as WGC0 may acting reasonably specify) of WGC0's request; and
 - (ii) provide all necessary assistance as reasonably requested by WGC0 in connection with any such Information, to enable WGC0 to respond to a

²⁶

Clause 12.1(e) – Commercially Sensitive Information. Any information or classes of information that the parties agree should be treated as Commercially Sensitive Information should be included in Schedule 7, Part C entitled Commercially Sensitive Material. The parties should be mindful of guidance on this issue when agreeing which information should be categorised as commercially sensitive. Broad blanket categorisations are not appropriate.

Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.

- (h) Following notification under sub-clause (g) and up until such time as the Company and the Shareholders has provided WGC0 with all the Information specified in sub-clause (g)(i), the Company may make representations to WGC0 as to whether or not or on what basis Information requested should be disclosed, and whether further Information should reasonably be provided in order to identify and locate the Information requested, provided always that WGC0 shall be responsible for determining at its absolute discretion:
- (i) whether the Information is exempt from disclosure under the FOIA and the Environmental Information Regulations;
 - (ii) whether the Information is to be disclosed in response to a Request for Information,

and in no event shall the Company respond directly or allow its subcontractors to reply directly to a Request for Information unless expressly authorised to do so by WGC0.

- (i) The Company shall ensure that all Information held on behalf of WGC0 is retained for disclosure for at least [six (6)] years from the date it is acquired and shall permit WGC0 to inspect such Information as requested from time to time.
- (j) The Company shall transfer to WGC0 any Request for Information received by the Company as soon as practicable and in any event within two (2) Business Days of receiving it.
- (k) The Company acknowledges that any lists provided by it listing or outlining Confidential Information, are of indicative value only and that WGC0 may nevertheless be obliged to disclose Confidential Information in accordance with sub-clause (i) above.
- (l) If WGC0 makes a request to the Company pursuant to sub-clause (g)(ii) the Company shall, as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform WGC0 of the Company's estimated costs of complying with the request to the extent these would be recoverable if incurred by WGC0 under section 12(1) of the FOIA and the Fees Regulations. Where such costs (either on their own or in conjunction with WGC0's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in section 12(1) of the FOIA and as set out in the Fees Regulations WGC0 shall inform the Company in writing whether or not it still requires the Company to comply with the request and where it does require the Company to comply with the request the ten (10) Business Days period for compliance shall be extended by such number of additional days for compliance as WGC0 is entitled to under section 10 of the FOIA. In such case, WGC0 shall notify the Company of such additional days as soon as practicable after becoming aware of them and shall reimburse the Company for such costs as the Company incurs in complying with the request to the extent WGC0 is itself entitled to reimbursement of such costs in accordance with its own FOIA policy from time to time.
- (m) The Company acknowledges that (notwithstanding the provisions of clause 12.1 (*Confidentiality*)) WGC0 may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under Part I of the Freedom of Information Act 2000 (or such equivalent as may from time to time be applicable in Wales) (**the Code**), be obliged under the

FOIA, or the Environmental Information Regulations to disclose Information concerning the Company:

- (i) in certain circumstances without consulting with the Company; or
- (ii) following consultation with the Company and having taken their views into account,

provided always that where sub-clause (m)(i) applies, WGCo shall, in accordance with the recommendations of the Code, draw this to the attention of the Company prior to any disclosure.

Governing law and Jurisdiction

12.2

- (a) This Agreement and any non-contractual obligations arising out of or in connection with it shall be considered as a contract made in England and Wales and shall be subject to the laws of England and Wales.
- (b) The parties agree that the courts of England and Wales shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of those courts.

Further assurance

12.3 Each party will:

- (a) execute any document and do any thing; and
- (b) use all reasonable endeavours to procure that any third party (where necessary) executes any deed or document and does any thing,

reasonably necessary to implement and give full effect to the terms of this Agreement.

Costs

12.4 Each party shall bear its own costs and expenses in relation to the drafting, negotiating, execution and implementation of this Agreement and the Project Documents.

Insurance

12.5

- (a) The Company and the Project Co shall each take out and maintain with reputable insurers all insurances required to be maintained by Law and such other prudent insurances against such risks as are normally insured against by businesses carrying on activities similar to those of the Company/Project Co and (without prejudice to the generality of the foregoing) shall insure its assets which are of an insurable nature for their full replacement or reinstatement value. Each of the Company and the Project Co shall comply with its obligations under the Project Documents in respect of insurance.
- (b) Each Shareholder shall ensure that any directors and officers liability insurance taken out by such Shareholder extends to any Directors nominated and appointed by such Shareholder.

Assignment

12.6

- (a) Subject always to clause 9 (*Restrictions on share transfers*), this Agreement can be transferred by a Shareholder to a permitted transferee or successor. This Agreement, shall be binding on, and shall enure to the benefit of, each of the parties and their respective permitted transferees and successors. In the case of WGCo its successors shall include any person to whom the Welsh Government transfers the property, rights and obligations of WGCo.
- (b) Save as permitted by sub-clause (a) and clause 9 (*Restrictions on share transfers*), no party shall assign, transfer, sub contract or otherwise dispose of any interest in this Agreement.

Entire agreement

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

Notices

12.8

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

<i>If to the PSDP</i>	
For the attention of	
Address	
Email	
<i>If to WGCo</i>	
For the attention of	
Address	
Email	
<i>If to the Company</i>	
For the attention of	
Address	
Email	
<i>If to the Project Co</i>	

For the attention of	
Address	
Email	

- (b) Any party to this Agreement may change its nominated address or email address by prior notice to the other parties.
- (c) Notices given by post shall be effective upon the earlier of (i) actual receipt, and (ii) five (5) Business Days after mailing. Notices delivered by hand shall be effective upon delivery. Notices given by email shall be deemed to have been received (unless there is an error message returned to that email):
 - (i) within two (2) hours after sending, if sent on a Business Day between the hours of 9am and 4pm; or
 - (ii) by 11am on the next following Business Day, if sent after 4pm, on a Business Day but before 9am on that next following Business Day.

Contracts (Rights of Third Parties) Act 1999

- 12.9 It is agreed for the purposes of the Contracts (Rights of Third Parties) Act 1999 that this Agreement is not intended to, and does not, give to any person who is not a party to this Agreement any rights to enforce any provisions contained in this Agreement.

Waiver – no waiver unless in writing

- 12.10 Any relaxation, forbearance, indulgence or delay (together indulgence) of any party in exercising any right shall not unless made in writing, be construed as a waiver of the right and shall not affect the ability of that party subsequently to exercise that right or to pursue any remedy, nor shall any indulgence constitute a waiver of any other right (whether against that party or any other person).

Severability

- 12.11 If any provision of this Agreement shall be declared invalid, unenforceable or illegal by the courts of any jurisdiction to which it is subject, such provision may be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability or legality of the remaining provisions of this Agreement.

No partnership or agency

12.12

- (a) Nothing in this Agreement shall be construed as creating a partnership.
- (b) No party shall be deemed to be an agent of any other party and no party shall hold itself out as having authority or power to bind any other party in any way.

Amendments

12.13 This Agreement may not be varied except by an agreement in writing executed as a deed by duly authorised representatives of the parties.

Executed as a deed by the parties or their duly authorised representatives on the date of this Agreement.

Schedule 1
Definitions and Interpretation

1. Definitions

1.1 In this Agreement, unless the context otherwise requires:

Agreement means this Shareholders' Agreement and Schedules;

Alternate means an alternate director appointed by a RTAD Shareholder under clause 5.1(d) (*Composition of the Boards and the right to appoint Directors*) provided such alternate director has been registered as a director at Companies House;

Annual Budget means the annual budget forming part of the Business Plan;

Annual Service Payment has the meaning given to it in the Authority Project Agreement;

Appointing Shareholder has the meaning given to it in clause 5.3(a) (*Removal of/change to nominated Directors*);

Articles means the Hold Co Articles or the Project Co Articles as the context requires;

Associate²⁷ means in relation to any company:

- (a) any company of which such company is a subsidiary;
- (b) any subsidiary of such company; or
- (c) any other subsidiary of such company's holding company,

and **Associated** shall be construed accordingly;

Authority means [*insert relevant definition from the Authority Project Agreement*];

Authority Project Agreement means [*add relevant definition of the project agreement*];

Boards means the Hold Co Board and the Project Co Board (as the context may require) and Board means either of them;

Business Day means a day other than a Saturday, Sunday or a bank holiday in England and Wales;

Business Plan means the plan referred to in clause 8.1(a) (*The Business Plan (including the Annual Budget)*) as the same may be varied or updated or replaced from time to time in accordance with the provisions of clause 8 (*Budgeting, Business Planning and financial matters*);

Businesses means the Hold Co Business and the Project Co Business and Business means either of them as the context requires;

²⁷

Schedule 1 Definitions – Associate. The definition of Associate to be considered on a project specific basis in accordance with the relevant facts and in the context of the relevant PSDP group structure to ensure the definition is appropriate/wide enough.

Chairman means such independent non-executive Director or other Director as may be appointed from time to time pursuant to clause 5.4 (*Chairman of the Board*);

Claim has the meaning given to it in clause **Error! Reference source not found.** (*Step-aside provisions*);

Code has the meaning given to it in clause 12.1(m) (*Miscellaneous*);

Commercially Sensitive Information means any information detailed in Part C of Schedule 7 (*Transparency Information and Commercially Sensitive Information*);

Confidential Information has the meaning given to it in sub-clause 12.1(e)(v) (*Confidentiality*);

Conflict Authorisation has the meaning given to it at clause 5.13 (*Director's power to authorise conflict situations*);

Conflict Authorisation Terms has the meaning given to it at clause 5.16 (*Director's power to authorise conflict situations*);

Conflict Situation has the meaning given to it in clause 5.13 (*Director's power to authorise conflict situations*);

Counterparty has the meaning given to it in clause 5.17(a) (*Director's power to authorise conflict situations*);

Data Protection Laws means Regulation (EU) 2016/679 (General Data Protection Regulation), as supplemented by the Data Protection Act 2018;

Data Sheet means the document in the Agreed Form containing details about the Company and the Project Co including, inter alia, subscriptions by the parties for Shares and details of any Shareholder Debt advanced to the Company, Directors details and other administrative matters;

Deed of Adherence means a deed in substantially the same form as the draft set out at Schedule 4 (*Deed of Adherence*);

Deemed Transfer Notice has the meaning given to it in the Hold Co Articles;

Default Shares has the meaning given to it in clause 9.2 (*Events of Default and deemed transfers*);

Defaulting Shareholder has the meaning given to it in clause 9.2 (*Events of Default and deemed transfers*);

Defaulting Shareholder Debt has the meaning given to it in clause 9.3(a) (*Shareholder Debt*);

Directors means, as the context may require:

- (a) the Hold Co Directors and/or the Project Co Directors as nominated by the relevant parties from time to time; and
- (b) a Chairman appointed pursuant to clause 5.4(b) (*Chairman of the Board*) and Article 37.1 (*Chairman of the Board*) (in respect of Project Co or Hold Co as applicable),

- (i) save as expressly stated otherwise in this Agreement;
- (ii) [save for the purpose of clause 5.1 (Composition of the Boards and the right to appoint Directors); and
- (iii) subject always to clause 5.5(a)(ii)(Board meetings and Board voting) and the Articles],

and Director shall mean any of them;

DOTAS means the Disclosure of Tax Avoidance Schemes rules which require a promoter of tax schemes to tell HM Revenue & Customs, and or any relevant tax authority with jurisdiction in Wales of any specified notifiable arrangements or proposals and to provide prescribed information on those arrangements or proposals within set time limits as contained in Part 7 of the Finance Act 2004 and in secondary legislation made under vires contained in Part 7 of the Finance Act 2004 and as extended to National Insurance Contributions by the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868 made under s.132A Social Security Administration Act 1992;

Draft Business Plan has the meaning given to it in sub-clause 8.1(b) (*The Business Plan (including the Annual Budget)*);

Environmental Information Regulations means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such regulations;

Equity Subscription Agreement means [◆];

Event of Default means:

- (a) a petition being presented or a proceeding commenced (and such petition or proceeding not being discharged or dismissed) or an order being made or an effective resolution passed for the winding-up, insolvency, administration, re-organisation, re-construction, dissolution or bankruptcy of a Shareholder or for the appointment of a liquidator, receiver, administrative receiver, administrator, trustee or similar officer of a Shareholder or of all or any part of its business or assets PROVIDED THAT this paragraph shall not apply to any bona fide re-organisation or re-construction of a Shareholder whilst solvent (the structure of which has been previously approved by the other Shareholders in writing, acting reasonably) in which a new company assumes (and is capable of assuming) all the obligations of the Shareholder;
- (b) a Shareholder stopping or suspending payments to its creditors generally or being unable to pay its debts as they fall due or seeking to enter into any composition or other arrangement with its creditors or being declared bankrupt or insolvent;
- (c) a creditor taking possession of all or any part of the business or assets of a Shareholder or any execution or other legal process being enforced against the business or any substantial asset of the Shareholder and not being discharged;
- (d) anything analogous or having an effect substantially similar to any of the events described in paragraphs (a) to (c);
- (e) a Shareholder changing the nature or scope of its business such that it becomes a Restricted Person;

- (f) a Shareholder being in material breach of any of the warranties given by it in clause 10.1 to clause 10.3 (*Warranties and undertakings*) or of its obligations under clause 4.1 (*Initial subscriptions of Shares*) [within [◆] Business Days of the due date for payment (whether by the defaulting Shareholder or pursuant to any guarantee or other security provided in support of such obligations)]²⁸;
- (g) a Shareholder attempting to sell, transfer, charge or otherwise dispose of any of its Shares or Shareholder Debt or any interest in Shares or Shareholder Debt otherwise than in accordance with this Agreement and/or the Articles (which in all cases shall be deemed not to be capable of remedy) or any secured party taking any steps to enforce any charge created over any Shares held by the Shareholder in the Company;
- (h) the circumstances where an Event of Default occurs as set out in clause 10.7(c) (*Provisional Transfer Notices*);
- (i) a Shareholder failing to comply with its obligations under clause 8.4(a)(ii) (*Provision of information to Shareholders and designated third parties*); or
- (j) a Shareholder committing any material offence under any anti-bribery and corruption legislation in the UK from time to time or at common law in respect of fraudulent acts and provided always that if the offence is an offence under section 7(1) of the Bribery Act 2010;

Expiry Date has the meaning given to it in the Authority Project Agreement;

Fees Regulations means The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004;

Finance Parties means [◆];

Financing Default means the occurrence of an event of default under the Principal Funding Agreement;

Financial Model has the meaning given to it in the Principal Funding Agreement;

Founder Shareholders means the Shareholders who entered into this Agreement on the date on which it was signed;

FOIA means the Freedom of Information Act 2000 and any subordinate legislation (as defined in section 84 of the Freedom of Information Act 2000) made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such Act;

Funding Agreements means [*define by reference to relevant MIM funding documents relating to Project Co*];

General Anti-Abuse Rule means:

- (a) the legislation in Part 5 of the Finance Act 2013; and

²⁸

Schedule 1 Definitions - Event of Default. To cover any payment default and with the benefit of the same grace period (if any) as permitted by Senior Funders (as defined in the Authority Project Agreement).

- (b) any future legislation introduced into parliament to counteract tax advantages arising from abusive arrangements to avoid national insurance contributions;

Halifax Abuse Principle means the principle explained in the CJEU Case C-255/02 Halifax and others;

Hold Co Articles means the articles of association of the Company in the format set out in Schedule 6 (*The Articles of Association of the Company*) as amended from time to time;

Hold Co Board means the board of Directors of the Company from time to time as constituted in accordance with this Agreement and the Hold Co Articles;

Hold Co Business means the business of Hold Co as described in clause 3.1(a) (*The business of the Company and Project Co and details of the Company and Project Co*) and such other business as the Shareholders may from time to time agree should be carried on by Hold Co;

Hold Co Director means:

- (a) any director from time to time of Hold Co appointed pursuant to clause 5.1 (b) (*Composition of the Boards and the right to appoint Directors*) and article 36.1 (*Appointment of Directors*); and
- (b) any Alternate (in that capacity):
- (i) save where expressly stated otherwise in this Agreement or the Articles;
 - (ii) save for the purpose of clauses [5.1 (*Composition of the Boards and the right to appoint Directors*), 5.6 to 5.8 (*Director Remuneration*) and 6.2(b) (*Reserved Matters*)]; and
 - (iii) subject always to Article 26.4 (*Quorum for Board Meetings*) and article 27.4 (*Voting at Board Meetings*).

Hold Co Loan Note means [◆];

Hold Co Loan Note Instrument means [◆];

Independent Directors has the meaning given to it in clause 6.5(a) (*Step-aside provisions*);

Index Linked means in relation to any amounts or sums, such amounts or sums as adjusted on each anniversary of the date of this Agreement in accordance with the following formula:

Amount or sum x (RPIXd / RPIX0)

Where RPIXd is the value of the Retail Prices Index (All Items Excl Mortgage Interest) published or determined with respect to the month most recently preceding the relevant anniversary of the date of this Agreement and RPIX0 is the value of the Retail Prices Index (All Items Excl Mortgage Interest) in respect of [◆];

Information has the meaning given to it under section 84 of the Freedom of Information Act 2000;

Instruction to Sell Notice has the meaning given to it in clause 9.4 (*Appointment of the Sale Agent in certain circumstances*);

Investment has the meaning given to it in clause 9.4 (*Appointment of the Sale Agent in certain circumstances*);

Law has the meaning given to it in the Authority Project Agreement;

Lock In Period has the meaning given to it in clause 9.7(c) (*Lock In Periods*);

Market Value has the meaning given to it in the Hold Co Articles;

Material Shareholder has the meaning given to it in clause 5.1(b) (*Composition of the Boards and the right to appoint Directors*);

MIM means the Welsh Government's Mutual Investment Model;

New Shareholder has the meaning given to it in sub-clause 2.1(b) (*Conditions precedent*);

Occasion of Tax Non-Compliance means:

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

Offer to Allot has the meaning given to it in sub-clause 4.4 (*Offers to Allot*);

On-Loan Agreement means [◆];

Original Meeting has the meaning given to it in sub-clause 6.3(b) (*Manner of giving Shareholder approval*);

Original PSDP Shareholder has the meaning given to it in clause 9.7(b) (*Lock In Periods*);

Other Directors has the meaning given to it in sub-clause 6.3(b) (*Manner of giving Shareholder approval*);

Outgoing Director has the meaning given to it in sub-clause 5.3(a) (*Removal of/change to nominated Directors*);

Outgoing Shareholder has the meaning given to it in sub-clause 5.3(b) (*Removal of/change to nominated Directors*);

Principal Funding Agreement means the [insert definition of Common Terms Agreement/Credit Agreement];

Proceedings means any adjudication, litigation, arbitration or administrative proceedings;

Project has the meaning given to it in clause 3.1(b) (*The business of the Company and Project Co and details of the Company and Project Co*);

Project Agreements means [the Authority Project Agreement and those other documents defined as "**Project Document**" pursuant to the Principal Funding Agreement];

Project Co Articles means the articles of association of Project Co;

Project Co Board means the board of Directors for the time being of Project Co as constituted in accordance with this Agreement and the Project Co Articles;

Project Co Business means the business of Project Co as described in clause 3.1(b) (*The business of the Company and Project Co and details of the Company and Project Co*) and such other business as the Shareholders may from time to time agree should be carried on by Project Co;

Project Co Director means:

(a) any director for the time being of Project Co appointed pursuant to clause 5.1 (b) (*Composition of the Boards and the right to appoint Directors*) and article 36.1 (*Appointment of Directors*); and

(a) any Alternate (in that capacity):

- (i) save where expressly stated otherwise in this Agreement or the Articles;
- (ii) save for the purpose of clauses [5.1 (*Composition of the Boards and the right to appoint Directors*), 5.6 to 5.8 (*Director Remuneration*) and 6.2(b) (*Reserved Matters*)]; and
- (iii) subject always to article 26.4 (*Quorum for Board Meetings*), article 27.7 (*Quorum for Board Meetings*) and article 27.4 (*Voting at Board Meetings*).

Project Co Lock In Period means the period during which Shareholders in Project Co and/or Hold Co are not entitled to transfer shares in the Project Co and/or Hold Co under clause [59.5] of the Authority Project Agreement;

Project Default means the occurrence of an event of default under a Project Agreement;

Project Documents means this Agreement, the Funding Agreements and the Project Agreements;

Project Document Conflict Authorisation has the meaning given in clause 5.17 (*Director's power to authorise conflict situations*);

Project Document Conflict Authorisation Terms has the meaning given to it in clause 5.18 (*Director's power to authorise conflict situations*);

Provisional Transfer Notice has the meaning given to it in clause 10.6 (*Tax compliance*);

PSDP Directors has the meaning given to it in clause 6.5 **Error! Reference source not found.** (*Step-aside provisions*);

Qualifying Bid has the meaning given to it in Schedule 5 (*Sale Agreement*);

Recipient has the meaning given to it in sub-clause 12.1(b) (*Confidentiality*);

Register has the meaning given to it in the Hold Co Loan Note Instrument;

Relevant Director has the meaning given to it in clause 5.13 (*Director's power to authorise conflict situations*);

Relevant Shareholder has the meaning given to it in clause 5.5(g) (*Board meetings and Board voting*);

Relevant Tax Authority means HM Revenue & Customs, or, if applicable, a tax authority in the jurisdiction in which the Shareholder and the Company/Project Co is ordinarily based for the purpose of carrying out its business;

Remedy Period has the meaning given to it in clause 9.2 (*Events of Default and deemed transfers*);

Request for Information shall have the meaning given to it in the FOIA or the Environmental Information Regulations as relevant;

Reserved Matters means those matters listed in Schedule 8 (*Reserved Matters*) and ticked in the second column (entitled "Shareholder"), which shall not be carried out without prior written approval in accordance with clause 6.2(a) (*Reserved Matters*);

Reserved Matter Board Approval means those matters listed in Schedule 8 (*Reserved Matters*) and ticked in the third column (entitled "Board"), which shall not be carried out without prior written approval in accordance with clause 6.2(b) (*Reserved Matters*);

Restricted Person shall have the meaning given to it in the Authority Project Agreement;

RTAD Shareholder means each Material Shareholder and, where WCo is not a Material Shareholder but holds issued Share capital in the Company, WCo;

Sale Agent has the meaning given in clause 9.4 (*Appointment of the Sale Agent in certain circumstances*);

Schedules means Schedules 1 (*Definitions and Interpretation*) to [8 (*Reserved Matters*)] attached to this Agreement;

Shares means the Shares referred to in Schedule 2 (*Details of the Company and the Project Co*) together with any further shares issued from time to time pursuant to clause 4 (*Funding of the Company and the Project Co and financial matters*);

Shareholder Debt means monies advanced or otherwise made available to Project Co by way of subordinated debt or loan stock subscription by a Shareholder or an Associate of a Shareholder (or, in relation to the Project Co, by the Company);

Shareholders means the parties to this Agreement (except for the Company and Project Co) and such other persons who may become shareholders in the Company from time to time as permitted by this Agreement and the Articles and Shareholder means any one (1) of them;

Shareholder's Group means:

- (a) in relation to a Shareholder which is a company, the Shareholder and each of its Associates; and
- (b) in the case of WGCo each Associate of WGCo and each member of WGCo Group;

Suitable Third Party means any person who is not a Restricted Person;

Transfer Notice has the meaning given to it in the Articles;

Transferring Shareholder has the meaning given to it in clause 9.1(i) (*Restrictions on transfers of Shares in the Company*);

Transparency Information means the information described in Parts A and B of Schedule 7 (*Transparency Information and Commercially Sensitive Information*) and, for the avoidance of doubt, in no circumstances shall any Transparency Information constitute Commercially Sensitive Information whether or not listed in Part C of Schedule 7 (*Transparency Information and Commercially Sensitive Information*);

WGCo Director means a Director appointed by WGCo or the WGCo Group; and

WGCo Group means:

- (a) any Associate of WGCo;
- (b) the Welsh Ministers or any agency, subsidiary or other body owned or controlled by the Welsh Ministers; and/or
- (c) any public sector body, third sector body or quasi autonomous non-governmental organisation who assumes and/or undertakes (whether as successor or otherwise) some or all of the functions exercised by WGCo or the Welsh Ministers.

1.2 Interpretation

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

- (a) The headings and marginal notes and references to them in this Agreement shall be deemed not to be part of this Agreement and shall not be taken into consideration in the interpretation of this Agreement.
- (b) Except where the context expressly requires otherwise, references to clauses, sub-clauses, paragraphs, sub-paragraphs, parts and Schedules are references to clauses, sub-clauses, paragraphs, sub-paragraphs and parts of and Schedules to this Agreement and references to Sections, Appendices and Attachments (if any) are references to Sections, Appendices and Attachments to or contained in this Agreement.
- (c) The Schedules to this Agreement (including any Attachments thereto) are an integral part of this Agreement and a reference to this Agreement includes a reference to the Schedules. In the event of any inconsistency between the provisions of the body of this Agreement and the Schedules, the body of this Agreement shall take precedence.
- (d) Words importing persons shall, where the context so requires or admits, include individuals, firms, partnerships, trusts, corporations, governments, governmental

bodies, authorities, agencies, unincorporated bodies of persons or associations and any organisations having legal capacity.

- (e) Where the context so requires words importing the singular only also include the plural and vice versa and words importing the masculine shall be construed as including the feminine or the neuter or vice versa.
- (f) The language of this Agreement is English. All correspondence, notices, and information shall be in English.
- (g) References to any Law are to be construed as references to that Law as from time to time amended or to any Law from time to time replacing, extending, consolidating or amending the same.
- (h) References to a public organisation shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the functions and responsibilities of such public organisation.
- (i) The words in this Agreement shall bear their natural meaning. The parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore, be construed contra proferentem.
- (j) Reference to **parties** means the parties to this Agreement and references to a **party** mean one of the parties to this Agreement.
- (k) In construing this Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word other or including or in particular shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
- (l) Reference to a document being in **Agreed Form** is a reference to the form of the relevant document agreed between the parties and for the purpose of identification initialled by each of them or on their behalf.
- (m) Where this Agreement states that an obligation shall be performed **no later than** or **within** or **by** a stipulated date or event which is a prescribed number of Business Days after a stipulated date or event, the latest time for performance shall be midnight on the last Business Day for performance of the obligations concerned.
- (n) A reference to a **subsidiary** or **holding company** is to be construed in accordance with section 1159 of the Companies Act 2006.
- (o) If there is a conflict between the terms of this Agreement and the Articles, the terms of this Agreement shall prevail and, if there is such a conflict, the Shareholders shall procure at the request of any of the Shareholders any modification reasonably required to be made to the Articles as shall be necessary to remedy such conflict.
- (p) A person, being a company, shall be **controlled** by another person if that other person owns a majority of the voting equity of that person or controls the majority of the votes at meetings of the board of directors of that person.
- (q) Save where stated to the contrary, references to any agreement or document include (subject to all relevant approvals and any other provisions of this Agreement concerning amendments to agreements or documents) a reference to that agreement or document as amended, supplemented, substituted, novated or assigned.

- (r) A reference in this Agreement to matters being agreed by the Directors shall only include Alternates (acting in that capacity) where he/ she is participating in a decision in place of a Director appointed pursuant to clause 5.1 (b) (*Composition of the Boards and the right to appoint Directors*).

**Schedule 2
Details of the Company and the Project Co**

The Company

Name:	◆ Limited	
Registered Office:	◆	
Registered Number:	◆	
Shareholders:	Shareholder	Shares
	PSDP	◆
	WGCo	◆
Initial Directors:	Material Shareholder Appointor	Initial Director appointee
	PSDP	◆
	PSDP	◆
	PSDP	◆
	WGCo	◆
Secretary:	◆	

The Project Co

Name:	◆ Limited	
Registered Office:	◆	
Registered Number:	◆	
Shareholders:	Shareholder	Shares
	The Company	◆
Directors:	As for the Company (see above).	
Secretary:	◆	

Schedule 3
Agreed Form Business Plan

(see clause 8 (*Budgeting, Business Planning and financial matters*))

[To be inserted]

**Schedule 4
Deed of Adherence**

THIS DEED OF ADHERENCE is made the day of 201[◆]

BY [◆] of [◆] (**Covenantor**) in favour of the persons whose names are set out in the Schedule to this Deed and is supplemental to the shareholders' agreement dated [◆] 201[◆] made by (1) [PSDP], (2) [WGCo], (3) [Company] and (4) [Project Co] (**Shareholders' Agreement**).

Terms defined in the Shareholders' Agreement shall bear the same meanings herein.

It is agreed

1. In consideration of the Covenantor being accepted as a party for the purposes of the Shareholders' Agreement by the parties thereto, as from [insert date] (**Adherence Date**) the Covenantor hereby confirms that it shall be a party to the Shareholders' Agreement as if they had originally been referred to in the Shareholders' Agreement as [◆] and agrees to be bound by all of the relevant provisions of the Shareholders' Agreement from the Adherence Date.
2. The Covenantor warrants and represents to each of the persons whose names are set out in the Schedule to this Deed, that the Covenantor is a Suitable Third Party.
3. The Covenantor makes all those warranties and representations, which are listed in full at clause 10.2 (*Warranties by the PSDP, the Company and the Project Co*) and clause 10.4 (*Tax compliance*) of the Shareholders' Agreement, to each of the persons whose names are set out in the Schedule to this Deed.
4. This Deed is governed by the law of England and Wales.

In witness whereof this Deed has been executed by the Covenantor and is intended to be and is hereby delivered on the date first above written.

SCHEDULE

[Parties to Shareholders' Agreement including those who have executed earlier deeds of adherence].

**Schedule 5
Sale Agent**

1. In this Schedule 5 (*Sale Agent*)(subject to paragraph 8):

Closing Date has the meaning given to it in paragraph 6;

Purchaser has the meaning given to it in paragraph 6;

Qualifying Bid means a bid for the entire Investment which:

(a) is accompanied by each of the following:

- (i) an acknowledgement addressed to the Shareholders to the effect that the bidder has carried out its own due diligence and in offering to purchase the Investment has not relied on (and an undertaking that it will not rely on) any warranty, statement, undertaking or representation (whether negligent or innocent) made by or on behalf of any Shareholder;
- (ii) a confirmation that if its bid is successful it will enter a Deed of Adherence and pay the Sale Agent's fees;
- (iii) a confirmation of funding for the purchase of the Investment and its ability to complete the payment for and the transfer of the Investment within the time period specified in paragraph 6; and

(b) is from a Suitable Third Party which is not Associated with the Defaulting Shareholder or any shareholder in the Defaulting Shareholder.

Reserve Bid has the meaning given to it in paragraph 8; and

Reserve Tenders has the meaning given to it in paragraph 8.

2. If the parties are unable to agree on the identity of the Sale Agent within twenty (20) Business Days of the issue of the Instruction to Sell Notice (as defined in clause 9.4 (*Appointment of the Sale Agent in certain circumstances*) of this Agreement), the Sale Agent shall thereafter be appointed on the application of any party by the President of the Institute of Chartered Accountants in England and Wales with the party making the application requesting that the appointment be made within twenty (20) Business Days of the date the party makes the application referred to.
3. The Defaulting Shareholder shall provide the Sale Agent with all such information as the Sale Agent may request in relation to the Investment and the Sale Agent shall invite tenders from Suitable Third Parties to purchase the Investment.
4. The Defaulting Shareholder and the Sale Agent shall comply with the Financial Services and Markets Act 2000 and all other legislation which may apply from time to time in relation to the offer for sale of the Investment.
5. The Defaulting Shareholder shall take all necessary action to ensure that the Investment has the widest possible market, and shall not do anything which might limit the number of potential bidders for the Investment and shall ensure that it has provided all necessary information to the Sale Agent to enable the Sale Agent to offer the Investment for sale within fifteen (15) Business Days of the appointment of the Sale Agent.
6. The Defaulting Shareholder shall accept the highest Qualifying Bid which is received by the Sale Agent (with the relevant Suitable Third Party being referred to as the **Purchaser**) by the

end of sixty (60) Business Days from the Instruction to Sell Notice (the **Closing Date**) and shall take all steps necessary to complete the transfer of its Shares and any Defaulting Shareholder Debt to the Purchaser within ten (10) Business Days of the Closing Date.

7. Should the Purchaser fail to complete the transfer of the Shares and any Defaulting Shareholder Debt to the Purchaser within ten (10) Business Days of the Closing Date then the Sale Agent shall remarket the Investment and the procedure referred to in paragraphs 3 to this paragraph 7 shall be followed until either the Investment has been sold to a purchaser or no Qualifying Bid is received by the relevant Closing Date.
8. Notwithstanding the provisions of paragraphs 1 to 7, the Sale Agent shall also invite tenders (**Reserve Tenders**) from Suitable Third Parties for any Defaulting Shareholder Debt only²⁹ and the provisions of paragraphs 1 to 7 shall apply with necessary changes having been made as if references to the "Investment" were in each case solely to the Defaulting Shareholder Debt and subject to the variations in this paragraph 8. If:
 - (a) the aggregate consideration offered pursuant to a Qualifying Bid comprising a Reserve Tender (a **Reserve Bid**) is greater than under the highest Qualifying Bid which is not a Reserve Bid (or no Qualifying Bid is received which is not a Reserve Bid), then the Reserve Bid shall be accepted by the Defaulting Shareholder and the sale and transfer of the Defaulting Shareholder Debt shall be effected in accordance with the provisions of paragraphs 1 to 7.
 - (b) Where a Reserve Bid is accepted pursuant to sub-paragraph (a) in relation to the Defaulting Shareholder Debt then, in relation to the Defaulting Shareholder's Shares, the provisions of clause 9.5 (*Appointment of the Sale Agent in certain circumstances*) shall apply in relation to the Default Shares and the Non- Defaulting Shareholders shall be entitled to give written notice under clause 9.5 (*Appointment of the Sale Agent in certain circumstances*).

²⁹

Schedule 5 – Sale Agent. This mechanism in Schedule 5 (The Sale Agent) allows for offers for the Loan Notes only on the basis that this flexibility may add some liquidity and enhance the value received in a default transfer scenario.

Schedule 6
The Articles of Association of the Company
[To be inserted³⁰]

³⁰ **Schedule 6 – Articles.**

Schedule 7
Transparency Information³¹ and Commercially Sensitive Information

Part A: Information to be provided by the Company and Project Co

Ref	Information	Last date for provision of information
A1	The audited accounts of the Company and Project Co for each financial year.	The earlier of: (a) the end of four (4) months after the end of that financial year; and (b) thirty (30) days after its publication.
A2	Quarterly cashflow statements and cashflow forecasts for the Company and Project Co including details of: (1) any payments received or made (a) by way liquidated damages and (b) in respect of change and variations; and (2) payments (excluding any reimbursement of expenses) to Directors.	The end of three (3) weeks after the end of each quarter during the construction period and 1/2 yearly thereafter.
A3	The equity internal rate of return (for both an actual cumulative return to the date of preparation and of the expected forecast return up to the Expiry Date) for each shareholder to be prepared using the Financial Model and calculated on a cash basis to include all distributions and any other payments made to Shareholders in respect of fees.	31 March and 30 September.
A4	Debt service cover ratio (for the twelve (12) month period to the date of preparation and for the next twelve (12) month period as from the date of preparation) and the loan life cover ratio (for the period as from the date of preparation to the Expiry Date).	31 March and 30 September.
A5	The occurrence of any Financing Default or Project Default.	Within seven (7) days of becoming aware of that event.
A6	Distributions paid to Shareholders and payments in respect of Shareholder Debt.	Within thirty (30) days of the date those payments are made.
A7	A copy of all information provided to the Authority under clause 24 of the Authority Project Agreement (Lifecycle Replacement).	Within seven (7) days of the date that information is delivered to the Authority.
A8	A copy of all information provided to the Authority under clause 35.2.3 (<i>Invoicing and Payment Arrangement</i>) of the Authority Project Agreement in respect of deductions from the Annual Service Payment and operating costs.	Within seven (7) days of the date that information is delivered to the Authority.

³¹

Schedule 7 - Transparency Information. This schedule of the standard form is subject to amendment from time to time as other relevant consultation exercises are concluded, policy established and relevant legislation is enacted or amended.

Part B: Information to be provided by the Shareholders

Ref	Information	Last date for provision of information
B1	In respect of Shares and Shareholder Debt held by it, the identity of each person having a beneficial interest in those investments [insert carve out language for Shareholders that are publicly quoted companies or funds]. For the purposes of this item B1 the term "beneficial owner" shall have the meaning as set out in Regulation 6 of The Money Laundering Regulations 2007 (the 2007 Regulations) and the holder of the Shares and/or Shareholder Debt shall to the extent within its power to do so and to the extent reasonably practicable carry out due diligence measures regarding the beneficial ownership of the Shares and Shareholder Debt as set out in Part 2 of the 2007 Regulations and make available the findings of that due diligence as Transparency Information.	The date of this Agreement and within seven (7) days of any change of beneficial ownership.
B2	In respect of each person named pursuant to B1 above, the jurisdiction of incorporation and tax residence, or in the case of an individual, his/her nationality and tax domicile.	The date of this Agreement and within seven (7) days of any change of beneficial ownership.
B3	The terms on which it has or is to dispose of any Shares or Shareholder Debt or has acquired any Shares or Shareholder Debt (including the identity of the transferee and the price paid or to be paid).	Within two (2) Business Days of the date on which legally binding documentation to dispose of that interest is entered into.

Part C: Commercially Sensitive Information

Ref	Information	Applicable Period
	[Note – to be added if/as required]	

Schedule 8 ³²Reserved Matters

Reference	Shareholder	Board	Reserved Matter
A			Financial
A1	✓		The approval of any change to the dividend policy set out in clause 7 (<i>Distributions</i>) which would adversely affect any Material Shareholder.
A2	✓		The making of any political donation.
A3	✓		The Company giving any deed of guarantee or indemnity involving a potential liability of £[100,000] (Index Linked) or more which in the reasonable opinion of a Material Shareholder is not required for the proper operation of the Company.
B			Shares/Shareholder Debt and constitutional
B1	✓		Any amendment to the Memorandum or Articles of the Company, which would adversely affect any Material Shareholder.
B2	✓		A change in the status of the Company from a limited company to a public limited company or from a company limited by shares to any other form of legal entity which would adversely affect any Material Shareholder or the Company.
B3	✓		A listing of the Company's share capital which would adversely affect any Material Shareholder or the Company.
C			Management, control, Directors and employees
C1	✓		Moving the central management and control of the Company or the Company's tax residence outside the UK.
C2		✓	The approval of (and any change to) Company policies which affect the potential statutory liability of Directors (e.g. anti-bribery and corruption, health and safety, non-discrimination).
C3		✓	Any increase in the payment of fees or remuneration to Directors to the Company save as expressly provided under this Agreement.
C4		✓	Conflict Authorisation to a Conflict Situation pursuant to clause 5.13

³²

Schedule 8 - Reserved matters. Three important general points: (1) the items in this table will need to be included in every Shareholders' Agreement for a MIM Project as a bid compliance matter; (2) a bidder/PSDP may suggest additional items for consideration/evaluation during the bid process, including a category of matters that are reserved for approval by a further distinct category of Shareholder (provided these do not cut across the effect of the compliance matters listed above); and provided always (3) no separate Reserved Matter or Reserved Matter type issues Lists are to be included which operate to exclude a particular Shareholder from voting or which remove all Shareholder voting rights on specific matters.

Reference	Shareholder	Board	Reserved Matter
			<i>(Director's power to authorise conflict situations).</i>
D			Project Co related Reserved Matters
D1	<i>Approval level as per the relevant item</i>		In relation to Project Co each of the above Reserved Matters in this table shall also be a Reserved Matter in relation to Project Co (as if references to the Company were references to Project Co and to the Hold Co Business were references to the Project Co Business).

Executed and delivered as a **DEED** by **[PSDP]**)
acting by its duly authorised signatories:)
)

Director

Director/Secretary*

OR

Executed and delivered as a **DEED** by **[PSDP]**)
acting by its duly authorised signatories:)
)

Director

In the presence of:

Witness Signature:

Name:

Address

Executed and delivered as a **DEED** by)
[WELSH GOVERNMENT COMPANY)
LIMITED] acting by its duly authorised)
signatories:)

Director

Director/Secretary*

OR

Executed and delivered as a **DEED** by)
[**WELSH GOVERNMENT COMPANY**)
LIMITED] acting by its duly authorised)
signatories:

.....

Director

In the presence of:

Witness Signature:

Name:

Address

Executed and delivered as a **DEED** by)
[**COMPANY**] **LIMITED** acting by its duly)
authorised signatories:)

.....

Director

.....

Director/Secretary*

OR

Executed and delivered as a **DEED** by)
[**COMPANY**] **LIMITED** acting by its duly)
authorised signatories:)

.....

Director

In the presence of:

Witness Signature:

Name:

Address

Executed and delivered as a **DEED** by)
[PROJECT CO] LIMITED acting by its duly)
authorised signatories:)

.....

Director

.....

Director/Secretary*

OR

Executed and delivered as a **DEED** by)
[PROJECT CO] LIMITED acting by its duly)
authorised signatories:)

.....

Director

In the presence of:

Witness Signature:

Name:

Address

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol



Llywodraeth Cymru
Welsh Government

(1) []

(2) []

(3) []

(4) []

(5) []

(6) []

(7) []

WEP STRATEGIC PARTNERING AGREEMENT

**ITPDSB Version
(Standard Form Version 1.4)**



STANDARD FORM WEP STRATEGIC PARTNERING AGREEMENT

STANDARD FORM VERSION 1

IMPORTANT NOTICE

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

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

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

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

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THIS AGREEMENT is made on the day of

AMONG:

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

RECITALS:

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

NOW IT IS HEREBY AGREED as follows:

1. DEFINITIONS, INTERPRETATION AND CONSTRUCTION

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

2. PURPOSE AND CONDUCT OF THE PARTIES

Aim

2.1 The purpose of this Agreement, the Shareholders' Agreements and the Project Agreements is to establish a long-term partnering relationship between WEPCo and the Participants and for WEPCo to provide or procure, across the Region as a whole, the provision of appropriate accommodation and related services to the Participants and others involved in providing Education Sector Services and/or Community Services with the aim of:

- 2.1.1 improving the efficiency of delivery of community and education based facilities;
- 2.1.2 making the best use of public resources; and
- 2.1.3 providing continuous improvement in both cost and quality in public procurement.

2.2 The aim of this Clause 2 is to identify the high level principles which underpin the delivery of the Parties' obligations under this Agreement and to set out key factors for a successful relationship between the Parties. Whilst it is recognised that these principles are difficult to measure in isolation, the successful implementation of the Project Agreements, the Shareholders' Agreements and this Agreement will depend on the Participants' ability effectively to co-ordinate and combine their expertise, manpower and resources in order to deliver an integrated approach to Education Sector Services and, in certain instances, Community Services in the Region, under this Agreement.

Principles

2.3 The principles referred to in Clause 2.2 are:

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

Mutual Objectives

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

- 2.4.1 WEPCo and the Participants agree and commit themselves to:
 - (a) the agreed mutual aims set out in Clause 2.1, and the WEP Objectives; and
 - (b) understanding the other Parties' long-term goals and working towards them in accordance with the principles set out in Clause 2.3;
- 2.4.2 these mutual objectives are kept under review through meetings and effective communications;
- 2.4.3 WEPCo and the Participants benefit from 'open book' relationships in accordance with Clause 36 (*Records and Open Book Accounting*);
- 2.4.4 in its dealings with Supply Chain Members for the delivery of individual Projects, WEPCo will seek to act in a manner consistent with the principles in Clause 2.3 and will seek to ensure that each of such parties is aware of and is able to contribute to the mutual objectives agreed with the Participants from time to time in accordance with this Clause 2.4; and
- 2.4.5 without prejudice to the provisions of Clause 30 (*Confidentiality*), all discussions between the Parties are treated with mutual confidentiality.

Problem Resolution

2.5 WEPCo and the Participants adopt an agreed systematic approach to problem resolution which recognises the principles contained in Clause 2.3.6 and:

- 2.5.1 seeks solutions without apportioning blame;
- 2.5.2 is based on mutually beneficial outcomes;
- 2.5.3 treats WEPCo and the Participants as equal parties in the dispute resolution process;
- 2.5.4 contains a mutual acceptance that adversarial attitudes waste time and money; and
- 2.5.5 relies on more and better discussion - with less paperwork and more constructive correspondence.

Improvement

2.6 WEPCo and the Participants will commit themselves to the achievement of continuous, measurable and measured improvement by:

2.6.1 agreeing quantitative and qualitative targets (pursuant to Clause 14.17 (*Managing WEPCo Performance*) and Section 3 (*Performance Measurement*) of Schedule 3 (*Partnering Services*) which relate to the purpose and aim of this Agreement and the Parties' mutual objectives and which:

- (a) are specific;
- (b) are challenging;
- (c) add value; and
- (d) eliminate waste;

2.6.2 measuring and reviewing contractual performance against the Key Performance Indicators in accordance with this Agreement; and

2.6.3 identifying and following best practice.

Non-binding effect of this Clause 2

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

3. COMMENCEMENT, DURATION AND EXPIRY OF THIS CONTRACT

Contract Term and Expiry

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

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

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

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

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

3.3 Upon the expiry or earlier termination of this Agreement, the following clauses shall continue to the extent necessary to give effect to the expiry or termination of this Agreement, or, if later (and where applicable to the operation of WEPCo's Partnering Services related to performance of a Project Service Provider under an operative Project Agreement), shall continue in force until the final D&B Termination Date of any Project Agreement for a D&B Project in force at the time of expiry or earlier termination of this Agreement, which was entered into pursuant to this Agreement:

Clause number(s)	Description
1	<i>Definitions, Interpretation and Construction</i>
5.2 - 5.5 (inclusive)	<i>Disposal of properties and/or shares</i>
8.1 (excluding Clause 8.1.5 and Clause 8.1.6), 8.4, in each case only to the extent relevant following expiry of this Agreement and relating to reporting and performance measurement obligations)	<i>Service Obligations</i>
12	<i>Parties' Representatives</i>
14 (excluding Clause 14.4)	<i>Management of WEPCo's performance</i>
16-20 (but, in the case of Clauses 20.3 to 20.8 (inclusive) only to the extent relevant following expiry of this Agreement)	<i>Indemnities; Insurance; Intellectual Property rights; Transfer of employment; Site security and personnel issues</i>
22	<i>Participant default</i>
23	<i>WEPCo events of default</i>
24	<i>Force Majeure</i>
25	<i>Corrupt gifts and fraudulent payments</i>
27	<i>Agency and Participants' statutory authority</i>
28	<i>Assignment and sub-contracting</i>

Clause number(s)	Description
29	<i>Performance of subcontractors</i>
30-32	<i>Confidentiality; Freedom of Information; Change in parties to the partnering agreement</i>
33-52	<i>Dispute resolution; Order of precedence of documents; No recourse to public funds; Records and open book accounting; Personal Data; Liability of the Participants; Prohibited activities; Notices; Amendments; Waiver; No agency; Entire agreement; Severability; No double recovery; Costs and expenses; Third Party Rights; Mitigation; Further assurance; Governing law and jurisdiction; General assistance and cooperation and Participant undertakings</i>

4. DELIVERABLES

4.1 On or prior to execution of this Agreement:

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

5. PLANNING MATTERS AND INTERESTS IN PROPERTY

5.1 **Planning matters**

- 5.1.1 It is the intention of the Parties that, where Planning Permission is required for any Approved Project, that detailed Planning Permission is obtained prior to execution of the Project Agreement in respect of the relevant Approved Project. In such cases the provisions of Schedule 12 (*Planning Matters*) and Schedule 13 (*Unreasonable Conditions*) shall have full effect in respect of such Approved Project. WEPCo's performance of its obligations under Schedule 12 (*Planning Matters*) in respect of a specific Approved Project shall be deemed to be part of the Project Development Partnering Services and the costs incurred relative thereto shall be included as part of the Project Development Fee.
- 5.1.2 In exceptional circumstances, in terms of the relevant Stage 2 Approval, detailed Planning Permission may not be required to be obtained prior to execution of the

relevant Project Agreement. In such cases the provisions of Schedule 12 (*Planning Matters*) and Schedule 13 (*Unreasonable Conditions*) shall, subject to Clause 5.1.4, have effect in respect of the relevant Approved Project until such time as a Project Agreement is executed whereupon such matters as relate to the development which is the subject of that Project Agreement shall become the responsibility of the Project Service Provider under that Project Agreement and, save as agreed to the contrary between the Project Service Provider and the relevant Project Agreement Counterparty, the appropriate provisions from Schedule 12 (*Planning Matters*) and Schedule 13 (*Unreasonable Conditions*) shall be included within the relevant Project Agreement.

- 5.1.3 WEPCo shall provide all such assistance as is required by any Project Service Provider under a Project Agreement to ensure a smooth transition of planning matters including but not limited to all Consents, Planning Permissions, Planning Agreements and Infrastructure Agreements which are the subject of that Project Agreement.
- 5.1.4 The requirements of paragraphs 1.1.1, 1.1.2 and 1.1.3 of Schedule 12 (*Planning Matters*) shall continue to apply in respect of any Project the subject of a Project Agreement notwithstanding the execution of the relevant Project Agreement.

Disposal of properties and/or shares

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

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

6. NEW PROJECTS

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

7. EXISTING SERVICE PROVIDERS

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

8. SERVICES OBLIGATIONS

8.1 WEPCo shall procure that the Partnering Services are at all times performed:

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

8.2 To avoid doubt, the obligations in Clause 8.1 are independent obligations. In particular compliance by WEPCo with Section 5 (*Partnering Services Method Statements*) of Schedule 3 (*Partnering*

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

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

8.4 The Parties agree that it is fundamental to the successful operation of this Agreement that WEPCo devotes sufficient resource and expertise to providing the Partnering Services in a competent and timely manner and otherwise in accordance with the standards set out in Clause 8.1 (*Service Obligations*).

9. **EXCLUSIVE NATURE OF THIS AGREEMENT**

9.1 Subject to Clauses 9.3, 9.7, 22.2, 22.6, 23.3 and 23.10, WEPCo shall have the sole and exclusive right and obligation for a period of ten (10) years from the Commencement Date to provide all of the services which comprise the Ongoing Partnering Services and the Project Development Partnering Services to each of the Participants on the terms and subject to the conditions of this Agreement and in particular subject to the Partnering Services Costs being recoverable only in accordance with Clause 10.2. In respect of the Project Development Partnering Services, such exclusivity relates only to Qualifying Projects.

9.2 Subject to Clauses 9.3, 9.6, 9.7, 22.2, 22.6, 23.3 and 23.10 and the provisions of Schedule 5 (*Approval Process for New Projects*), WEPCo shall have the sole and exclusive right for a period of ten (10) years from the Commencement Date to provide itself, or nominate its wholly owned Subsidiaries or, in the case of MIM Projects nominate a PSDP Related Party, to provide Project Services (in each case as Project Service Provider) to each of the Participants in relation to those Qualifying Projects that become Approved Projects within such ten (10) year period and each Participant shall ensure that, subject to the terms of this Agreement, they contract with WEPCo or its nominees as aforesaid under a Project Agreement for the provision of Project Services in relation to all such Qualifying Projects which become Approved Projects, in each case on the terms and subject to the conditions of this Agreement.

9.3 WEPCo shall have no right or obligation, but may be requested by any Participant, subject to the agreement of appropriate terms and conditions and subject to applicable Law prevailing at the relevant time and applicable procurement rules and guidance, to provide itself, or nominate its wholly owned Subsidiaries or, in the case of MIM Projects under Clause 9.3.5 to nominate a PSDP Related Party, to provide (in each case as Project Service Provider) to the Participants (or any of them):

9.3.1 Project Services in relation to capital projects identified by a Participant as required for the provision of Education Sector Services (where such projects have been expressly designated and Approved under a Strategic Outline Programme) and/or Community Services, in the Region;

- 9.3.2 Project Services in relation to the provision of FM Services that are not provided as part of any Qualifying Project, but are required in relation to capital projects procured under Clause 9.3.1 in the Region;
- 9.3.3 Strategic Support Partnering Services;
- 9.3.4 Ongoing Partnering Services and/or Project Development Partnering Services after the date falling ten (10) years from the Commencement Date, where the term of this Agreement has been extended beyond the Initial Expiry Date in accordance with Clause 3.2;
- 9.3.5 Project Services in respect of Qualifying Projects which become Approved Projects after the date falling ten (10) years from the Commencement Date, where the term of this Agreement has been extended beyond the Initial Expiry Date in accordance with Clause 3.2; and/or
- 9.3.6 Project Development Partnering Services in respect of potential New Projects which are not Qualifying Projects but are requested by a Participant pursuant to Clause 9.3.1 or Clause 9.3.2.

9.4 All Project Services to be provided to Participants or to any other person(s) pursuant to Clause 9.3 (excluding Clause 9.3.5 to which Clause 6.1 shall apply) shall be provided pursuant to a Project Agreement either:

- 9.4.1 substantially in the form of the relevant Template Project Agreement completed in accordance with the "IMPORTANT NOTICE" set out on such Template Project Agreement to reflect such amendments as may be required in the circumstances of that particular Project Agreement and as may be agreed between WEPCo and the Relevant Participant(s) and approved by the Welsh Government; or
- 9.4.2 in the case of Project Services for FM Services only, or a D&B Project for Community Services only, in such form as may be agreed between WEPCo and the Relevant Participant(s) and approved by the Welsh Government.

9.5 The Participants shall work together with each other and with WEPCo with the aim of ensuring that the Project Services at all of their Facilities are provided under the terms of this Agreement and the Project Agreements.

9.6 Subject to Clauses 9.3, 9.7, 22.2, 22.6, 23.3 and 23.10 and the provisions of Schedule 5 (*Approval Process for New Projects*), each of the Participants undertake to WEPCo, that they shall not enter into any transactions for the provision of Qualifying Projects in the Region in furtherance of their statutory duties or otherwise, other than pursuant to a Project Agreement entered into pursuant to this Agreement. The undertaking contained in this Clause 9.6 shall cease to be effective and binding on the expiry of ten (10) years from the Commencement Date.

9.7 The exclusivity granted pursuant to Clause 9.1 and/or Clause 9.2 may be suspended in respect of any Participant during any period where WEPCo has failed the Track Record Test by such Participant serving written notice of such suspension on WEPCo. Without prejudice to the rights of the Participants under Clauses 23.3 and 23.10, any such suspension shall expire:

- 9.7.1 following written notice to that effect being served on WEPCo by the Participant in question, copied to the SPB; or
- 9.7.2 automatically where WEPCo passes a subsequent Track Record Test or where Clause 23.12.2(b) applies.

9.8 No breach of Clause 9.1 or Clause 9.2 shall arise as a result of the provision of Partnering Services or Project Services by a third party to any Participant who serves a suspension notice in circumstances where they are entitled to do so under this Agreement, to the extent such services are instructed during such period of suspension.

9.9 Where a suspension of exclusivity by a Participant occurs (whether pursuant to Clause 9.7, Clause 23.3 or Clause 23.10) and WEPCo has commenced the New Project Approval Process for a New Project for which such Participant is a Relevant Participant but has not obtained a Stage 1 Approval or Stage 2 Approval (as the case may be), then, subject to the terms of Schedule 5 (*Approval Process for New Projects*), WEPCo shall continue to provide the Project Development Partnering Services comprised within the relevant stage(s) of the New Project Approval Process for such New Project unless and until notice is served pursuant to paragraph 7 of Schedule 5 (*Approval Process for New Projects*) by the Relevant Participant in respect of such New Project.

10. PRICE AND PAYMENT FOR THE SERVICES

Payment for Partnering Services

10.1 WEPCo shall prepare and maintain accurate records of the Partnering Services Costs (and details of the proposed New Projects in relation to which such costs are incurred, where relevant).

10.2 Save in the circumstances set out in Clause 22 (*Participant Default*) and Schedule 5 (*Approval Process for New Projects*), WEPCo shall recover its Partnering Services Costs in respect of Ongoing Partnering Services and Project Development Partnering Services as provided in Schedule 4 (*Partnering Services Costs*). As regards Strategic Support Partnering Services then, subject always to Clause 22 (*Participant Default*), these shall be provided by WEPCo and paid for by the relevant Participant(s) (within 30 days of valid invoice therefor) at rates and prices quoted by WEPCo and accepted by the relevant Participant(s) in advance. These rates and prices should be in accordance with Section 4 (*Partnering Services Costs Rates*) of Schedule 3 (*Partnering Services*) as updated from time to time in accordance with this Agreement, subject to whatever adjustments as may be agreed between WEPCo and the relevant Participant(s) in each case.

10.3 All payments under this Agreement shall be made in pounds sterling by electronic transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified in the relevant invoice, quoting the invoice number against which payment is made. Subject to Section 3 (*Payment and Interest*) of Schedule 14 (*Compensation on Participant Event of Default and Termination*), all valid invoices shall be payable within 30 days of receipt.

10.4 If any Party (acting in good faith) disputes all or any part of any sum payable hereunder, the undisputed amount shall be paid by the relevant Party in accordance with Clause 10.3 and the provisions of the Dispute Resolution Procedure shall apply in respect of the disputed part. Following resolution of the dispute, any amount agreed or determined to have been payable shall be paid forthwith by the relevant

Party to the recipient, together with interest on such amount calculated in accordance with Clause 10.5 (*Late Payment*).

Late Payment

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

Set-Off

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

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

VAT

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

10.9 Each party shall pay to the relevant other party any VAT properly chargeable on any supply made to it under this Agreement provided that it shall first have received from the other party a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.

10.10 If any Party (the "**First Party**") considers that any VAT which another Party (the "**Second Party**") claims to be properly chargeable to the First Party in connection with this Agreement is not in fact properly so chargeable, the First Party shall be entitled to require the Second Party to obtain a clearance from HM Revenue and Customs (or, if relevant, such other body as is charged at the time with the collection and management of VAT) as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request HM Revenue and Customs for such a clearance.

10.11 The following further provisions shall apply in respect of the applications for a clearance in accordance with Clause 10.10:

10.11.1 prior to submitting its request for such clearance and any further communication to HM Revenue and Customs in connection with the obtaining of the clearance, the Second Party shall first obtain the agreement of the First Party to the contents of such request and any such further communication, such agreement not to be unreasonably withheld or delayed;

10.11.2 the Second Party shall provide to the First Party copies of all communications received from HM Revenue and Customs in connection with the application for clearance as soon as practicable after receipt; and

10.11.3 the Second Party shall use all reasonable endeavours (including without limitation the provision of such additional information as HM Revenue and Customs may require) to obtain such clearance as soon as reasonably practicable following the initial request.

10.12 If clearance is required by the First Party under Clause 10.10, the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until clearance is received from HM Revenue and Customs which states that a sum of VAT (the "**VAT Sum**") is properly so chargeable or HM Revenue and Customs state that they are not prepared to give clearance on the matter. In this case, then subject to Clauses 10.13 and 10.14 and provided that the First Party shall first have received a valid tax invoice which complies with the requirements of Part III VAT Regulations 1995 and which states the VAT Sum to be the amount of VAT chargeable to the First Party, the First Party shall pay the VAT Sum (and any interest or penalties attributable to the VAT Sum) to the Second Party.

10.13 If the First Party disagrees with any clearance obtained pursuant to Clause 10.10 by the Second Party from HM Revenue and Customs, then the Second Party (provided that it is indemnified to its reasonable satisfaction against all costs and expenses including interest and penalties which it may incur in relation thereto) shall take such action and give such information and assistance to the First Party as the First Party may require to challenge such clearance or otherwise to resist or avoid the imposition of VAT on the relevant supply.

10.14 The following further provisions shall apply if the First Party shall exercise its rights under Clause 10.13:

10.14.1 the action which that First Party shall be entitled to require the Second Party to take shall include (without limitation) contesting any assessment to VAT or other relevant determination of HM Revenue and Customs before any VAT tribunal or court of competent jurisdiction and appealing any judgement or decision of any such tribunal or court;

10.14.2 if the Second Party shall be required to pay to or deposit with HM Revenue and Customs a sum equal to the VAT assessed as a condition precedent to its pursuing any appeal, the First Party shall, at its election, either pay such sum to HM Revenue and Customs on behalf of the Second Party or on receipt of proof in a form reasonably satisfactory to the First Party that the Second Party has paid such sum to or deposited such sum with HM Revenue and Customs the First Party shall pay such sum to the Second Party;

10.14.3 save as specifically provided in Clause 10.12, the First Party shall not be obliged to pay to the Second Party any sum in respect of the VAT in dispute to the Second Party or in respect of VAT on any further supplies made by the Second Party to the First Party which are the same type and raise the same issues as the supplies which are the subject of the relevant dispute unless and until the final outcome of the relevant dispute is that it is either determined or agreed that VAT is properly chargeable on the relevant supply or supplies; and

10.14.4 the Second Party shall account to the First Party for any costs awarded to the Second Party on any appeal, for any sum paid to or deposited with HM Revenue and Customs in accordance with Clause 10.14.2 which is repayable to the Second Party and for any interest to which the Second Party is entitled in respect of such sums.

11. **NOT USED**

12. **PARTIES' REPRESENTATIVES**

Representatives of the Participants

12.1 The respective Participants' Representatives shall be

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

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

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

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

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

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

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

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

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

Representative of WEPCo

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

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

13. VALUE FOR MONEY

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

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

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

- 13.4 WEPCo shall also record the final cost for:
- 13.4.1 the design and construction of each Project; and
 - 13.4.2 as the information becomes available over time, the actual cost of maintaining and repairing each Project throughout the duration of the relevant Project Agreement,
- in either case where such design and construction and/or maintenance and repair is the responsibility of the Project Service Provider under the relevant Project Agreement.

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

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

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

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

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

- 14.1.1 one representative from each of the Participants from time to time who shall, in each case, be that Participant's Representative or any other person authorised by that Participant's Representative¹;
- 14.1.2 one representative of WEPCo, nominated by the board of directors of WEPCo;
- 14.1.3 one additional representative of Welsh Government (at Welsh Government's discretion), as notified from time to time in writing to the Chairman; and
- 14.1.4 such other reasonable number of representatives of stakeholders interested in or affected by Education Sector Services and/or Community Services and any other co-opted person as the Participants may from time to time agree (having first consulted with WEPCo) ("**Stakeholder Representatives**"). The Participants shall ensure that the

¹ It is anticipated the Representatives on the SPB will be senior representatives.

Stakeholder Representatives are bound by the same obligations of confidentiality to WEPCo and to the Participants as if they were a party to this Agreement.

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

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

14.2.1 financial; and

14.2.2 operating (including performance),

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

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

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

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

14.6 A chair of the SPB ("**Chairman**") shall be appointed in accordance with this Clause 14.6.

14.6.1 The Chairman will be appointed on an annual basis from amongst the Participants' Representatives.

14.6.2 Save where agreed to the contrary by the Participants, it is intended that the post of Chairman shall rotate annually amongst the Participants' Representatives in turn.

14.6.3 The first Participant's Representative to hold the post of Chairman (from the Commencement Date until the first anniversary thereof) shall be the Participant's Representative appointed by [*insert first Chairman appointing Participant*]. The order of rotation thereafter shall be as agreed between the Participants.

14.6.4 The Chairman will be non-voting in his capacity as Chairman.

14.7 SPB meetings will take place at such places and (subject to Clause 14.2) times as the Parties shall decide. Agendas will be circulated on behalf of the Chairman five (5) Business Days in advance (with supporting papers) and any Party wishing to raise other agenda items (including an item under "Any other

business") will notify all other Parties (with supporting papers) in writing no later than three (3) Business Days in advance.

14.8 A quorum for the proper and valid conduct of any business of the SPB shall be [five (5)] Participants' Representatives (one of whom must be a representative from Welsh Government) and the WEPCo Representative, in each case appointed pursuant to Clause 14.1.

14.9 If a quorum is not present at any meeting of the SPB within 30 minutes of that meeting's start time, it shall be adjourned to the same time and place on the date which is five (5) Business Days later. The quorum for any adjourned meeting shall be one (1) Participant's Representative (who must be a representative from Welsh Government) and the WEPCo Representative.

14.10 The Participants shall arrange for a person to take minutes of all SPB meetings and circulate the same to all representatives appointed at such time pursuant to Clause 14.1 and the Chairman (whether or not the same were in attendance of the meeting) within five (5) Business Days after the relevant meeting.

14.11 Each of the Parties shall use all its reasonable endeavours to ensure their regular attendance at all meetings of the SPB and each Participant will, unless unavoidable, ensure that its representative on the SPB is appropriately empowered to agree matters on its behalf.

14.12 Each Participant shall use all its reasonable endeavours to ensure that its representative on the SPB conducts himself in accordance with the partnering principles contained in Clause 2.3 and in a manner intended to ensure (insofar as each Participant is able) that the SPB complies with its obligations and carries out its functions in a timely manner.

14.13 A telephone conference call or video conference or a combination of the same, at which all participants are able to speak to and hear each of the other participants and at which for all times at that meeting a quorum of the SPB is able to so participate, shall be valid as a meeting of the SPB.

Managing WEPCo performance

14.14 The SPB will act as the primary mechanism for managing WEPCo's performance.

14.15 WEPCo shall regularly monitor and report to the SPB on the performance of WEPCo (and its Partnering Subcontractors) under this Agreement and of the Project Service Providers and the Supply Chain Members under Project Agreements.

14.16 WEPCo shall, within twenty (20) Business Days of each Review Date, complete and issue to the SPB the WEPCo Performance Report. The WEPCo Performance Report shall include a review of each of the Key Performance Indicators, detailing, in each case, whether or not the relevant Key Performance Indicator has been met together with a summary of the data and scoring supporting each of the Key Performance Indicators (which data and scoring shall be as up to date as reasonably practicable as at the Review Date and in any event shall be up to date as at the date thirty (30) Business Days prior to the Review Date). If any change is made to the WEPCo Performance Report pursuant to the procedure in Clause 14.18, then references to the WEPCo Performance Report shall be read as references to the WEPCo Performance Report as updated or amended by agreement with WEPCo or as a result of agreement or determination pursuant to the Dispute Resolution Procedure.

14.17 The Participants and WEPCo shall meet annually following each Review Date to consider whether the Key Performance Indicators remain the most appropriate measure of WEPCo's performance of the

Services, having regard in particular to the principle that a continuous improvement in WEPCo's performance should be incentivised through the Key Performance Indicators and the requirement to comply with prevailing Law and applicable governmental policy, and shall act reasonably in seeking to agree any amendment to the Key Performance Indicators and consequential changes to the Partnering Services Method Statements.

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

15. INFORMATION

15.1 WEPCo shall not in any way be relieved from any obligation under this Agreement nor shall it be entitled to claim against the Participant on grounds that any information, whether obtained from the Participant or otherwise (including information made available by the Participant) is incorrect or insufficient and shall make its own enquiries as to the accuracy and adequacy of that information.

15.2 Save to the extent expressly provided in a Project Agreement:

15.2.1 none of the Participants nor any of their respective agents, servants or advisers shall be liable to WEPCo (whether in contract, tort or otherwise and whether or not arising out of any negligence on the part of the Participants or any of their respective agents, servants or advisers) in respect of any inadequacy of any kind whatsoever in Works and Facilities Information;

15.2.2 no Participant shall be deemed to have given any warranty or undertaking that Works and Facilities Information represents all of the information in its possession or power relevant or material to any New Project; and

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

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

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

- 15.3.1 before execution of each Project Agreement, they shall have conducted their own analysis and review of the relevant Works and Facilities Information and as such shall be deemed to have satisfied themselves as to the accuracy, completeness and fitness for purpose of all such Works and Facilities Information upon which they place reliance; and
- 15.3.2 save to the extent expressly provided in a Project Agreement, they shall not be entitled to make any claim against any of the Participants or any of their respective agents, servants or advisers, whether in damages or for extensions of time or additional payments under the Project Agreement, on the grounds of any misunderstanding or misapprehension in respect of the relevant Works and Facilities Information or on the grounds that incorrect or insufficient information relating thereto or to any Site was given to it by any person whether or not in the employ of the Participants, nor shall they be relieved from any risks or obligations imposed on or undertaken by them under the Project Agreements on any such ground.

16. INDEMNITIES

WEPCo indemnities to Participants

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

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

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

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

Participants' indemnities to WEPCo

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

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

which results in:

- 16.2.1 any claim for, or in respect of, the death and/or personal injury of any employee of, or person engaged by, that Participant or a Participant Party relating to that Participant notwithstanding any act or omission of WEPCo or any WEPCo Party;
- 16.2.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 16.1.1 or Clause 16.2.1), save to the extent caused (or contributed to) by any act or omission of WEPCo or any WEPCo Party;
- 16.2.3 any physical damage to any part of the Facilities or any assets or other property of WEPCo or any WEPCo Party, save to the extent caused (or contributed to) by any act or omission of WEPCo or any WEPCo Party; or
- 16.2.4 any loss of or damage to property or assets of any third party, save to the extent caused (or contributed to) by any act or omission of WEPCo or any WEPCo Party,

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

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

Conduct of claims

16.3 This sub-clause shall apply to the conduct by a party from whom an indemnity is sought under this Agreement, of claims made by a third person against a party having (or claiming to have) the benefit of the indemnity. The party having, or claiming to have, the benefit of the indemnity is referred to as the "**Beneficiary**" and the party giving the indemnity is referred to as the "**Indemnifier**". Accordingly:

- 16.3.1 if the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become, entitled to indemnification under this Agreement, the Beneficiary shall give notice in writing to the Indemnifier as soon as reasonably practicable and in any event within twenty (20) Business Days of receipt of the same;
- 16.3.2 subject to Clauses 16.3.3, 16.3.4 and 16.3.5 below, on the giving of a notice by the Beneficiary pursuant to Clause 16.3.1 above, where it appears that the Beneficiary is or may be entitled to indemnification from the Indemnifier in respect of all (but not part only) of the liability arising out of the claim, the Indemnifier shall (subject to providing the Beneficiary with a secured indemnity to its reasonable satisfaction against all costs and expenses that it may incur by reason of such action) be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier's own expense and take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations. The Beneficiary shall give the Indemnifier all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim;
- 16.3.3 with respect to any claim conducted by the Indemnifier pursuant to Clause 16.3.2 above:
 - (a) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
 - (b) the Indemnifier shall not bring the name of the Beneficiary into disrepute; and
 - (c) the Indemnifier shall not pay or settle such claims without the prior consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;

- 16.3.4 the Beneficiary shall be free to pay or settle any claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if:
- (a) the Indemnifier is not entitled to take conduct of the claim in accordance with Clause 16.3.2 above; or
 - (b) the Indemnifier fails to notify the Beneficiary in writing of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Beneficiary under Clause 16.3.1 above or notifies the Beneficiary in writing that it does not intend to take conduct of the claim; or
 - (c) the Indemnifier fails to comply in any material respect with the provisions of Clause 16.3.3 above;
- 16.3.5 the Beneficiary shall be free at any time to give notice in writing to the Indemnifier that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any claim (or of any incidental negotiations) to which Clause 16.3.2 applies. On receipt of such notice the Indemnifier shall promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and shall provide to the Beneficiary all reasonable cooperation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice in writing pursuant to this paragraph, then the Indemnifier shall be released from any liability under its indemnity under Clause 16.1 or Clause 16.2 (as the case may be) and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to Clause 16.3.2 in respect of such claim;
- 16.3.6 if the Indemnifier pays to the Beneficiary an amount in respect of an indemnity and the Beneficiary subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Beneficiary shall forthwith repay to the Indemnifier whichever is the lesser of:
- (a) an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out of pocket costs and expenses properly incurred by the Beneficiary in recovering the same; and
 - (b) the amount paid to the Beneficiary by the Indemnifier in respect of the claim under the relevant indemnity,
- PROVIDED THAT** there shall be no obligation on the Beneficiary to pursue such recovery and the Indemnifier shall be repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Indemnifier exceeds any loss sustained by the Beneficiary (including for this purpose indirect or consequential losses or claims for loss of profits which are excluded by this Agreement from being recovered from the Indemnifier); and
- 16.3.7 any person taking any of the steps contemplated by Clauses 16.3.1 to 16.3.5 (inclusive) shall comply with the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Agreement.

Mitigation - indemnity claims

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

Taxation

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

Limitations

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

17. INSURANCE

The Insurances

- 17.1 WEPCo shall procure at its own cost that the insurances, details of which are set out in Schedule 9 (*Insurances*), are taken out and are maintained for the term of this Agreement provided that WEPCo shall not be required to maintain such of those insurances as are unavailable within the worldwide insurance market with reputable insurers of good standing (provided always such unavailability is not caused by the actions of WEPCo) or which are offered on terms such that the risk is not generally being insured against in the worldwide insurance market.
- 17.2 Without prejudice to the other provisions of this clause, WEPCo shall, at all relevant times, at its own cost, effect and maintain in full force those insurances which it is required to effect by any applicable Law.

17.3 All Insurances shall:

17.3.1 be placed with insurers who are:

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

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

Subrogation and vitiation

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

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

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

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

Evidence of the Insurances

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

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

Acceptance and compliance

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

Uninsurable risks under Project Agreements

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

18. INTELLECTUAL PROPERTY RIGHTS

Partnering Services Data

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

Maintenance of data³

- 18.2 To the extent that any of the data, materials and documents referred to in this Clause 18 (*Intellectual Property Rights*) are generated by or maintained on a computer or similar system, WEPCo shall:

- 18.2.1 use all reasonable endeavours to procure for the benefit of each Participant, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software to enable each Participant or its nominee to access and otherwise use (subject to the payment by the relevant Participant of the relevant fee, if any) such data for the Approved Purposes. As an alternative, WEPCo may provide such data, materials or documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format; and
- 18.2.2 enter into the NCC's then current multi-licence escrow deposit agreement or standard single licence escrow deposit agreement as appropriate in each case.

³ If any party is to be given access to any of the other party's computer systems, as a matter of good practice and also to clarify potential liability for unauthorised access to those systems under the Computer Misuse Act 1990, the scope of each party's authorisation to access each other's computer systems will need to be defined clearly. The terms of such authorisation will be project specific.

18.3 WEPCo shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Clause 18.2 in accordance with Good Industry Practice. Without prejudice to this obligation, WEPCo shall submit to the Participants for approval its proposals for the back-up and storage in safe custody of such data, materials and documents and any Participant shall be entitled to object if the same is not in accordance with Good Industry Practice. WEPCo shall comply, and shall cause all WEPCo Parties to comply, with all procedures to which the Participants have given their approval. WEPCo may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Participants, who shall be entitled to object on the basis set out above.

Intellectual Property Rights

18.4 WEPCo:

18.4.1 hereby grants to each Participant, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub licences) to use the Intellectual Property Rights which are or become vested in WEPCo; and

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

in both cases, solely for the Approved Purposes.

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

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

Claims

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

19. TRANSFER OF EMPLOYMENT

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

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

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

20. SITE SECURITY AND PERSONNEL ISSUES

20.1 Each Participant shall have the right to refuse admittance to, or order the removal from any premises of that Participant or from the Facilities of any person employed by (or acting on behalf of) WEPCo who such Participant has reasonable grounds for believing is not a fit and proper person to be in such premises or the Facilities.

20.2 Any action taken under Clause 20.1 shall forthwith be confirmed in writing by the relevant Participant to WEPCo and, to avoid doubt, shall not relieve WEPCo of any of its obligations under this Agreement.

Resources and training

20.3 WEPCo shall procure that:

20.3.1 there shall at all times be a sufficient number of staff (including all relevant grades of supervisory staff) engaged in the provision of the Partnering Services with the requisite level of skill and experience. To avoid doubt, this obligation shall include ensuring that there are sufficient staff to cover periods of holiday, sickness, other absence and anticipated and actual peaks in demand for each of the Partnering Services; and

20.3.2 all staff receive such training and supervision as is necessary to ensure the proper performance of this Agreement and compliance with all health and safety rules, procedures and requirements.

20.4 Each Participant agrees to permit and arrange for prospective Transferring Employees who are employees of that Participant, prior to the relevant Transfer Date, to receive training and to make familiarisation visits to any relevant premises of WEPCo or a Partnering Subcontractor (all as reasonably requested by WEPCo and in such manner as to ensure that there is no material adverse effect on the operations of the Participant as a result of the same).

Convictions and disciplinary action

- 20.5 WEPCo (to the extent permitted by Law) shall procure that all potential staff or persons performing any of the Partnering Services who may reasonably be expected in the course of their employment or engagement to have access to children, the elderly or vulnerable adults (each a "**Named Employee**"):
- 20.5.1 (other than Transferring Participant Employees):
 - (a) are questioned concerning their Convictions prior to commencing such employment or engagement; and
 - (b) obtains a check of the most extensive available kind made with the Disclosure and Barring Service.
 - 20.5.2 are questioned during the term of their employment or engagement concerning any Convictions which arise during the term of their employment or engagement.
- 20.6 WEPCo shall procure that (other than Transferring Participant Employees) no person who discloses any Convictions, or who appears on a Barred List following the results of a Disclosure and Barring Service check, is employed without the Participants' Representatives prior written consent (such consent not to be unreasonably withheld or delayed).
- 20.7 Subject always to having the prior written consent of the relevant individual, WEPCo shall procure that the Participants are kept advised at all times of any member of staff who, subsequent to his/her commencement of employment as a member of staff, receives a Conviction or whose previous Convictions become known to WEPCo (or any employee of a Partnering Subcontractor). WEPCo shall procure the removal of such persons who subsequently receive a Conviction (or whose previous Convictions become known to WEPCo) from the relevant facilities either:
- 20.7.1 at the Participant's request (where the information has been provided to the Participant); and
 - 20.7.2 in all cases, where the relevant information has not been provided to the Participant.
- 20.8 Any Participant's Representative (acting reasonably) may instruct WEPCo to procure that appropriate disciplinary action is taken against any employee of WEPCo or any Partnering Subcontractor (in accordance with the terms and conditions of employment of the employee concerned) who misconducts himself or is incompetent or negligent in his duties or who any Participant has reasonable grounds for believing that their presence or conduct on the Facilities or at work is otherwise undesirable. The Participants shall co-operate with any such disciplinary proceedings and shall be advised in writing by WEPCo of the outcome.
- 20.9 WEPCo shall procure that there are set up and maintained, by it and by all Partnering Subcontractors, personnel policies and procedures covering all relevant matters (including discipline, grievance, equal opportunities and health and safety). WEPCo shall procure that the terms and the implementation of such policies and procedures comply with Law and Good Industry Practice and that they

are published in written form and that copies of them (and any revisions and amendments to them) are forthwith issued to the Participants.

Lists and Records

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

20.10.1 details of qualifications; and

20.10.2 details of training undertaken by the employee.

21. TRANSITION/HANDOVER ON EXPIRY AND TERMINATION

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

22. PARTICIPANT DEFAULT

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

22.1.1 one or more Participants:

- (a) committing a material breach of the terms of Clauses 9.1, 9.2 and 9.6, provided that the renewal or extension of a lease of premises currently occupied by a Participant or the taking of a short term lease by a Participant to cover the short term needs of that Participant pending completion of Required Facilities pursuant to a Project Agreement shall not comprise a material breach by that Participant of the provisions of Clauses 9.1, 9.2 and/or 9.6; and/or
- (b) failing to perform its obligations under Clause 14.11 (to the extent that such breach is not an event or circumstance falling under the terms of Clause 22.1.2) where such breach of Clause 14.11 has a material adverse effect on WEPCo or any Project Service Provider;

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

22.1.3 an expropriation, sequestration, nationalisation or requisition of any Facilities or a material part of the Facilities or a material part of the assets and/or shares of WEPCo or its Holding Company or a Project Service Provider by a Participant or any other Relevant Authority;

22.1.4 non-payment by any Participant(s) of amounts due under this Agreement (which are not in dispute) exceeding £100,000 (index linked) sixty (60) Business Days after a written

notice is served on all the relevant Participant(s), copied to the other Participants stating the amount due and the date when such amount becomes due,

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

22.2 On the occurrence of a Participant Event of Default or within a reasonable time after WEPCo becomes aware of the same, and while the same is still subsisting, WEPCo may, at its option:

22.2.1 suspend performance by it of all or part of its obligations under this Agreement to the Participant(s) responsible for the Participant Event of Default until such time as such Participant(s) have demonstrated to WEPCo's reasonable satisfaction that they will perform and are capable of performing their obligations under this Agreement; or

22.2.2 serve written notice on Participant(s) responsible for the Participant Event of Default (copied to the other Participants) of the occurrence and (specifying details) of such Participant Event of Default. If the relevant matter or circumstance is capable of remedy (and, for the avoidance of doubt, a delay referred to in Clause 22.1.2 and breach of the provisions of Clause 14.11 shall each be deemed to be capable of remedy) and has not been remedied by the responsible Participant(s) (or otherwise) within thirty (30) Business Days of such notice, or, if it is not capable of remedy, with immediate effect, WEPCo may:

(a) serve a written notice on each Participant responsible for the Participant Event of Default terminating this Agreement with immediate effect insofar as it relates to such Participant; or

(b) serve a written notice on each Participant responsible for the Participant Event of Default (copied to the other Participants) specifying the effect such Participant Event of Default has had (and continues to have) on WEPCo (a "**Participant Default Notice**").

22.3 WEPCo shall not exercise or purport to exercise any right to terminate this Agreement except as expressly set out herein.

22.4 Where WEPCo has served a Participant Default Notice and/or terminates this Agreement in accordance with Clause 22.2 in respect of a Participant as a result of a Participant Event of Default, the Participant(s) responsible for the Participant Event of Default shall pay compensation to WEPCo calculated in accordance with Section 1 (*Participant Event of Default Compensation Sum*) of Schedule 14 (*Compensation on Participant Event of Default and Termination*).

22.5 Where, as a result of termination in accordance with Clause 22.2 in respect of a Participant Event of Default, WEPCo has terminated this Agreement in its entirety, the Participant(s) responsible for the Participant Event of Default shall, in addition to liability under Section 1 (*Participant Event of Default Compensation Sum*) of Schedule 14 (*Compensation on Participant Event of Default and Termination*), pay

compensation to WEPCo calculated in accordance with Section 2 (*Participant Event of Default Termination Sum*) of Schedule 14 (*Compensation on Participant Event of Default and Termination*).

22.6 Where WEPCo has validly served a Participant Default Notice more than once in any twelve (12) month period in respect of the same Participant, it shall not be required to provide either the Project Development Partnering Services or any Strategic Support Partnering Services to that Participant under this Agreement except on terms which provide, inter alia, for the payment by such Participant of all Partnering Services Costs (other than those which are already being paid via Project Agreements) monthly in arrears.

23. WEPCO EVENTS OF DEFAULT

WEPCo Events of Default

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

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

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

23.1.2 the occurrence of a Significant Performance Failure;

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

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

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

23.1.5 WEPCo commits a material breach of its obligations under this Agreement (other than as a consequence of a breach by one or more of the Participants of their obligations under this Agreement) which results in the criminal prosecution and conviction of WEPCo or any WEPCo Party under the Health and Safety Regime (an "**H&S Conviction**") provided

that an H&S Conviction of a WEPCo Party shall not constitute a WEPCo Event of Default if either:

- (a) within ninety (90) Business Days from the date of the H&S Conviction (or, in the case of H&S Conviction which is subject to an appeal or any further judicial process and where such appeal or further judicial process does not result in the successful appeal against or quashing of the H&S Conviction, within sixty (60) Business Days of the date of the decision of such appeal or judicial process), the involvement in this Agreement of each relevant WEPCo Party (which in the case of an individual director, officer or employee shall be deemed (if it is reasonable to so deem) to include the WEPCo Party of which that person is a director, officer or employee) is terminated and a replacement is appointed by WEPCo in accordance with Clause 28.2 below; or
- (b) within forty (40) Business Days of the H&S Conviction WEPCo puts forward a method statement which specifies in sufficient detail the changes to working practices that will be implemented to prevent any recurrence of the events leading up to the H&S Conviction and that method statement is approved by the Participants, such approval not to be unreasonably withheld or delayed;

- 23.1.6 WEPCo failing to comply with the provisions of Clause 28 (*Assignment and sub-contracting*);
- 23.1.7 WEPCo failing to pay any sum or sums due to the Participants (or any of them) under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) £10,000 (index linked) and such failure continues for sixty (60) Business Days from receipt by WEPCo of a written notice of non-payment from the Participants;
- 23.1.8 an Insolvency Event occurs in relation to WEPCo;
- 23.1.9 an Insolvency Event (or equivalent event in terms of the relevant Project Agreement) occurs in relation to a Project Service Provider other than WEPCo;
- 23.1.10 any Project Service Provider fails (after having received a valid notice from its relevant Project Agreement Counterparty) to terminate any Supply Chain Agreement to which it is a party and to procure that a replacement Supply Chain Member is appointed in accordance with the provisions of the relevant Project Agreement;
- 23.1.11 WEPCo has, at the date of this Agreement, been in one of the situations referred to in regulation 57(1) of the Public Contracts Regulations 2015 (S.I. 2015/102), including as a result of the application of regulation 57(2) of the Public Contract Regulations 2015 (S.I 2015/102) and should therefore have been excluded from the procurement proceedings;
- 23.1.12 In the circumstances described in Clauses 26.5.5(a), 26.6 and 26.7; and
- 23.1.13 a Prohibited Act, giving rise to a right to terminate pursuant to Clause 25 or the relevant Project Agreement.

23.2 Each Party shall notify the others in writing of the occurrence, and details, of any WEPCo Event of Default promptly on such Party becoming aware of its occurrence, and WEPCo shall notify the Participants in writing of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to a WEPCo Event of Default promptly on WEPCo becoming aware of such event or circumstance.

23.3 On the occurrence of a WEPCo Event of Default, without prejudice to the rights of the Participants (acting through Welsh Government) pursuant to Clause 23.4 to 23.13, each Participant may elect to suspend the exclusivity granted to WEPCo by it pursuant to Clause 9.1 and/or Clause 9.2 by serving written notice of such suspension on WEPCo (which shall include, for the avoidance of doubt, the suspension of exclusivity in respect of any of the Participant's batched New Projects that have not achieved Stage 2 Approval, pursuant to paragraph 1.3.1(a) of Section 1 of Schedule 3 (*Partnering Services*)). Without prejudice to the rights of each of the Participants under Clause 9.7, any such suspension shall expire:

23.3.1 following written notice to that effect being served on WEPCo by the Participant in question, copied to the SPB; and

23.3.2 automatically where the WEPCo Event of Default has been remedied or where Clause 23.12.2(b) applies.

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

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

(a) exercise their rights under Clause 23.6; or

(b) serve written notice of default on WEPCo requiring WEPCo at WEPCo's option either:

(i) to remedy the WEPCo Event of Default referred to in such notice of default (if the same is continuing) within twenty (20) Business Days of such notice of default; or

(ii) to put forward within twenty (20) Business Days of such notice of default a programme to the reasonable satisfaction of the Participants (acting through Welsh Government) (set out, if appropriate, in stages) for remedying the WEPCo Event of Default (a "**Remediation Programme**") or in the case of a Significant Performance Failure, to satisfy the Participants that the events or circumstances that gave rise to the Significant Performance Failure will not recur or has/have otherwise been addressed to the Participants' satisfaction (an "**Improvement Programme**"). In either case, such programme may include the PSDP proposing the replacement of a shareholder who holds shares directly or indirectly in the PSDP pursuant to Clause 9.8 of the WEPCo Shareholders Agreement.

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

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

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

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

If WEPCo fails:

- (1) to remedy the WEPCo Event of Default in accordance with Clause 23.4.1(b)(i) and does not put forward a Remediation Programme or an Improvement Programme (as the case may be) in accordance with Clause 23.4.1(b)(ii), in either case within twenty (20) Business Days of the notice referred to in Clause 23.4.1(b); or
- (2) (in the case of a Remediation Programme) to remedy the WEPCo Event of Default within the agreed time period(s) specified in the Remediation Programme; or
- (3) (in the case of an Improvement Programme) to implement the material steps identified in the Improvement Programme to the reasonable satisfaction of the Participants within the relevant time period(s) specified in the Improvement Programme so as to satisfy the Participants (in their absolute discretion) that the events or circumstances that gave rise to the Significant Performance Failure will not recur or has/have otherwise been addressed within the timescales as agreed in the Improvement Programme,

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

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

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

- 23.5 Where WEPCo puts forward a Remediation Programme or an Improvement Programme in accordance with Clause 23.4.1(b)(ii), the Participants shall have twenty (20) Business Days from receipt of the same within which to notify WEPCo in writing (acting reasonably) that they do not accept the programme, failing which the Participants shall be deemed to have accepted the programme. Where the Participants notify WEPCo that they do not accept the programme, the Participants may elect to exercise their rights under Clause 23.6.
- 23.6 Where the Participants are entitled to exercise their rights under this Clause 23.6, the Participants may, in their absolute discretion (acting through Welsh Government):
- 23.6.1 require WEPCo by written notice to terminate a Supply Chain Agreement to which it is a party or, as the case may be, procure the termination of any Supply Chain Agreement to which any Project Service Provider or Partnering Subcontractor is a party as employer which has caused or materially contributed to the occurrence of the WEPCo Event of Default and to procure that a replacement Supply Chain Member is appointed in accordance with the provisions of this Agreement or the relevant Project Agreement as the case may be; or
 - 23.6.2 where WEPCo itself has been providing the Services in respect of which the WEPCo Event of Default occurred, require WEPCo to cease providing the relevant Services and procure that a replacement Supply Chain Member is appointed in accordance with Clause 28 (*Assignment and sub-contracting*) to provide such Services within sixty (60) Business Days.
- 23.7 If the Participants exercise their rights under Clause 23.6 in relation to a WEPCo Event of Default affecting provision of the Partnering Services, WEPCo shall forthwith put forward proposals for the interim management or provision of the relevant Partnering Services until such time as an alternative Supply Chain Member can be engaged by WEPCo. If WEPCo fails to do so (or its proposals if implemented are not reasonably likely to give adequate provision of the relevant Partnering Services) then without prejudice to the other rights of the Participants in this Clause 23 (*WEPCo Events of Default*), the Participants (or any of them) may perform, or procure a third party to perform, such Partnering Services themselves and WEPCo shall indemnify each of the Participants in respect of their costs in so doing.
- 23.8 If WEPCo fails to terminate or procure the termination of the relevant Supply Chain Agreement to which it or any Project Service Provider or Partnering Subcontractor is a party as employer and to procure that a replacement Supply Chain Member is appointed in accordance with the provisions of Clause 23.6, the Participants shall be entitled at their option to exercise their rights in accordance with the provisions of Clause 23.10.
- 23.9 Where a Project Service Provider Default has occurred the following shall apply:
- 23.9.1 where the Project Service Provider Default is not capable of remedy, the Participants (acting through Welsh Government) shall be entitled to exercise the rights set out in Clause 23.10; and
 - 23.9.2 where the Project Service Provider Default is capable of remedy, the Participants (acting through Welsh Government) may serve written notice of default on WEPCo requiring WEPCo to put forward within twenty (20) Business Days of such notice of default a reasonable programme (set out, if appropriate, in stages) for remedying the Project

Service Provider Default and ensuring that such Project Service Provider Default does not recur (the "**PSP Rectification Programme**"), in which case:

- (a) where WEPCo fails to put forward such PSP Rectification Programme in the twenty (20) Business Day period, the Participants (acting through Welsh Government) shall be entitled to exercise the rights set out in Clause 23.10; and
- (b) where WEPCo puts forward a PSP Rectification Programme within the twenty (20) Business Day period:
 - (i) the PSP Rectification Programme shall specify in reasonable detail the manner in, and the latest date by, which the Project Service Provider Default is proposed to be remedied (where such default is capable of remedy) and the procedures and practices which WEPCo and/or the Project Service Providers propose to put in place to ensure that such Project Service Provider Default does not recur;
 - (ii) the Participants shall consider the PSP Rectification Programme and liaise with WEPCo to discuss its contents and, in particular, whether the Participants consider it to be sufficient that, if properly implemented by WEPCo and/or the Project Service Providers it would prevent the Project Service Provider Default from recurring. The Participants shall, in considering whether or not to approve a PSP Rectification Programme under consideration, be entitled to take into account the performance of WEPCo and/or the relevant Project Service Provider in implementing the provisions of any previous PSP Rectification Programme agreed in relation to a breach or breaches substantially similar to the breach or breaches which have given rise to the PSP Rectification Programme then under consideration;
 - (iii) the Participants and WEPCo shall use their respective best endeavours to ensure that such liaison as is appropriate takes place so as to ensure that the Participants are in a position to determine whether they are satisfied with the PSP Rectification Programme within twenty (20) Business Days after receipt by the Participants of the PSP Rectification Programme; and
 - (iv) where the Participants (acting reasonably) are not satisfied that the PSP Rectification Programme meets the requirements set out in Clause 23.9.2(b)(i) or agreement cannot be reached between the Participants and WEPCo as to the terms of a PSP Rectification Programme or WEPCo fails to comply with the agreed PSP Rectification Programme, the Participants (acting through Welsh Government) shall be entitled to exercise the rights set out in Clause 23.10.

23.10 Subject to Clause 23.12, where the Participants are entitled to exercise their rights under this Clause 23.10, the Participants may (acting through Welsh Government):

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

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

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

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

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

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

- 23.12.1 the Participants (acting through Welsh Government) shall be entitled to terminate this Agreement with immediate effect by notice in writing to WEPCo (a "**Default Termination Notice**");

23.12.2 if no Default Termination Notice is given by the Participants pursuant to Clause 23.12.1 within twenty (20) Business Days of the deemed occurrence of the SPA Material Default then:

- (a) the provisions of Clauses 9.3 to 9.9 of the WEP Co Shareholders Agreement shall apply; and
- (b) if an SPA Material Default Notice is served at a time when WEPCo's exclusivity has been suspended pursuant to Clauses 9.7, 23.3 or 23.10.1 or where the SPA Material Default Notice is deemed to have been given pursuant to Clause 23.10, then a Reinstatement Notice (and/or notice revoking such suspension in the case of Clauses 9.7 and 23.3) shall be deemed to have been given immediately on completion of the sale (at the end of the procedure in Clauses 9.3 to 9.9 of the WEPCo Shareholders Agreement and the related provisions in the Articles of Association of WEPCo), of all the shares held by the PSDP in WEPCo to WGCo and/or a third party purchaser.

Participants' costs

23.13 WEPCo shall reimburse each Participant for all reasonable costs incurred by that Participant as a result of WEPCo's breach of any of its obligations under this Agreement or their exercise of their rights under this Agreement in respect of such breach (including, without limitation, any relevant increased administrative expenses and the reasonable and proper costs of the Participant incurred under this Agreement and the WEPCo Shareholders Agreement resulting from the occurrence of a termination of this Agreement pursuant to this Clause 23 (the "**Participants' Costs**")).

24. FORCE MAJEURE

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

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

25. CORRUPT GIFTS AND FRAUDULENT PAYMENTS

Warranty

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

Remedies

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

25.2.1 if a Prohibited Act is committed by WEPCo or by an employee not acting independently of WEPCo then each of the Participants may terminate this Agreement with immediate

effect with respect to that Participant by giving written notice to WEPCo, and this Agreement will terminate with respect to that Participant;

- 25.2.2 if the Prohibited Act is committed by an employee of WEPCo acting independently of WEPCo, then each of the Participants may give written notice to WEPCo of termination of this Agreement with respect to that Participant and this Agreement will so terminate, unless within twenty (20) Business Days of receipt of such notice WEPCo terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Services by another person;
- 25.2.3 if the Prohibited Act is committed by a Contractor and/or Service Provider or by an employee of a Contractor and/or Service Provider not acting independently of that Contractor and/or Service Provider then each of the Participants may give written notice to WEPCo of termination of this Agreement with respect to that Participant and this Agreement will so terminate, unless within twenty (20) Business Days of receipt of such notice WEPCo terminates the relevant Supply Chain Agreement and procures the performance of the relevant part of the Services by another person, where relevant, in accordance with Clause 28 (*Assignment and sub-contracting*);
- 25.2.4 if the Prohibited Act is committed by an employee of a Contractor and/or Service Provider acting independently of that Contractor and/or Service Provider then each of the Participants may give written notice to WEPCo of termination of this Agreement with respect to that Participant and this Agreement will so terminate, unless within twenty (20) Business Days of receipt of such notice WEPCo procures the removal of the employee from any and all WEPCo Operations and (if necessary) procures the performance of the relevant part of the WEPCo Operations by another person;
- 25.2.5 if the Prohibited Act is committed by any other person involved in the provision of WEPCo Operations not specified in Clauses 25.2.1 to 25.2.4 above then each of the Participants may give written notice to WEPCo of termination of this Agreement with respect to that Participant and this Agreement will so terminate unless within twenty (20) Business Days WEPCo procures the removal of such person from any and all WEPCo Operations and the termination of the appointment of their employer (where such person is not employed by WEPCo) and (if necessary) procures the performance of the relevant part of the Services by another person; and
- 25.2.6 any notice of termination under this sub-clause shall specify:
- (a) the nature of the Prohibited Act;
 - (b) the identity of the party who the Participant(s) believe has committed the Prohibited Act; and
 - (c) the date on which this Agreement will terminate in accordance with the applicable provisions of this sub-clause.

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

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

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

Permitted Payments

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

Notification

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

Interim Management

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

26. TAX COMPLIANCE

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

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

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

26.2.2 provide to the Participants:

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

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

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

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

26.5 If:

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

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

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

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

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

then the Participants shall be entitled to give to WEPCo:

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

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

26.6 Subject to Clause 26.7, where the Occasion of Tax Non-Compliance applies to a Non-Compliant Shareholder, the Participants may by written notice (a "**Shareholder Tax Non-compliance Notice**") require

that the Non-Compliant Shareholder transfers all its shares and Shareholder loan notes in WEPCo to a person who is not an Unsuitable Person within one hundred and eighty (180) days commencing on the date the Shareholder Tax Non-compliance Notice is served. If the Non-Compliant Shareholder does not effect such transfer of shares and Shareholder loan notes in WEPCo to a person who is not an Unsuitable Person within such one hundred and eighty (180) day period (or such longer period as may be agreed by the Participants in its absolute discretion) then the Participants will be entitled to give a notice to WEPCo under Clause 23.1.12.

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

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

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

28. **ASSIGNMENT AND SUB-CONTRACTING**

Assignment and sub-contracting

28.1 This Agreement and any other agreements to which WEPCo and at least one of the Participants are a party shall be binding on, and shall enure to the benefit of, WEPCo and the relevant Participants and their respective successors and permitted transferees and assignees. In the case of the Participants, their successors shall include any person to whom the Welsh Ministers or other Relevant Authority, in exercising their statutory powers to transfer property, rights and liabilities of any Participant upon such Participant ceasing to exist, transfers the property, rights and obligations of the Participants under this Agreement and any other agreements to which WEPCo and that Participant are a party.

28.2 Subject to Clause 28.3, WEPCo shall not, without the prior written consent of the Participants or, in the case of specific subcontracts for Strategic Support Partnering Services to be provided to individual Participants or Project Development Partnering Services in respect of identified New Projects, the written consent of the relevant Participant (such consent in the case of any proposed sub-contracting not to be unreasonably delayed and may only be withheld in circumstances where the obligations to be subcontracted are material obligations and the proposed sub-contractor is an Unsuitable Person), assign, transfer, subcontract or otherwise dispose of any interest in this Agreement and any other contract entered into by WEPCo for the purposes of performing its obligations under this Agreement.

28.3 The provisions of Clause 28.2 do not apply to the grant or exercise of any security rights, in a form approved by the Participants prior to its grant (such approval not to be unreasonably withheld or delayed),

for any loan made to WEPCo under any Funding Agreement. The Participants may make any approval conditional upon the execution by such assignee of a Funders' Direct Agreement in relation to the exercise of its rights.

28.4 A Participant shall not assign or otherwise dispose of the benefit of the whole or part of this Agreement to any person, save:

- 28.4.1 to the Welsh Ministers or a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975, or any other person or body replacing any of the foregoing (or to whom the Welsh Ministers or the Government exercising their statutory rights would be entitled to transfer such benefits); or
- 28.4.2 to any department, office, instrumentality or agency of the Welsh Ministers or Government or any Local Authority which (in any such case) has the legal capacity and sufficient financial resources to perform the obligations of the Participant hereunder and any other agreement (including a Project Agreement) to which such assignment, transfer or disposal relates;
- 28.4.3 in the case of any Further Education Corporation or Designated Institution (as defined in the Further and Higher Education Act 1992) any other Further Education Corporation or Designated Institution who has the legal capacity and sufficient financial resources to perform the obligations of the Participant hereunder and/or any other agreement (including a Project Agreement) to which such assignment, transfer or disposal relates and/or whose obligations are validly and enforceably guaranteed by the Welsh Ministers or Government; and/or
- 28.4.4 to any person who has the legal capacity and sufficient financial resources to perform the obligations of the Participant hereunder and whose obligations are validly and enforceably guaranteed by the Participant, a Local Authority, or the Welsh Ministers or Government or by any department, office, instrumentality or agency of the Government,

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

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

- 28.5.1 which requires payment to be made to the Partnering Subcontractor within a specified period not exceeding thirty (30) days from receipt of a valid application for payment as

defined by the contract requirements and provides that, for the purpose of payment alone, where the relevant Participant responsible for payment for the Partnering Services has made payment to WEPCo and the Partnering Subcontractor's application for payment includes Partnering Services in relation to which payment has been made by the relevant Participant then, to the extent that it relates to such Partnering Services, the invoice shall be treated as valid and payment shall be made to the sub-contractor without deduction (but without prejudice to any right to deduct or set off validly arising under the terms of the contract with the Partnering Subcontractor); and

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

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

29. **PERFORMANCE OF SUBCONTRACTORS**

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

30. **CONFIDENTIALITY**

Confidential Information

30.1 The Parties agree that the provisions of this Agreement shall, subject to Clause 30.2 below, not be treated as Confidential Information and may be disclosed without restriction.

30.2 Clause 30.1 above shall not apply to provisions of this Agreement designated as Commercially Sensitive Information and listed in Section 1 (*Commercially Sensitive Information*) of Schedule 19 (*Confidential Information*) which shall, subject to Clause 30.4, be kept confidential for the periods specified in that Section.

30.3 The Parties shall keep confidential all Confidential Information received by one Party from another Party relating to or in connection with this Agreement and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

Permitted Disclosure

30.4 Clauses 30.1 and 30.3 shall not apply to:

30.4.1 any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under this Agreement for the performance of those obligations;

- 30.4.2 any matter which a party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this Clause;
- 30.4.3 any disclosure to enable a determination to be made in accordance with Schedule 22(*Dispute Resolution Procedure*) or in connection with a dispute between WEPCo and any of its subcontractors;
- 30.4.4 any disclosure which is required pursuant to any Law or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or, if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- 30.4.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 30.4.6 any provision of information to the Parties' own professional advisers or insurance advisers or insurers or to any Funders or any Funders' professional advisers or insurance advisers or, where it is proposed that a persons should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to WEPCo to enable it to carry out its obligations under this Agreement, or may wish to acquire shares in WEPCo in accordance with provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- 30.4.7 any disclosure by a Participant of information as may be reasonably required for the purpose of conducting a due diligence exercise, to any person in connection with the operation of Schedule 6 (*New Project Pricing Report*);
- 30.4.8 any registration or recording of the Consents and property registration required;
- 30.4.9 any disclosure of information by a Participant to the Welsh Government or any department, office or agency of the Welsh Government or their respective advisers or to any person engaged in providing services to a Participant for any purpose related to or ancillary to this Agreement;
- 30.4.10 any disclosure for the purpose of:
 - (a) the examination and certification of a Participant's or WEPCo's accounts;
 - (b) any examination pursuant to section 6(1) of the National Audit Act 1983 or study pursuant to section 145A Government of Wales Act 1998 of the economy, efficiency and effectiveness with which a Participant has used its resources;
 - (c) complying with a proper request from a Party's insurance adviser, or insurer on placing or renewing any insurance;
 - (d) (without prejudice to the generality of Clause 30.4.4 above) compliance with the FOIA and/or the Environmental Information Regulations; or

(e) [compliance with the Local Government Wales Measure 2009]; or

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

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

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

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

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

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

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

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

Announcements

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

Departmental Disclosure

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

31. **FREEDOM OF INFORMATION**

- 31.1 WEPCo acknowledges that a Participant is subject to the requirements of the FOIA and the Environmental Information Regulations and shall assist and cooperate with a Participant (at WEPCo's expense) to enable the Participant to comply with any Information disclosure requirements.
- 31.2 In the event that a Request for Information is received by WEPCo, WEPCo will transfer the Request for Information to the Participant as soon as practicable after receipt and in any event within two (2) Business Days of receiving the request.
- 31.3 In the event that a Request for Information is received by a Participant in relation to Information that WEPCo is holding on its behalf and which the Participant does not hold itself the Participant shall refer to WEPCo such Request for Information as soon as practicable and in any event within five (5) Business Days of receiving such Request for Information and WEPCo shall:
- 31.3.1 provide the Participant with a copy of all Information in its possession or power in the form that the Participant requires within five (5) Business Days (or such other period as the Participant may specify) of the Participant requesting that Information; and
 - 31.3.2 provide all necessary assistance as reasonably requested by the Participant to enable the Participant to respond to the Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.
- 31.4 Following notification under Clause 31.3, and up until such time as WEPCo has provided the Participant with all the Information specified in Clause 31.3 WEPCo may make representations to the Participant as to whether or not or on what basis Information requested should be disclosed, provided always that the Participant shall be responsible for determining at its absolute discretion:
- 31.4.1 whether Information is exempt from disclosure in accordance with the provisions of the FOIA or the Environmental Information Regulations;
 - 31.4.2 whether Information is to be disclosed in response to a Request for Information, and
- in no event shall WEPCo respond directly to a Request for Information unless expressly authorised to do so by the Participant.
- 31.5 WEPCo shall ensure that all Information produced in the course of this Agreement or relating to this Agreement is retained for disclosure for as long as is reasonably necessary for the purposes of this Agreement and shall permit the Participant to inspect such records as requested from time to time.
- 31.6 WEPCo acknowledges that any lists or schedules provided by it outlining Commercially Sensitive Information are of indicative value only and that the Participant may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of the FOIA and the Environmental Information Regulations.
- 31.7 WEPCo acknowledges that (notwithstanding the provisions of Clause 30 (*Confidentiality*)) a Participant may, acting in accordance with the Secretary of State's Code of Practice on the Discharge of Functions of Public Authorities under Part 1 of the Freedom of Information Act 2000 (the "**FOIA Code**")

and/or having full regard to any guidance or briefings issued by the Information Commissioner or the Welsh Government, be obliged under the FOIA, or the Environmental Information Regulations to disclose Information concerning WEPCo, the Partnering Services or any Project:

31.7.1 in certain circumstances without consulting with WEPCo; or

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

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

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

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

32. CHANGE IN PARTIES TO THE PARTNERING AGREEMENT

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

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

33. DISPUTE RESOLUTION

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

34. ORDER OF PRECEDENCE OF DOCUMENTS

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

34.1.1 this Agreement; followed by

34.1.2 Project Agreements; followed by

34.1.3 Shareholders Agreements; followed by

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

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

35. **NO RECOURSE TO PUBLIC FUNDS**

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

- 35.1.1 as otherwise expressly provided for elsewhere in this Agreement or the Shareholders Agreements; or
- 35.1.2 with the prior written consent of any Affected Participant;
- 35.1.3 in relation to any New Project, in terms of the approvals obtained pursuant to Schedule 5 (*Approval Process for New Projects*) (for Qualifying Projects) or as otherwise agreed between WEPCo and the relevant Project Agreement Counterparty (for all other Projects).

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

36. **RECORDS AND OPEN BOOK ACCOUNTING**

Maintenance and provision of records

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

Audit and review

36.2 WEPCo shall ensure that:

- 36.2.1 all documents kept pursuant to Clause 36.1 shall be kept in good order and shall be available at all reasonable times for inspection by the Participants, the Participants' Representatives and any third party identified by the Participants, including any Governmental audit organisation, and WEPCo shall make available (or, as the case may

be, procure the availability of) such items of clarification or substantiation as may be required by any of the Participants in relation thereto including such oral or written explanations as may be considered necessary by any of the Participants (acting reasonably); and

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

Duration of Retention of Records

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

Support to the Participants

36.4 WEPCo shall maintain such contemporaneous records and other documentation as shall be required by any of the Participants to support the Participants in any criminal or civil proceedings by or against the Participants. WEPCo shall ensure that all such records and other documentation are complete and accurate and shall provide all reasonable assistance as may be required by any of the Participants to support any such criminal or civil proceedings. The provisions of this Clause 36.4 shall not apply to proceedings initiated by or against WEPCo under Schedule 22 (*Dispute Resolution Procedure*) or Clause 51.2.

36.5 For the purposes of:

36.5.1 the audit, examination and certification of the Participants' accounts;

36.5.2 any examination or study pursuant to the Public Audit (Wales) Act 2004 of the economy, efficiency and effectiveness with which the Participant has used its resources; or

36.5.3 [an assessment under the Local Government Wales Measure 2009],

the Auditor General for Wales, the Public Accounts Committee of Wales and the Wales Audit Office may examine such documents as they may reasonably require which are owned, held or otherwise within the control of WEPCo (and WEPCo shall procure that any person acting on its behalf who has such documents and/or other information shall also provide access) and may require WEPCo to produce such oral or written explanation as he considers necessary.

36.6 WEPCo shall provide and shall procure that the Supply Chain Members shall provide such information as any of the Participants may reasonably require from time to time to enable them to meet their obligations to provide reports and returns pursuant to regulations, directions or guidance applicable to Participants (in each case as amended, replaced or consolidated from time to time) or as required by

external agencies including, without limitation, reports and returns regarding the physical condition of buildings occupied by the Participants, health and safety, under the Regulatory Reform (Fire Safety) Order 2005, relating to environmental health.

37. PERSONAL DATA

37.1 In this Clause 37, the terms "**Controller**", "**Data Subject**", "**Personal Data Breach**", "**Process**", "**Processor**" and "**Special Categories of Personal Data**" shall have the meanings given to them by the Data Protection Laws. "**Data Loss Event**" shall mean any event that results, or may result, in unauthorised access to Personal Data held under this Agreement, and/or actual or potential loss and/or destruction of Personal Data in breach of this Agreement, including any Personal Data Breach.

37.2 WEPCo undertakes to each of the Participants that it shall comply at all times with its obligations as a separate Controller under the Data Protection Laws. In particular (but without prejudice to the generality of the foregoing) WEPCo:

- 37.2.1 warrants that it has, or will have at all material times, (and shall use best endeavours to procure that all Supply Chain Members and their agents and sub-contractors of any tier have or will have at all material times) Protective Measures in place to protect against unauthorised or unlawful Processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data held or Processed by it and that it has taken, or will take at all material times, all reasonable steps to ensure the reliability of any of its staff which will have access to Personal Data Processed as part of the WEPCo Operations;
- 37.2.2 undertakes that it will only obtain, hold, process, use, store and disclose Personal Data as is necessary (and only for so long as is necessary) to perform its obligations under and in connection with this Agreement and that such data will be held, processed, used, stored and disclosed in accordance with the Data Protection Laws and any other applicable Law;
- 37.2.3 notify the relevant Participant(s) without undue delay upon becoming aware of any Data Loss Event in respect of the Personal Data;
- 37.2.4 co-operate with the relevant Participant(s), to the extent reasonably requested, in relation to any notifications to the Information Commissioner or to Data Subjects which any Party is required to make following a Personal Data Breach;
- 37.2.5 co-operate with the relevant Participant(s), to the extent reasonably requested in relation to:
 - (a) a request to a Participant from a Data Subject to exercise any right under the Data Protection Laws;
 - (b) any other communication from a Data Subject to a Participant concerning the Processing of their Personal Data; and
 - (c) any communication from the Information Commissioner concerning the Processing of Personal Data, or compliance with the Data Protection Laws.

- 37.2.6 undertakes that it will allow each of the Participants access to any relevant premises on reasonable written notice to inspect its procedures described at Clause 36.2.1 above; and
- 37.2.7 pay an annual fee to the Information Commissioner in accordance with the Data Protection (Charges and Information) Regulations 2018 (unless exempt from the requirement to do so); and
- 37.2.8 undertakes that it will indemnify and keep indemnified each of the Participants against all losses, claims, compensation awards, damages, liabilities, costs and expense (including without limitation, reasonable legal investigatory and consultancy fees and expenses) incurred by them which arises from:
- (a) any breach of this Clause 37 (*Personal Data*) by WEPCo, any WEPCo Party or the Supply Chain Members or their agents and subcontractors of any tier; and/or
 - (b) any act or omission of WEPCo, any WEPCo Party or the Supply Chain Members or their agents and subcontractors of any tier which results in a breach by a Participant of Clause 37.

38. LIABILITY OF THE PARTICIPANTS

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

39. PROHIBITED ACTIVITIES

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

40. NOTICES

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

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

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

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

40.3 Notices given:

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

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

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

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

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

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

41. **AMENDMENTS**

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

42. **WAIVER**

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

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

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

43. **NO AGENCY**

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

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

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

44. **ENTIRE AGREEMENT**

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

44.2 Each of the Parties acknowledge that:

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

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

45. **SEVERABILITY**

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

46. **NO DOUBLE RECOVERY**

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

47. **COSTS AND EXPENSES**

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

48. **THIRD PARTY RIGHTS**

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

49. **MITIGATION**

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

50. **FURTHER ASSURANCE**

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

51. **GOVERNING LAW AND JURISDICTION**

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

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

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

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

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

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

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

52.2 Nothing in Clause 52.1 shall:

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

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

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

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

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

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

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

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

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

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

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

SCHEDULES

SCHEDULE 1 - DEFINITIONS, INTERPRETATION AND CONSTRUCTION

1. DEFINITIONS

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

"21st Century Schools and Colleges (Band B) Programme"	means phase 2 of the 21st Century Schools and Colleges strategic investment programme, led by Welsh Government in collaboration with the Welsh Local Government Association, local authorities, colleges and dioceses;
"21st Century Schools and Colleges (Band B) MIM Programme"	means projects comprised within the 21st Century Schools and Colleges (Band B) Programme, where such projects have been expressly approved for funding through MIM, as identified in the draft programme attached at Part 1 of Schedule 8 (<i>Draft 21st Century Schools and Colleges (Band B) MIM Programme</i>) and as may be adjusted from time to time to reflect revised funding allocations under the 21st Century Schools and Colleges (Band B) Programme;
"ACBR Enhancements"	has the meaning given in the Template Project Agreement;
"Additional Amount"	has the meaning given to it in Clause 16.5;
["Additional Benefits"	means the community benefits listed in Table 3 of the Appendix to Section 3 of Schedule 3 (<i>Key Performance Indicators</i>);]
"Additional Community Benefit Project Co Proposals"	has the meaning given in the Template Project Agreement;
"Administering Authority"	means the administering authority for each relevant LGPS Fund and the Fund which they administer;
"Admission Body"	means a transferee admission body for the purposes of regulations 5 of the LGPS Regulations;
"Affect"	in relation to a Participant, a decision of the SPB affects that Participant if: (a) it requires expenditure to be incurred by that Participant; (b) it requires that Participant to incur an actual or

contingent liability;

- (c) it has an adverse impact upon the manner in which that Participant discharges a statutory function,

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

"Affected Authority"	means a Participant in relation to whose land and/or facilities Planning Permission and/or a Planning Agreement and/or an Infrastructure Agreement is required to enable Project Services to proceed on or at such land and/or facilities;
"Affordable"	means within the capital funding envelope and/or revenue resource parameters, as appropriate determined by the Relevant Participant(s) as available for a proposed New Project;
"Affordability Cap"	has the meaning given to it in paragraph 3.1 of Schedule 5 (<i>Approval Process for New Projects</i>);
"Agreement"	means this agreement;
"Annual Review"	has the meaning given to it in Clause 14.18;
"Approval Criteria"	has the meaning given to it in paragraph 5.5 of Schedule 5 (<i>Approval Process for New Projects</i>);
"Approved"	means any project or group of potential projects referred to in a Strategic Outline Programme that has, in either case, fulfilled the Strategic Outline Case Requirements and has been requested by a Participant pursuant to Clause 9.3.1, after the Initial Period;
"Approved Project"	means a New Project which is a Qualifying Project and which has Stage 2 Approval;
"Approved Purposes"	means such purposes as any Participant may consider appropriate from time to time, including: (a) each of the Participants carrying out their duties under this Agreement and/or any statutory functions which each of the Participants may have; and (b) following termination of this Agreement and/or the exercise by the Participants of their rights under Clause 23.7, the carrying out of operations the same as, or similar to, the WEPCo Operations, the design and/or construction of the Facilities and/or the operation, maintenance or improvement of the Facilities;
"Asbestos"	has the meaning given to it in the Control of Asbestos Regulations

2012;

"Asbestos Management Survey"	means a Management Survey as described in Guidance Note HSG264 (Asbestos: The Survey Guide) published by the Health & Safety Executive;
"Asbestos Provisional Sum and Programme"	has the meaning given to it in paragraph 4.10.3 of Schedule 5 (<i>Approval Process for New Projects</i>);
"Asbestos Schedule"	means the asbestos schedule, in the form set out in Schedule Schedule 21 (<i>Asbestos Schedule</i>) together with any adjustments that WEPCo and the Relevant Participant agree are necessary for each New Project, in advance of the appointment of the Asbestos Surveyor.
"Asbestos Surveyor"	means a licensed asbestos surveyor appointed in accordance with paragraph 4.10.1 of Schedule 5 (<i>Approval Process for New Projects</i>);
"Asbestos Management Survey Report"	means a report prepared by the Asbestos Surveyor on the results of an Asbestos Management Survey, which report shall include the Asbestos Schedule and WEPCo's assessment of the Asbestos Provisional Sum and Programme required for the removal of Asbestos materials identified in the Asbestos Management Survey, pursuant to paragraph 4.10.3 of Schedule 5 (<i>Approval Process for New Projects</i>);
"Assigned Staff"	has the meaning given to it in paragraph 1.2 of Schedule 20 (<i>Handover On Expiry Or Termination</i>);
"Associate"	means: <ul style="list-style-type: none">(a) in respect of any body corporate:<ul style="list-style-type: none">(i) any other body corporate which is a subsidiary undertaking or a parent undertaking of such body corporate or a subsidiary undertaking of any parent undertaking of such body corporate;(ii) any other body corporate of which that body corporate is a director;(iii) any body corporate in the same group as such body corporate; and(iv) any employee or director of that body corporate or of any body corporate in the same group;

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

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

"Authority's Community Benefit Requirement KPIs"

has the meaning given in the Template Project Agreement;

"B Shareholder Member"

has the meaning given in the WEP Co Shareholders' Agreement;

"Barred List"

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

["BCIS TPI"

means the Tender Price Index as published by the Building Cost Information Service from time to time, or failing such publication, such other index as the parties may agree, or as may be determined in accordance with Schedule 22 (*Dispute Resolution Procedure*), most closely resembles such index;]

"Beneficiary"

has the meaning given to it in Clause 16.3;

"BIM Execution Plan"

means:

- (a) in respect of Stage 1, a BIM Execution Plan in the form of the Construction Project Information Committee's (CPIC) Pre-Contract BIM Execution Plan; and
- (b) in respect of Stage 2, a BIM Execution Plan in the form of the Construction Project Information Committee's (CPIC) Post-Contract BIM Execution Plan;

"BREEAM"

means the Building Research Establishment Environmental Assessment Method used to assess and rate infrastructure's

	sustainability outcomes;
"Broadly Comparable Scheme"	means the pension scheme or schemes nominated by WEPCo (or any relevant Partnering Subcontractor) in accordance with paragraph 2.7 of Section 1 (<i>General</i>) of Schedule 15 (<i>Transfer of Employment and Pensions</i>);
"BIM"	Building Information Modelling;
"Business Day"	means a day other than a Saturday, Sunday or a bank holiday in Wales;
"Business Plan"	has the meaning given to it in the WEPCo Shareholders' Agreement;
["CBR Enhancement"	means the community benefits listed in the Appendix to Section 3 of Schedule 3 (<i>Key Performance Indicators</i>);]
"CDM Regulations"	means the Construction (Design and Management) Regulations 2015 together with the recommendations contained in the most recent official guidance relating to such regulations or any amendment to or re-enactment of the same (and " CDM Regulation " shall be construed accordingly);
"CEDR"	has the meaning given to it in paragraph 4.4 of Schedule 22;
"Cessation Date"	means any date on which WEPCo (or any relevant Partnering Subcontractor) ceases to be an Admission Body other than as a result of the termination or expiry of this Agreement or because it ceases to employ any LGPS Participant Employees or any New Employees who join the LGPS pursuant to paragraph 1.34.1 of Section 1 (<i>General</i>) of Schedule 15 (<i>Transfer of Employment and Pensions</i>);
"Chairman"	has the meaning given to it in Clause 14.6;
"Code"	means the Welsh Authorities Staff Transfers (Pensions) Direction 2012; and/or any such similar protocol, requirements or guidance issued and with which the Participants, WEPCo, or relevant Supply Chain Members may be required to comply;

"Code Obligations"	means the express obligations of WEPCo in paragraphs 1.1 to 1.35 of Section 1 of Schedule 15 (<i>Transfer of Employment and Pensions</i>);
"Commencement Date"	means <i>[date to be inserted]</i> ⁶ ;
"Commercially Sensitive Information"	means the sub set of Confidential Information listed in column 1 of Section 1 (<i>Commercially Sensitive Contractual Provisions</i>) and column 1 of Section 2 (<i>Commercially Sensitive Material</i>) of Schedule 19 (<i>Commercially Sensitive Information</i>) in each case for the period specified in column 2 of Section 1 and Section 2 of Schedule 19 (<i>Commercially Sensitive Information</i>);
"Community Benefit Requirement KPIs"	means the community benefits listed in the Appendix to Section 3 of Schedule 3 (<i>Key Performance Indicators</i>);
"Community Services"	means library services, leisure services, children's services and other educational community based services to the public within the Region, where such services are strategically related to projects that have been Approved under a Strategic Outline Programme pursuant to Clause 9.3.1, or Project Services delivered (or to be delivered) pursuant to Clause 9.2 or Clause 9.3.5;

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Complete with commencement date prior to contract award.

"Comparator"	<p>means the relevant element(s) and/or component(s) of the relevant project(s) from the Pricing Data which are:</p> <ul style="list-style-type: none"> (a) agreed between WEPCo and the Relevant Participants pursuant to paragraphs 2.2.11 and 2.3 of Schedule 5 (<i>Approval Process for New Projects</i>) or determined by the SPB pursuant to paragraph 2.4 of Schedule 5 (<i>Approval Process for New Projects</i>) for the purpose of determining any revised Project Development Fee Cap for a New Project; and/or (b) agreed between WEPCo and the Relevant Participants pursuant to paragraph 3.1.1 of Schedule 6 (<i>New Project Pricing Report</i>) for the purposes of determining the appropriate cap for stages of New Projects to apply pursuant to paragraph 3.2 of Schedule 6 (<i>New Project Pricing Report</i>); <p>it being recognised that the Comparators for specific elements or components of a New Project may be from different projects within the Pricing Data;</p>
"Confidential Information"	<p>means:</p> <ul style="list-style-type: none"> (a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interest of any person, trade secrets, Intellectual Property Rights and know-how of either party and all Personal Data within the meaning of the Data Protection Laws; and (b) Commercially Sensitive Information;
"Consents"	<p>means all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorisations required by Law, and all necessary consents and agreements from any third parties needed to carry out the Partnering Services in accordance with this Agreement;</p>
"Continuing Participants"	<p>has the meaning given in Clause 3.2.2;</p>
"Contractor"	<p>means a person engaged by a Project Service Provider to carry out design, construction, testing, commissioning and completion of any premises (including any temporary works) and the installation of any equipment pursuant to a Project Agreement;</p>
"Contract Year"	<p>means in respect of the period from the Commencement Date to</p>

	the following 31 March and subsequently each period of twelve (12) calendar months commencing on 1 April, until the final Contract Year which is the period from the 1 April prior to the Initial Expiry Date or, where applicable, the Extended Expiry Date;
"Convictions"	means, other than in relation to minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding-overs (including any spent convictions as contemplated by section 1(1) of The Rehabilitation of Offenders Act 1974 by virtue of the exemptions specified in Part II of Schedule Part 1 of the Rehabilitation of Offenders Act 1974 (Exemptions) Order 1975 (SI 1975/1023) or any replacement or amendment to that Order);
"Dashboard Template"	has the meaning given to it in the Template Project Agreement;
"Data Loss Event"	has the meaning given in Clause 37.1;
"Data Protection Laws"	means applicable legislation protecting the fundamental rights and freedoms of individuals, in respect of their right to privacy and the processing of their personal data, as amended from time to time, including, Regulation (EU) 2016/679, 'the General Data Protection Regulation' (" GDPR "), the Data Protection Act 2018 and the Privacy and Electronic Communications Regulations 2003, together with decisions, guidelines, guidance notes and codes of practice issued from time to time by courts, data protection authorities and other applicable Government authorities;
"D&B Project"	means a design and build Project, and, where such Project relates to the provision of Education Sector Services, for which the Project Agreement is based on the Template Project Agreement set out at Section 2 (<i>Design and Build Development Agreement</i>) of Schedule 7 (<i>Template Project Agreements</i>);
"D&B Termination Date"	means the earlier of (a) expiry of the Defects Liability Period (as such term is defined in the relevant Project Agreement for a D&B Project) or the final Defects Liability Period (where there is more than one such date in the relevant Project Agreement); and (b) early termination;
"Default Interest Rate"	means [◆];
"Default Termination Notice"	has the meaning given in Clause 23.12.1;
"Design Data"	means all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing and/or operation of a Site;
"Development Amount"	has the meaning given to it in the Template Project Agreement set

"Analysis"	out at Section 2 (<i>Design and Build Development Agreement</i>) of Schedule 7 (<i>Template Project Agreements</i>);
"Direct Losses"	means, subject to the provisions of Clause 16 (<i>Indemnities</i>), all damage, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an agent/client, client paying basis), proceedings, demands and charges whether arising under statute, contract or at common law but, to avoid doubt, excluding Indirect Losses;
"Directive"	means EC Council Directive 2001/23/EC;
"Disclosed Data"	means any data defined as such in Schedule Part 1 of each Project Agreement;
"Disclosure and Barring Service"	the non-departmental public body established pursuant to the Protection of Freedoms Act 2012;
"Dispute"	has the meaning given to it in Schedule 22 (<i>Dispute Resolution Procedure</i>);
"Dispute Resolution Procedure"	means the procedure set out in Clause 33 (<i>Dispute Resolution</i>) and Schedule 22 (<i>Dispute Resolution Procedure</i>);
"DOTAS"	means the Disclosure of Tax Avoidance Schemes rules which require a promoter of tax schemes to tell HM Revenue & Customs of any specified notifiable arrangements or proposals and to provide prescribed information on those arrangements or proposals within set time limits as contained in Part 7 of the Finance Act 2004 and in secondary legislation made under vires contained in Part 7 of the Finance Act 2004 and as extended to National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868 made under s.132A of the Social Security Administration Act 1992;
"Education Sector Services"	means education (including pre-school, primary, secondary and/or further education) services to the public within the Region;
"Employee Liability Information"	the employee liability information to be provided pursuant to Regulation 11 of the Transfer Regulations;
"Environmental Information Regulations"	means the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government department in relation to such regulations;
"Equal Pay Ruling"	has the meaning given to it in paragraph 1.18 of Schedule 15 (<i>Transfer of Employment and Pensions</i>);

"Equality Requirements"	means the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and the Equality Act 2010;
"Ethical Employment Code"	means the Code of Practice - Ethical Employment in Supply Chains issued by the Welsh Government on [◆];
"Extended Expiry Date"	means the date falling five (5) years from the Initial Expiry Date in the event written notice is served in accordance with Clause 3.2;
"Facilities"	<p>means the buildings and other facilities, together with all supporting infrastructure (including Plant and [Group 1 Equipment]), and amenities located at any Site as required to be provided by a Project Service Provider or in respect of which FM Services are to be provided by a Project Service Provider in terms of any Project Agreement, to enable:</p> <p>(a) WEPCo to comply with its obligations under this Agreement and any Project Service Provider to comply with its obligations under its Project Agreements all as the same may be varied, amended or supplemented from time to time in accordance with this Agreement or the relevant Project Agreements;</p> <p>(b) WEPCo or any Project Service Provider to comply with any agreement between WEPCo and a Participant in terms of Clause 9.3;</p>
"Facilities Requirements"	means the construction and general facilities requirements of the particular Project Agreement Counterparty, being the "Authority's Construction Requirements" as defined in and set out in each relevant Project Agreement;
"FBC"	means the Full Business Case in relation to a Stage 2 Approval;
"First Party"	has the meaning given to it in Clause 10.10;
"FM Services"	means "hard" facilities management services, including building maintenance services;
"FOIA"	means the Freedom of Information Act 2000 and any subordinate legislation (as defined in section 84 of the Freedom of Information Act 2000 made under the Freedom of Information Act 2000 from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such Act);
"FOIA Code"	has the meaning given to it in Clause 31.7;

"Force Majeure"	<p>means any of the following events or circumstances:</p> <ul style="list-style-type: none"> (a) war, civil war, armed conflict or terrorism; or (b) nuclear contamination unless in any case the party claiming the benefit of relief (or a WEPCo Party or Participant Party as the case may be) is the source or cause of the contamination; or (c) chemical or biological contamination of the Works and/or the Facilities and/or the Site from any of the events referred to in paragraph (a) above; or (d) pressure waves caused by devices travelling at supersonic speeds, <p>which directly causes any party to be unable to comply with all or a material part of its obligations under this Agreement;</p>
"Funders' Direct Agreement"	<p>means, where applicable, the agreement to be entered into between the Funders and each Project Service Provider substantially in the form set out in the Template Project Agreement at Section 1 (<i>Design, Build, Finance and Maintain</i>) of Schedule 7 (<i>Template Project Agreements</i>);</p>
"Funders"	<p>means all or any of the persons who provide senior financing or senior funding in respect of Project Services under the Funding Agreements including, where the context so permits, prospective senior financiers or senior funders, excluding Project Agreement Counterparties in respect of payments made by them under Project Agreements;</p>
"Funding Agreements"	<p>means all or any of the agreements or instruments to be entered into by a Project Service Provider or any of their Associates relating to the financing of its business of providing services pursuant to the terms of any Project Agreements, excluding always the Project Agreements themselves;</p>
"Future Service Provider"	<p>means any service provider who shall provide any services equivalent to the Partnering Services immediately after termination or expiry of this Agreement or suspension of exclusivity in respect of such Partnering Services;</p>
"General Anti-Abuse Rule"	<p>means:</p> <ul style="list-style-type: none"> (a) the legislation in Part 5 of the Finance Act 2013; and (b) any future legislation introduced into parliament to counteract tax advantages arising from abusive

arrangements to avoid national insurance contributions;

"Good Industry Practice"	means using standards, practices, methods and procedures conforming to the Law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under the same or similar circumstances;
"Government"	means the government of the United Kingdom and/or the Welsh Government;
["Group 1 Equipment"	has the meaning given to it, where applicable, in the Project Agreements;]
"Halifax Abuse Principle"	means the principle explained in the CJEU Case C-255/02 Halifax and Others;
"H&S Conviction"	has the meaning given in Clause 23.1.5;
"Health and Safety Regime"	means the Food Safety Act 1990 (and associated regulations), the Health & Safety at Work etc Act 1974 (and associated regulations), the Fire Precautions Act 1971, the Environmental Protection Act 1990, the Water Industry Act 1991, the Water Resources Act 1991 and any similar or analogous health, safety or environmental legislation in force from time to time;
"Holding Company"	shall be construed in accordance with section 1159 and 1173 of the Companies Act 2006;
"HSE"	means the Health and Safety Executive;
"Identified Projects"	means [<i>insert names of Projects listed as Identified Projects in the ITPDSB</i>];
"Improvement Programme"	has the meaning given in Clause 23.4.1(b)(ii);
"Incurred Project Development Fee"	has the meaning given to it in paragraph 1.9 of Schedule 4 (<i>Partnering Services Costs</i>);
"Indemnifier"	has the meaning given to it in Clause 16.3;
"Indirect Losses"	means loss of profits, loss of use, loss of production, loss of business or loss of business opportunity or any consequential loss or indirect loss of any nature;

"Indulgence"	has the meaning given to it Clause 42.1;
"Information"	has the meaning given to it under section 84 of the Freedom of Information Act 2000;
"Information Commissioner"	has the meaning given to it in the Data Protection Laws;
"Information System"	means a system for generating, sending, receiving, storing or otherwise processing electronic communications;
"Infrastructure Agreement"	means an agreement with any highways authority, public or private utility drainage, sewerage, water, electricity, gas or telecommunications undertaker, authority or company or with any service provider or company body or authority for the requisitioning, design, commissioning, installation, laying, relaying, construction, repair, maintenance, adoption use or diversion and/or connection to any services and service and/or conducting media of any kind including without prejudice to the generality thereof gas, water, electricity, television, signals and pulses, telecommunications, drainage, roads, sewers, footways, footpaths, bridle ways, pipes, drains, sewers, wires, cables, conduits and apparatus;
"Initial Period"	means the period from the Commencement Date until [1 June 2024];
"Initial Expiry Date"	has the meaning given to it in Clause 3.1;
"Insolvency Event"	means, in respect of any company, any of the following: <ul style="list-style-type: none"> (a) any arrangement or composition with or for the benefit of its creditors which does not involve a continuation of its business in the same or substantially the same form (including any voluntary arrangement as defined in the Insolvency Act 1986) being entered into by or in relation to the person in question; (b) a supervisor, receiver, administrator, administrative receiver or other encumbrances taking possession or being appointed over, or any distress, execution or other process being levied or enforced (and not being discharged within ten (10) Business Days) upon, the whole or part of the assets of the company; (c) the company ceasing to carry on business; (d) a petition being presented (and not being discharged within twenty (20) Business Days) or a resolution being passed or an order being made for the administration or

the administration, winding-up, bankruptcy or dissolution of the company; and

- (e) the company suffering any event analogous to any of the foregoing in any jurisdiction in which it is incorporated, established or resident;

"Insurances"

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

"Intellectual Property"

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

"Intellectual Property Rights"

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

"Key Performance Indicators"

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

"Law"

means:

- (a) any applicable statute or proclamation or any delegated or subordinate legislation;
- (b) [any enforceable community right within the meaning of section 2(1) European Communities Act 1972;]
- (c) any applicable guidance, direction or determination with which any of the Participants and/or WEPCo is bound to comply (including the Welsh Language Standards) to the extent that the same are published and publicly available or the existence or the contents of them have been

notified to WEPCo by the Participants; and

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

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

"New Employee Dispute Resolution Procedure"	means the procedure set out in Appendix 1 (<i>New Employee Dispute Resolution Procedure</i>) to Schedule 15 (<i>Transfer of Employment and Pensions</i>);
"New Employees"	those employees engaged by WEPCo and/or any Partnering Subcontractor to provide the Partnering Services (excluding for the avoidance of doubt any Transferring Employees) who will be working alongside the Transferring Employees;
"New Project"	means: <ul style="list-style-type: none"> (a) a requirement for Required Facilities by the Participants; and (b) any requirement for Project Services pursuant to Clause 9.3 which does not relate to Required Facilities;
"New Project Approval Process"	means the process for obtaining approval of New Projects as detailed in Schedule 5 (<i>Approval Process for New Projects</i>);
"New Project Request"	has the meaning given to it in paragraph 3.1 of Schedule 5 (<i>Approval Process for New Projects</i>);
"New Project Specific Project Agreement"	means the Template Project Agreement, as adjusted by the Relevant Participant for the relevant New Project;
"Non-Compliant Shareholder"	has the meaning given to it in Clause 26.2 (<i>Tax Compliance</i>);
"Non Scheduled Costs"	has the meaning given to it in Section 4 (<i>Partnering Services Costs Rates</i>) of Schedule 3 (<i>Partnering Services</i>);
"Notice"	has the meaning given to it in paragraph 5.2 of Schedule 22;
"Notice to Mediate"	has the meaning given to it in paragraph 4.7 of Schedule 22;
"Occasions of Tax Non-Compliance"	means: <ul style="list-style-type: none"> (a) any tax return of WEPCo or a Shareholder submitted to a Relevant Tax Authority on or after 1 October 2012 is found to be incorrect as a result of: <ul style="list-style-type: none"> (i) a Relevant Tax Authority successfully challenging WEPCo or the relevant Shareholder under the General Anti-Abuse Rule or the Halifax Abuse Principle or under any tax rules or legislation that have an effect equivalent or similar to the General Anti-Abuse Rule or the

Halifax Abuse Principle;

(ii) the failure of an avoidance scheme which WEPCo or the relevant Shareholder was involved in, and which was, or should have been, notified to a Relevant Tax Authority under the DOTAS or any equivalent or similar regime; and/or

(b) WEPCo's or the relevant Shareholder's tax affairs giving rise on or after 1 April 2013 to a criminal conviction in any jurisdiction for tax-related offences which is not spent at the date of this Agreement or to a penalty for civil fraud or evasion;

"OH&S"	has the meaning give to it in Section 2.1.1 of Schedule 3;
"Ongoing Partnering Services"	means the Partnering Services listed in paragraph 1.1.3(a) of Section 1 (<i>Specification</i>) of Schedule 3 (<i>Partnering Services</i>);
"OPS Relevant Proportion"	means the fee payable to WEPCo in respect of the provision of a relevant proportion of the Ongoing Partnering Services (and financing thereof) through a New Project, in accordance with paragraph 3 of Schedule 4 (<i>Partnering Services Costs</i>);
"Original Dispute"	has the meaning given to it in paragraph 8.1 of Schedule 22;
"Participant"	means any party to this Agreement from time to time (other than WEPCo);
"Participant Default Notice"	has the meaning given to it in Clause 22.2.2(b);
"Participant Event of Default"	has the meaning given to it in Clause 22.1;
"Participant Event of Default Compensation Sum"	has the meaning given to it in paragraph 2 of Section 1 (<i>Participant Event of Default Compensation Sum</i>) of Schedule 14 (<i>Compensation on Participant Event of Default and Termination</i>);
"Participant Event of Default Termination Sum"	has the meaning given to it in paragraph 2 of Section 2 (<i>Participant Event of Default Termination Sum</i>) of Schedule 14 (<i>Compensation on Participant Event of Default and Termination</i>);
"Participant Party"	means any of a Participant's agents (including a Participant's Representative), contractors and subcontractors of any tier and its or their directors, officers and employees but excluding WEPCo and any WEPCo Party, any Project Service Provider or Supply Chain Member (in their capacity as such) and " Participant Parties " shall

	be construed accordingly;
"Participants' Costs"	has the meaning given in Clause 23.13;
"Participants' Policies"	means those policies of any Participant notified in writing to WEPCo in the event of a Relevant Transfer as amended from time to time and "Participant Policy" shall be construed accordingly;
"Participants' Representatives"	means the persons appointed by each of the Participants in accordance with Clause 12, and Participant's Representative shall be construed accordingly;
"Parties"	means each of WEPCo and the Participants and "Party" means any of them;
"Partner Admission Agreement"	means an admission agreement entered into in accordance with Part 3 of Schedule 2 of the LGPS Regulations by the Administering Authority and WEPCo or any relevant Partnering Subcontractor (as appropriate) and a template for which is set out at Schedule 18 (<i>Partner Admission Agreement</i>);
"Partnering Services"	means the services to be delivered under this Agreement set out in paragraphs 1.2 to 1.4 (inclusive) of Section 1 (<i>Specification</i>) of Schedule 3 (<i>Partnering Services</i>) and the performance by WEPCo of its obligations hereunder;
"Partnering Services Costs"	means the costs of WEPCo in providing the Partnering Services, including all out of pocket expenses and disbursements reasonably, properly and necessarily incurred in connection therewith;
"Partnering Services Data"	means: <ul style="list-style-type: none"> (a) all drawings, reports, documents, plans, software, formulae, calculations and all other data relating to or arising out of the provision of the Partnering Services; and (b) any other materials, documents and or data acquired, brought into existence or used in relation to the WEPCo Operations or this Agreement;

"Partnering Services Method Statement"	means, in respect of any Partnering Service, the applicable procedures and methods for delivery of such Partnering Service, as set out at Section 5 (<i>Partnering Services Method Statements</i>) of Schedule 3 (<i>Partnering Services</i>);
"Partnering Services Supply Chain Refresh"	has the meaning given in paragraph 1.2.2(b)(iii) of Section 1 of Schedule 3 (<i>Partnering Services</i>);
"Partnering Subcontractor"	means any subcontractor (of any tier) of WEPCo engaged from time to time as may be permitted by this Agreement to provide all or any of the Partnering Services;
"Pathfinder Project"	means [◆];
"Personal Data"	has the meaning given to it in the Data Protection Laws, and refers to personal data processed by any Party in connection with its respective rights and obligations under this Agreement;
"Planning Act"	means the Town and Country Planning Act 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Wales) Act 2015 and the Planning (Hazardous Substances) Act 1990;
"Planning Advocate"	means a practising member of the Bar with at least ten (10) years post-call experience in advising in respect of planning law agreed by the parties or, in default of agreement within fourteen (14) days of one Party making a request to the others as to the identity of such person, appointed following the application of any Party by the President for the Law Society of England and Wales;
"Planning Agreement"	means an agreement, undertaking or obligation pursuant to the provisions of section 106 Town and Country Planning Act 1990 or section 111 of the Local Government Act 1972, section 33 of the Local Government (Miscellaneous Provisions) Act 1982 or an infrastructure agreement pursuant to section 38 or section 278 of the Highways Act 1980 or the section 104 of the Water Industry Act 1991;
"Planning Appeal"	means an appeal to the Welsh Ministers pursuant to the provisions of section 78 of the Town and Country Planning Act 1990 and/or section 20 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and/or section 21 of the Planning (Hazardous Substances) Act 1990 in respect of or arising out of a Planning Application;
"Planning Application"	means an application/s for Planning Permission as may be necessary for the carrying out of Project Services and/or use or operation of Facilities;

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

"Pricing Report"	has the meaning given in Schedule 6 (<i>New Project Pricing Report</i>);
"Principal Designer"	has the meaning given in the CDM Regulations;
"Proforma 1"	means the proforma Tables 1 to 4 set out under the heading "Proforma 1", attached to Appendix 1 (<i>Pricing Data</i>) to Schedule 4 (<i>Partnering Services Costs</i>);
"Proforma 2"	means the proforma Tables 1 and 2 set out under the heading "Proforma 2", attached to Appendix 1 (<i>Pricing Data</i>) to Schedule 4 (<i>Partnering Services Costs</i>);
"Prohibited Act"	means: <ul style="list-style-type: none"> (a) offering, giving or agreeing to give to any Participant or any other public body or to any person employed by or on behalf of any Participant or any other public body any gift or consideration of any kind as an inducement or reward: <ul style="list-style-type: none"> (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other agreement with any Participant or any other public body; or (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other agreement with any Participant or any other public body; (b) entering into this Agreement or any other agreement with any Participant or any other public body in connection with which commission has been paid or has been agreed to be paid by WEPCo or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to that Participant; (c) committing any offence: <ul style="list-style-type: none"> (i) under the Bribery Act 2010; (ii) under any Law creating offences in respect of fraudulent acts; or (iii) at common law, in respect of fraudulent acts in relation to this Agreement or any other

agreement with any Participant or any other public body; or

- (d) defrauding or attempting to defraud or conspiring to defraud any Participant or any other public body;
- (e) committing a breach of the Employment Regulations 1999 Act (Blacklists Regulations) 2010 or section [137] of the Trade Union and Labour Regulations (Consolidation) Act 1992; or
- (f) committing any breach of the Data Protection Laws by unlawfully processing Personal Data in connection with blacklisting activities; or
- (g) committing any offence under the Data Protection Act 2018 in respect of Personal Data;

"Prohibited Amendments" means:

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

"Project" means the carrying out of any works and the provision of services under a Project Agreement;

"Project Agreement"	means the agreement entered into or to be entered into between a Project Service Provider and the relevant Project Agreement Counterparty or other third party for the provision by the Project Service Provider of Project Services, provided that, following its execution, each such agreement shall cease to be a Project Agreement for purposes of this Agreement in the event that the contracting party thereunder (not being a Project Agreement Counterparty) ceases to be a Project Service Provider in accordance with the terms of the Project Agreement;
"Project Agreement Counterparty"	means the Relevant Participant(s) who is/are party to a Project Agreement;
"Project BIM Agreement"	means an agreement, substantially in the form of the Template Project BIM Agreement entered into (or to be entered into) between WEPCo and the Relevant Participant in respect of each New Project;
"Project Co Shareholders' Agreement"	means an agreement or agreements among a Project Service Provider and its Holding Company, the PSDP(s) and WCo, including any agreement relating to the subscription of equity (or other shareholder funding) by the shareholders of the Project Service Provider and its Holding Company;
"Project Development Fee"	means the fee payable to WEPCo in respect of the provision of Project Development Partnering Services in respect of a specific New Project and the OPS Relevant Proportion, determined in accordance with Schedule 4 (<i>Partnering Services Costs</i>) and Schedule 5 (<i>Approval Process for New Projects</i>);
"Project Development Fee Cap"	<p>means, in respect of:</p> <ul style="list-style-type: none"> (a) the New Project Approval Process for each New Project; (b) the work carried out so as to obtain Stage 1 Approval for each New Project; and (c) the work carried out so as to obtain Stage 2 Approval for each New Project, <p>as the case may be, the level of maximum Project Development Fee that can be charged by WEPCo, calculated in accordance with paragraph 2 of Schedule 4 (<i>Partnering Services Costs</i>);</p>

"Project Development Fee Estimate"	means the estimated Project Development Fee, calculated in accordance with paragraph 1.2 of Schedule 4 (<i>Partnering Services Costs</i>);
"Project Development Partnering Services"	means the Partnering Services listed in paragraph 1.1.3(b) of Section 1 (<i>Specification</i>) of Schedule 3 (<i>Partnering Services</i>);
"Project Execution Plan"	has the meaning given in paragraph 1.3.1(b)(i)(3) of Section 1 (<i>Specification</i>) of Schedule 3 (<i>Partnering Services</i>);
"Project Service Provider"	means any person that is obliged, pursuant to a Project Agreement, to provide the Project Services thereunder and, where not WEPCo, is a Subsidiary of WEPCo, or is a PSDP Related Party in the case of MIM Projects;
"Project Service Provider Default"	has the meaning given to it in Clause 23.4.3;
"Project Services"	means: <ul style="list-style-type: none"> (a) services required to be provided in relation to the design, construction, testing, commissioning and completion of premises (including any temporary works) and the installation of equipment; and/or (b) the provision of FM Services; <p>whether or not in relation to Required Facilities;</p>
"Proposed Mitigating Measures"	has the meaning given in Clause 26.2.2(a) (<i>Tax Compliance</i>);
"Protective Measures"	means appropriate technical and organisational measures which may include: pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of such measures;
"Providing Party"	has the meaning given to it in Clause 52.3;
"PSDP(s)"	[◆] Limited (registered No [◆]) whose registered office is at [◆];
"PSDP Related Party"	[means a company which the PSDP holds the majority of the voting rights in, or a Subsidiary of such company;]
"PSP Rectification"	has the meaning given in Clause 23.9.2;

Programme"

"Qualifying Projects"

means:

- (a) the Identified Projects; and
- (b) all other 21st Century Schools and Colleges (Band B) MIM Programme projects, where such project has been identified by a Participant as being required to enable them to provide education based services in the Region;

"Recognition Agreement"

means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations relating to the recognition of a trade union or unions by an employer to any extent for the purposes of collective bargaining (as defined by section 178(2) of the Trade Union and Labour Relations (Consolidation) Act 1992);

"Related Dispute"

has the meaning given to it in paragraph 8.1 of Schedule 22;

"Related Dispute Notice"

has the meaning given to it in paragraph 8.2 of Schedule 22;

"Region"

means Wales;

"Reinstatement Notice"

has the meaning given in Clause 23.10.1;

"Relevant Authority"

means any court with jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official, public or statutory person of the government of the United Kingdom or the European Union or of the Welsh Ministers or the National Assembly of Wales;

"Relevant Government Departments"

means any Government department;

"Relevant Participant(s)"

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

"Relevant Service Transfer Date"

has the meaning given to it in paragraph 1.1 of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*);

"Relevant Tax Authority"

means HM Revenue and Customs or, if applicable, a tax authority in the jurisdiction in which WEPCo, or, as the case may be, the relevant person is established;

"Relevant Transfer"

means a relevant transfer for the purposes of the Transfer Regulations;

"Relief Event"

has the meaning given to it in the relevant Project Agreement;

"Remediation Programme"	has the meaning given in Clause 23.4.1(b)(ii);
"Requesting Party"	has the meaning given to it in Clause 52.3;
"Requests for Information"	shall have the meaning set out in the FOIA or the Environmental Information Regulations as relevant (where the meaning set out for the term "request" shall apply);
"Required Facilities"	means Facilities to be provided or in respect of which services are to be provided pursuant to Qualifying Projects;
"Retendering Information"	has the meaning given to it in paragraph 1.9 of Schedule 20 (<i>Handover On Expiry Or Termination</i>);
"Review Date"	means each anniversary of the Commencement Date;
"RPIX"	means the Retail Prices Index (All Items Excluding Mortgage Interest) as published by the Office for National Statistics from time to time, or failing such publication, such other index as the parties may agree, or as may be determined in accordance with Schedule 22 (<i>Dispute Resolution Procedure</i>), most closely resembles such index;
"Satisfactory Planning Permission"	means a Planning Permission which is not subject to an Unreasonable Condition;
"SDP" or "Strategic Delivery Plan"	means the Strategic Delivery Plan as set out at Section 1 (<i>Initial SDP</i>) of Schedule 11 (<i>Strategic Delivery Plan</i>) and approved by the SPB as amended from time to time pursuant to Section 2 (<i>Updated SDP</i>) of Schedule 11 and approved by the SPB;
"Second Party"	has the meaning given to it in Clause 10.10;
"Service Level Specifications"	has the meaning given to it in Schedule Part 1 of each relevant Project Agreement;
"Service Provider"	means any person engaged from time to time as may be permitted by this Agreement and/or any Project Agreement to procure the provision of the Services (or any of them);
"Services"	means the Partnering Services and the Project Services;
"Shareholder"	means a shareholder in WEPCo from time to time;
"Shareholders Agreements"	means the WEPCo Shareholders' Agreement and Project Co Shareholders' Agreement;
"Shareholder Tax Mitigation Measures Non-	has the meaning given to it in Clause 26.7;

Compliance Notice"

**"Shareholder Tax
Non-Compliance Notice"**

has the meaning given to it in Clause 26.6;

**"Significant Performance
Failure"**

means an event identified as such in Section 3 (*Performance Measurement*) of Schedule 3 (*Partnering Services*)⁸, disregarding the extent to which such failure is attributable to a Relief Event or the occurrence of Force Majeure;

"Site"

has the meaning given to it in the relevant Project Agreement;

"SPA Material Default"

has the meaning given to it in Clause 23.12;

**"SPA Material Default
Notice"**

has the meaning given to it in Clause 23.10.3;

"SPB"

means the strategic partnering board as defined in Clause 14.1;

"Specific Requirement"

has the meaning given to it in paragraph 3.1.2 of Schedule 5 (*Approval Process for New Projects*);

"Stage 1"

means the stage described at paragraph 4 of Schedule 5 (*Approval Process for New Projects*);

"Stage 1 Approval"

has the meaning given to it in paragraph 4 of Schedule 5 (*Approval Process for New Projects*);

"Stage 2 Approval"

has the meaning given to it in paragraph 5.7.1 of Schedule 5 (*Approval Process for New Projects*);

"Stage 1 Submission"

has the meaning given to it in paragraph 4.1 of Schedule 5 (*Approval Process for New Projects*);

"Stage 2"

means the stage described at paragraph 5 of Schedule 5 (*Approval Process for New Projects*);

"Stage 2 Submission"

has the meaning given to it in paragraph 5.1 of Schedule 5 (*Approval Process for New Projects*);

**"Stakeholder
Representatives"**

has the meaning given to it in Clause 14.1.4;

"Strategic Outline Case"

means Welsh Government's requirements from time to time for

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

Requirements"	approval of a Strategic Outline Case;
"Strategic Outline Programme"	means a Strategic Outline Programme listing projects to be included in the 21 st Century Schools and Colleges (Band B) Programme, submitted by Participants to Welsh Government dated with a base date of July 2017, as updated from time to time;
"Strategic Support Partnering Services"	means the Partnering Services listed in paragraph 1.1.3(c) of Section 1 (<i>Specification</i>) of Schedule 3 (<i>Partnering Services</i>);
"Subsidiary"	shall be construed in accordance with section 1159 and 1173 of the Companies Act 2006;
"Supply Chain Agreement Dispute"	has the meaning given to it in paragraph 6.1 of Schedule 22;
"Supply Chain Agreements"	means the agreements between: <ul style="list-style-type: none"> (a) WEPCo and its direct Partnering Subcontractors; (b) a Partnering Subcontractor and its subcontractors in relation to Partnering Services; and (c) any Project Service Provider and its Service Providers and Contractors, from time to time;
"Supply Chain Member(s)"	means any party (except WEPCo or a Project Service Provider) to a Supply Chain Agreement;
"Suspension Notice"	has the meaning given in Clause 23.10.1;
"Template Project Agreement"	means the relevant form of agreement set out at Sections 1 and 2 of Schedule 7 (<i>Template Project Agreements</i>);
"Template Project BIM Agreement"	means the relevant form of agreement set out at Schedule 16 (<i>Template Project BIM Agreement</i>);
"Template Project Co Shareholders' Agreement"	means the relevant form of agreement set out at Section 4 of Schedule 7 (<i>Template Project Co Shareholders' Agreement</i>);
"Template WEPCo Shareholders' Agreement"	means the relevant form of agreement set out at Section 3 of Schedule 7 (<i>Template WEPCo Shareholders' Agreement</i>);
"Tender Process"	has the meaning set out in Schedule 6 (<i>New Project Pricing Report</i>) and "Tendering" shall be construed accordingly;
"Track Record Test"	means, assessment of whether the most recent WEPCo Performance Report shows that the WEPCo has met the requirements identified as relevant in [column 6 of Tables 1 to 3 and column 5 of Table 4] of Section 3 (<i>Performance Measurement</i>)

	of Schedule 3 (<i>Partnering Services</i>) ⁹ ;
"Transfer Date"	means the date on which a Relevant Transfer occurs;
"Transfer Event"	means the occurrence of a Relevant Transfer upon expiry or termination of this Agreement;
"Transfer Regulations"	means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI No 246);
"Transferring Employee"	means any Transferring Participant Employee or Transferring Non-Participant Employee;
"Transferring Non-Participant Employee"	means in relation to any service equivalent to a Partnering Service, any persons employed by any organisation or body other than a Participant (including for the avoidance of doubt, any sub-contractor or agent engaged by the Participants) who is wholly or mainly engaged in the provision of that service as at the Transfer Date and who will become an employee of WEPCo or a Partnering Subcontractor on the Transfer Date in accordance with the provisions of paragraph 1 of Section 1 (<i>General</i>) of Schedule 15 (<i>Transfer of Employment and Pensions</i>);
"Transferring Participant Employee"	means in relation to any service equivalent to a Partnering Service, all those persons employed by any of the Participants under a contract of employment (excluding, to avoid doubt (without limitation), any person engaged by any of the Participants as an independent contractor or persons employed by any sub-contractor engaged by any of the Participants) who are wholly or substantially engaged in the provision of that service as at the Transfer Date; ¹⁰
"Uninsurable Risk"	in respect of a MIM Project, has the meaning given to it in the relevant Project Agreement;
"Unreasonable Conditions"	means any condition, requirement or obligation whether in or proposed to be in a Planning Permission, a Planning Agreement or an Infrastructure Agreement as set out in Schedule 13 (<i>Unreasonable Conditions</i>) PROVIDED ALWAYS that for the purposes of this Agreement, none of the following constitute an Unreasonable Condition:

⁹ Relevant KPIs and calibrations to be agreed with Bidders during dialogue – Section 3 of Part 3 of the Schedule 3 must be self-contained and capable of clearly identifying what constitutes a pass or failure on the Track Record Test (see Table 5 in this regard).

¹⁰ Schedule 15 is drafted on the basis that the employer of the Transferring Employees is a party to the Strategic Partnering Agreement. In the event that the employer is not a party to the Strategic Partnering Agreement, then any employees who are to transfer will be considered to be Transferring Non-Participant Employees for the purposes of these provisions. This will need to be considered further on a case-by-case basis.

- (a) any condition, requirement or obligation which has been volunteered in writing by the parties or has been acknowledged to be acceptable by them in writing prior to its imposition; or
- (b) any condition, requirement or obligation which is agreed or deemed or determined pursuant to the provisions of this Agreement not to be an Unreasonable Condition;

"Unsuitable Person"

means either:

- (a) any person who has a material interest in the manufacture, production, sale or distribution of [pornography,] [arms and weapons or] tobacco products and/or alcoholic drinks; or
- (b) [any person whose tax returns submitted on or after 1 October 2012 have been found to be incorrect as a result of:
 - (i) HM Revenue and Customs successfully challenging it under the General Anti-Abuse Rule ("**GAAR**") or the Halifax Abuse Principle;
 - (ii) the Relevant Tax Authority challenging it under any tax rules or legislation that have an effect equivalent or similar to the GAAR or the Halifax Abuse Principle; and/ or
 - (iii) the failure of an avoidance scheme which the person was involved in and which was, or should have been, notified under the DOTAS or any equivalent or similar regime in a jurisdiction in which the person is established;
- (c) any person whose activities are, in the reasonable opinion of the Participants, incompatible with the provision of Education Sector Services and/or Community Services (as applicable) in the Region; or
- (d) any person whose activities, in the reasonable opinion of the Participants, pose or could pose a threat to national security;

"VAT"

means value added tax at the rate prevailing at the time of the relevant supply charged in accordance with the provisions of the Value Added Tax Act 1994;

"VAT Sum"

has the meaning given to it in Clause 10.12;

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

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

"WEP Objectives"

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

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

Services;

"WCo"	means [◆];
"Works"	means the design (including the preparation of all Design Data), construction, testing, commissioning and completion of Facilities (including any temporary works) and the installation of any equipment to be performed in accordance with a Project Agreement (as varied or supplemented from time to time in accordance with the provisions of the relevant Project Agreement);
"Works and Facilities Information"	means all materials, documents and data relating to the proposed design or construction of Works, the operation and maintenance of Facilities and other matters relevant thereto supplied or made available to WEPCo or any of its nominees or any Project Service Provider by or on behalf of any of the Participants from time to time;

2. INTERPRETATION

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

- 2.1 The headings and marginal notes and references to them in this Agreement shall be deemed not to be part of this Agreement and shall not be taken into consideration in the interpretation of this Agreement.
- 2.2 Except where the context expressly requires otherwise, references to:
- 2.2.1 clauses, sub-clauses, and Schedules are references to clauses, sub-clauses of and Schedules to this Agreement;
 - 2.2.2 references to paragraphs, sub-paragraphs, and Appendices are references to paragraphs and sub-paragraphs of and appendices to Schedules (or Sections of Schedules) to this Agreement;
 - 2.2.3 Sections are references to sections of Schedules to this Agreement; and
 - 2.2.4 Attachments (if any) are references to attachments to or contained in this Agreement.
- 2.3 The Schedules and any Appendices or Attachments to this Agreement are an integral part of this Agreement and a reference to this Agreement includes a reference to the Schedules, Appendices and the Attachments.
- 2.4 Words importing persons shall, where the context so requires or admits, include individuals, firms, partnerships, trusts, corporations, governments, governmental bodies, authorities, agencies, unincorporated bodies of persons or associations and any organisations having legal capacity.

- 2.5 Where the context so requires words importing the singular only also include the plural and vice versa and words importing the masculine shall be construed as including the feminine or the neuter or vice versa.
- 2.6 The language of this Agreement is English. All correspondence, notices, drawings, test reports, certificates, specifications and information shall be in English. All operating and maintenance instructions, name plates, identification labels, instructions and notices to the public and staff and all other written, printed or electronically readable matter required in accordance with, or for purposes envisaged by, this Agreement shall comply with Welsh Language Standards (including any amending, supplemental or replacement law from time to time) and shall be bilingual (in English and Welsh), where required by the Participants, provided that all operating and maintenance instructions (and any other complex technical documents) are permitted in English only.
- 2.7 References to any agreement or document include (subject to all relevant approvals and any other provisions of this Agreement concerning amendments to agreements or documents) a reference to that agreement or document as amended, supplemented, substituted, novated or assigned.
- 2.8 References to any Law are to be construed as references to that Law as from time to time amended or to any Law from time to time replacing, extending, consolidating or amending the same.
- 2.9 References to a public organisation (other than a Participant) shall be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the functions and responsibilities of such public organisation. References to other persons (other than WEPCo or a Participant) shall include their successors and assignees.
- 2.10 References to a deliberate act or omission of a Participant or any Participant Party shall be construed having regard to the interactive nature of the activities of the Participants and of WEPCo and the expression shall exclude acts or omissions which were within the contemplation of the parties or which were otherwise provided for in this Agreement or in any Project Agreement.
- 2.11 The words in this Agreement shall bear their natural meaning. The parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore, be construed contra proferentem.
- 2.12 Reference to "Parties" means the parties to this Agreement and references to a "Party" mean one of the parties to this Agreement.
- 2.13 In construing this Agreement, the rule known as the ejusdem generis rule shall not apply nor shall any similar rule or approach to the construction of this Agreement and accordingly general words introduced or followed by the word "other" or "including" or "in particular" shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words.
- 2.14 All of WEPCo's obligations, duties and responsibilities shall be construed as separate obligations, duties and responsibilities owed to the Participants (or a Participant, as the case may be) and to be performed at WEPCo's own cost and expense.

2.15 References to amounts or sums expressed to be "index linked" are, unless expressly stated otherwise, references to amounts or sums as adjusted on each anniversary of the Commencement Date in accordance with the following formula:

$$\text{Amount or sum} \times (\text{RPIXd} / \text{RPIX0})$$

Where RPIXd is the value of the Retail Prices Index (All Items Excl Mortgage Interest) published or determined with respect to the month most recently preceding the relevant anniversary of the Commencement Date and RPIX0 is the value of the Retail Prices Index (All Items Excl Mortgage Interest) in respect of [♦].

2.16 [Reference to a document being in the "agreed form" is a reference to the form of the relevant document agreed between the parties and for the purpose of identification initialled by each of them or on their behalf.]

2.17 Where this Agreement states that an obligation shall be performed "no later than" or "within" or "by" a stipulated date or event which is a prescribed number of Business Days after a stipulated date or event, the latest time for performance shall be noon on the last Business Day for performance of the obligations concerned.

2.18 Where this Agreement states that an obligation shall be performed "no later than" or "by" a prescribed number of Business Days before a base date or "by" a date which is a prescribed number of Business Days before a base date, the latest time for performance shall be noon on the last Business Day for performance of the obligations concerned.

2.19 References to this Agreement, a Project Agreement or a Shareholders' Agreement or to a provision thereof shall be construed at a particular time as a reference to it as it may have been amended, varied, supplemented, modified or appended.

2.20 A person, being a company, shall be "controlled" by another person if that other person owns a majority of the voting equity of that person or controls the majority of the votes at meeting of the board of directors of that person.

2.21 A "**parent undertaking**" or "**subsidiary undertaking**" has the meaning set out in section 1162 and Schedule 7 of the Companies Act 2006.

2.22 A body corporate is in the "same group" as another body corporate where:

2.22.1 it is a subsidiary undertaking of such body corporate;

2.22.2 it is a parent undertaking of such body corporate; or

2.22.3 it is a subsidiary undertaking of the parent undertaking of such other body corporate.

SCHEDULE 2 - COMPLETION DOCUMENTS

SECTION–1 - DOCUMENTS TO BE DELIVERED BY WEPCO

1. Unless an original document is specifically requested, a copy (certified by an officer of WEPCo as being a true copy) of each of the following documents is to be delivered by WEPCo to each Participant's Representative:
 - 1.1 The WEPCo Shareholders' Agreement and certification from WEPCo that the WEPCo Shareholders' Agreement has become (or will become, simultaneously with delivery of the other documents referred to in this Schedule 2 (*Completion Documents*)) unconditional in accordance with its terms, accompanied by evidence of the same.
 - 1.2 Extracts from the minutes of the meeting of the board of directors (certified as true and accurate by a director or the secretary of the relevant company) of each of WEPCo and the PSDP, at which resolutions were passed approving the execution, delivery and performance of each relevant document to which such person is expressed to be a party and in each case authorising a named person or persons to execute and deliver each such document and any other documents to be delivered by it pursuant to it.
 - 1.3 Evidence of the share subscriptions required under the WEPCo Shareholders' Agreement having been made by the Shareholders in WEPCo.
 - 1.4 WEPCo's Certificate of incorporation and of any certificate of incorporation on change of name.
 - 1.5 The memorandum and articles of association of WEPCo.
 - 1.6 Evidence of the insurances required in accordance with Clause 17 (*Insurance*) having been taken out by WEPCo and that the policies comply with the requirements of this Agreement.
 - 1.7 [Management Services Agreement between WEPCo [and the PSDP] properly executed by each party thereto].
 - 1.8 Supply Chain Agreements in respect of delivery of the Partnering Services.¹²

¹² It is expected any key supply chain agreements relating to the delivery of the Partnering Services (only) shall be in place with the execution of the SPA – exact details will be specific to the PSDP and completed during the Selected Bidder period.

SECTION-2 - DOCUMENTS TO BE DELIVERED BY THE PARTICIPANTS

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

SCHEDULE 3 - PARTNERING SERVICES

SECTION 1 - SPECIFICATION

1. PARTNERING SERVICES OBLIGATIONS

1.1 General Requirements

1.1.1 Required Outcome

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

1.1.2 Scope

- (a) Value planning shall be carried out to ensure that WEPCo and the Participants are mutually supportive and undertake only those tasks for which they are best suited and to ensure that:
 - (i) each of the Participants receive optimal value for money in the Partnering Services provided by WEPCo and its supply chain;

- (ii) each of the Participants receive optimal value for money in all Approved Projects, and in particular Project Services procured from WEPCo and its supply chain;
- (iii) risk allocation is, subject to the terms of this Agreement, equitable and appropriately apportioned between the parties; and
- (iv) openness and accountability can be demonstrated to the appropriate governance authorities for public sector organisations.

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

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

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

Ongoing Partnering Services**1.2.1 Partnering and Collaborative Working****(a) Required outcome**

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

(b) Scope

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

(c) **Ancillary activities**

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

- (i) developing and maintaining relationships and working closely with local stakeholders from each Participant, local authority departments, local businesses and the wider community to ensure ownership and support for the SDP;
- (ii) developing and maintaining close relationships with Participants and local stakeholders to understand their strategic and local drivers and constraints in order to support delivery of the SDP;
- (iii) developing and maintaining an awareness and understanding of the SDP, and how this fits into the Participants' corporate vision and strategy;
- (iv) developing and maintaining an awareness and understanding of Participants' sustainability strategies;
- (v) developing and maintaining an awareness and understanding of how shared community facilities and services may be appropriate and can contribute to delivering integrated services, community services and regeneration with the Region;
- (vi) developing and maintaining an understanding of national and local policies on major public sector strategic documents, policies, targets, timeframes etc and the impact they may have on New Projects;
- (vii) supporting the Participants in the efficient identification and maximisation of opportunities to acquire new sites or dispose of existing sites;
- (viii) maintaining an awareness of future changes in legislation that may impact the SDP and reporting these to the SPB in a timely manner;
- (ix) actively participating with each of the Participants and other stakeholders within other agencies and organisations in the identification of common goals for improving local communities through improved provision of services; and
- (x) building close working relationships with external agencies and other interested organisations as part of the SDP development process and in connection with the development of New Projects.

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

1.2.2 Partnering Services Supply Chain Establishment and Overall Management

(a) Required outcome

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

(b) Scope

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

- (1) WEPCo shall select and appoint a supply chain commensurate with the Participants' values, goals and vision having regard to a number of areas including, but not limited to, health and safety, commitment to delivery of community benefits, quality and sustainability. Subject to the terms of this Agreement, the supply chain will be established and managed in a manner that will:
 - (A) optimise and clearly demonstrate value for money;
 - (B) ensure the effective performance of the Project Services and the other Partnering Services;
 - (C) provide optimal risk transfer to achieve certainty of delivery;
 - (D) mitigate the risk of time and/or cost overrun;
 - (E) secure and maximise tangible benefits from repeat business and long-term business relationships, where appropriate;
 - (F) deliver and demonstrate continuous improvement in the delivery of the Partnering Services over the term of this Agreement; and
 - (G) be undertaken in a transparent and auditable manner with clearly identified selection criteria and evaluation methodology and so as to satisfy

the SPB (under exclusion of WEPCo's representative) that decisions have been made on a proper, arm's length basis where WEPCo proposes to include within the supply chain any B Shareholder Member or any Associate of any of WEPCo, the PSDP or any B Shareholder Member.

- (2) The assessment and selection of supply chain partners shall be conducted following a robust and clear procedure with suitable levels of checking to ensure that supply chain partners are selected with the ability to demonstrate:
 - (A) appropriate professional accreditation;
 - (B) financial robustness;
 - (C) capacity to undertake the required services;
 - (D) established and successful management systems including quality, environment and health and safety;
 - (E) sufficient resources;
 - (F) an appropriate level of support to the key resources;
 - (G) an appropriate level of quality in deliverables; and
 - (H) a proven track record in terms of relevant experience in relation to capital and revenue funded education and/or community projects, as appropriate.
- (3) WEPCo shall establish supply chain agreements based on goals common to those of WEPCo, the Participants and service users.

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

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

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

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

- (1) WEPCo shall develop and implement robust, transparent and auditable processes (clearly dealing with any conflicts of interest, potential or actual) for:
 - (A) performance measurement, performance management and periodic review of the Supply Chain Members;
 - (B) (not less than every two (2) years) carrying out a full review and assessment of the performance of

incumbent Supply Chain Members and implementing a robust, transparent and auditable open-market exercise in respect of Partnering Services, to select the most appropriate new supply chain members so as to update its supply chain by the addition, removal, retention and/or substitution of its members from time to time (such process being known as the "**Partnering Services Supply Chain Refresh**"),

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

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

1.2.3 Value for Money

(a) **Required outcome**

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

(b) **Scope**

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

Project Development Partnering Services

1.3.1 New Project Development and Delivery

(a) Required Outcome

- (i) New Projects developed in a robust and transparent basis with clear understanding of Participant requirements as to risk, cost and programme.
- (ii) New Projects developed bringing leading edge design quality and innovation including clear emphasis on health and safety and sustainability.
- (iii) New Projects developed that enable improved education service delivery and optimal value for money to Participants.
- (iv) New Projects taken effectively and efficiently through optioneering, feasibility, outline business case, final business case and contract award (as required) in a planned, structured and managed process.
- (v) Improvement in the speed, quality and cost of delivering New Projects.
- (vi) The enhancement of affordability and value for money through shared use, the development of multi-purpose buildings and the attraction of private sector tenants and other third party incomes, where requested.

(b) Scope

(i) Stage 1

- (1) The provision of all the information reasonably required to achieve Stage 1 Approval. This should comprise provision of choice to the Relevant Participants and sufficient information to inform that choice and to ensure the best available value for money option is identified in each case, including but not limited to:
 - (A) critical success factors for the New Project;
 - (B) site selection including location, acquisition and development cost, where requested;
 - (C) future flexibility and adaptability of the site;
 - (D) design of the facilities taking into account functionality, flexibility and whole life cost, together with suitable warranties allowing the

Contractor and design team appointed at Stage 2 to rely on and use such concept designs;

- (E) specific requirements for the development and operation of the facilities;
 - (F) interfaces with other public or private organisations and the impact this may have on the Facilities including any opportunity for improving efficiency of service through sharing of all, or parts, of the facilities; and
 - (G) facilities management and service delivery requirements.
- (2) Consistency of approach to development and delivery of New Projects to measure, understand and work with each of the Participants to facilitate continued improvement.
 - (3) WEPCo shall provide a detailed Project execution plan including critical success factors for the New Project programme, stakeholder engagement plan, communication plan, BIM Execution Plan, deliverable list, roles and responsibility matrix and risk register covering the Stage 1 activities ("**Project Execution Plan**").
 - (4) WEPCo shall monitor their performance of New Project Stage 1 development and through appropriate and agreed measures, highlight lessons learnt and include these with that continuous improvement process.
 - (5) For the purposes of the CDM Regulations, conduct appropriate competency assessments of potential Principal Designers (who may be Supply Chain Members) on behalf of the Relevant Participant(s) in their capacity as "Client" (which shall have the meaning ascribed to it in the CDM Regulations) for the potential New Project and so as to ensure the Relevant Participant(s) are able to discharge the relevant obligations of the Client under the CDM Regulations in that regard.
 - (6) Recommend to the Relevant Participant(s) an appropriate person or persons whom the Relevant Participant(s) (or one of them) in their capacity as "Client" for purposes of the CDM Regulations may wish to appoint as Principal Designer in respect of the New Project as a whole (in this regard, all Parties recognising that the preference would be for the same Principal Designer to continue in role once the Project

Service Provider takes over as "Client" pursuant to the relevant Project Agreement).

- (7) Where any activities to be carried out as referred to in paragraphs 4.2.3(b) to 4.2.3(g) of Schedule 5 (*Approval Process for New Projects*) are notifiable for purposes of the CDM Regulations, WEPCo shall elect to be the Client in respect of such works and shall discharge the roles and responsibilities incumbent on the Client in respect of such activities under the CDM Regulations. WEPCo shall ensure that the Relevant Participant(s) are timeously supplied with a copy of each and every health and safety file prepared by the relevant Principal Designer in respect of such notifiable activities.

(ii) **Stage 2**

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

- (6) Conduct, on behalf of the Relevant Participant(s) in their capacity as "Client" for purposes of the CDM Regulations appropriate competency assessments of any potential Principal Contractors so as to discharge the relevant obligations of the Client under the CDM Regulations in that regard.

(iii) **General**

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

(1) **Design Approach**

WEPCo shall:

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

(2) **Health and Safety**

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

(3) **Community Inclusion**

- (a) WEPCo shall ensure that it includes local communities in the development of New Projects

and associated community improvement initiatives.

- (b) WEPCo shall ensure the enhancement of user satisfaction by developing and designing facilities that present a focal point for the community through, where applicable, multi-use including complementary businesses and services such as fitness centres, cafeterias etc.
- (c) WEPCo shall understand and have expertise in the management, operating and design implications of extended facilities and out-of-hours community use, including considerations for:
 - (i) good signage both external and internal;
 - (ii) access, external lighting and car parking;
 - (iii) heating controls for use outside normal hours;
 - (iv) changing facilities, reception and social areas for community use accessible for use outside normal hours; and
 - (v) facilities used for community use grouped for ease of access, security and zoned heating.

(4) **Facility Interaction**

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

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

(5) **Innovation**

- (a) WEPCo shall ensure that appropriate consideration is given to innovation in the design and development of New Projects.
- (b) WEPCo shall:
 - (i) have the understanding and skills to develop creative and innovative solutions to facility organisation, design of facility buildings and provision of facilities, that are sustainable, and will deliver wider Community Services improvements;
 - (ii) consider the provision of imaginatively designed solutions that will inspire staff and service users, provide flexibility of use and make a positive statement to the community;
 - (iii) have the understanding and skills to develop and deliver new and different approaches in service provision that are transformational; and
 - (iv) have an understanding of the changing ICT environment and the opportunities this provides in terms of space use flexibility and improved service delivery.

(6) **Sustainability**

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

(7) **Community**

- (a) WEPCo shall give due consideration to, and compliance where appropriate, with local community improvement projects in the vicinity

of New Projects and the wider strategic importance of these initiatives.

- (b) WEPCo shall undertake widespread consultation (on basis agreed with the Relevant Participant(s)) within the local community throughout the New Project process.

1.3.1 Supply Chain Establishment for New Projects

(a) Required outcome

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

- (i) a New Project for a single Facility;
- (ii) a New Project for a group or batch of Facilities; or
- (iii) a group or batch of planned New Projects, in which case the Tender Process will be carried out in conjunction with the first of such New Projects but shall establish a supply chain for the prescribed number of New Projects, on the basis of terms that secure and maximise tangible benefits from repeat business and long-term business relationships, subject always to Clause 23 and Appendix 1 of Schedule 6 (*New Project Pricing Report*).

(b) Scope

- (i) WEPCo shall ensure the appropriate engagement of supply chain partners during (and before) the New Project Approvals Process, as appropriate, from conception to enable improved outcomes and best available value for money.
- (ii) WEPCo shall review the suitability of supply chain partners to undertake services in relation to a New Project or New Projects, paying regard, but not limited to, the following:
 - (1) availability of resources, where appropriate, to progress the New Project through the design, construction and operation phases of the New Project; and
 - (2) ability to provide a level of service on a constant and recurring basis throughout the development of the New Project.

- (iii) WEPCo shall select and appoint a supply chain commensurate with the Relevant Participants' values, goals and vision having regard to a number of areas including, but not limited to, health and safety, commitment to delivery of community benefits, quality and sustainability. Subject to the terms of this Agreement, the supply chain will be established and managed in a manner that will:
- (A) optimise and clearly demonstrate value for money;
 - (B) ensure the effective performance of the Project Services;
 - (C) provide optimal risk transfer to achieve certainty of delivery;
 - (D) mitigate the risk of time and/or cost overrun;
 - (E) secure and maximise tangible benefits from repeat business and long-term business relationships, where appropriate; and
 - (G) be undertaken in a transparent and auditable manner with clearly identified selection criteria and evaluation methodology and so as to satisfy the SPB (under exclusion of WEPCo's representative) that decisions have been made on a proper, arm's length basis where WEPCo proposes to include within the supply chain any B Shareholder Member or any Associate of any of WEPCo, the PSDP or any B Shareholder Member.
- (iv) The assessment and selection of supply chain partners shall be conducted following a robust and clear tender procedure with suitable levels of checking to ensure that supply chain partners are selected with the ability to demonstrate:
- (A) appropriate professional accreditation;
 - (B) financial robustness;
 - (C) capacity to undertake the required works or services;
 - (D) established and successful management systems including quality, environment and health and safety;
 - (E) sufficient resources;
 - (F) an appropriate level of support to the key resources;
 - (G) an appropriate level of quality in deliverables; and

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

1.3.2 Funding

(a) Required Outcome

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

(b) **Scope**

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

1.3.3 **Value for Money**

(a) **Required outcome**

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

(b) **Scope**

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

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

Strategic Support Partnering Services

1.4.1 Strategic Estate Planning

(a) Required outcome

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

(b) Scope

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

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

1.4.2 Service Planning

(a) Required Outcome

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

(b) **Scope**

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

1.4.3 **Value for Money**

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

SECTION 2 - MANAGEMENT SYSTEMS

1. GENERAL

1.1 WEPCo may operate the quality, health & safety and environmental management systems required by this Section 2 (*Management Systems*) as independent systems or integrate common elements to form a single system.

1.2 WEPCo shall ensure that:

1.2.1 an audit of the system or systems required to be maintained pursuant to this Section 2 is carried out at regular intervals and the findings of such audit reported to the SPB; and

1.2.2 such system or systems are reviewed at intervals agreed by the SPB (excluding WEPCo's representative) to ensure continued stability and effectiveness.

2. MANAGEMENT SYSTEM GENERAL REQUIREMENTS

2.1 WEPCo shall establish, document, implement and maintain:

2.1.1 a quality management system for the purpose of ensuring and demonstrating that all aspects of the Partnering Services and all other matters for which WEPCo is responsible under this Agreement are carried out fully in conformity with the relevant provisions of this Agreement and WEPCo's quality management policies and objectives (as approved by the SPB from time to time);

2.1.2 an appropriate system for implementing its occupational health and safety ("**OH&S**") policies and objectives (as approved by the SPB from time to time) to enable it to control its OH&S risks and improve its OH&S performance over time; and

2.1.3 an appropriate system for achieving and demonstrating sound environmental performance by controlling the impacts of its activities, products and services on the environment, consistent with its environmental policy and objectives (as approved by the SPB from time to time).

2.2 Such management systems and relevant policies and objectives shall be reflected in:

2.2.1 quality plans (to be contained in a quality manual) which shall, as a minimum, be consistent with BS EN 9001 or 9002 (as the case may be) or any equivalent standard which is generally recognised as having replaced them (or either of them);

2.2.2 a health and safety manual which shall, as a minimum, be consistent with OHSAS 18001 or any equivalent standard which is generally recognised as having replaced it; and

2.2.3 an environmental manual which shall, as a minimum, be consistent with ISO 14001 or any equivalent standard which is generally recognised as having replaced it,

and otherwise be consistent with the terms of Appendix 1 (*Initial Management Systems*) to this Section 2.

2.3 Notwithstanding any other provisions of this Agreement, the manuals comprising WEPCo's management systems shall include the following or, as necessary, make reference to the location of documents describing:

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

3. **MANAGEMENT SYSTEMS DIRECTOR**

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

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

3.2 **Audit**

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

APPENDIX 1 - INITIAL MANAGEMENT SYSTEMS

The Initial Management Systems are attached hereto.¹³

¹³ Bidders to develop and to be agreed during dialogue.

SECTION 3 - PERFORMANCE MEASUREMENT

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

APPENDIX - SCHEDULE OF KEY PERFORMANCE INDICATORS¹⁴

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¹⁴ Refer to KPIs extract in the ITPDSB. Relevant KPIs, Significant Performance Failures, Track Record Tests and calibrations to be developed and agreed with Tenderers during dialogue and inserted prior to contract execution. The KPIs are described at high level for the purposes of dialogue and will be refined and developed at Selected Bidder stage (without altering the original purpose). Note the baseline community benefit requirements are mandatory and are not subject to dialogue.

SECTION 4 - PARTNERING SERVICES COSTS RATES¹⁵

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

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

¹⁵ Partnering Services Cost Rates are solution specific and are to be developed and agreed with Bidders during dialogue. Partnering Services Cost Rates are expected to include rates for the development of New Project Requests through Stage 1 of the New Project Approvals Process.

Discipline	Grade and Qualifications	Hourly Rate £	Day Rate £
WEPCo Staff			
Director/ Chief Executive			
Manager			
[Other]			
Feasibility & Design			
Architect	Director		
	Associate		
	Project Architect		
	Technician		
Engineer - C&S	Director		
	Associate		
	Project Engineer		
	Technician		
Engineer - M&E	Director		
	Associate		
	Project Engineer		
	Technician		
Quantity Surveyor	Director		
	Associate		
	Senior QS		
	Assistant QS		
Project Manager	Director		
	Associate		

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

SECTION 5 - PARTNERING SERVICES METHOD STATEMENTS

5A - ONGOING PARTNERING SERVICES

The Ongoing Partnering Services Method Statement is attached hereto¹⁶.

¹⁶ Method Statements are solution specific and are to be developed and agreed with Bidders during dialogue. These should include method statements for delivery of Community Benefit Requirement KPIs, CBR Enhancements and Additional Benefits.

5B - PROJECT DEVELOPMENT PARTNERING SERVICES

The Project Development Partnering Services Method Statement is attached hereto.¹⁷

¹⁷ Method Statements are solution specific and are to be developed and agreed with Bidders during dialogue. These should include specific sections dealing with each of the following:

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

5C - STRATEGIC SUPPORT PARTNERING SERVICES

The Strategic Support Partnering Services Method Statement is attached hereto.¹⁸

¹⁸ Method Statements are solution specific and are to be developed and agreed with Bidders during dialogue.

SCHEDULE 4- PARTNERING SERVICES COSTS

1. PAYMENT FOR PROJECT DEVELOPMENT PARTNERING SERVICES

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

1.1.1 Qualifying Projects; and

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

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

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

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

1.2.2 save to the extent adjustments are required and agreed between the Parties to give effect to Clause 19.1, the Project Development Fee Estimate for each element or component of the Project Development Partnering Services, for each stage of the New Project Approval Process and in respect of the New Project as a whole, can in no circumstances exceed the relevant Project Development Fee Cap, as arrived at using Tables 1 and 2 of Proforma 1 of Appendix 1 to this Schedule 4 (*Partnering Services Costs*) for the estimated value of the New Project;

1.2.3 these costs will be computed based on WEPCo's estimate of the time involved in taking the New Project through to contract completion and execution (including

time spent by WEPCo's own staff), applying the Partnering Services Cost rates or alternative basis as referred to in paragraph 1.3;

1.2.4 these costs may include:

- (a) costs reasonably and properly incurred by WEPCo in doing work which would otherwise have been required for a Stage 1 Approval in advance of issue by the Relevant Participant(s) of a New Project Request, where such work was done "at risk" by WEPCo with the express agreement of the Relevant Participant(s) on the understanding such work would be captured pursuant to this paragraph 1.2.4 should a Stage 1 Approval be given for the New Project in question; and/or
- (b) with the agreement of the Relevant Participant, costs reasonably and properly incurred by WEPCo in relation to a New Project in relation to which a Stage 1 Submission has been submitted but which did not receive Stage 1 Approval (other than for reasons related to WEPCo's failure to meet the requirements of this Agreement) (such consent not to be unreasonably withheld or delayed where the costs incurred relate to a previous attempt to obtain Stage 1 Approval for the New Project for which Stage 1 Approval is being sought);

1.2.5 for the avoidance of doubt the Project Development Fee Estimate shall also include the OPS Relevant Proportion allocated to the New Project; and

1.2.6 WEPCo shall not be entitled to include or recover any Non Scheduled Costs as part of any Project Development Fee or Incurred Project Development Fee where such costs have not been agreed or Tendered in accordance with Section 4 (*Partnering Services Costs Rates*) of Schedule 3 (*Partnering Services*).

1.3 The actual costs for providing the Project Development Partnering Services shall be calculated utilising the Partnering Services Costs rates specified in Section 4 (*Partnering Services Costs Rates*) of Schedule 3 (*Partnering Services*) or, where more beneficial to the Relevant Participant(s), on any alternative basis (such as fixed prices or volume discounts) agreed between WEPCo and the relevant Supply Chain Member and approved by the Relevant Participant for this purpose. In the case of an Approved Project, the costs should include (as a fixed sum) those costs anticipated to be properly and reasonably incurred in achieving financial close or contract award.

1.4 Within twenty (20) Business Days of a New Project achieving Stage 1 Approval and then after it becomes an Approved Project, WEPCo shall notify the Relevant Participant(s) of the actual costs (calculated on the basis specified in paragraph 1.3 above) of providing the Project Development Partnering Services in respect of that New Project and the OPS Relevant Proportion properly and reasonably incurred by WEPCo in obtaining such approvals (and, in the case of an Approved Project, anticipated to be properly and reasonably incurred in achieving financial close or contract award). WEPCo shall provide all necessary supporting information (including timesheets, invoices and the like) necessary to substantiate the levels of costs incurred (or anticipated to be incurred as aforesaid).

- 1.5 The Relevant Participant(s) and WEPCo shall seek to agree the costs to be paid pursuant to paragraph 1.4 within twenty (20) Business Days of WEPCo's notification, failing which WEPCo or the Relevant Participant(s) shall be entitled to refer the matter for consideration under the Dispute Resolution Procedure. Where such costs as agreed or determined are lower than the Project Development Fee Estimate for the relevant stage provided pursuant to paragraph 1.2 above, the Project Development Fee will be reduced accordingly. Where such costs as agreed or determined are higher than the Project Development Fee Estimate for the relevant stage provided pursuant to paragraph 1.2 above, the Project Development Fee will be increased accordingly, subject always to paragraph 2 below and the Project Development Fee Caps.
- 1.6 Subject to paragraphs 1.7 and 1.8, recovery of the full Project Development Fee is dependent on the relevant New Project becoming an Approved Project and a Project Agreement being entered into in relation to that Approved Project in which case WEPCo shall:
- 1.6.1 in MIM Projects, charge an amount equivalent to the Project Development Fee (under deduction of any sums paid under paragraph 1.7) as a lump sum to the Project Service Provider entering into the relevant Project Agreement and that Project Service Provider shall, in turn, recover such amount through the amounts to be paid to the Project Service Provider under the Project Agreement; and
 - 1.6.2 for Approved Projects other than as referred to in paragraph 1.6.1, recover the Project Development Fee (under deduction of any sums paid under paragraph 1.7) in accordance with the terms of the relevant Project Agreement.
- 1.7 The Relevant Participant(s) shall pay WEPCo that part of the Project Development Fee in respect of a New Project which has obtained Stage 1 Approval that relates to the costs incurred in obtaining such Stage 1 Approval within thirty (30) Business Days of agreement or determination of the costs specified in paragraph 1.3 relative to such Stage 1 Approval.
- 1.8 WEPCo shall be entitled to reimbursement of the Incurred Project Development Fee in the circumstances referred to in paragraphs 4.8.2, 4.8.3, 5.10.1(a), 5.10.2(a), 6.1.2(a), 6.2 and 7 of Schedule 5 (*Approval Process for New Projects*) and/or (but without double counting or double recovery) as part of the Participant Event of Default Compensation Sum and/or Participant Event of Default Termination Sum.
- 1.9 The "**Incurred Project Development Fee**" is, in respect of each New Project, the actual development costs of the nature referred to in paragraph 1.2.1 above (calculated on the basis specified in paragraph 1.3 above) properly and reasonably incurred by WEPCo as at the relevant date in seeking to develop a Stage 1 Submission and/or Stage 2 Submission (and which WEPCo is not already entitled to be paid pursuant to paragraph 1.7 above), but in no circumstances shall the Incurred Project Development Fee for:
- 1.9.1 a stage of the New Project Approval Process in respect of a New Project exceed the Project Development Fee Cap for that stage; or
 - 1.9.2 a New Project exceed the Project Development Fee Cap for that New Project set out in the Stage 1 Submission.

2. PROJECT DEVELOPMENT FEE CAP

2.1 The Project Development Fee Cap in respect of a New Project shall be:

2.1.1 in the case of Stage 1, the amount specified in the relevant row within Proforma 2 of the Pricing Data, based on the amount contained in Table 1 of Proforma 1 for the estimated capital value of the relevant New Project stated in the New Project Request; and

2.1.2 in the case of Stage 2, the amount specified in the relevant row within Proforma 2 and:

(a) calculated by multiplying the percentage value contained in Table 2 of Proforma 1 by the estimated capital value of the New Project stated in the New Project Request; or

(b) where applicable, based on the Stage 2 Fee Cap stated in monetary terms in Table 2 of Proforma 1.

2.2 The Project Development Fee Cap for the New Project as a whole shall be the aggregate of the fee caps for each stage agreed or determined pursuant to paragraph 2.1 above.

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

3. PAYMENT FOR ONGOING PARTNERING SERVICES

3.1 Partnering Services Costs relative to the provision of Ongoing Partnering Services shall be paid through the OPS Relevant Proportion payable by the Relevant Participant(s) as part of the Stage 1 Project Development Fee and by Project Agreement Counterparties under Project Agreements as part of the Stage 2 Project Development Fee, calculated in accordance with the provisions of this Agreement.

3.2 The OPS Relevant Proportion should be clearly identified as part of the Stage 1 and Stage 2 Project Development Fee Estimates, as set out in paragraph 1.2 of this Schedule 4 (*Partnering Services Costs*).

3.3 WEPCo will be required to demonstrate the value for money of the approach taken to the level of OPS Relevant Proportion on an individual New Project as part of the Pricing Report required to be submitted in accordance with Schedule 6 (*New Project Pricing Report*) and subject to the approvals process described in Schedule 5 (*Approval Process for New Projects*).

APPENDIX 1 - PRICING DATA

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

may be agreed between the SPB and WEPCo (as agreed from time to time with the Relevant Participant(s));

2.3 the Parties have agreed that only the following aspects may, on an individual New Project, be relevant considerations for suggesting adjustments to the figures or percentages specified in Proforma 1:¹⁹

2.3.1 **Complexity**

Where the specific details of a New Project in terms of design detailing, site specifics and/or buildability are materially more or less complex than the information on which the Pricing Data was based, it may be appropriate to adjust the Project Development Fee Caps in Proforma 1.

2.3.2 **Pathfinders/Preparatory Work**

Where Relevant Participants have carried out desktop studies in advance of issuing New Project Requests, the Project Development Fee Caps in Proforma 1 shall be adjusted as set out in the Partnering Services Method Statements²⁰.

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

2.3.3 **Planning Process**

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

¹⁹ Bidders are expected to provide proposals as to methodologies for producing such adjustments within the relevant Partnering Services Method Statement (but are not expected to increase the scope of the possible grounds of adjustment).

²⁰ Bidders are required to include specific details.

The Pricing Data is attached hereto.²¹

Proforma 1

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

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

For the purposes of interpretation of this Proforma 1, subject to paragraph 2 of Schedule 4 of Schedule 4 (*Partnering Services Costs*), the capital value of each New Project shall be based on the estimated value of the New Project contained in the New Project Request. The Project Development Fee Cap for Stage 1 and the Project Development Fee Cap for Stage 2 (together with the Annual Project Management Fee Cap and the Project Equity Returns) shall be calculated based on the relevant banding of capital value, the project type and scheme type, as described in Tables 1 to 4 below.

Table 1: Project Development Fee Caps for Stage 1²²

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

²¹ Pricing Data is solution specific and is to be developed and agreed with Bidders during dialogue.

²² Stage 1 fee caps are exclusive of survey costs specified in paragraph 4.2.3(b) to 4.2.4(q).

	[Medium Value Single Project]	[£30m - £40m]	£
	[High Value Single Project]	[£40m +]	£
	[Batch of Projects]	[£15m - £40m]	£
Primary School	[Batch of Projects]	[£15m - £40m]	£
Mix	[Batch of Projects]	[£15m - £40m]	£

Table 2: Project Development Fee Caps for Stage 2

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

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

Table 3: Project Equity Return Cap⁵

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

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

Table 4: Annual Project Management Fee Cap

Scheme Type	Project Type	Capital Value	Fee Cap (£)
College	[Low Value Single Project]	[up to £30m]	£
	[Medium Value Single Project]	[£30m - £40m]	£
	[High Value Single Project]	[£40m +]	£
Secondary School	[Low Value Single Project]	[up to £30m]	£
	[Medium Value Single Project]	[£30m - £40m]	£
	[High Value Single Project]	[£40m +]	£

	[Batch of Projects]	[£15m - £40m]	£
All-through School	[Low Value Single Project]	[up to £30m]	£
	[Medium Value Single Project]	[£30m - £40m]	£
	[High Value Single Project]	[£40m +]	£
	[Batch of Projects]	[£15m - £40m]	£
Primary School	[Batch of Projects]	[£15m - £40m]	£
Mix	[Batch of Projects]	[£15m - £40m]	£

Proforma 2

This Proforma 2 is to be completed on a per New Project basis, in accordance with paragraph 1.2 of Schedule 4. The total estimated Stage 1 and Stage 2 Project Development Fees for each proposed New Project shall be calculated by completing Tables 1 and 2 below using the relevant Partnering Services Cost rates set out in Section 4 of Schedule 3 (*Partnering Services Cost Rates*), as adjusted from time to time in accordance with this Agreement. The Project Development Fee Cap for each Stage shall be populated, where indicated in Tables 1 and 2.

Table 1 - Stage 1 Project Development Partnering Services

		Stage 1 Project Development Partnering Services												
		(i) New Project Development			(ii) Supply Chain Establishment			(iii) Funding			(iv) Value for Money			Total Fee
Discipline	Grade	Day Rate £	No. days	Fee £	Day Rate £	No. days	Fee £	Day Rate £	No. days	Fee £	Day Rate £	No. days	Fee £	
WEPCo Staff														
WEP Co Staff	Chief Executive													
	Manager													
	[Other]													
Feasibility & Design														
Architect	Director													
	Associate													
	Project Architect													

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	Technician													
Engineer - C&S	Director													
	Associate													
	Project Engineer													
	Technician													
Engineer - M&E	Director													
	Associate													
	Project Engineer													
	Technician													
Quantity Surveyor	Director													
	Associate													
	Senior QS													
	Assistant QS													
Project Manager	Director													
	Associate													
	Senior PM													
	Assistant PM													
Energy Specialist	[TBC]													
Planning Advisor	[TBC]													
Transport Engineer/ Adviser	[TBC]													

Rates Advisor	[TBC]													
[Other]	[TBC]													
Finance Support														
Financial Modellers	[TBC]													
Risk Specialist Advisor	[TBC]													
Tax Advisor	[TBC]													
Third Party Income Advisor	[TBC]													
External Financial Auditor	[TBC]													
[Other]	[TBC]													
Legals														
Company Secretary	[TBC]													
External Advice	Partner													
	Senior Associate													
	Junior Associate													
	Trainee/paralegal													
[Other]	[TBC]													
Other														
Building, Engineering and Construction	[TBC]													

Project Management	[TBC]													
[Other]	[TBC]													
Stage 1: Total estimated Partnering Services Costs for Project Development Partnering Services (£)														
Stage 1: OPS Relevant Proportion (£)														
Stage 1: Project Development Fee Estimate (£)*														
Stage 1: Project Development Fee Cap (£)														

*The Stage 1 Project Development Fee Estimate, being the sum of the Partnering Services Costs for the Project Development Partnering Services and the OPS Relevant Proportion, shall not exceed the Stage 1 Project Development Fee Cap.

Table 2 – Stage 2 Project Development Partnering Services

		Stage 2 Project Development Partnering Services												
		(i) New Project Development			(ii) Supply Chain Establishment			(iii) Funding			(iv) Value for Money			Total Fee
Discipline	Grade	Day Rate £	No. days	Fee £	Day Rate £	No. days	Fee £	Day Rate £	No. days	Fee £	Day Rate £	No. days	Fee £	
WEPCo Staff														
WEPCo Staff	Chief Executive													

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	Manager																		
	[Other]																		
Feasibility & Design																			
Architect	Director																		
	Associate																		
	Project Architect																		
	Technician																		
Engineer - C&S	Director																		
	Associate																		
	Project Engineer																		
	Technician																		
Engineer - M&E	Director																		
	Associate																		
	Project Engineer																		
	Technician																		
Quantity Surveyor	Director																		
	Associate																		
	Senior QS																		
	Assistant QS																		
Project Manager	Director																		
	Associate																		
	Senior PM																		
	Assistant PM																		

Energy Specialist	[TBC]													
Planning Advisor	[TBC]													
Transport Engineer/ Adviser	[TBC]													
Rates Advisor	[TBC]													
[Other]	[TBC]													
Finance Support														
Financial Modellers	[TBC]													
Risk Specialist Advisor	[TBC]													
Tax Advisor	[TBC]													
Third Party Income Advisor	[TBC]													
External Financial Auditor	[TBC]													
[Other]	[TBC]													
Legals														
Company Secretary	[TBC]													
External Advice	Partner													
	Senior Associate													
	Junior Associate													

	Trainee/paralegal													
[Other]	[TBC]													
Other														
Building, Engineering and Construction	[TBC]													
Project Management	[TBC]													
[Other]	[TBC]													
Stage 2: Total estimated Partnering Services Costs for Project Development Partnering Services (£)														
Stage 2: OPS Relevant Proportion (£)														
Stage 2: Project Development Fee Estimate (£)*														
Stage 2: Project Development Fee Cap (£)														

*The Stage 2 Project Development Fee Estimate, being the sum of the Partnering Services Costs for the Project Development Partnering Services and the OPS Relevant Proportion, shall not exceed the Stage 2 Project Development Fee Cap.

SCHEDULE 5 - APPROVAL PROCESS FOR NEW PROJECTS

1. PURPOSE

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

2. GENERAL OBLIGATIONS OF THE PARTIES

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

- 2.1.1 work with the Participants to develop local delivery plans which will then form the basis of the updated SDP; and
- 2.1.2 work with the Participants to review the applicability of the SDP to the provision of Education Sector Services and Community Services in the Region and to decide which New Projects to proceed with,

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

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

- 2.2.1 identify, analyse and discuss the Participants' collective and individual accommodation requirements;
- 2.2.2 assist in the development of local delivery plans and review their applicability to the provision of Education Sector Services and Community Services in the Region;
- 2.2.3 develop further the SDP, in particular to further refine the proposals contained in the SDP;
- 2.2.4 prioritise New Projects on a basis consistent with the decisions from time to time of the SPB under Clause 14.2;
- 2.2.5 identify and appraise available options for meeting the Participants' accommodation requirements and thereby recommend (on the basis of best available value for money) which New Projects to progress;
- 2.2.6 advise how best to bundle accommodation requirements within a New Project to ensure that the New Project is Affordable, offers value for money and provides a solution with an appropriate level of flexibility;

- 2.2.7 take into consideration the views of relevant stakeholders in relation to the SDP and actual or potential New Projects;
- 2.2.8 develop the Participants' requirements in relation to New Projects which, in due course, during the Stage 2 Approval process set out at paragraph 5, will be developed further to enable it to form the basis for the agreement of the relevant Project Agreement;
- 2.2.9 analyse and discuss the range of potential funding options for New Projects including the feasibility of third party funding such as sponsorship when considering and developing a New Project;
- 2.2.10 assist in the preparation of outline business cases and obtaining all necessary approvals; and
- 2.2.11 in addition to the requirements of Schedule 6 (*New Project Pricing Report*), agree with potential Relevant Participant(s):
 - (a) the appropriate Comparator for purposes of determining any adjustments to the Project Development Fee Cap pursuant to paragraph 2 of Schedule 4 (*Partnering Services Costs*) in respect of such Comparator; and
 - (b) each part of the Project Development Fee Estimate, including the OPS Relevant Proportion, for each stage set out in Proforma 2,

for any New Project in respect of which such Participant(s) has/have indicated an intention to submit a New Project Request.

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

- 2.3.1 providing any information reasonably required by WEPCo to enable it to satisfy the requirements of paragraphs 4 and/or 5 ;
 - 2.3.2 identifying whether any requirements under paragraph 4.2 and/or 5.4 may not be required or what additionally may be required by the Participants;
 - 2.3.3 explaining any relevant considerations around the funding of and/or financial envelope for the proposed New Project;
 - 2.3.4 identifying suitable benchmarks for the New Project; and
 - 2.3.5 providing reasonable assistance to WEPCo in relation to the procurement by WEPCo of all relevant Consents and the entering into of Project Agreements,
- and agreeing with WEPCo the matters referred to in paragraph 2.2.11 above.

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

3. NEW PROJECT REQUESTS

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

- 3.1.1 indicative funding proposals setting out the maximum available capital and/or revenue which can be committed to that New Project, together with high level detail of assumptions associated with this calculation (the "**Affordability Cap**");
- 3.1.2 any requirements in relation to a New Project that must be satisfied as part of a Stage 1 Submission and/or Stage 2 Submission, including any governmental or similar approval requirements (for example the requirement to comply with—the Welsh Government's ["Better Business Cases - using the Five Case Model"]), funding approvals or grant conditions ("**Specific Requirements**"); and
- 3.1.3 a clear, detailed Project brief setting out the scope of the work to be undertaken, supported by relevant information which is commensurate with any previous development work undertaken on the New Project, together with any key aims and objectives related to the delivery of the New Project and the project specific requirements. This should include (i) details of the curriculum model; (ii) education brief (including any key programming requirements); (iii) site brief (including location, red line plan, title details and any "Reserved Rights" "Title Conditions", existing facilities and the extent of any engagement on planning matters and/or other consents); (iv) the New Project Specific Project Agreement, including the Site Specific Brief within the Authority's Construction Requirements, the Schedule of Accommodation, Area Data Sheets, the ICT requirements, Equipment requirements and Thermal and Energy Efficiency Testing Procedures, each as referred to in the Template Project Agreement; (iv) in the case of Pathfinder Projects, as a minimum, desktop surveys; (v) any initial agreement that may be in place between the Participant and any relevant Government body (whether pursuant to the Welsh Government's ["Better Business Cases - using the Five Case Model"] or otherwise); (vi) the Strategic Outline Case approved by Welsh Government; (vii) RIBA Stage 1 design information; (viii) any Well-being of Future Generations (Wales) Act 2015 policy objectives; (ix) the Project BIM Agreement relative to the New Project; and (x) details of approach to revenue/capital funding; and (xi) the anticipated position on staff transfers. As part of its preparation for each Pathfinder Project the Relevant Participant shall procure a desktop study of the relevant site or sites and report the results of such studies. Such report shall be accompanied by the requirements as to what, if any further studies or investigations should be carried out by WEPCo for the purposes of producing a Stage 1 Submission.

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

- (a) the Relevant Participant(s) shall indicate this in the New Project Request and shall provide details of the work done to date, any revised requirements for the Stage 1 Submission and/or Stage 2 Submission (or, in relevant cases, whether a Stage 1 Submission is required at all) and any proposed risk allocation including proposals for

novation or otherwise of the design and/or other consultancy contracts which the Relevant Participants may have in place;

- (b) WEPCo and the Relevant Participants shall agree the appropriate adjustments to the process set out in this Schedule 5 (*Approval Process for New Projects*) and Schedule 6 (*New Project Pricing Report*) necessary to reflect the circumstances of the Project, including timing and details of the proposed Project Development Fee (it being agreed that the Parties' intentions are for this process to be applied with least practicable adjustments); and
- (c) the period for WEPCo's confirmation under paragraph 3.3 shall be increased to thirty (30) Business Days.

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

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

3.3.1 where the reason for not proceeding is that the Affordability Cap provided by the Relevant Participants is unrealistically low, WEPCo and the Relevant Participant(s) shall work together in good faith to seek to agree an alternative Project brief and/or Affordability Cap which can form the basis for a revised New Project Request. Failing an agreement on such terms within six (6) months of WEPCo's original confirmation, the Relevant Participant(s) shall be entitled to procure such New Project outside the terms of this Agreement and shall not be or be deemed to be in breach of Clause 9 (*Exclusive Nature of this Agreement*) unless such New Project is a Qualifying Project and they commence to procure such New Project prior to the expiry of ten (10) years from the Commencement Date at a substantially greater cost than the Affordability Cap (adjusted, for these purposes to reflect changes in BCIS TPI (as specified by the Relevant Participant(s)) from the date of the New Project Request); and

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

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

4. **STAGE 1 APPROVAL**

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

4.2

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

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

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

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

- (a) demonstrate that the Participant's requirements (including the Affordability Cap) are likely to be met;
- (b) establish that the New Project is likely to provide value for money; and
- (c) enable a cost estimate to be prepared with sufficient accuracy to establish whether or not the New Project can be delivered within the Affordability Cap (subject to the inclusion of identified contingencies for matters not yet known);

4.2.3 the results of the following:

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

and, where applicable, in terms of paragraph 4.5,

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

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

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

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

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

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

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

4.3 In developing a Stage 1 Submission:

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

- 4.4 Without prejudice to the requirements of Schedule 6 (*New Project Pricing Report*), the Relevant Participant(s) shall provide WEPCo with such information as to its/their requirements (including the Specific Requirements) and other inputs as WEPCo may reasonably require and shall assist WEPCo in the review of any draft designs and broad proposals in relation to the Stage 1 Submission. Any and all information and other input or feedback so provided shall be provided without warranty and on the same basis as the provision of any information pursuant to Clauses 14.4 to 14.6 and shall be without prejudice to the rights of the Relevant Participant(s) to approve or not approve any New Project as they, in their absolute discretion, deem fit under this Schedule 5.
- 4.5 Save in respect of Pathfinder Projects, as part of its preparation for each Stage 1 Submission, WEPCo shall carry out a desktop study of the relevant site or sites and report (in advance of the Stage 1 Submission) to the Relevant Participant(s) of the results of such studies. Such report shall be accompanied by the recommendations of WEPCo as to what, if any further studies or investigations (as listed in paragraph 4.2.3 above) should be carried out by WEPCo for the purposes of producing a Stage 1 Submission. The Relevant Participant(s) shall confirm to WEPCo which if any such studies and/or investigations are required and WEPCo shall procure such studies and/or investigations on terms and at prices agreed with the Relevant Participants (which terms shall include the Relevant Participant(s) having the right to rely on the same). Such further surveys shall be carried out at the cost of the Relevant Participant(s) and shall not form part of the Project Development Fee unless the Relevant Participant(s) and WEPCo agree to the contrary.
- 4.6 Following receipt of a Stage 1 Submission, the Relevant Participant(s) shall have a period of two (2) months from the date of receipt of the Stage 1 Submission (or such longer period as they may have agreed with WEPCo in writing, all acting reasonably) in which to notify WEPCo that it approves or rejects the Stage 1 Submission. It is expected that the SPB will provide a forum for discussion of such Stage 1 Submission. If following the date of the New Project Request, WEPCo has failed the Track Record Test and, as a result, the Relevant Participants reject the Stage 1 Submission which otherwise meets the requirements of paragraph 4.2, then paragraphs 4.8.3 and 4.9 shall apply.
- 4.7 Where the Relevant Participant(s) approve a Stage 1 Submission, that New Project shall be known as a "**Stage 1 Approved Project**" or as having received "**Stage 1 Approval**", as the context requires.
- 4.8 If a New Project in respect of which a Stage 1 Submission has been submitted in accordance with this paragraph 4 does not become a Stage 1 Approved Project then WEPCo's costs in relation to the preparation of such Stage 1 Submission shall be borne by WEPCo unless:
- 4.8.1 the New Project subsequently becomes an Approved Project and the relevant costs are included as part of the Project Development Fee for such Approved Project in accordance with paragraph 1.2.4 of Schedule 4 (*Partnering Services Costs*); or
 - 4.8.2 the Relevant Participant(s) have neither approved nor rejected the Stage 1 Submission within one (1) month of a notice (served no earlier than expiry of the two (2) months period specified in paragraph 4.6 (or such longer period as WEPCo may have agreed in writing, acting reasonably)) by WEPCo on the Relevant Participant(s) referring to this paragraph 4.8 and confirming that WEPCo intends to withdraw the Stage 1 Submission in the absence of approval by the Relevant Participant(s) within such further one (1) month period, in which case where WEPCo subsequently notifies the Relevant Participant(s) in writing of such withdrawal, WEPCo shall be entitled to the Incurred

Project Development Fee in respect of such Stage 1 Submission calculated in accordance with paragraph 1.9 of Schedule 4 (*Partnering Services Costs*); or

4.8.3 such Stage 1 Submission is rejected by the Relevant Participant(s) solely on grounds that:

- (a) the Track Record Test has been failed; or
- (b) the Relevant Participant(s) have exercised a right to suspend exclusivity pursuant to Clause 23.3 or Clause 23.10.1,

in which case WEPCo shall be entitled to the Incurred Project Development Fee relative to such Stage 1 Submission in respect of such Stage 1 Submission in accordance with paragraph 1.9 of Schedule 4 (*Partnering Services Costs*).

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

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

- (a) WEPCo has failed the Track Record Test or the Relevant Participant(s) or any of them have exercised a right to suspend exclusivity pursuant to Clause 23.3 or Clause 23.10.1; or
- (b) WEPCo has not:
 - (i) demonstrated to the satisfaction of the Relevant Participant(s) that the New Project provides value for money, including demonstration of continuous improvement in value for money where appropriate; or
 - (ii) met the requirements of paragraph 4.2 relative to such Stage 1 Submission; or

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

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

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

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

- 4.10.1 WEPCo shall seek competitive tenders from a minimum of [three (3)] licensed Asbestos surveyors and shall appoint the tenderer with the most economically advantageous tender and the necessary skills, qualification and experience to carry out an Asbestos Management Survey and prepare an Asbestos Management Survey Report.
- 4.10.2 The Asbestos Surveyor will be required to carry out an Asbestos Management Survey and complete the relevant columns of the Asbestos Schedule, to include within an Asbestos Management Survey Report. The Asbestos Surveyor shall include details of the following within the Asbestos Schedule:
 - (a) Asbestos containing materials that are identified by the survey or surveys; and
 - (b) where Asbestos containing materials have been identified within a survey or surveys, a description of whether Asbestos is "strongly presumed" or "presumed", taking into account any access restrictions.
- 4.10.3 Under the direction of the Relevant Participant, WEPCo shall be required to:
 - (a) price the Asbestos Schedule using benchmarked rates, for the purposes of establishing a provisional sum; and
 - (b) estimate the programme,in each case for the removal of Asbestos materials identified in the Asbestos Management Survey Report, such rates and programme duration being based on Good Industry Practice (the "**Asbestos Provisional Sum and Programme**").
- 4.10.4 The Asbestos Management Survey Report and Asbestos Provisional Sum and Programme shall be included in the Stage 1 Submission and Stage 2 Submission. The Relevant Participant does not expect this amount or programme duration to change between the point the report is produced and execution of the Project Agreement.
- 4.10.5 The Asbestos Management Survey Report shall be included in the Project Agreement.

5. **STAGE 2 APPROVAL**

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

5.2 In developing a Stage 2 Submission:

- 5.2.1 WEPCo shall continue to liaise with the Relevant Participant(s) and relevant end users (in the case of end users, such end users to be such persons or organisations as the Relevant Participant(s) in consultation with WEPCo consider appropriate) as necessary to ensure the best available value for money is achieved through the appropriate consideration of all viable options and informed choices by WEPCo, stakeholders and the Relevant Participant(s); and
- 5.2.2 WEPCo shall be obliged to comply with its BIM protocol obligations under the Project BIM Agreement and submit a BIM Execution Plan to the Relevant Participant within one month of commencing Stage 2.

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

- 5.3.1 provide WEPCo with such information as to its/their requirements (including the Specific Requirements) and other inputs as WEPCo may reasonably require and shall assist WEPCo in the review of any draft designs and proposals in relation to the Stage 2 Submission. Any and all information and other input or feedback so provided shall be provided without warranty and on the same basis as the provision of any information pursuant to Clauses 14.4 to 14.6 and shall be without prejudice to the rights of the Relevant Participant(s) to approve or not approve any New Project as they, in their absolute discretion, deem fit under this Schedule 5; and
- 5.3.2 generally co-operate with WEPCo in relation to any Stage 2 Submission, including (without limitation) promptly providing:
 - (a) written confirmation of the Affordability Cap and/or any Specific Requirements or any change to such Affordability Cap and/or Specific Requirements;
 - (b) any information reasonably required by WEPCo enable it to satisfy the requirements of paragraph 5.4; and
 - (c) reasonable assistance to WEPCo in relation to procurement by WEPCo of all relevant Consents (provided that this sub-paragraph shall not apply to a Relevant Participant which is a Local Planning Authority exercising its functions as such).

5.4 Subject to paragraph 5.2, and without prejudice to the generality of Clause 8.1.6, WEPCo shall produce each Stage 2 Submission in accordance with the relevant Partnering Services Method Statement and shall procure that a Stage 2 Submission shall address all issues that have a potential impact on risk and/or price in respect of the proposed New Project and shall include as a minimum:

- 5.4.1 a value for money assessment in respect of the option given Stage 1 Approval:
 - (a) containing:
 - (i) a Pricing Report prepared in accordance with Schedule 6 (*New Project Pricing Report*);

- (ii) an elemental cost plan updating the information provided at Stage 1, firming up on contingencies against identified risks and matters not known; and
 - (iii) financial model or Development Amount Analysis, as the case may be;
 - (b) explaining, in accordance with the relevant provisions of the Partnering Services Method Statement applicable to the Project Development Partnering Services and the assumptions underpinning the OPS Relevant Proportion, why WEPCo's proposals demonstrate value for money, taking into account construction and design cost, FM costs, lifecycle costs and all other relevant factors (cost related or otherwise); and
 - (c) confirming that such proposals would meet the relevant objectives and commitments in the Key Performance Indicators;
- 5.4.2 where the transfer of properties by Participants or third parties to WEPCo or to Project Service Providers are required for the New Project, the terms for such transfers as agreed between WEPCo and the relevant Participants or third parties;
- 5.4.3 a mark up of the New Project Specific Project Agreement which contains, inter alia, the completed WEPCo's Proposals or "Project Co's Proposals" (as the case may be) (as defined in the relevant Project Agreement) which meet the Facilities Requirements and/or Service Level Specifications as applicable, and which reflects all proposed changes or amendments that have been proposed by WEPCo and agreed by the Relevant Participant and approved by Welsh Government, all in accordance with the "IMPORTANT NOTICE" set out on the Template Project Agreement and taking account of the Approval Criteria at paragraphs 5.5.5 and 5.5.6;
- 5.4.4 detailed design work (to RIBA Stage 4) and submission of relevant building warrant applications;
- 5.4.5 warrant applications;
- 5.4.6 plans and drawings;
- 5.4.7 requirements for planning approvals and all associated costs, including either evidence of the Planning Permission for the New Project, (including a report on all conditions attached to such Planning Permission setting out WEPCo's recommended strategy for dealing with the same) or a programme by which such Planning Permission will be obtained, taking into account the provisions of Clause 5.1 (*Planning Matters*);
- 5.4.8 without prejudice to paragraph 5.4.1, an explanation (together with appropriate supporting evidence) as to why the Stage 2 Submission meets the Approval Criteria (as defined in paragraph 5.5);
- 5.4.9 commitment letters from any proposed tenants or sub-tenants of the Facilities, where applicable;

- 5.4.10 an assessment of the effect (if any) on any employees of the Relevant Participants or proposed Project Agreement Counterparty, including any potential transfer of any such employees to any Project Service Provider or their Supply Chain Member and the cost implications of such transfer;
- 5.4.11 a timetable setting out the stages and timescales for the period between achieving Stage 2 Approval (as defined in paragraph 5.7.1) and the execution of the Project Agreement in relation to that New Project;
- 5.4.12 details of the competency assessments undertaken and the results of the same, in respect of the potential "Principal Contractor" for purposes of the CDM Regulations;
- 5.4.13 [Site Waste Management Plan], incorporating design stage and construction phase actions, including the estimated total mass of waste and the estimated recovery rate before mitigating actions, with a list of actions to reduce waste and increase the level of recovery (distinguishing construction, demolition/strip-out and excavation wastes as appropriate) and increase reused and recycled content;
- 5.4.14 the corporate structure of the Project Service Provider and where not WEPCo, confirming that:
 - (a) such Project Service Provider would be a PSDP Related Party or Subsidiary of WEPCo (as applicable) as at the date of execution of the relevant Project Agreement; and
 - (b) where the Project Service Provider is not WEPCo or a Subsidiary of WEPCo, that:
 - (i) WCo shall be entitled to subscribe for up to twenty (20) per cent of the issued share capital in the Project Service Provider; and
 - (ii) the proposed shareholders in the Project Service Provider (or its parent company) shall be given the opportunity to provide initial subordinated debt or other shareholder funding to the Project Service Provider on a basis pro-rata to their proposed shareholding and otherwise consistent with the principles set out in the Template Project Co Shareholders' Agreement.
- 5.4.15 a draft Project Co Shareholders' Agreement relating to any New Project which is a MIM Project, which reflects all proposed changes or amendments that have been proposed by WEPCo, agreed by the Relevant Participant and approved by Welsh Government, all in accordance with the "IMPORTANT NOTICE" set out on the Template Project Co Shareholders' Agreement and taking account of the Approval Criteria at paragraph 5.5.6;
- 5.4.16 fully developed sub-contracts for each of the Contractor and (in the case of MIM Projects) the Service Provider and any relevant [Key Sub-Contractors], clearly demonstrating robust and deliverable risk allocation and in a form agreed by the Relevant Participant and approved by Welsh Government;

- 5.4.17 details of the proposed security package, including draft parent company guarantees through which the Project Service Provider will be protected against financial or other failure of the principal Contractor and/or (in the case of MIM Projects) Service Provider, in a form agreed by the Relevant Participant and approved by Welsh Government; and
- 5.4.18 in the case of MIM Projects, commitment letters from the senior funders confirming acceptance of the documents submitted by WEPCo pursuant to paragraphs 5.4.3, 5.4.15, 5.4.16 and 5.4.17.²³

5.5 For the purposes of this Schedule 5 (*Approval Process for New Projects*), "**Approval Criteria**" means the criteria against which any New Project is judged in determining whether it achieves Stage 2 Approval. The criteria are:

- 5.5.1 that the cost of the New Project is within the Affordability Cap or any increased Affordability Cap notified to WEPCo by the Relevant Participant(s);
- 5.5.2 that it has been demonstrated to the satisfaction of the Relevant Participant(s) that the New Project provides value for money including demonstration of continuous improvement in value for money where appropriate;
- 5.5.3 that the New Project meets the Specific Requirements and each of the Relevant Participant(s)' other requirements (including for the avoidance of doubt: design quality; sustainability; and terms and conditions of the Project Agreement) as identified at the time a New Project became a Stage 1 Approved Project;
- 5.5.4 that the Stage 2 Submission contains all the information required pursuant to paragraph 5.4 and has been produced in accordance with the relevant Partnering Services Method Statement;
- 5.5.5 in the case of MIM Projects and D&B Projects that any proposed changes or amendments to the relevant Template Project Agreement (other than amendments contained in the New Project Specific Project Agreement issued by the Relevant Participant with the New Project Request) for project specific reasons are in accordance with the "IMPORTANT NOTICE" set out on the Template Project Agreement and are not Prohibited Amendments;
- 5.5.6 in the case of MIM Projects, that any proposed changes to the Template Project Co Shareholders' Agreement that have been proposed are in accordance with the "IMPORTANT NOTICE" set out on the Template Project Co Shareholders' Agreement and are not Prohibited Amendments.
- 5.5.7 that the implementation of the New Project would not breach Law;
- 5.5.8 that the Stage 2 Submission was submitted within the maximum period specified therefor in the Stage 1 Submission (failure to do so shall mean that the Relevant Participant(s) are entitled to deem that the Approval Criteria are not met);

²³ The list represents Welsh Government's minimum requirements. Other items to be discussed during dialogue to align with Bidders method statements.

5.5.9 that the proposed Project Service Provider is a PSDP Related Party in the case of MIM Projects, or otherwise is WEPCo or a Subsidiary of WEPCo, as at the date of execution of the Project Agreement and the confirmation required under paragraph 5.4.14(b) has been properly provided; and

5.5.10 that the Authority's Community Benefit Requirement KPIs are met.

5.6 WEPCo shall submit its Stage 2 Submission to the Relevant Participant(s), copied to the SPB. It is expected that the SPB will provide a forum for discussion of such Stage 2 Submission. The Relevant Participant(s) shall be entitled to call for such reasonable information as they consider appropriate to enable them to decide whether the Stage 2 Submission meets the Approval Criteria. WEPCo shall reply promptly to all such requests for further information and assistance. If, acting reasonably, the Relevant Participant(s) find that any material aspects of the Stage 2 Submission are unsatisfactory to them, the Relevant Participant(s) shall notify WEPCo of the same and offer reasonable assistance to WEPCo to address such deficiencies. If WEPCo addresses such deficiencies to the satisfaction of the Relevant Participant(s), acting reasonably, paragraph 5.7.1 shall apply. If WEPCo is unable to resolve such deficiencies to the satisfaction of the Relevant Participant(s) (acting reasonably) paragraph 5.7.2 shall apply.

5.7 Within sixty (60) Business Days of the later of submission to the Relevant Participant(s) of a Stage 2 Submission and the date on which WEPCo provides them with all reasonable further information that has been requested and provided pursuant to 5.6, the Relevant Participant(s) shall give written notice of whether they:

5.7.1 approve the relevant New Project (in which case the New Project shall be deemed to have received "**Stage 2 Approval**"); or

5.7.2 reject the New Project:

- (a) on grounds other than those set out in paragraph (b), (c) or (d); or
- (b) subject to paragraph (c), on the grounds that it has failed to meet one or more of the Approval Criteria;
- (c) because of any change to the Affordability Cap from that originally notified in the New Project Request, the New Project is not Affordable despite being within the Affordability Cap as originally notified in the New Project Request; or
- (d) because WEPCo has failed the Track Record Test or because the Relevant Participant(s) have exercised a right to suspend exclusivity pursuant to Clause 23.3 or Clause 23.10.1.

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

- 5.8 If the Relevant Participant(s) fail to notify WEPCo of a decision within the period of sixty (60) Business Days referred to in paragraph 5.7, WEPCo shall notify the Relevant Participant(s) of that fact in writing, referring to this paragraph 5.8. If the Relevant Participant(s) have not notified WEPCo in writing of a decision to approve or reject the New Project within a further twenty (20) Business Days of such notification, they shall be deemed to have rejected the New Project on grounds set out in paragraph 5.7.2(a).
- 5.9 If the Relevant Participant(s) reject the New Project on the grounds set out in paragraph 5.7.2(b), the Relevant Participant(s) and WEPCo will work together to address the reasons for such failure and WEPCo will attempt in good faith to produce a revised Stage 2 Submission which WEPCo shall re-submit to the Relevant Participant(s) as soon as reasonably practicable and in any case within thirty (30) Business Days of such rejection, which re-submission shall be treated as a Stage 2 Submission. If no re-submission is made within the said (30) Business Day period or the resubmitted Stage 2 Submission is rejected by the Relevant Participant(s) on the grounds set out in paragraph 5.7.2(b) or 5.7.2(d), it shall be treated as having been rejected and, subject to paragraph 5.11, neither the Relevant Participant(s) nor WEPCo shall have any further obligations in relation to the relevant New Project under this paragraph 5.9.
- 5.10 Where the Relevant Participant(s) reject or are deemed to have rejected a Stage 2 Submission:
- 5.10.1 pursuant to paragraph 5.7.2(a) or paragraph 5.7.2(c):
- (a) WEPCo's Incurred Project Development Fee relative to the Stage 2 Submission will be paid by the Relevant Participant(s) within ten (10) Business Days of the date on which WEPCo receives written notice of the rejection (or the expiry of the four (4) month period referred to in paragraph 5.7 without the obtaining of all relevant FBC approvals for the Relevant Participant(s)/proposed Project Agreement Counterparty, if applicable); and
 - (b) unless the period of ten (10) years after the Commencement Date has expired, to the extent the New Project in question is a Qualifying Project, the Relevant Participant(s) shall not be entitled to procure the Required Facilities and/or the provision of the Project Services outside the terms of this Agreement and, if they do so, such action shall and shall be deemed to be in breach of Clause 9 (*Exclusive Nature of this Agreement*); or
- 5.10.2 pursuant to paragraph 5.7.2(d):
- (a) WEPCo's Incurred Project Development Fee relative to the Stage 2 Submission will be paid by the Relevant Participant(s) within ten (10) Business Days of the date on which WEPCo receives written notice of the rejection; and
 - (b) the Relevant Participant(s) shall be entitled to procure the New Project outside the terms of this Agreement and shall not be or be deemed to be in breach of the provisions of Clause 9 (*Exclusive Nature of this Agreement*) unless, prior to the expiry of ten (10) years after the Commencement Date, the New Project is a Qualifying Project and they seek to commence the procurement of such New Project after expiry of any suspension of exclusivity pursuant to Clause 9.7, Clause 23.3 or Clause 23.10.1.

- 5.11 Subject to paragraph 5.9, if the Relevant Participant(s) reject a New Project pursuant to the provisions of paragraph 5.7.2(b) in respect of which a Stage 2 Submission has been resubmitted, WEPCo shall be entitled to refer the matter for consideration under the Dispute Resolution Procedure within ten (10) Business Days after receiving written notice of the rejection by the Relevant Participant(s). If, following a referral to Schedule 22 (*Dispute Resolution Procedure*), it is agreed or determined that the New Project rejected by the Relevant Participant(s) pursuant to paragraph 5.7.2(b) met the Approval Criteria the Relevant Participant(s) shall either:
- 5.11.1 declare that the relevant New Project is an Approved Project and that such New Project shall proceed in accordance with paragraph 5.14; or
 - 5.11.2 declare that its rejection of the relevant New Project be treated as a rejection pursuant to the provision of paragraph 5.7.2(a) and the relevant provisions of paragraph 5.10 shall apply.
- 5.12 If, following a referral to Schedule 22 (*Dispute Resolution Procedure*) under paragraph 5.11, it is agreed or determined that the New Project did not meet the Approval Criteria, or WEPCo does not refer the matter for consideration under the Dispute Resolution Procedure in accordance with paragraph 5.11, the provisions of paragraph 5.13 will apply.
- 5.13 Where, in terms of paragraph 5.12, this paragraph 5.13 applies, the Relevant Participant(s) shall be entitled either to procure the Required Facilities and/or the provision of the Project Services covered by the relevant Stage 2 Submission outside the terms of this Agreement (whether or not the New Project in question is a Qualifying Project and whether or not the period of ten (10) years from the Commencement Date has expired), or not to proceed with procurement of the Required Facilities/Project Services, and, for the avoidance of doubt shall not be or be deemed to be in breach of the provisions of Clause 9 (*Exclusive Nature of this Agreement*) in either case. In the event that the Relevant Participant(s) are so entitled pursuant to this paragraph 5.13, then where the Approval Criterion on Affordability has not been met, they shall not, prior to the expiry of the 10th anniversary of the Commencement Date, make any change to the Facilities Requirements which, had it been made prior to the submission of the relevant Stage 2 Submission, would have been reasonably likely to result in a material change in the sums payable by the relevant proposed Project Agreement Counterparty in respect of the Project.
- 5.14 If a New Project becomes an Approved Project, WEPCo will carry out further work to develop appropriate Project Agreements to implement the Approved Project on the terms of the Stage 2 Submission (as the same may be amended from time to time by agreement between WEPCo and the Relevant Participant(s)).
- 5.15 The Relevant Participant(s) shall notify WEPCo in writing as soon as they become aware of any matter which may adversely affect the viability of any New Project including any:
- 5.15.1 Unreasonable Conditions or other planning issues likely to cause a material delay in the anticipated programme for the New Project;
 - 5.15.2 material cost increases (whether on an aggregate basis or on a line by line basis); or

5.15.3 changes to funding which any Relevant Participant receives or to the way in which funding may be applied, either or both which may affect whether a New Project is Affordable,

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

5.16 The Relevant Participant(s) shall provide reasonable assistance to WEPCo in relation to the procurement by WEPCo of all relevant Consents and the entering into of the relevant Project Agreement(s). This paragraph 5.16 and paragraph 5.15.1 shall not apply to a Relevant Participant which is a Local Planning Authority exercising its functions as such.

5.17 WEPCo shall be responsible for performing its obligations under Clause 5.1 (*Planning Matters*) in respect of such Approved Project.

5.18 WEPCo shall novate all of its past, present and future rights, obligations and liabilities under a Project BIM Agreement to the Project Service Provider on or prior to the date of execution of the Project Agreement for the Approved Project.

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

6.1 If the Specific Requirements, Affordability Cap or Approval Criteria are subject to any material variation in relation to a New Project by the Relevant Participant(s) after a Stage 1 Submission has been submitted then:

6.1.1 WEPCo and the Relevant Participant(s) shall negotiate in good faith as to the implications on the Stage 1 Submission and/or Stage 2 Submission (as the case may be) and shall seek to agree changes thereto to accommodate the variation (including any change to the Affordability Cap, the appropriate Comparators (or adjustments to Comparators) and/or to the Project Development Fee);

6.1.2 save where such changes have been made as a result of the advice given by WEPCo, if agreement has not been reached pursuant to paragraph 6.1.1 within twenty (20) Business Days (or such longer period as the parties may agree) then:

- (a) WEPCo shall be entitled by notice in writing to the Relevant Participant(s) to withdraw the Stage 1 Submission or the Stage 2 Submission or to decline to submit a Stage 2 Submission (as the case may be) and to be paid the Incurred Project Development Fee with the relevant date for calculation being the date the change was notified to WEPCo; and
- (b) unless the period of ten (10) years after the Commencement Date has expired, to the extent the New Project in question is a Qualifying Project, the Relevant Participant(s) shall not be entitled to procure the Required Facilities and/or the provision of the Project Services outside the terms of this Agreement without recommencing this New Project Approval Process and, if they do so, such action shall and shall be deemed to be in breach of Clause 9 (*Exclusive Nature of this Agreement*).

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

7. **SUSPENSION OF EXCLUSIVITY**

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

8. **SURVEYS**

8.1 In accordance with paragraphs 4.2.3 and 4.5 above, where WEPCo recommends that surveys, studies and/or investigations (other than desktop studies) are required for the purposes of a Stage 1 Submission, WEPCo shall procure such surveys, studies and/or investigations on the terms and at prices agreed with the Relevant Participant (which terms shall include the Relevant Participant having the right to rely on the same).

8.2 The cost of such surveys, studies and/or investigations carried out pursuant to paragraph 8.1 shall be due and payable by the Relevant Participant to WEPCo within [twenty five (25)] Business Days of receipt of a valid invoice and such costs shall not form part of the Project Development Fee unless the Relevant Participant and WEPCo agree to the contrary. For the avoidance of doubt, desktop studies relating to the relevant site and carried out by WEPCo shall form part of the Project Development Fee.

SCHEDULE 6 - NEW PROJECT PRICING REPORT

1. DEFINITIONS

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

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

Clause 25 (*Corrupt Gifts and Fraudulent Payments*);

"Prospective Tenderers"	means those persons who express an interest in being included in any Tender Process of Tendered Elements, group of Tendered Elements or any part of any Tendered Element (as the case may be);
"Relevant Employees"	means in relation to any service comprised within a Tendered Element for which a Tenderer is tendering, any persons employed by any of the Relevant Participant(s) or any other organisation or body (including, for the avoidance of doubt, any sub-contractor or agent engaged by the Relevant Participant(s)) who will be wholly or mainly engaged in the provision of that service as at the relevant Transfer Date (as defined under any Project Agreement concluded in respect of the New Project in question should it become an Approved Project) and who will become an employee of the Project Service Provider or a Supply Chain Member providing the Tendered Element services in accordance with the relevant provisions of such Project Agreement;
"Tender Requirements"	means the form and requirements of the tender documents to be sent to Tenderers as agreed or determined in accordance with the Tender Process provisions of this Schedule 6 (<i>New Project Pricing Report</i>), in particular paragraph 5.2.1(a)(iv);
"Tender Validity Period"	means the period specified within the Tender Requirements as being the period within which final tenders from Tenderers must be received;
"Tendered Element"	means the element of a New Project [(whether a construction prime cost element, a construction non-prime cost element, design, funding, lifecycle, or facilities management services, management services cost elements or otherwise)] which would be required to be provided as part of the Project Services should the New Project in question become an Approved Project] ²⁴ ;
"Tendered Evaluation Report"	has the meaning given to it in paragraph 5.2.1(b) of this Schedule 6 (<i>New Project Pricing Report</i>);
"Tender Process"	means the carrying out of an open market competitive tendering process in accordance with the provisions of this Schedule 6 (<i>New Project Pricing Report</i>) and "Tendering" shall be construed accordingly;

²⁴ Definition includes illustrative list of works/services to be competitively tendered. This will be refined during dialogue. In the case of MIM Projects, equity and sub-debt funding will not be competitively tendered and the equity IRR will be fixed for the first 7 years of the term of the Agreement.

"Tenderers"	means those of the Prospective Tenderers that express an interest in the relevant Tender Process and that are invited to submit tenders following the pre-selection evaluation, in accordance with paragraph 5.2.2 and Appendix 1 below;
"TUPE Information"	means information relating to the terms and conditions, job title, age, length of service and benefits of the Relevant Employees;
"Welsh Language Standards"	means the Welsh Language Standards (No.1) Regulations 2015.

2. PURPOSE

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

2.2 In considering comparable projects to produce relevant benchmarking information and in determining adjustments to be made to Comparators, account shall be taken of inflation in respect of the Pricing Data, in accordance with:

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

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

3. COMPARATORS AND PROGRAMME

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

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

- (a) in respect of each stage, the adjustment (if any) to be made to the relevant figure or percentage cap specified in Proforma 1 of the Pricing Data to reflect variances between the Comparator as identified in the Pricing Data and the details of the New Project, such adjustment to be carried out in accordance with the principles set out in Appendix 1 (*Comparator and Initial Pricing Information*) to Schedule 4 (*Partnering Services Costs*); and

- (b) where, for any one or more element or component of such New Project there is not an appropriate Comparator and in the case of all Tendered Elements, the approach and timescales for setting pricing, in accordance with the Tender Process set out in paragraph 5 and appropriate projects to act as a benchmark for production of the Pricing Report pursuant to paragraph 4.1.1(b) and paragraph 5.5,

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

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

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

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

4. **PRICING REPORT**

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

4.1.1 analyse:

- (a) for Stage 1 Approval, its predicted maximum cost of the relevant New Project (including all profit, overheads, contingencies and other costs chargeable to the relevant New Project) and in relation to the Partnering Services Costs, a completed Table 1 of Proforma 2, as set out in Appendix 1 to Schedule 4 (*Partnering Services Costs*);
- (b) for Stage 2 Approval, its predicted cost of the relevant New Project (including all profit, overheads, contingencies and other costs chargeable to that New Project) and in relation to the Partnering Services Costs, a completed Table 2 of Proforma 2, as set out in Appendix 1 to Schedule 4 (*Partnering Services Costs*),

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

- (i) the appropriate Comparators for the relevant elements or components of such overall cost (as adjusted pursuant to paragraph 3.1.1 above), including Partnering Services Costs in respect of Project Development Partnering Services and the OPS Relevant Proportion;
- (ii) the actual costs (and prices) of Approved Projects;
- (iii) other relevant projects agreed between the Relevant Participant(s) and WEPCo pursuant to paragraph 3 above;

- (iv) general market level of pricing, charges, costs and fees for all elements and components of similar projects;
- (v) other projects in the Region (outside of the WEP Strategic Partnering Delivery Model);
- (vi) other projects in the UK in the education sector or accommodation sector generally (outside of the WEP Strategic Partnering Delivery Model); and
- (vii) general market level of pricing, charges, costs and fees for all elements and components of similar projects in other territories, including information in respect of equivalent projects based on any benchmarking data and indices which may from time to time be provided by the Welsh Government,

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

- 4.1.2 during Stage 1 include a fully costed risk register showing the allowances included within the predicted maximum cost to reflect matters which cannot be fully priced at that stage given the level of design development carried out to date or due to the fact they are Tendered Elements; and
- 4.1.3 during Stage 2 show how the matters included within the costed risk register submitted as part of the Pricing Report in the Stage 1 Submission have been resolved within the predicted cost.

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

4.2 WEPCo shall

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

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

4.3.1 WEPCo shall:

- 4.3.2 maintain a full record and audit trail of any benchmarking exercise and make all such records (including details of all tenders and information received) available for

inspection by each Participants and its authorised representatives (including, without limitation, the National Audit Office and the Wales Audit Office) upon reasonable notice from that Participant; and

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

5. TENDER PROCESS

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

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

5.2.1 Invitation to Tender and Tender Requirements

- (a) WEPCo must obtain the approval of the Relevant Participant(s) in each case for:
- (i) (subject to the provisions of paragraph 5.2.1(b)) any grouping or groupings of Tendered Elements or any division of any Tendered Elements into separate parts which will optimise the opportunity for the Participants to obtain best value for money;
 - (ii) the appropriate media for advertising the Tendered Elements and identifying the Prospective Tenderers (who should be wider than PSDP Associates but, for the avoidance of doubt, can include the PSDP and/or any PSDP Associate). Without prejudice to the Community Benefit Requirement KPIs relating to advertising of supply chain opportunities, WEPCo acknowledges the advertising requirements of [Procurement Policy Note "Supply Chain Visibility" dated 10 April 2018] and shall ensure that they are complied with in accordance with the principles of this Agreement;

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

reflect the principles set out in Clause 2 (*Purpose and Conduct of the Parties*) and the other requirements of this Agreement;

- (9) the information Tenderers are required to provide by way of submission requirements, which shall include:
- (A) in the case of construction and/or service related Tendered Elements, a requirement to submit details of the proposed security package, including draft parent company guarantees through which the Project Service Provider will be protected against financial or other failure of the principal Contractor and/or (in the case of MIM Projects) Service Provider;
 - (B) in the case of construction and/or service related Tendered Elements, acceptance of/ or a mark-up of the form of the Supply Chain Agreement (including developed technical schedules) approved pursuant to paragraph 5.2.1(c) below, on the basis that WEPCo shall be entitled to exclude any Tenderer from the Tender Process that submits amendments or modifications akin to Prohibited Amendments.
 - (C) in the case of funding Tendered Elements, a term sheet and commitment letter from the Senior Funders confirming acceptance of the [Template Project Co Shareholders' Agreement and Template Project Agreement].²⁵

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

- (b) Unless WEPCo can demonstrate to the Relevant Participant(s) that it will optimise its ability to obtain best value for money for the Relevant Participant(s) if Tendered Elements are tendered separately or in particular groupings, or if any Tendered Element is divided into separate parts, the grouping of any Tendered Elements shall be limited to groupings of construction-related works, facility management related services and funding, and shall otherwise be left to the discretion of Tenderers on the basis that the Tender Requirements shall specify that:
- (i) Tenderers may submit tenders for all or any of the groups within the Tendered Elements; and

²⁵ The list represents Welsh Government's minimum requirements. Other items to be discussed during dialogue to align with Tenderers method statements.

- (ii) where a Tenderer submits a tender for a group or groups of Tendered Elements, it may be required to provide all or any of the services in such group or groups and shall, in any event, provide separate pricing for each service in such group or groups.
- (c) The Tender Requirements and form of Supply Chain Agreement (including technical requirements and schedules) required under the terms of this Agreement, approved by the Relevant Participant(s), shall be used for the Tender Process.

5.2.2 Selection of Tenderers

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

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

- (d) The Relevant Participants shall have a right to object to the selection of any person as a Tenderer if such person does not (or could not reasonably be considered) to comply with any of the criteria referred to in 5.2.2(c) above.
- (e) To avoid doubt, a Potentially Conflicted Entity shall not be disqualified from selection as a Tenderer merely by virtue of the existence of the contractual relationship reflected in the WEPCo Shareholders Agreement, Project Agreements or Supply Chain Agreements where the requirements of the relevant provisions of the Partnering Services Method Statements²⁶ have been complied with, subject to:
 - (i) compliance with all Laws; and

²⁶ See footnote at Section 5 of Schedule 3 regarding required content within Partnering Method Statements for dealing with supply chain assembly, tendering and conflicts of interest. Bidders will be expected to ensure that, where possible, the selection stage shall take account of whether a Bidder has a conflict of interest that may negatively affect performance under the relevant Supply Chain Agreement.

- (ii) the establishment of, and compliance with, arrangements reasonably satisfactory to the Participants to avoid any conflict of interest, breach of confidentiality or unfair advantage. Failure by WEPCo to comply with any such arrangements shall automatically lead to the disqualification of the Potentially Conflicted Entity and the provisions of paragraph 5.4 shall apply.
- (f) Without prejudice to paragraph 5.2.2(d) above, the Relevant Participant(s) shall, in their absolute discretion, have the right to veto the selection of any person as a Tenderer on the grounds that the Prospective Tenderer:
 - (i) has committed a Prohibited Act; or
 - (ii) [is directly responsible for WEPCo incurring a Significant Performance Failure or failing a Track Record Test;]
- (g) WEPCo shall (after consultation with the Relevant Participant(s)) procure that any Prospective Tenderer which is unsuccessful in being selected as a Tenderer is provided with an appropriate explanation of the reasons behind its non-selection, if so requested by the Prospective Tenderer in question.
- (h) Where, in respect of any Tendered Element or group of Tendered Elements or any part of any Tendered Element, there is only one Prospective Tenderer, WEPCo shall not be entitled to proceed with the Tender Process of the same without the prior written consent of the Relevant Participant(s), such consent not to be unreasonably withheld or delayed.

5.2.3 Tendering Process

- (a) WEPCo shall procure that:
 - (i) the Tender Process is managed and conducted in an efficient, fair and transparent manner in accordance with the requirements of this paragraph 5.2 and Appendix 1 and shall procure that only Tenderers selected in accordance with this paragraph 5.2 and Appendix 1 are invited to submit tenders;
 - (ii) the principle of equality of information to, and treatment of, Tenderers shall apply at all times;
 - (iii) all necessary documents and information (including, without limitation, the Tender Requirements) are sent to Tenderers in a timely manner;
 - (iv) Tenders are only assessed in respect of compliance with the Tender Requirements; and
 - (v) the Relevant Participant(s) are given the opportunity to attend any meetings held with Tenderers and, where applicable, to witness the opening of tenders.

- (b) The Parties agree that e-tendering is the preferred method for tenderers to submit their price. The e-tendering platform and associated protocols for this purpose shall be developed by or on behalf of WEPCo at its own cost and submitted to the Participants for their agreement.

5.2.4 Preferred Tenderers

- (a) Following expiry of the Tender Validity Period, WEPCo shall (subject to the provisions of this paragraph 5.2.4) conduct a tender evaluation in accordance with Appendix 1, to determine which Tenderer (the "**Preferred Tenderer**") offers the MEA Tender in respect of any Tendered Element, group of Tendered Elements or individual part of any Tendered Element.
- (b) Within [■] Business Days of the determination referred to in paragraph 5.2.4(a) being made, WEPCo shall supply to the Relevant Participant(s) a tender report (the "**Tender Evaluation Report**") which shall include, as a minimum:
 - (i) a section setting out an introduction and the purpose of the report, which for the avoidance of doubt shall support the evaluation of the Stage 2 Submission;
 - (ii) a review of the invitation to tender and Tender Requirements;
 - (iii) the Tender Validity Period;
 - (iv) an overview of the tenders received;
 - (v) observations, remarks and qualifications of tenders;
 - (vi) amount of contingency within the pricing tendered;
 - (vii) conclusions and recommendations for award; and
 - (viii) a copy of the tender evaluation together with sufficient other supporting information concerning the tender evaluation, compliance checks and the breakdown of the price and quality scores, to enable the Relevant Participant(s) to analyse and understand the basis for such determination.
- (c) If the Relevant Participant(s) does not agree with the notified determination of the MEA Tender, the Relevant Participant(s) may, within fifteen (15) Business Days of being provided with the Tender Evaluation Report pursuant to paragraph 5.2.4(b) above, dispute such determination and, if the WEPCo and the Relevant Participant(s) do not resolve such dispute within a further fifteen (15) Business Days, the dispute shall be referred for resolution in accordance with Schedule 22 (*Dispute Resolution Procedure*).

5.2.5 Appointment

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

5.3 WEPCo shall:

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

5.4 WEPCo shall indemnify and keep each of the Relevant Participants fully indemnified at all times for and against all claims (including any claim made by any person (including any Prospective Tenderer,

Tenderer or Preferred Tenderer) that is not awarded a contract), demands or notices which may be brought or alleged or threatened against any of the Participants or a Participant Party and from and against all Direct Losses or fines which that Relevant Participant or relative Participant Party may suffer or incur in relation to any such claims, demands or notices which occur as a result of or in connection with:

5.4.1 the implementation of this paragraph 5.4.1; and

5.4.2 any breach of the provisions of this paragraph 5.4.2,

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

5.5

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

(a) Section 4 (*Partnering Services Costs Rates*) of Schedule 3 (*Partnering Services*) in respect of those elements of the project calculated by reference to the rates specified in said Section 4; and

(b) for all other elements of the project, the terms of Appendix 1 (*Pricing Data*) to Schedule 4 (*Partnering Services Costs*); and

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

6. IRREGULARITY IN AWARD OF CONTRACTS

6.1

Acceptance by WEPCo

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

6.1.1 accept or agree to accept any gift or consideration of any kind as an inducement or reward:

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

(b) for showing or not showing favour or disfavour to any person in relation to any Supply Chain Agreement; or

6.1.2 enter into any Supply Chain Agreement in connection with which commission has been paid or has been agreed to be paid unless, before the Supply Chain Agreement is made, particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Participants and they have consented to the same (in their absolute discretion),

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

6.2

Offer by Tenderer

6.2.1 Where WEPCo is required by this Agreement to carry out or procure the carrying out of Tender Process and any Prospective Tenderer or Tenderer (or anyone acting on its or their behalf or any of its or their directors, officers or employees) offers or agrees to give to WEPCo or any Associated Entity any gift or consideration of any kind as inducement or reward:

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

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

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

6.3

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

APPENDIX 1 - TENDER PROCESS METHODOLOGY

Purpose

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

1. **RESPONSIBILITY**

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

2. **CONTEXT**

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

3. **AIMS OF THE TENDER PROCESS**

3.1 **Value for Money**

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

3.2 **Transparent Evaluation Regime**

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

3.3 **Welsh Language**

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

4. **PRE-SELECTION AND GATEWAY COMPLIANCE**

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

5. INVITATION TO TENDER

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

6. TIMESCALES/RECEIPT OF TENDERS

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

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

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

7. EVALUATION METHODOLOGY

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

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

Evaluation will be by way of pass/fail tests and weighted scores. The scoring methodology shall ensure that each part of the tender to be scored provides an objective basis for ranking tenderers

and shall provide a comprehensive audit trail of the process. Specifically, the evaluation of community benefits must also account for the following:

- (a) commitment to the relevant Authority's Community Benefit Requirement KPIs and robust, deliverable method statements for delivery, on a pass/fail basis;
- (b) scoring the value of any commitments toward ACBR Enhancements, together with assessment of the level of robustness and deliverability of method statements for delivery; and
- (c) scoring the scope and value of commitments toward Additional Community Benefit Project Co Proposals, including whether such proposals:
 - (i) are tangible and measurable KPIs, that set out a clear, objective and transparent method of calculation and target;
 - (ii) are linked to the subject-matter of the Project Agreement (within the meaning of Regulation 67(5) of the Public Contract Regulations 2015);
 - (iii) do not replicate the KPIs that are already captured in the Community Benefit Requirement KPIs (and are additional benefits in that sense); and
 - (iv) set out the calculation on an open book basis, reflecting the cost of delivery of such proposals using verifiable information; and
 - (v) achieve one or more of the Relevant Participant's Well-being of Future Generations (Wales) Act 2015 policy objectives outlined in the New Project Request (if any).

8. **PREFERRED TENDERER**

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

9. **AUDIT**

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

SCHEDULE 7²⁷ - TEMPLATE PROJECT AGREEMENTS AND SHAREHOLDERS AGREEMENTS

SECTION 1 - MIM PROJECTS

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

²⁷ Refer to ITPDSB. To be inserted before contract execution.

Section 2 - Design and Build Development Agreement²⁸

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

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

SECTION 3 - WEPCO SHAREHOLDERS' AGREEMENT²⁹

THE WEPCO SHAREHOLDERS' AGREEMENT IS ATTACHED HERETO.

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

SECTION 4 - PROJECT CO SHAREHOLDERS' AGREEMENT³⁰

THE PROJECT CO SHAREHOLDERS' AGREEMENT IS ATTACHED HERETO.

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

SCHEDULE 8

DRAFT 21ST CENTURY SCHOOLS AND COLLEGES (BAND B) MIM PROGRAMME³¹

³¹ Please refer to Appendix 2 of the Descriptive Document. Draft programme to be inserted before contract execution.

SCHEDULE 9 - INSURANCES

1. LIMITS OF INDEMNITY

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

2. MAXIMUM DEDUCTIBLES

The maximum deductibles required by this Schedule 9 (*Insurances*) shall be increased in multiples of £5,000 as follows. If on a renewal date maximum deductibles figures stated in this Schedule 9 (*Insurances*) (index linked) shall exceed the existing maximum by £3,000 or more, then the maximum deductibles required by this Schedule 9 (*Insurances*) shall be increased by an amount equal to the nearest multiple of £5,000 that exceeds such index linked figure. To avoid doubt if on a renewal date the maximum deductibles figures stated in this Schedule 9 (*Insurances*) (index linked) shall not exceed the existing maximum by £3,000 then the maximum deductibles required by this Schedule 9 (*Insurances*) shall remain unchanged.

3. THIRD PARTY LIABILITY (INCLUDING PRODUCTS LIABILITY)

3.1 Interest

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

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

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

3.2 Insured

- 3.2.1 WEPCo.

3.3 Period of Insurance

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

3.4 [Limit of Indemnity

3.4.1 Not less than £[10,000,000]³² (index linked) any one occurrence, the number of occurrences being unlimited but in the annual aggregate in respect of pollution and products liability].

3.5 Maximum Deductibles

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

3.6 Principal Extensions

3.6.1 Cross liabilities clause;

3.6.2 Contractual liability clause;

3.6.3 Worldwide jurisdiction;

3.6.4 Contingent motor;

3.6.5 Legal defence costs in addition to the limit of indemnity;

3.6.6 Indemnity to principals clause; and

3.6.7 Waiver of subrogation in favour of the Participants, their employees and agents.

3.7 Principal Exclusions

3.7.1 Liability of any insured to its own employees;

3.7.2 Fines, penalties, punitive or exemplary damages;

3.7.3 Liquidated damages;

3.7.4 War, invasion, acts of foreign enemies, hostilities (whether declared or not), civil war, rebellion, revolution, insurrection of military or usurped power;

3.7.5 Seepage, pollution or contamination unless caused by a sudden, unintended and unexpected happening;

3.7.6 Liability of each of the Participants arising from their clinical negligence;

3.7.7 Nuclear risks;

3.7.8 Such other exclusions as are generally applied as a matter of current market practice in the relevant insurance market from time to time; and

3.7.9 Liability arising out of asbestos.

³² To be confirmed.

4. **[PROFESSIONAL INDEMNITY INSURANCE**

4.1 Interest

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

4.2 Insured

WEPCo

4.3 Period of insurance

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

4.4 Limit of indemnity

A limit of indemnity of not less than five million pounds (£5,000,000) in the annual aggregate with at least one (1) annual reinstatement, but five million pounds (£5,000,000) any one claim and in the aggregate per annum for liability arising out of pollution or contamination (to the extent insured by the relevant policy).

4.5 Maximum deductible threshold

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

4.6 Cover features and extensions

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

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

4.6.3 Loss of documents.

4.7 Principal exclusions

4.7.1 War and related perils

4.7.2 Nuclear and radioactive risks]

5. **EMPLOYER'S LIABILITY**

5.1 In a form complying with current Law.

- 5.2 Minimum limit of liability - £10,000,000 (index linked), each and every occurrence, the number of occurrences being unlimited.
- 5.3 Incorporating a waiver of subrogation against the Participants, their employees and agents.

SCHEDULE 10 - DEED OF ADHERENCE

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

THIS AGREEMENT IS MADE ON

AMONG:

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

(2) [] of [];

(3) [] of [];

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

(4) [] of [].

IT IS AGREED AS FOLLOWS:

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

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

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

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

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

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

EXECUTED as a Deed)

by [] acting by)

[])

EXECUTED as a Deed)

by [] acting by)

[])

SCHEDULE 11 - STRATEGIC DELIVERY PLAN

Section 1 - Initial SDP³³

³³ Please refer to the Descriptive Document. To be inserted before contract execution.

Section 2 - Updated SDP

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

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

SCHEDULE 12 - PLANNING MATTERS

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

1. PLANNING MATTERS

- 1.1 Subject to the terms of specific Project Agreements, WEPCo shall be responsible for:
- 1.1.1 obtaining all Consents, Planning Permissions, Planning Agreements and Infrastructure Agreements which may be required for the performance of the Services;
 - 1.1.2 implementing or procuring that the relevant Project Service Provider and the relevant Supply Chain Members implement each Consent, Planning Permission, Planning Agreement and Infrastructure Agreement relevant to a Project Agreement within the period of its validity in accordance with its terms; and
 - 1.1.3 complying with or procuring that the relevant Project Service Provider and the relevant Supply Chain Members comply with the provisions of each Consent, Planning Permission, Planning Agreement and Infrastructure Agreement applicable pursuant to a Project Agreement,
- provided that to the extent that such Consents, Planning Permissions, Planning Agreements and Infrastructure Agreements can only be or, in terms of a Project Agreement, are required to be obtained, implemented and/or complied with by the Project Agreement Counterparty or any third party occupier of the Facilities and are not obtained, implemented and/or complied with, WEPCo shall not be in breach of this Agreement.
- 1.2 WEPCo shall use all reasonable endeavours to secure the grant of Satisfactory Planning Permission.
- 1.3 WEPCo shall not allow or agree with the Local Planning Authority any extension of the statutory period for determination of the Planning Application without the prior written consent of the Affected Authority (such consent not to be unreasonably withheld or delayed).
- 1.4 The Affected Authority hereby undertakes with WEPCo that subject to the provisions of this Schedule 12 it shall, at the request and cost of WEPCo, do all acts and things reasonably necessary and within the ability and control of the Affected Authority to facilitate a Planning Application and/or Planning Appeal and shall assist in dealing with a Planning Call In and/or Planning Proceedings and subject to the provisions of this Schedule 12 at all times at the request and cost of WEPCo support WEPCo in making pursuing and/or dealing with a Planning Application and/or Planning Appeal and/or Planning Call In and/or Planning Proceedings which WEPCo shall reasonably require to secure a Satisfactory Planning Permission.
- 1.5 WEPCo shall not object to or procure, support or encourage any other person to object to any Planning Application or Planning Appeal submitted by WEPCo or the Affected Authority in respect of any part or parts of the Affected Authority's land or its facilities or proposed facilities in respect of New Projects.
- 1.6 WEPCo shall comply with the provisions of a Satisfactory Planning Permission and any Planning Agreement entered into pursuant to the provisions of this Agreement. For the avoidance of doubt, to the extent that such Satisfactory Planning Permission and any Planning Agreements are not complied with by

any third party occupier of the Facilities (including any Project Agreement Counterparty), WEPCo shall not be liable and there will be no breach of this paragraph 1.6 unless, in terms of the relevant Project Agreement, such third party occupier is the responsibility of the Project Service Provider.

1.7 WEPCo and any Affected Authority shall enter into, comply with and perform any Planning Agreement and/or any Infrastructure Agreement necessary to obtain a Satisfactory Planning Permission or to facilitate the carrying out of the Project Services in accordance with the provisions of this Agreement and the relevant Project Agreement (in so far as they do not contain any Unreasonable Conditions that have not been resolved in accordance with this Agreement) with the intention and proviso that the Affected Authority shall only do so if it is necessary to do so in its capacity as the owner of the land concerned. Save where agreed to the contrary by the Affected Authority and approved by the Relevant Participant(s) as part of the New Project Approval Process WEPCo will be responsible for all costs involved in completing any Planning Agreement and Infrastructure Agreement including for the avoidance of doubt all legal and administrative costs of the Affected Authority.

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

- 1.8.1 WEPCo shall prepare at its own expense draft Planning Application(s) in conjunction with the Affected Authority.
- 1.8.2 WEPCo shall ensure that it consults closely with the Affected Authority during the preparation and submission of any Draft Planning Application and shall ensure that the Affected Authority is satisfied with the suitability of the relevant Draft Planning Application.
- 1.8.3 WEPCo shall at its own expense submit a Planning Application in the joint names of WEPCo and the Affected Authority to the appropriate Local Planning Authority and shall use all reasonable endeavours to obtain Satisfactory Planning Permission in respect thereof.
- 1.8.4 If a Planning Application is:
 - (a) refused by the Local Planning Authority;
 - (b) deemed to have been refused under section 78(2) of the Town and Country Planning Act 1990; or
 - (c) the subject of a Planning Call-In,

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

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

behalf of WEPCo or supplied by the Local Planning Authority or any third parties; and

- (ii) all applications, affidavits, judgements and all other relevant documents in connection with any Planning Proceedings;

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

- 1.9.1 send a copy of the Planning Permission to the Affected Authority; and
- 1.9.2 within fifteen (15) Business Days of receipt of such aforesaid Planning Permission the parties shall give notice in writing to each other whether in their reasonable opinion acting reasonably they consider the Planning Permission to be a Satisfactory Planning Permission or whether it is subject to an Unreasonable Condition and if so specifying such condition and giving the reason why it constitutes an Unreasonable Condition.
- 1.9.3 If either Party fails to so notify the other Party within that period the Planning Permission shall be deemed to be satisfactory to that Party.

1.10 WEPCo shall within five (5) Business Days of receipt of a draft Planning Agreement or Infrastructure Agreement:

- 1.10.1 send a copy of the draft Planning Agreement or Infrastructure Agreement to the Affected Authority; and
- 1.10.2 within fifteen (15) Business Days of receipt of such aforesaid draft Planning Agreement or Infrastructure Agreement the parties shall give notice in writing to each other whether in their reasonable opinion acting reasonably they consider the draft Planning Agreement or Infrastructure Agreement is subject to an Unreasonable Condition and if so specifying such condition and giving the reason why it constitutes an Unreasonable Condition.
- 1.10.3 If either Party fails to so notify the other Party within the period set out in paragraph 1.10.2 above the draft Planning Agreement or Infrastructure Agreement shall be deemed to be satisfactory to that Party;

1.11 If either WEPCo or the Affected Authority notify the other that it considers that the Planning Permission, Planning Agreement or Infrastructure Agreement contains an Unreasonable Condition and either the other party agrees that it is unreasonable or if the outcome of a referral of the dispute between the parties in accordance with Schedule 22 (*Dispute Resolution Procedure*) is that a condition is unreasonable, WEPCo shall at its own expense within twenty (20) Business Days of the agreement or determination either:

- 1.11.1 submit an application pursuant to section 73 of the Town and Country Planning Act 1990 or section 96A of the Town and Country Planning Act 1990 or Section 19 of the Planning (Listed Buildings and Conservation Areas) Act 1990, or Section 13 of the Planning (Hazardous Substances) Act 1990 to vary the Planning Permission to remove the Unreasonable Condition or for the development of the WEPCo Operations without complying with an Unreasonable Condition or Unreasonable Conditions subject to which the Planning Permission was granted (such application to be in a form previously

approved in writing by the Affected Authority) (and in the event that such an application is made such application shall for the purpose of this Agreement be treated as a Planning Application); or

1.11.2 (if the Affected Authority has given its consent in writing) lodge a Planning Appeal in the joint names of WEPCo and the Affected Authority with the Welsh Ministers and shall use all reasonable endeavours to prosecute the Planning Appeal or the Planning Application (as the case may be) with all speed and diligence and shall indemnify the Affected Authority in respect of any award of costs against the Affected Authority in its capacity as a joint appellant.

1.12 WEPCo shall where necessary use all reasonable endeavours to secure the earliest available date for a hearing or inquiry into a Planning Appeal or Planning Call-In and, unless otherwise agreed in writing by the Affected Authority, WEPCo shall accept the first date offered by the Directorate for Planning Inspectorate and Environmental Appeals for a hearing inquiry into a Planning Appeal or Planning Call-In.

1.13 WEPCo shall obtain the prior written approval (such approval not to be unreasonably withheld or delayed) of the Affected Authority to the appointment of the Planning Advocate and other appropriate expert witnesses proposed to be instructed in connection with a Planning Appeal or Planning Call-In or Planning Proceedings.

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

SCHEDULE 13 - UNREASONABLE CONDITIONS

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

SCHEDULE 14 - COMPENSATION ON PARTICIPANT EVENT OF DEFAULT AND TERMINATION

SECTION 1 - PARTICIPANT EVENT OF DEFAULT COMPENSATION SUM

1. Where:

1.1 WEPCo has served a Participant Default Notice; and/or

1.2 WEPCo terminates this Agreement with respect to one or more Participants pursuant to Clause 22.2.2(a),

each Participant responsible for the Participant Event of Default giving rise to the service of the Participant Default Notice shall pay to WEPCo the relevant Participant Event of Default Compensation Sum (if any) calculated in accordance with paragraph 2.

2. The Participant Event of Default Compensation Sum payable by a Participant responsible (in whole or in part) for the Participant Event of Default in question shall be an amount equal to:

2.1 the aggregate of the Partnering Service Costs (subject always to operation of the relevant Project Development Fee Caps) which WEPCo or the Supply Chain Members have properly and reasonably incurred in connection with the provision of Project Development Partnering Services to that Participant but which have not been paid by that Participant at the time of service of the Participant Default Notice ("**Unrecoverable Partnering Services Costs**") less an amount equal to the aggregate of:

2.1.1 any such Partnering Service Costs so incurred which would, on the assumption that all Project Agreements continue in full force and effect for the full period of their respective terms, be recovered by Project Service Providers as part of the payments they receive under or in connection with such Project Agreements; and

2.1.2 any sums which any Project Service Provider has received from any of the Participants or has received or is entitled to receive under any policy of insurance by way of payment of, reimbursement or compensation towards any Unrecoverable Partnering Services Costs;

2.2 where the Participant Event of Default giving rise to a Participant Default Notice and/or termination is under Clause 22.1.2, interest at the Default Interest Rate on WEPCo's Partnering Services Costs properly incurred (subject always to the applicable Project Development Fee Cap) in relation to the Approved Project which is the subject of the delay referred to in Clause 22.1.2 for the period of such delay; and

2.3 where the Agreement has been terminated with respect to that Participant as a result of a Participant Event of Default by that Participant under Clause 22.1.2:

2.3.1 anticipated loss of profits for WEPCo on the 'lost' New Project (it being agreed that where more than one Participant has been responsible for the Participant Event of Default, each shall be jointly and severally liable to WEPCo for such lost profits, but WEPCo shall not be entitled to recover in total from all Participants any more than such anticipated loss of profits); and

2.3.2 where the Participant in question would be the sole Relevant Participant for the next New Project projected to reach financial close or otherwise be subject to a concluded Project Agreement in terms of the most recent decision of the SPB in that regard, anticipated loss of profits of WEPCo on that New Project.

3. For the purposes of paragraph 2.3.2, where the next New Project is one of a number of New Projects which are due to reach financial close or otherwise be subject to a concluded Project Agreement at the same time, for which the Participant in question would be the sole Relevant Participant, the next New Project shall be the scheme with the highest capital cost.
4. Where more than one Participant is responsible for the Participant Event of Default, each such Participant shall be jointly liable for payment of the relevant Participant Event of Default Compensation Sum save as provided in paragraph 2.3.1 above.

SECTION 2 - PARTICIPANT EVENT OF DEFAULT TERMINATION SUM

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

SECTION 3 - PAYMENT AND INTEREST

1. PAYMENT AND INTEREST

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

1.2 Each relevant Participant shall pay to WEPCo:

- 1.2.1 the relevant compensation or termination sum within forty (40) Business Days of the Invoice Date; and
- 1.2.2 interest on the relevant compensation or termination sum (or any part of such sum that remains outstanding) from the date on which the Participant Default Notice is served or on which this Agreement is terminated, as the case may be, in the case of Section 1 of this Schedule 14 (*Compensation on Participant Event of Default and Termination*), or this Agreement is terminated, in the case of Section 2 of this Schedule 14 (*Compensation on Participant Event of Default and Termination*), until the date of payment:
 - (a) at [◆]% for the period from (but excluding) the date on which the Participant Default Notice is served, in the case of Section 1 of this Schedule 14 (*Compensation on Participant Event of Default and Termination*), or this Agreement is terminated, in the case of Section 2 of this Schedule 14 (*Compensation on Participant Event of Default and Termination*), to (and including) the date which is forty (40) Business Days after the Invoice Date; and
 - (b) thereafter, at the Default Interest Rate.

2. EXCLUSIVITY OF REMEDY

The compensation payable under Sections 1 of this Schedule 14 (*Compensation on Participant Event of Default and Termination*) and Section 2 of this Schedule 14 (*Compensation on Participant Event of Default and Termination*) shall be the sole remedy of WEPCo against the Participants or any of them in connection with the termination of this Agreement but shall be without prejudice to any antecedent claims which any Party may have against any of the others pursuant to the terms of this Agreement.

3. NO DOUBLE RECOVERY

Where termination of this Agreement in respect of any Participant follows service of a Participant Default Notice in respect of such Participant, there shall be no double counting or double recovery pursuant to Section 1 (*Participant Event of Default Compensation Sum*) and 2 (*Participant Event of Default Termination Sum*) of this Schedule 14 (*Compensation on Participant Event of Default and Termination*) of any Partnering Services Costs or loss of profit.

SCHEDULE 15 - TRANSFER OF EMPLOYMENT AND PENSIONS

The provisions of this Schedule 15 shall apply in relation to each Relevant Transfer during the term of this Agreement. In relation to each such Relevant Transfer the provisions of this Schedule 15 shall apply save that WEPCo and the relevant Participant(s) (all acting reasonably) shall agree such amendments to the provisions of this Schedule 15 as are required to reflect the fact that any Transferring Employees may be Transferring Non-Participant Employees, but without imposing liability (actual, potential or contingent) on the relevant Participant in relation to any matter for which it does not have a corresponding right or remedy against the employer(s) of the Transferring Employees.

The provisions of this Schedule 15 shall not, save where expressly provided, apply on expiry or termination of this Agreement and the provisions of Schedule 20 (*Handover on Expiry or Termination*) shall apply in such regard.

Section 1 - General

1. TUPE AND EMPLOYMENT MATTERS³⁴

Relevant Transfer

- 1.1 WEPCo and the Participants agree that the Transfer Regulations may apply to the transfer on one or more dates agreed by the Parties (each a “**Relevant Service Transfer Date**”) to WEPCo of responsibility for provision of (or procuring the provision by any Partnering Subcontractor of) the Partnering Services in accordance with this Agreement and that a Relevant Transfer may take place on each Relevant Service Transfer Date (or such date as may be determined by Law). [The Relevant Service Transfer Date in respect of each of the Partnering Services is specified in Section 2 (*Relevant Service Transfer Dates*) of this Schedule 15 (*Transfer of Employment and Pensions*).]
- 1.2 In accordance with the Transfer Regulations, the contracts of employment of each Transferring Employee shall (subject to Regulation 4(7) of the Transfer Regulations) have effect after the relevant Transfer Date as if originally made between those employees and WEPCo or the relevant Partnering Subcontractor except insofar as such contracts relate to old age, invalidity or survivors benefit.
- 1.3 The Participants and WEPCo agree and intend and shall take all reasonable steps to procure that there shall be a Relevant Transfer on each occasion on which the identity of a service provider changes pursuant to this Agreement and that the contracts of employment of all those employees of the relevant service provider wholly or mainly engaged in the provision of the Partnering Services immediately before the change of identity of the service provider shall have effect (subject to Regulation 4(7) of the Transfer Regulations) thereafter as if originally made between those employees and the new service provider except insofar as such contracts relate to an occupational pension scheme and WEPCo shall and shall procure that both the former and the new service providers shall comply with their obligations under the Transfer Regulations.

³⁴ These provisions are drafted on the basis that the employer of the Transferring Employees is a party to the Strategic Partnering Agreement (i.e. a Local Authority Participant). In the event that the employer is not a party to the Strategic Partnering Agreement), then

1.4 Not used

1.5 Each of the Participants shall comply with their obligations under the Transfer Regulations in respect of each Relevant Transfer pursuant to this Agreement and WEPCo shall comply and shall procure that each Partnering Subcontractor shall comply with their obligations (including without limitation the obligation under Regulation 13(4) of the Transfer Regulations) in respect of each Relevant Transfer pursuant to this Agreement and each of the Participants shall indemnify WEPCo and WEPCo shall indemnify each Participant against any Direct Losses sustained as a result of any breach of this paragraph 1.5 by the party in default.

Offer of Employment

1.6 If the Transfer Regulations do not apply to any person who is a Transferring Participant Employee, WEPCo shall offer to or shall procure the offer by the relevant Partnering Subcontractor to each and every such employee of a new contract of employment commencing on the relevant Transfer Date under which the terms and conditions including full continuity of employment shall not differ from those enjoyed immediately prior to the relevant Transfer Date (except insofar as such terms and conditions relate to an occupational pension scheme) and the offer shall be in writing, shall be open to acceptance for a period of not less than ten (10) Business Days and shall be made:

1.6.1 if it is believed that the Transfer Regulations will not apply to a Transferring Participant Employee, not less than ten (10) Business Days before the relevant Transfer Date; or

1.6.2 if it is believed that the Transfer Regulations apply to a Transferring Participant Employee but it is subsequently decided that the Transfer Regulations do not so apply, as soon as is practicable and in any event no later than ten (10) Business Days after that decision is known to WEPCo.

1.7 Where any such offer as referred to in paragraph 1.6 is accepted, each Participant shall indemnify and keep indemnified in full WEPCo on the same terms and conditions as those set out in paragraphs 1.14 to 1.17 inclusive as if there had been a Relevant Transfer in respect of each and every Transferring Participant Employee relative to that Participant who has accepted any such offer.

1.8 Where any such offer as referred to in paragraph 1.6 is accepted, WEPCo shall act and shall procure that each relevant Partnering Subcontractor shall act in all respects as if the Transfer Regulations had applied to each and every Transferring Participant Employee who has accepted any such offer and shall comply with paragraph 2 in respect of each and every such employee who was immediately before the relevant Transfer Date, an LGPS Participant Employee.

Provision of Information

1.9 Not used.

1.10 Not used.

any employees who are to transfer will be considered to be Transferring Non-Participant Employees for the purposes of these provisions. This will need to be considered further on a case-by-case basis.

1.11 Each Participant shall and WEPCo shall procure that each and every Partnering Subcontractor shall take all reasonable steps, including co-operation with reasonable Requests for Information, to ensure that each and every Relevant Transfer pursuant to this Agreement takes place smoothly with the least possible disruption to the services to the Participants including the Partnering Services and to the employees who transfer from or who are retained by any Participant.

Union Recognition

1.12 Each Participant shall procure if they have the contractual or legal powers to do so and shall otherwise use all reasonable endeavours to procure that every relevant sub-contractor of that Participant shall supply to WEPCo no later than five (5) Business Days prior to the relevant Transfer Date true copies of its Recognition Agreement(s) and WEPCo shall procure that each and every Partnering Subcontractor shall in accordance with the Transfer Regulations recognise the trade unions representing Transferring Employees (as relevant to WEPCo or its Partnering Subcontractors) after the transfer to the same extent as they were recognised by the relevant Participant or the relevant sub-contractor before the relevant Transfer Date.

1.13 WEPCo shall procure that, on each occasion on which the identity of a Partnering Subcontractor changes pursuant to this Agreement, in the event that there is a Relevant Transfer, the new Partnering Subcontractor shall in accordance with the Transfer Regulations recognise the trade unions representing the employees whose contracts of employment transfer to the new Partnering Subcontractor to the same extent as they were recognised before the change of identity of the Partnering Subcontractor in respect of the provision of the Partnering Services at any of the Participants' premises.

Participant Indemnities

1.14 Each Participant shall indemnify and keep indemnified in full WEPCo (for itself and for the benefit of each relevant Partnering Subcontractor) against all emoluments and all other contractual or statutory payments due to any relevant Transferring Participant Employee or former employee of that Participant in respect of his or her employment by that Participant or its termination by that Participant which relate to any period of employment prior to or on the relevant Transfer Date even if the liability to make any such payment does not arise until on or after the relevant Transfer Date (which shall include any backdated pay award by that Participant), and against all income tax and pension and national insurance contributions payable thereon.

1.15 Insofar as paragraph 1.14 does not apply, each Participant shall indemnify and keep indemnified in full WEPCo against all Direct Losses sustained by WEPCo in consequence of any liability which transfers to WEPCo or the Partnering Subcontractors in accordance with the Transfer Regulations and/or the Directive in relation to any relevant Transferring Participant Employee or former employee of that Participant in respect of his or her employment by that Participant or its termination by that Participant which arises as a result of any act or omission by the Participant occurring before or on the relevant Transfer Date. The provisions of this paragraph 1.15 and of paragraph 1.14 shall not apply in respect of any claim that the terms and conditions of employment relating to Pay (as defined in paragraph 1.19) of Transferring Employees contravene the Legislation (as defined in paragraph 1.19) including but not limited to any claim in respect of an Equal Pay Ruling (as defined in paragraph 1.18).

1.16 Where any liability in relation to any Transferring Participant Employee, or former employee of a Participant in respect of his or her employment by a Participant or its termination which transfers in whole or part in accordance with the Transfer Regulations and/or the Directive arises partly as a result of any act

or omission occurring on or before the relevant Transfer Date and partly as a result of any act or omission occurring after the relevant Transfer Date, the relevant Participant shall indemnify and keep indemnified in full WEPCo against only such part of the Direct Losses sustained by WEPCo or any Partnering Subcontractor in consequence of the liability as is reasonably attributable to the act or omission occurring before the relevant Transfer Date.

1.17 The indemnities contained in paragraph 1.14 and paragraph 1.15 shall apply as if references in those paragraphs to any Transferring Participant Employee also included a reference to any Transferring Non-Participant Employee to the extent that the relevant Participant recovers any sum in respect of the subject matter of those indemnities from any sub-contractor of the Participant under any indemnity or other legal entitlement it has against such sub-contractor. Each Participant undertakes that it will use all reasonable endeavours to recover any sums under any such entitlement as is mentioned in this paragraph 1.17.

1.18 For the purposes of this paragraph 1:

"Equal Pay Ruling" means:

- (a) a determination by an employment tribunal or court of competent jurisdiction or the settlement or compromise to which the relevant Participant shall have consented in either case relating to any claim brought by any Transferring Participant Employee before the 1st anniversary of the Commencement Date against the Participant or WEPCo or the Partnering Subcontractor under the Legislation (as defined below) that the terms and conditions of employment relating to Pay (as defined below) of Transferring Participant Employees, contravene the Legislation; and/or
- (b) in relation to any LGPS Participant Employee any alteration to salaries and pay scales prescribed by the Single Status Agreement in order to settle, address or compromise threatened or extant claims under the Legislation against the Local Authority Participant) and/or employers engaged as at the Commencement Date or subsequently in the provision of services to the Local Authority Participant.

1.19 For the purposes of this paragraph 1:

"Legislation" means all and any anti-discrimination and equal pay opportunities laws, including but not limited to the Equal Treatment Directive (Recast) (Council Directive 2006/54/EC), Article 141 of the Treaty of Rome, the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and the Equality Act 2010

"Pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which a Transferring

Participant Employee receives either directly or indirectly in respect of his or her employment, from his/her employer

1.20 If there is an Equal Pay Ruling relating to Transferring Participant Employees then in respect of the period up to and including the relevant Transfer Date relating to such employees, the cost of such Equal Pay Ruling shall be borne by the relevant Participant in the manner set out in paragraph 1.22 and in respect of any subsequent period the cost shall be borne by WEPCo and the relevant Partnering Subcontractor.

1.21 If there is an Equal Pay Ruling relating to any employee of a Participant other than one described in paragraph 1.20 then the cost of such Equal Pay Ruling shall be borne by the relevant Participant even if such Equal Pay Ruling arises from a change to the terms and conditions of an employee of WEPCo or a Partnering Subcontractor.

1.22 Where the costs of an Equal Pay Ruling are to be borne by a Participant pursuant to the provisions of paragraphs 1.20 or 1.21 the Participant shall indemnify WEPCo and keep it indemnified against Direct Losses arising out of or in connection with the Equal Pay Ruling.

1.23 To avoid doubt Clause 16.3 (*Conduct of Claims*) applies to the indemnities under paragraphs 1.5, 1.14, 1.15, 1.16 and 1.22.

1.24 To avoid doubt, nothing in paragraphs 1.5, 1.14, 1.15, 1.16 and 1.22 shall impose any liability upon any Participant for any part of any statutory or contractual redundancy payment to any Transferring Employee which is payable as a result of any termination of employment of a Transferring Employee occurring after the relevant Transfer Date.

Compliance with Legislation and Participant Policies

1.25 WEPCo shall comply and shall procure that each Partnering Subcontractor and all persons employed or engaged by a Partnering Subcontractor in connection with the provision of any Partnering Services shall comply at all times with the Law on health and safety at work and on anti-discrimination and equal opportunities.

1.26 WEPCo shall procure that each Partnering Subcontractor takes all reasonable steps to procure that all persons including any employed or engaged by a Partnering Subcontractor in connection with the provision of any Partnering Services shall, so far as applicable, comply with the Participants' Policies as regards health and safety at work (including the Participants' Policies regarding smoking) and with those relating to anti-discrimination and equal opportunities (including those relating to harassment) and WEPCo shall take and shall procure that every Partnering Subcontractor shall take all such steps as each of the Participants may reasonably require, which shall include co-operation with action proposed or taken by any of the Participants, to ensure that each of the Participants comply with their duties under section 3(1) of the Health and Safety at Work etc Act 1974 regarding the conduct of the undertaking of that Participant.

WEPCo Indemnities

1.27 WEPCo shall indemnify and keep indemnified in full each of the Participants and, at any Participant's request, each and every Future Service Provider against:

1.27.1 claims in respect of all emoluments and all other contractual or statutory payments unpaid by WEPCo or a Partnering Subcontractor to any person entitled to such payments from WEPCo or a Partnering Subcontractor who is or has been employed or

engaged by WEPCo or any Partnering Subcontractor in connection with the provision of any of the Partnering Services which relate to any period of employment or engagement with WEPCo or any Partnering Subcontractor on or after the relevant Transfer Date but prior to the date of expiry or termination of this Agreement (or suspension of exclusivity, as the case may be) and all income tax and pension and national insurance contributions payable thereon; and

1.27.2 insofar as paragraph 1.27.1 above does not apply, all Direct Losses sustained by that Participant in respect of any claim against the Participant incurred as a consequence of the Transfer Regulations or the provision of this paragraph 1, who is or has been employed or engaged by WEPCo or any Partnering Subcontractor in connection with the provision of any of the Partnering Services which arises as a result of any act or omission of WEPCo or the Partnering Subcontractor occurring before the expiry or termination of this Agreement but after the relevant Transfer Date,

but the indemnities in paragraphs 1.27.1 and 1.27.2 shall not apply:

- (a) in respect of any sum for which the Participant is obliged to indemnify WEPCo or a relevant Partnering Subcontractor pursuant to paragraphs 1.14, 1.15 or 1.16; or
- (b) to the extent that the claim arises from a wrongful act or omission of that Participant.

1.28 Clause 16.3 (*Conduct of Claims*) shall apply where any claim is made in respect of the indemnities given by WEPCo under paragraph 1.27.

Staff Records

1.29 Each Participant shall deliver, subject to the requirements of the Law, to WEPCo as soon as reasonably practicable after the relevant Transfer Date all those records relating to the relevant Transferring Employees which were in its possession or under its control at the relevant Transfer Date, which shall include all such records relating to competence, qualifications and training.

1.30 No Participant gives any warranty as to the accuracy or completeness of any records referred to in paragraph 1.29 except that each of the Participants warrants that they have maintained all those records relating to their respective Transferring Employees who were employees of that Participant which the Participant themselves (but not any sub-contractor, predecessor body or previous employer) is required by Law to maintain to the extent which the Law requires.

Compliance with Code Obligations

1.31 Each of the Participants and WEPCo shall and WEPCo shall procure that any relevant Partnering Subcontractor shall have regard to the Code in interpreting and applying the Code Obligations.

1.32 Subject to paragraph 1.34, WEPCo shall procure that any New Employees shall be employed on terms and conditions of employment which are overall fair and reasonable and no less favourable than those of the Transferring Employees engaged in the provision of the Partnering Services who are working alongside and holding the same or a similar position to the New Employees.

1.33 WEPCo shall procure that any relevant Partnering Subcontractor shall consult with the recognised trade unions and where there is no recognised trade union any other employee representatives on the terms to be offered to the New Employees pursuant to paragraph 1.32.

1.34 In addition to its obligations under paragraph 1.32 above, WEPCo shall and shall procure that any Partnering Subcontractor shall offer to the New Employees either:

1.34.1 membership of the LGPS where the employer has Admission Body status within the LGPS and makes the requisite contributions; or

1.34.2 membership of a good quality employer pension scheme, being either:

(a) a contracted out final salary based defined benefit scheme; or

(b) a defined contribution scheme under which the employer must match employee contributions up to six percent (6%); or

1.34.3 a stakeholder pension scheme, under which the employer matches employee contributions up to six percent (6%).

1.35 During the term of this Agreement, WEPCo shall on request by any of the Participants provide or procure that the Participants are provided with such accurate and complete information as reasonably requested by the Participant as soon as reasonably practicable, including the terms and conditions of employment of Transferring Employees and the New Employees, where this is required to monitor WEPCo's compliance with its Code Obligations.

1.36 WEPCo shall and shall procure that any relevant Partnering Subcontractor shall support any central Government sponsored review and monitoring obligation programme on the impact of the Code and on request by any of the Participants provide the Participants with such accurate and complete information as reasonably requested by the Participant as soon as reasonably practicable in order to assist the Participants in doing this.

Disputes Relating to the Code

1.37 Each of the Participants and WEPCo shall in the first instance seek to resolve by discussions between them any complaints from any employee or any recognised trade union in relation to compliance by WEPCo or any Partnering Subcontractor with its Code Obligations.

1.38 Where it appears to a Participant or WEPCo that it is not possible to resolve the matter by continuing discussions between them pursuant to paragraph 1.37 or where an employee of WEPCo or any Partnering Subcontractor or any recognised trade union writes to the relevant Participant to confirm that it has been unable to resolve its compliance directly with WEPCo or any Partnering Subcontractor in relation to WEPCo's or the Partnering Subcontractor's Code Obligations:

1.38.1 the Participant shall first write to WEPCo to seek an explanation for the alleged failure by WEPCo or any Partnering Subcontractor to comply with its Code Obligations. WEPCo shall or shall procure that the relevant Partnering Subcontractor shall provide such an explanation within five (5) Business Days of receipt of the request from the Participant;

- 1.38.2 if the response provided by WEPCo or Partnering Subcontractor satisfies the Participant that the Code Obligations have been met, then the Participant will inform the complainant of this and the matter will be deemed to have been concluded;
- 1.38.3 in the event that the Participant is not satisfied with the response provided by WEPCo or any Partnering Subcontractor, the Participant shall write to WEPCo within five (5) Business Days to require WEPCo to take immediate action to resolve the Dispute; and
- 1.38.4 if, following such a request by a Participant, WEPCo or any Partnering Subcontractor still appears to the Participant not to be complying with its Code Obligations, the matter shall be dealt with in accordance with the New Employee Dispute Resolution Procedure.

Provision of Details and Indemnity

1.39 WEPCo shall as soon as reasonably practicable and in any event within five (5) Business Days following a written request by any Participant to the Participant details of any measures which WEPCo or any Partnering Subcontractor envisages it or they will take in relation to any employees who are or who will be the subject of a Relevant Transfer, and if there are no measures, confirmation of that fact, and shall indemnify each of the Participants against all Direct Losses resulting from any failure by WEPCo to comply with this obligation.

2. PENSION MATTERS

LGPS PARTICIPANT EMPLOYEES

WEPCo to become an Admission Body

2.1 Where WEPCo (or any relevant Partnering Subcontractor) employs any LGPS Participant Employees from a Transfer Date and wishes to offer those LGPS Participant Employees membership of the LGPS, WEPCo shall procure that it (and/or any relevant Partnering Subcontractor) shall become an Admission Body. WEPCo shall before the Transfer Date execute (and procure that any relevant Partnering Subcontractor executes) a Partner Admission Agreement which will have effect from and including the Transfer Date.

Partner Admission Agreement

2.2 Each relevant Local Authority Participant shall before the Transfer Date execute each of the Partner Admission Agreements referred to in paragraph 2.1 [and shall use reasonable endeavours to ensure that the Administering Authority executes each such Partner Admission Agreement before the Transfer Date³⁵.]

Indemnity for a breach of the Partner Admission Agreement

2.3 WEPCo hereby indemnifies the relevant Local Authority Participants and/or any Future Service Provider and, in each case, their sub-contractors on demand from and against all Direct Losses suffered or incurred by it or them which arise from any breach by WEPCo (or any relevant Partnering Subcontractor) of

³⁵ The relevant Local Authority Participant may also be the Administering Authority.

the terms of the Partner Admission Agreement to the extent that such liability arises before or as a result of the termination (howsoever caused), suspension or expiry of this Agreement.

Indemnity or bond

- 2.4 WEPCo shall procure that it (and any relevant Partnering Subcontractor) shall as soon as reasonably practicable obtain the indemnity or bond required in accordance with the Partner Admission Agreements.³⁶

Right of Set Off

- 2.5 The relevant Local Authority Participant shall have a right to set off against any payments due to WEPCo under this Agreement an amount equal to any overdue employer and employee contributions and other payments (and interest payable under the LGPS Regulations) due from WEPCo (or from any relevant Partnering Subcontractor (as applicable)) under the Partner Admission Agreement.³⁷

WEPCo ceases to be an Admission Body

- 2.6 If WEPCo or any relevant Partnering Subcontractor employs any LGPS Participant Employees from a Transfer Date and:

- 2.6.1 WEPCo (or any relevant Partnering Subcontractor) does not wish to offer those LGPS Participant Employees membership of the LGPS;
- 2.6.2 the relevant Local Authority Participant, WEPCo and/or any relevant Partnering Subcontractor are all of the opinion that it is not possible to operate the provisions of paragraph 2.1 to paragraph 2.5 inclusive; or
- 2.6.3 for any reason after the Transfer Date WEPCo or any relevant Partnering Subcontractor ceases to be an Admission Body other than on the date of termination or expiry of this Agreement or because it ceases to employ any LGPS Participant Employees (or any New Employees who join the LGPS pursuant to paragraph 1.34),

then the provisions of paragraph 2.1 to paragraph 2.5 shall not apply (without prejudice to any rights of the relevant Local Authority Participant under those clauses) and the relevant provisions of paragraph 2.7 shall apply in respect of the LGPS Participant Employees.

Membership of a Broadly Comparable Scheme for LGPS Participant Employees

- 2.7 The provisions of paragraphs 2.7.1 and 2.7.2 shall apply in relation to LGPS Participant Employees.

³⁶ Under Regulation 5(5)(a) of the LGPS (Administration) Regulations, the Local Authority (in the majority of cases) must carry out an assessment, taking account of actuarial advice, of the level of financial risk arising on premature termination of the provision of the service or assets by reason of the insolvency, winding up or liquidation of the transferee admission body and that where the level of risk identified by the assessment is such as to require it, the transferee admission body must provide an indemnity or bond to meet the level of risk identified.

³⁷ This clause seeks to mirror the right of set off which must be included in the Partner Admission Agreement under regulation 5(7) of the LGPS (Administration) Regulations.

- 2.7.1 WEPCo shall procure that each LGPS Participant Employee shall on the Transfer Date or the Cessation Date (as applicable) be offered membership of a pension scheme for future service operated by WEPCo (or the relevant Partnering Subcontractor) which must be:
- (a) established within three (3) months of the Transfer Date or the Cessation Date (as the case may be) and maintained until any payment to be made under Schedule 17 (*LGPS Bulk Transfer Terms*) is made;
 - (b) reasonably acceptable to the relevant Local Authority Participant (such acceptance not to be unreasonably withheld or delayed);
 - (c) a registered pension scheme for the purposes of Part 4 of the Finance Act 2004; and
 - (d) certified by the Government Actuary's Department as broadly comparable to the LGPS, assessed following the principles set out in the Statement of Practice issued by the Government Actuary's Department as current at the time.
- 2.7.2 WEPCo shall ensure that a certificate from the Government Actuary's Department referred to in paragraph 2.7.1(d) and 2.7.2(d) for the Broadly Comparable Scheme shall be delivered to the Participants on or before signature of this Agreement (or on or before the Cessation Date as applicable) and shall provide confirmation that the certificate(s) remain in force [three (3)] months before each Transfer Date or Cessation Date (as the case may be) in respect of each LGPS Participant Employee who is to be offered membership of the pension scheme to which the certificate relates.

GAD Certificate

- 2.8 each of the Participants shall provide WEPCo with such information as it (or any Partnering Subcontractor) may reasonably require in relation to the LGPS (as appropriate) to enable WEPCo (or any relevant Supply Chain Members providing any of the Partnering Services) to submit a proposal to the Government Actuary's Department to assess the comparability of the Broadly Comparable Scheme. The Participants may (at their option) provide such information directly to the Government Actuary's Department. WEPCo shall (and it shall procure that any Supply Chain Members providing any of the Partnering Services shall) provide such documentation as is required to enable the Government Actuary's Department to consider the question of comparability including, but not necessarily limited to, the Trust Deed and Rules of the Broadly Comparable Scheme, the latest actuarial valuation report, the latest trustees' report and accounts together with a statement giving details of the increases in pensions in payment and deferred pensions in each of the last ten years and details of any area where the trustees will operate discretion to improve benefits.

Liability for Costs

- 2.9 All costs incurred in connection with the Partner Admission Agreement and/or obtaining a certificate of broad comparability from the Government Actuary's Department shall be borne by WEPCo.

Bulk Transfers

2.10 WEPCo shall procure that each Broadly Comparable Scheme shall be able to accept bulk transfers from the LGPS (as appropriate). WEPCo shall comply with (and shall procure that each relevant Partnering Subcontractor shall comply with) the provisions of Schedule 17 (*LGPS Bulk Transfer Terms*) in respect of transfers from the LGPS following the Transfer Date and any subsequent bulk transfers on termination or expiry of this Agreement.

WEPCo Undertaking

2.11 WEPCo undertakes to each of the Participants (for the benefit of the Participants themselves and for the Participants as agent and trustee for the benefit of the LGPS Participant Employees) that it shall (and shall procure that any relevant Partnering Subcontractor shall) procure that:

- 2.11.1 the LGPS Participant Employees shall by three (3) months before the Transfer Date or the Cessation Date (as the case may be) be offered membership of the Broadly Comparable Scheme with effect from and including the Transfer Date (or Cessation Date (as the case may be)).
- 2.11.2 the Broadly Comparable Scheme shall provide benefits in respect of the LGPS Participant Employees' periods of service on and after the Transfer Date (or Cessation Date (as the case may be)) which the Government Actuary's Department shall certify to be the same as, broadly comparable to, or better than the benefits which the LGPS Participant Employees were entitled to under the LGPS (as applicable) at the Transfer Date (or the Cessation Date (as the case may be)).
- 2.11.3 if the Broadly Comparable Scheme is terminated, a replacement pension scheme shall be provided with immediate effect for those LGPS Participant Employees who are still employed by WEPCo or a relevant Partnering Subcontractor. The replacement scheme must comply with this paragraph 2.11 as if it were the Broadly Comparably Scheme.
- 2.11.4 Where the Broadly Comparable Scheme has not been established by the Transfer Date (or Cessation Date (as the case may be)) the LGPS Participant Employees shall be provided with benefits in respect of death-in-service which are no less favourable than the death-in-service benefits provided by the LGPS (as applicable) before the Transfer Date (or Cessation Date (as the case may be)). Such benefits shall continue to be provided until death-in-service benefits are provided by the Broadly Comparable Scheme.

Subsequent Transfers

2.12 Where during the term of this Agreement the employment of any LGPS Participant Employee is transferred on a second and/or subsequent occasion as a result of a change of service provider, WEPCo shall procure that each LGPS Participant Employee who is a member of, or eligible for membership of, the outgoing employer's pension scheme shall be offered membership of a pension scheme operated by the new employer which, as a minimum:

- 2.12.1 for future service offers the benefits which enabled the outgoing employer's pension scheme to be certified as being broadly comparable in accordance with the provisions of paragraphs 2.7; and

2.12.2 must be able to accept bulk transfers from the outgoing employer's pension scheme (where the pension schemes are different) in respect of benefits which the LGPS Participant Employee had accrued or been credited in the outgoing employer's pension scheme,

and WEPCo shall (and shall procure that any relevant Partnering Subcontractor) shall consult with and inform those employees of the pension provisions relating to the transfer.

Each of the Participants shall have the right, but not the obligation, on any second or subsequent transfer, to request the Government Actuary's Department to certify, in respect of any new employer's pension scheme, that the requirements of paragraph 2.7.1 or paragraph 2.7.2 as the case may be have been met. WEPCo shall procure that any new employer shall provide all such documentation as is required to enable the Government Actuary's Department to make the necessary assessment.

WEPCo shall further procure that where during the term of this Agreement the employment of any New Employee is transferred on a second and/or subsequent occasion as a result of a change of Partnering Subcontractor or any sub-contracting of the Partnering Services, the New Employee is offered membership of a pension scheme operated by the new employer which, as a minimum, complies with the requirements of paragraph 1.34.

Pension issues on Expiry or Termination

2.13 WEPCo shall (and shall procure than any relevant Partnering Subcontractor) shall:

- 2.13.1 maintain such documents and information as will be reasonably required to manage the pension aspects of any onward transfer of any person engaged or employed by WEPCo (or any relevant Partnering Subcontractor) in the provision of the Partnering Services on the expiry or termination of this Agreement (including without limitation identification of the LGPS Participant Employees and New Employees who have accepted the offer of pension provision pursuant to paragraph 1.34;
- 2.13.2 provide to Participants such documents and information mentioned in sub-paragraph 2.13.1 which any of the Participants may reasonably request in advance of the expiry or termination of this Agreement; and
- 2.13.3 fully co-operate (and procure that the trustees of the Broadly Comparably Scheme shall fully co-operate) with the reasonable requests of any of the Participants relating to any administrative tasks necessary to deal with the pension aspects of any onward transfer of any person engaged or employed by WEPCo (or any relevant Partnering Subcontractor) in the provision of the Partnering Services on the expiry or termination of this Agreement.

Discretionary Benefits

2.14 Where WEPCo (or a relevant Partnering Subcontractor) is an Admission Body, WEPCo shall (and/or shall procure that any relevant Partnering Subcontractor shall) award benefits (where permitted) to the LGPS Participant Employees under the LGPS (Compensation) Regulations and/ or the LGPS in

circumstances where the LGPS Participant Employees would have received such benefits had they still been employed by the relevant Local Authority Participant.

2.15 Where the award of benefits in paragraph 2.14 is not permitted under the LGPS (Compensation) Regulations and/or the LGPS or where WEPCo (and/or a relevant Partnering Subcontractor) is not an Admission Body, WEPCo shall (and/or shall procure that any relevant Partnering Subcontractor shall) award benefits to the LGPS Participant Employees which are identical to the benefits the LGPS Participant Employees would have received under the LGPS (Compensation) Regulations and/or the LGPS in circumstances where the LGPS Participant Employees would have received such benefits had they still been employed by the relevant Local Authority Participant.

2.16 Where under paragraphs 1.1 and 2.14 such benefits are of a discretionary nature, they shall be awarded on the basis of the relevant Local Authority Participant's written policy in relation to such benefits at the time of the Transfer Date (which the relevant Local Authority Participant shall provide upon request). Where the payment of such benefits is not, for whatever reason, possible, WEPCo shall (and/or shall procure that any relevant Supply Chain Member providing any of the Partnering Services shall) compensate the LGPS Participant Employees in a manner which is broadly comparable or equivalent in cash terms.

[Section 2 - Relevant Service Transfer Dates]

[APPENDIX 1 - NEW EMPLOYEE DISPUTE RESOLUTION PROCEDURE]

1. INTRODUCTION

This Appendix 1 to Schedule 15 (*Transfer of Employment and Pensions*) sets out the procedure to be followed in resolving any disputes arising in respect of the compliance or otherwise by WEPCo or any Partnering Subcontractor and/or their subcontractors with the provisions of paragraphs 1.32 to 1.38 inclusive of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*). The parties agree that the procedure should be the last resort and will make their best efforts to resolve any dispute by agreement. The parties support the Government criteria that the Alternative Dispute Resolution procedure (ADR) should be fast, efficient and cost-effective.

2. THE NEED TO EXHAUST LOCAL PROCEDURES

2.1 The parties shall exhaust all normal local procedures before invoking the ADR contained in this Schedule 15 (*Transfer of Employment and Pensions*). For the avoidance of doubt, this shall mean that:

- 2.1.1 where any complaints arise from employees and/or recognised trade unions those organisations should, in the first instance, seek to resolve any such complaints directly with WEPCo or any Partnering Subcontractor and WEPCo or any Partnering Subcontractor and/or their subcontractors shall enter into discussions with such employees and/or recognised trade unions and shall use their best endeavours to resolve any such dispute;
- 2.1.2 where it appears to any of the Participants that WEPCo or any Partnering Subcontractor and/or their subcontractors are not meeting its obligations under paragraphs 1.32 to 1.38 of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*), or where an employee of WEPCo or a Partnering Subcontractor and/or their subcontractors or any recognised trade union writes to any of the Participants to confirm that it has been unable to resolve its complaint directly with WEPCo or any Partnering Subcontractor and/or their subcontractors under paragraph 2.1.1 above, the Participant shall first write to WEPCo to seek an explanation for alleged failure by WEPCo or any Partnering Subcontractor and/or their subcontractors to comply with paragraphs 1.32 to 1.38 inclusive of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*). WEPCo shall provide such an explanation in writing within three (3) Business Days of receipt of the request from the Participant pursuant to this paragraph 2.1.2.
- 2.1.3 if the response provided by WEPCo under paragraph 2.1.2 satisfies the Participant that the terms of paragraphs 1.32 to 1.38 inclusive of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*) have been followed, then the Participant will inform the complainant of this and the matter will be deemed to have been concluded;
- 2.1.4 in the event that the Participant is not satisfied with WEPCo's response provided pursuant to paragraph 2.1.2, the Participant shall write to WEPCo within five (5) Business Days to require WEPCo to take immediate action to resolve this dispute; and

2.1.5 if, following such a request by the Participant pursuant to paragraph 2.1.4, WEPCo or any Partnering Subcontractor and/or their subcontractors still appears to the Participant not to be complying with the requirements of paragraphs 1.32 to 1.38 inclusive of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*), the matter shall be dealt with in accordance with the procedure set out in paragraphs 3 and 4 below.

3. **RESPONSIBILITY FOR RESOLVING DISPUTES**

The ADR procedure set out in this Appendix 1 shall be under the supervision of an independent person (the “**Independent Person**”) appointed by the parties from an approved list supplied by ACAS. If the parties so agree, they may appoint two “wing members”, with one being from an employer background and one being from trade union background, to assist the Independent Person.

4. **THE DISPUTE RESOLUTION PROCESS**

Disputes will be resolved using the following three-stage procedure:

Stage 1: Initial reference to the Independent Person

4.1 The parties shall invite the Independent Person to answer three questions:

- (i) Is this a dispute about compliance with paragraphs 1.32 to 1.38 inclusive of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*)?

If the answer to question (i) is no, the matter can proceed no further. If the answer to question (i) is yes, then the Independent Person will move to question (ii).

- (ii) Have the parties exhausted local procedures?

If the answer to question (ii) is no, then the Independent Person shall invite the parties to make further local efforts to resolve the dispute. If the answer to question (ii) is yes, then the Independent Person will conduct an independent assessment, by answering question (iii) and giving reasons for their answer.

- (iii) Do the terms and conditions of employment on offer to new employees comply with the requirements of paragraphs 1.32 to 1.38 inclusive of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*)?

If the answer to question (iii) is yes following the assessment by the Independent Person, then the matter is deemed to be concluded and WEPCo and any Partnering Subcontractor can continue to offer the same package of conditions to new employees. If the answer to question (iii) is no, then the dispute will proceed to Stage 2.

The Time limit for Stage One of the procedure is twenty (20) Business Days.

Stage 2: Discussions with a view to reaching an agreement on compliant terms and conditions

4.2 At the commencement of Stage 2 of the ADR process, the parties will be invited by the Independent Person to seek to resolve the matter through further discussions.

- 4.2.1 The Independent Person will make themselves available to the parties to facilitate the process or to facilitate a mediation by the parties of the issues in dispute. The parties shall also have the option of establishing other arrangements for mediation as they shall deem appropriate.
- 4.2.2 If the parties can reach an agreement consistent with the terms of paragraphs 1.32 to 1.38 inclusive of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*) following such further discussions or mediation under paragraph 4.2.1, then the matter is closed and the new package of conditions of employment will be applied both to new starters and to those employed during the dispute.
- 4.2.3 If no agreement can be reached within the allotted time then the dispute will proceed to Stage 3.

The time limit for Stage Two of the procedure is ten (10) Business Days. The parties may, by the agreement of all the parties to the dispute and with the consent of the Independent Person extend the time limit for this stage of the procedure by up to a maximum of a further fifteen (15) Business Days.

Stage 3: Final Reference to the Independent Person

4.3 In the event that the matter cannot be resolved within the periods specified at Stage Two of the procedure, the Independent Person shall invite the parties to make final written submissions concerning the points of dispute.

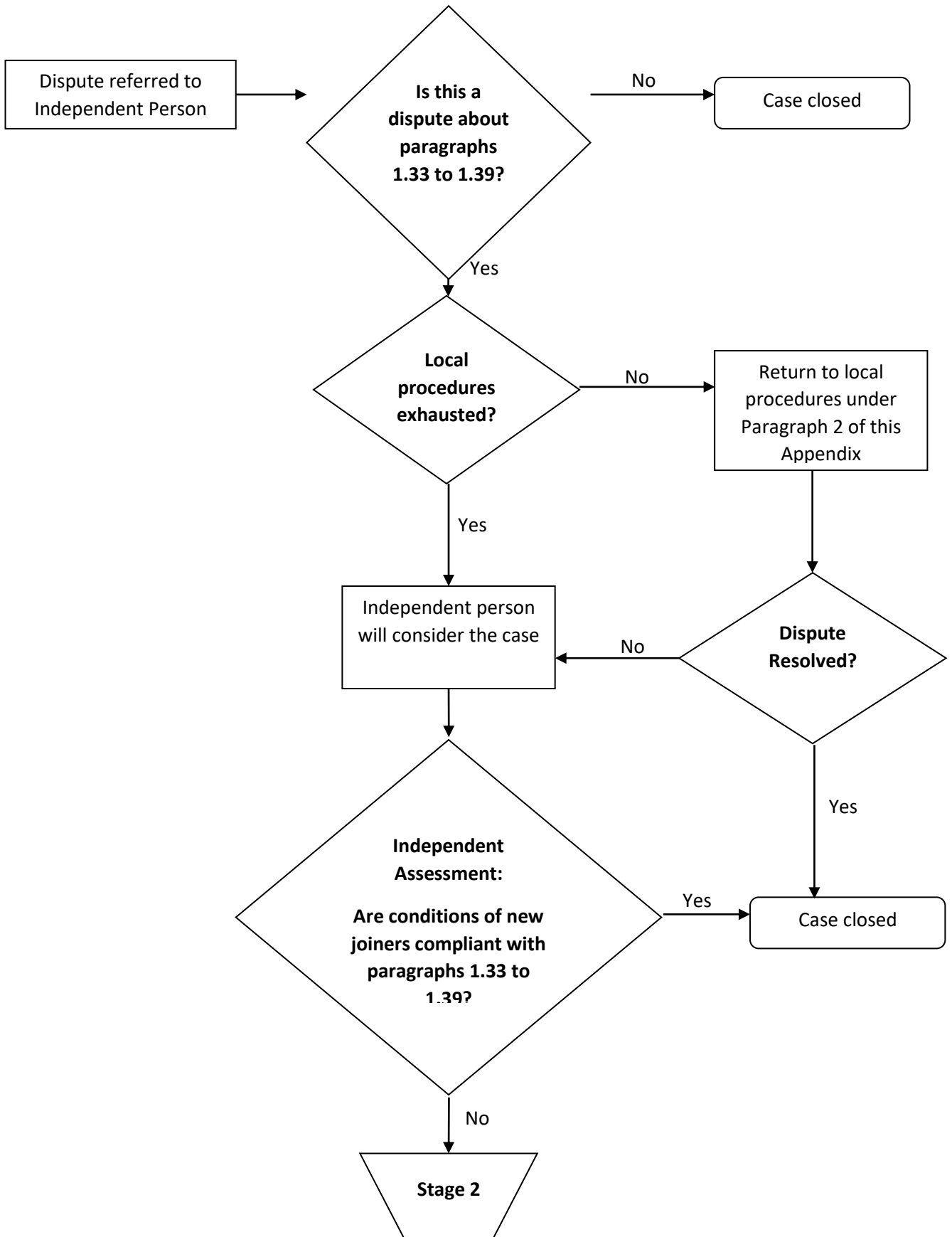
- 4.3.1 If the Independent Person then believes it would be worthwhile, the parties may be given a short period of further discussion of up to five (5) Business Days although the Independent Person may increase this period at their discretion.
- 4.3.2 If the Independent Person does not believe that the matter will not be resolved by allowing a further period of discussion or if during any additional period allowed for discussion the parties are unable to agree on how to bring the matter to a successful conclusion, then the Independent Person will proceed to a final binding arbitration.
- 4.3.3 The Independent Person shall hear such further evidence as the parties may choose to advance (either in writing or by oral submission) and having heard such evidence and reached a conclusion the Independent Person will impose a revised package of terms and conditions applicable to each of the affected employees. The parties agree to be bound by the decision of the Independent Person and shall adhere to the requirements of their decision.

The time limit for this final stage of the procedure is ten (10) Business Days. This period may be extended at the discretion of the Independent Person.

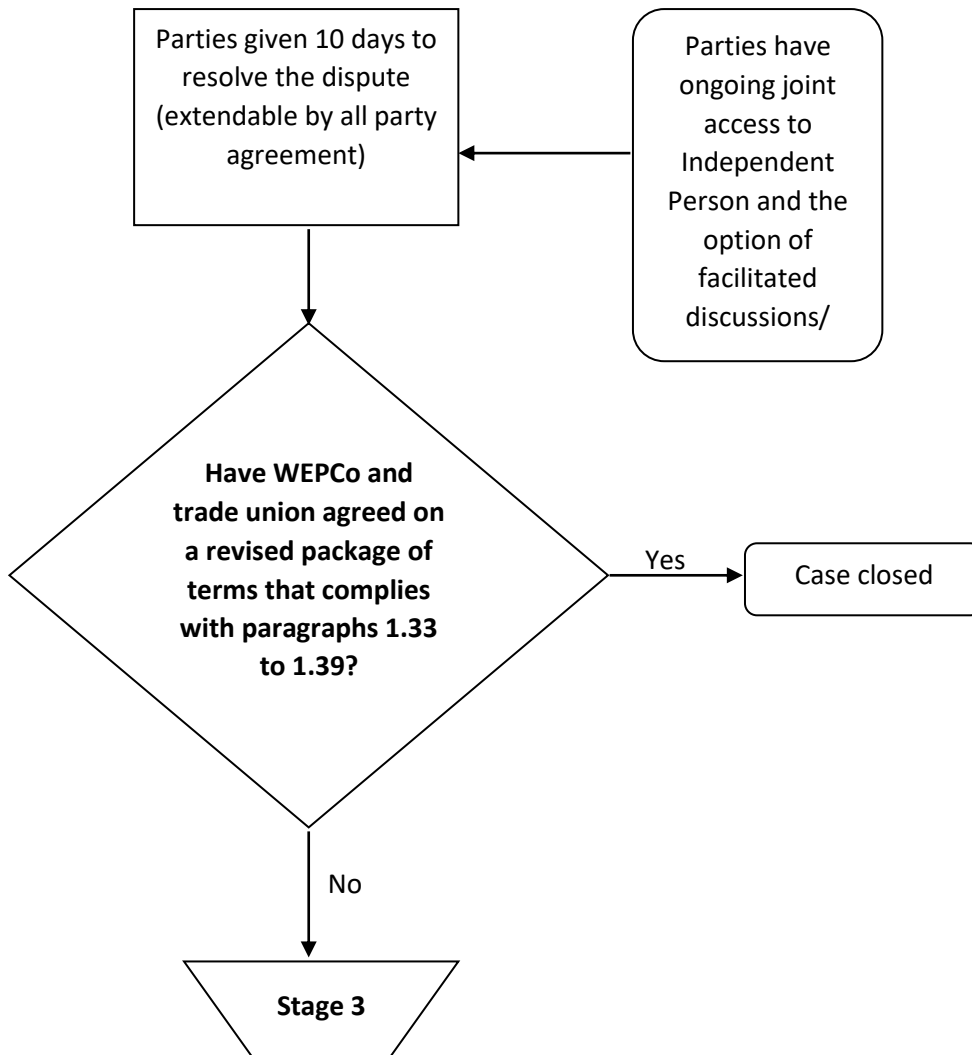
4.4 For the avoidance of doubt, following the resolution of any dispute at any stage of the procedure set out above, then the new package of conditions of employment will be applied both to new starters and

to those employed by WEPCo or any Partnering Subcontractor and/or their subcontractors engaged during the period during which the dispute was being resolved.

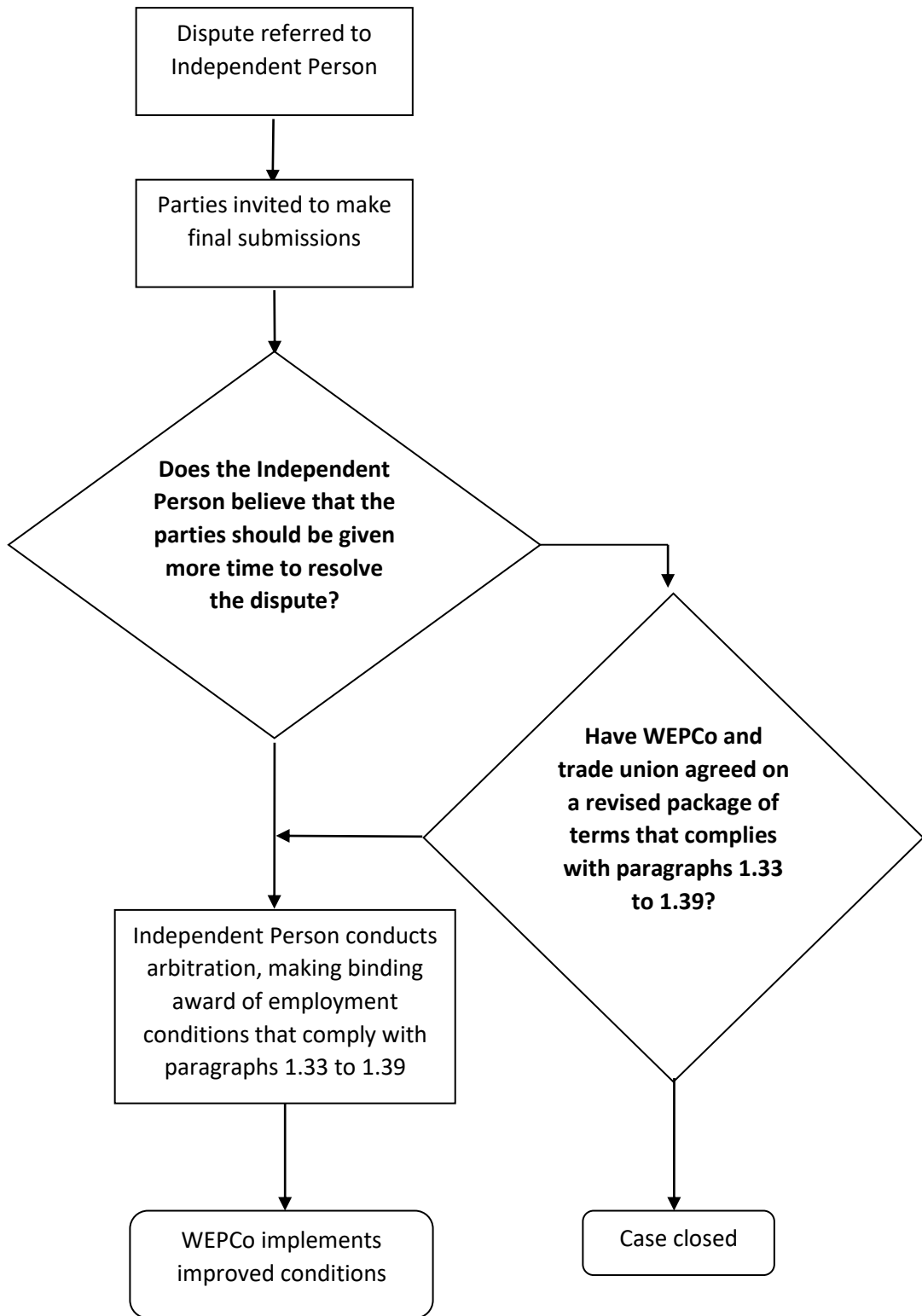
Stage 1: Referral to Independent Person and Execution of Independent Assessment (twenty (20) Business Days in total from the point when ADR is invoked)



Stage 2: Parties given time to resolve the dispute, with ongoing joint access to the Independent Person and with the option of mediation (ten (10) Business Days, extendable by agreement)



Stage 3: Final submissions and Arbitration (ten (10) Business Days)



SCHEDULE 16 - TEMPLATE PROJECT BIM AGREEMENT³⁸

³⁸ Welsh Government will share a draft of the Template Project BIM Agreement with bidders in the first round of dialogue. This will form the basis of dialogue with Bidders and Bidders responses will be evaluated.

SCHEDULE 17- [LGPS BULK TRANSFER TERMS]

The provisions of this Schedule 17 shall apply in relation to each Relevant Transfer during the term of this Agreement which affects LGPS Participant Employees. In relation to each such Relevant Transfer the provisions of this Schedule 17 shall apply save that WEPCo and the relevant Participant(s) (all acting reasonably) shall agree such amendments to the provisions of this Schedule 17 as are required to reflect the specifics of the transfer in terms of details of the Administering Authority's Actuary, the Funds, the Due Date and Actuary's Letter, the matters identified herein and any comments from the Administering Authority.

1. DEFINITIONS

1.1 In this Schedule 17 (*LGPS Bulk Transfer Terms*) the following expressions shall, unless the context otherwise requires, have the following meanings:

"Actuary's Letter"	means, in respect of each Fund, the letter from the Administering Authority's Actuary, stating the methods and assumptions to be used for the purposes of this Schedule 17 (<i>LGPS Bulk Transfer Terms</i>), a copy of which is set out as Appendix 1 (<i>Actuary's Letter</i>) to this Schedule 17 (<i>LGPS Bulk Transfer Terms</i>)
"Administering Authority's Actuary"	means [name of actuary] of [name of firm], or another actuary appointed by the relevant Administering Authority for the purposes of this Schedule 17 (<i>LGPS Bulk Transfer Terms</i>)
"AVCs"	means AVCs or SCAVCs as defined in the LGPS Regulations
"Broadly Comparable Scheme"	means the pension scheme or schemes to be provided by the Employer in accordance with paragraph 2.7.1 of Section 1 (<i>General</i>) of Schedule 15 (<i>Transfer of Employment and Pensions</i>) (or, where the context so requires, the trustees for the time being of such scheme)
"Due Date"	means the date [] days after the last of the conditions in paragraph 3.6 has been satisfied
"Employer"	means WEPCo and/or any Partnering Subcontractor who employs a LGPS Participant Employee from the Transfer Date
"Employer's Actuary"	means [name of actuary] of [name of firm], or another actuary appointed by the Employer for the purposes of this Schedule 17 (<i>LGPS Bulk Transfer Terms</i>)
"Fund"	means each of the [] and [] Funds within the LGPS ³⁹
"Transfer Amount"	means the amount or amounts referred to in paragraph 3.1

³⁹

Drafting will require to be reviewed and updated where there is more than one LGPS Participant Fund

"Transferring Member" means an LGPS Participant Employee who agrees to a transfer of benefits being made for him or her from the relevant Fund to the Broadly Comparable Scheme under paragraph 2

1.2 In this Schedule 17 (*LGPS Bulk Transfer Terms*) other defined terms shall, unless the context otherwise requires, have the meanings given to them in Schedule 1 (*Definitions, Interpretation and Construction*).

2. THE BROADLY COMPARABLE SCHEME

WEPCo shall procure that the Employer shall invite each LGPS Participant Employee who joins the Broadly Comparable Scheme in accordance with paragraph 2.7.1 of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*) to consent to a transfer of benefits being made for him from the relevant Fund to the Broadly Comparable Scheme. The Employer must issue this invitation no later than [one] month after the Transfer Date. The invitation must be in a form that is acceptable to the relevant Local Authority Participant and the relevant Administering Authority (such acceptance not to be unreasonably withheld or delayed by the relevant Local Authority Participant) and that complies with any requirements of the LGPS Regulations. Any LGPS Participant Employee wishing to consent to a transfer of benefits must notify the Employer of this consent in writing no later than [three] months after the date of the invitation. The Employer shall provide the relevant Local Authority Participant and the relevant Administering Authority with the names of the Transferring Members no later than [four] months after the Transfer Date.

3. TRANSFER PAYMENT FROM THE FUND

3.1 In respect of its own LGPS Participant Employees, each Local Authority Participant shall use reasonable endeavours to ensure that the relevant Administering Authority transfers from the Fund to the Broadly Comparable Scheme on the Due Date an amount in respect of the relevant Transferring Members' service in the Fund before the Transfer Date calculated in accordance with the Actuary's Letter and Part 9 of the LGPS Regulations.

3.2 As soon as reasonably practicable following the Transfer Date, WEPCo shall procure that the Employer shall promptly provide all data within its possession or under its control which the relevant Administering Authority and the Administering Authority's Actuary may require for the calculation of the Transfer Amount and shall warrant that this data is in all material respects true, complete and accurate.

3.3 As soon as reasonably practicable following the Transfer Date, the relevant Local Authority Participant shall promptly provide all data within its possession or under its control which the relevant Administering Authority and the Administering Authority's Actuary may require for the calculation of the Transfer Amount In respect of its own Transferring Members, and shall warrant that this data is in all material respects true, complete and accurate.

3.4 The relevant Local Authority Participant shall use its reasonable endeavours to procure that:

3.4.1 as soon as reasonably practicable after the Administering Authority's Actuary has been provided with the necessary data and information, the Administering Authority's Actuary shall calculate the Transfer Amount In respect of its own Transferring Members, in accordance with the Actuary's Letter and the LGPS Regulations; and

3.4.2 within [one week] of completing this calculation, the Administering Authority's Actuary shall notify the Employer's Actuary in writing of the particulars of the calculation and the data on which the calculation is based.

The Employer's Actuary will then have [one month] (or such longer period as the parties may agree) from the date on which those particulars and data have been supplied to him in which to object in writing that the calculation is incorrect or not in accordance with the Actuary's Letter. The calculation shall be final and binding on the parties if the Employer's Actuary raises no objection within this stated period.

3.5 If the Employer's Actuary objects in writing under paragraph 3.4 and the Administering Authority's Actuary and the Employer's Actuary cannot subsequently agree the relevant Transfer Amount within [one] month (or such longer period as shall be agreed between the parties) of the objection, then the amount shall be determined by an independent actuary to be nominated by the relevant Administering Authority and the Employer jointly or, if they cannot agree, by the President of the Faculty of Actuaries on application by either party. The independent actuary shall act as an expert and not as an arbitrator, and his decision shall be final and binding on the parties. The independent actuary's costs shall be payable equally by the relevant Administering Authority and the Employer.

3.6 Payment to the Broadly Comparable Scheme of the Transfer Amount shall only be made on the following conditions:

- 3.6.1 the Transfer Amount has been agreed or determined under paragraph 3.4 or 3.5 and in accordance with the LGPS Regulations;
- 3.6.2 the Employer has complied with all its obligations under this Schedule 17 (*LGPS Bulk Transfer Terms*); and
- 3.6.3 the trustees of the Broadly Comparable Scheme have confirmed in writing that:
 - (a) a payment should be made in accordance with the LGPS Regulations and that they shall accept payment on the terms set out in paragraph 4;
 - (b) they shall accept liability for each Transferring Member's accrued contracted out rights under the Fund; and
 - (c) they shall accept the Transfer Amount in full and final settlement of all claims against the Fund in respect of each Transferring Member.

3.7 [The payment of the relevant Transfer Amount shall be satisfied by the transfer of readily marketable stocks and shares of the relevant Fund as agreed by the relevant Administering Authority and the trustees of the Broadly Comparable Scheme having a mid-market value on the day before the Due Date equal to the relevant Transfer Amount. If the relevant Administering Authority and the trustees of the Broadly Comparable Scheme are not able to agree some or all of the particular assets to be transferred, or the mid-market value of any such assets, the payment of the Transfer Amount (or the appropriate part of

it) shall be satisfied by the relevant Fund transferring cash equal to []% of that part of the relevant Transfer Amount in respect of which there has been no agreement as to the assets to be transferred.]⁴⁰

4. PAST SERVICE BENEFITS

4.1 WEPCo shall procure that the Employer shall ensure that:

4.1.1 the Broadly Comparable Scheme provides in respect of each Transferring Member such benefits as the Administering Authority's Actuary certifies to be of actuarially equivalent value [(in accordance with the Actuary's Letter)]⁴¹ to the benefits which would have been payable under the LGPS in respect of the Transferring Member's service before the Transfer Date if he had remained a member of the LGPS; [and

4.1.2 the Transfer Amount will, subject only to any HM Revenue & Customs limits that may still apply, be wholly applied in the Broadly Comparable Scheme for the provision of the benefits mentioned in this paragraph 4.1 ⁴²] and

4.1.3 the Broadly Comparable Scheme provides in respect of each Transferring Member such benefits as the Administering Authority's Actuary certifies to be of actuarially equivalent value [(in accordance with the Actuary's Letter)]⁴³ to the benefits which would have been payable under the LGPS in respect of the Transferring Member's service before the Transfer Date if he had remained a member of the LGPS.

5. ADDITIONAL VOLUNTARY CONTRIBUTIONS

5.1 Nothing in this Schedule 17 (*LGPS Bulk Transfer Terms*) shall apply to AVCs or to benefits secured by them. However, the relevant Local Authority Participant shall use reasonable endeavours to ensure that the assets representing each Transferring Member's AVCs in the Fund (if any) shall be transferred to the Broadly Comparable Scheme. WEPCo shall procure that the Employer shall ensure that the Broadly Comparable Scheme provides benefits for each relevant Transferring Member which are equivalent to the assets transferred.

6. NO ASSISTANCE

6.1 WEPCo shall procure that the Employer shall not encourage or initiate or assist or facilitate any action or provide any financial assistance for the purpose of requiring the relevant Fund to pay an amount

⁴⁰ The form of payment and discount for cash needs to be discussed with the Administering Authority. If this is to be covered in the Actuary's Letter, this clause can be deleted.

⁴¹ It may be necessary to refer to the Actuary's Letter to determine what 'actuarially equivalent value' means. 'Actuarially equivalent value' is the term used in the HM Treasury Guidance 'A Fair Deal for Staff Pensions : Procurement of Bulk Transfer Agreements and Related Issues'.

⁴² The Local Authority may wish to consider whether it wants to seek to ring-fence any Transfer Amount within the Broadly Comparable Scheme. The Local Authority should consult with its professional advisers regarding this option.

⁴³ It may be necessary to refer to the Actuary's Letter to determine what 'actuarially equivalent value' means. 'Actuarially equivalent value' is the term used in the HM Treasury Guidance 'A Fair Deal for Staff Pensions : Procurement of Bulk Transfer Agreements and Related Issues'.

larger than the relevant Transfer Amount to the Broadly Comparable Scheme in respect of the Transferring Members.

7. [EXIT PROVISIONS⁴⁴

7.1 WEPCo undertakes on its own behalf and on behalf of the Employer to the relevant Local Authority Participant (for the benefit of the relevant Local Authority Participant itself and for the relevant Local Authority Participant as agent and trustee for the benefit of its LGPS Participant Employees)⁴⁵ that on:

- 7.1.1 the expiry or termination of this Agreement or of the relevant Supply Chain Agreement (in the case of Partnering Subcontractors); or
- 7.1.2 the employment of any LGPS Participant Employee transferring to a new employer in accordance with paragraph 2.12 of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*) (or otherwise),

WEPCo shall procure that the Employer shall procure that the trustees of the Broadly Comparable Scheme offer bulk transfer terms in respect of the relevant LGPS Participant Employees' service in the Broadly Comparable Scheme to the pension scheme of the relevant Local Authority Participant or any Future Service Provider (or their sub-contractors) which are no less favourable (in the opinion of the Administering Authority's Actuary or an actuary appointed by the relevant Local Authority Participant) than the bulk transfer terms set out in the Actuary's Letter, subject to a reasonable adjustment in respect of market fluctuations since the date of the Actuary's Letter.

7.2 If the transfer payment paid by the trustees of the Broadly Comparable Scheme is less (in the opinion of the Administering Authority's Actuary or an actuary appointed by the Local Authority) than the transfer payment which would have been paid had paragraph 7.1 been complied with, the Employer shall pay to the relevant Local Authority Participant or any Future Service Provider (or their sub-contractor) (as appropriate) (or as such person shall direct) the amount of the difference.^{46]}

⁴⁴ The exit provisions aim to reflect as far as possible the exit requirements of HM Treasury Guidance 'A Fair Deal for Staff Pensions : Procurement of Bulk Transfer Agreements and Related Issues'. The Local Authority could consult with its professional advisers regarding these provisions and the Guidance and the requirements it wishes to impose.

⁴⁵ HM Treasury have indicated that the exit provisions in HM Treasury Guidance 'A Fair Deal for Staff Pensions : Procurement of Bulk Transfer Agreements and Related Issues' may cover not only Transferring Members but also LGPS Participant Employees who did not transfer their benefits from the LGPS under the initial bulk transfer but did join the Broadly Comparable Scheme for future service only. The Local Authority should consult with its professional advisers regarding the scope of the employees it wishes to protect under this paragraph.

⁴⁶ HM Treasury Guidance 'A Fair Deal for Staff Pensions : Procurement of Bulk Transfer Agreements and Related Issues' provides that onward bulk transfer requirements can be imposed on the pension scheme and/or the sponsoring employer. The Local Authority will need to consider whether it wants to include a shortfall obligation of this type on the Employer.

APPENDIX 1 - [ACTUARY'S LETTER]

[To be inserted on a case by case basis for each Relevant Transfer to which this Schedule 17 applies]

SCHEDULE 18- [PARTNER ADMISSION AGREEMENT]

[To be inserted on a case by case basis for each Relevant Transfer requiring a Partner Admission Agreement]

SCHEDULE 19- CONFIDENTIAL INFORMATION

SECTION 1 - COMMERCIALLY SENSITIVE INFORMATION⁴⁷

Column 1

Column 2

Commercially sensitive contract provisions

For the period ending on the date below.

⁴⁷ To be completed at Selected Bidder stage.

SECTION 2 - COMMERCIALY SENSITIVE MATERIAL⁴⁸

Column 1

Column 2

Commercially sensitive material

For the period ending on the date below

⁴⁸ To be completed at Selected Bidder stage.

SCHEDULE 20 - HANDOVER ON EXPIRY OR TERMINATION

1. PROVISIONS UPON TERMINATION

- 1.1 On the expiry or earlier termination of this Agreement, in respect of one or more Participant, each of the Participants and WEPCo agree that it is their intention that the Transfer Regulations shall apply in respect of the provision thereafter of any service equivalent to a Partnering Services but the position shall be determined in accordance with the Law at the date of expiry or termination as the case may be and this paragraph is without prejudice to such determination. For the avoidance of doubt, for the purposes of this Schedule 20 (*Handover on Expiry or Termination*), the term "Supply Chain Member" shall be construed as including any subcontractors engaged by WEPCo or any Supply Chain Member in connection with the delivery of the Partnering Services.
- 1.2 On the expiry or earlier termination of this Agreement in respect of one or more Participant, where the Transfer Regulations apply, the contracts of employment of all employees who immediately prior to the Transfer Event are wholly or mainly engaged on the service or services which are the Partnering Services and which are the subject of the Transfer Event ("**Assigned Staff**") shall transfer on the basis of the Transfer Regulations and have effect after the Transfer Event as if originally made between the Assigned Staff and the relevant Participant(s) and/or any new Contractor.
- 1.3 Where the Transfer Regulations apply as aforesaid, the relevant parties shall take all reasonable steps to ensure that a smooth transition is effected in respect of the transfer of the contracts of employment of the Assigned Staff from the Transfer Event and the relevant Participant shall comply and procure that, where appropriate, any new Contractors shall comply with their obligations under Regulation 13 of the Transfer Regulations.
- 1.4 If the Transfer Regulations do not apply on expiry or earlier termination of this Agreement in respect of one or more Participant, the relevant Participant(s) shall ensure that each new provider (if any) of a service equivalent to a Partnering Service on or after expiry or termination of this Agreement (including the relevant Participant(s)) shall offer employment to the persons employed by WEPCo or a Supply Chain Member providing any of the Partnering Service in the provision of the Partnering Services immediately before the expiry or termination of this Agreement and shall indemnify WEPCo or a Partnering Subcontractor for Direct Losses any of them suffer or incur as a result of its failure to do so, and for any costs, claims or liabilities for redundancy payments (whether statutory or contractual)⁴⁹.
- 1.5 If an offer of employment is made in accordance with paragraph 1.4 above, the employment shall be on the same terms and conditions (except for entitlement to membership of an occupational pension scheme, which shall be dealt with in accordance with paragraph 2 of Section 1 (*General*) of Schedule 15 (*Transfer of Employment and Pensions*) as applied immediately before the expiry or earlier termination of this Agreement including full continuity of employment, except that the relevant Participant(s) or other new service provider may at its absolute discretion not offer such terms and conditions if there has been any change to the terms and conditions of the persons concerned in breach of paragraph 1.9 below.
- 1.6 Save where any such Direct Losses are as a result of any act or omission of a Participant or its subcontractors, WEPCo shall indemnify, and keep indemnified, each Participant and, at the Participant's request, each and every service provider who shall provide any service equivalent to any of the Partnering

⁴⁹

Participants should ensure that this obligation is passed on to the new service provider by way of contract.

Services after a Transfer Event against all Direct Losses sustained by the Participant arising in connection with:

- 1.6.1 any act or omission in respect of any of the Assigned Staff by WEPCo or a Partnering Subcontractor prior to the Transfer Event (including without limitation the employment or termination of the employment of any of the Assigned Staff), and WEPCo's or a Partnering Subcontractor's obligations under Regulation 13 of the Transfer Regulations but excluding in relation to any occupational pension scheme;
- 1.6.2 any claim by any person arising from any negligent act or omission of any of the Assigned Staff prior to the Transfer Event;
- 1.6.3 any claim for personal injury sustained by any of the Assigned Staff the cause of action of which arose during their employment prior to the Transfer Event save that in this respect the indemnity given by WEPCo shall extend only to such sum as is referable to the period of employment with WEPCo or a Partnering Subcontractor;
- 1.6.4 any employees or former employees of WEPCo or of any provider of a service or services which are Partnering Services who are not identified to the relevant Participant(s) as being Assigned Staff prior to the relevant Transfer Event arising out of any claim that their employment or any liability in respect of their employment or its termination has or should have transferred to the relevant Participant(s) and/or any new Contractor pursuant to the Transfer Regulations and/or the arrangements contemplated by the relevant agreement; and
- 1.6.5 all emoluments and other contractual or statutory payments or parts thereof due to any Assigned Staff member arising before the Transfer Event or which fall due for payment after the Transfer Event but which relate to any period before that date (including, for the avoidance of doubt, any liabilities arising in relation to any equal pay claims relating to the Assigned Staff).

1.7 Clause 16.3 (*Conduct of Claims*) shall apply where any claim is made in respect of the indemnities given by WEPCo under paragraph 1.6.

1.8 For the avoidance of doubt, nothing in paragraph 1.6 shall impose any liability on WEPCo for any part of any statutory or contractual redundancy payment to any Assigned Staff member which is payable as a result of any termination of employment occurring on or after the Transfer Event.

1.9 Subject to its obligations under the Data Protection Act 2018 no less than twelve (12) months prior to a Transfer Event, WEPCo shall supply or shall procure the supply of details of the Assigned Staff to the relevant Participant(s) and/or at the direction of the relevant Participant(s), to any new Contractor, and shall advise the relevant Participant(s) and any new Contractor of any alteration thereto occurring prior to the Transfer Event. These details (being the "**Retendering Information**") are to include the names of the Assigned Staff and in respect of each one, the:

- 1.9.1 terms of employment (including full particulars of emoluments and benefits);
- 1.9.2 date of commencement of employment;
- 1.9.3 current job title and details of proportion of time spent working on the Partnering Services;

- 1.9.4 any professional bodies, trade unions and other bodies of which the Assigned Staff are members and the identity of any representatives of such bodies of which WEPCo and the relevant Partnering Subcontractor is aware; and
- 1.9.5 full details of any actions, claims or disputes involving any Assigned Staff of which WEPCo and any of the Partnering Subcontractor is aware or anticipates.

1.10 WEPCo shall inform the Participants of any changes to the information given pursuant to this paragraph 1.10. WEPCo shall indemnify and keep indemnified in full each Participant and at the Participant's request any new Contractor against all Direct Losses arising from any claim by any party as a result of WEPCo or Partnering Subcontractor failing to provide or promptly to provide the Participant or at the Participant's request any new Contractor with any Retendering Information and/or Employee Liability Information or to provide full Retendering Information and/or Employee Liability Information or as a result of any material inaccuracy in or omission from the Retendering Information and/or Employee Liability Information.

1.11 From the later of the period beginning twelve (12) months prior to the Transfer Event or from the date on which notice of termination is served WEPCo shall not and shall procure that any Partnering Subcontractor shall not:

- 1.11.1 enter into any negotiation with or make any offer to the Assigned Staff or any of them concerning the terms of their employment other than in the normal course of business without the Participants' consent (which shall not be unreasonably withheld). Nothing in this paragraph shall prevent WEPCo or its Partnering Subcontractor from implementing any statutory requirements or any terms and conditions agreed with the workforce collectively prior to this period;
- 1.11.2 seek or make any alteration to the numbers of Assigned Staff or those employees identified as Assigned Staff without the Participant's consent (which shall not be unreasonably withheld) save in the event of resignation or dismissal for misconduct or poor performance;
- 1.11.3 transfer any of the Assigned Staff to another part of its business or move other employees from elsewhere in its or their business who have not previously been engaged in providing the Partnering Services to provide the Partnering Services save with the Participants' consent (which shall not be unreasonably withheld).

SCHEDULE 21 - ASBESTOS SCHEDULE

Asbestos Schedule

Facility Details:											Contacts:	

Information to be provided

	Item Location and Description				Product Type	Provisional Sum				Contractor Tendered Sum				Comments /Notes
	Block (see Note 6)	Floor	Room Reference	Item Description	Type of Asbestos - Thermal Insulation / Asbestos / Insulation Board / Asbestos Cement / Woven Products etc.	Quantities identified within the Asbestos Management Survey Report(s) (see Notes 1, 3 and 6)	Unit of Measurement Nr. / m ²	WEPCo Benchmark Rate (See Note 4)	Total allowance	Quantities identified within the subsequent (post contract) Asbestos Refurbishment and Demolition Survey Report(s) (See Notes 2, 3 and 7)	Unit of Measurement Nr. / m ²	Tendered Rate (see Note 5)	Tendered amount	
1								£				£		
7								£				£		
8								£				£		
9								£				£		
						Provisional Sum			£	Total Tendered Sum			£	
10						Programme for Removal of Asbestos Materials included within this Section of the Blue Form (See Note 8)			Weeks	Tendered Programme for Removal of Asbestos Materials included within this Section of the Blue Form (See Note 9)			Weeks	

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1. Where two or more Asbestos Management Survey Reports are in place then individual quantities columns should be included within the Schedule with each column headed to identify the particular contract asbestos survey report.
2. Where two or more Asbestos Refurbishment and Demolition Survey Reports are in place then individual quantities columns should be included within the Schedule with each column headed to identify the particular post contract asbestos survey report.
3. Where individual items are located within a common environment (for example, pipe lagging, debris and residue within a floor duct) then these should be grouped together for pricing purposes.
4. The benchmark rate will be provided by the WEPCo and will be based on library rates for comparable asbestos items.
5. Tendered rates to be obtained from three separate specialist sub-contractors.
6. In completing this section, the Asbestos Surveyor should consider including at least the following:
 - i. Asbestos containing materials that are identified within the Asbestos Management Survey.
 - ii. Asbestos containing materials that have been identified within the Asbestos Management Survey or surveys and described as strongly "presumed".

The Asbestos Surveyor must consider each individual asbestos item on a case by case basis and use their knowledge and experience to determine whether "presumed" asbestos identified in the survey report should be included. In drawing conclusions, the reasons why asbestos is "presumed" must be fully considered.
7. In completing this section, the contractor should include at least the following:
 - i. All Asbestos containing materials identified within the post contract survey or surveys and categorised as either identified or "strongly presumed".

The contractor must consider each survey on a case by case basis and use their knowledge and experience to determine whether "presumed" asbestos identified in the survey should be included. In drawing conclusions, the reasons why asbestos is "presumed" must be fully considered.
8. The overall programme to be entered is to be the period for the removal of asbestos materials included within this section of the "Blue Form" based on the scope of Asbestos materials identified within the Asbestos Management Survey Report including periods for the following activities which are to be separately programmed:
 - Procurement, instruction and the undertaking and reporting of an Asbestos Refurbishment and Demolition (R&D) Survey;
 - Tendering, Reporting and Instruction of the Asbestos Removal Works as identified by the Asbestos R&D Survey;
 - Preparation of Plans of Work; and
 - Statutory Notification Periods.

WEPCo is to separately show the above individual periods within this Programme.
9. The period to be entered is to be the varied tendered period for the removal of Asbestos materials included within this section of the "Blue Form" based on the scope of Asbestos materials identified within the Asbestos Refurbishment and Demolition Survey Report only.

SCHEDULE 22- DISPUTE RESOLUTION PROCEDURE

1. This Dispute Resolution Procedure shall apply to any dispute, claim or difference between any two or more Parties arising out of or relating to this Agreement ("**Dispute**").
2. This Dispute Resolution Procedure shall not impose any pre-condition on any party or otherwise prevent or delay any party from commencing proceedings in any court of competent jurisdiction in relation to any Dispute in which that party requires either:

2.1 an order (whether interim or final) restraining the other party from doing any act or compelling the other party to do any act; or

2.2 a judgement for a liquidated sum to which there is no arguable defence.

3. **CONSULTATION**

3.1 Subject to paragraph 2 of this Schedule 22, if a Dispute arises, the relevant Parties shall first consult in good faith in an attempt to come to an agreement in relation to the disputed matter.

3.2 If the relevant Parties fail to come to an agreement through such consultation, each relevant Party shall refer the matter to its [*Participants to confirm escalation point*]⁵⁰ or, in the case of WEPCo, its [*Bidders to specify*] for resolution.

4. **MEDIATION**

4.1 If the relevant Parties have been unable to resolve the Dispute within ten (10) Business Days of referral in accordance with paragraph 3.2 above, they may (if the relevant Parties so agree) refer the Dispute to mediation in accordance with this paragraph 4. Any mediation shall be completed within forty (40) Business Days (or such longer period as the Parties may agree, acting reasonably) of such referral and any agreement reached by the parties and recorded in writing by them shall be binding upon the parties.

4.2 Mediation shall not be a precondition to the commencement of Arbitration.

4.3 Mediation may be conducted using a sole mediator or (where the Parties agree acting reasonably that more than one mediator is required) co-mediators (the "**Mediator(s)**") (such expression not to exclude the presence of a pupils or assistant mediators).

4.4 The Parties shall agree to conduct the mediation in or substantially in accordance with the Centre for Effective Dispute Resolution ("**CEDR**") Model Mediation Procedure 2018 Edition ("**MMP**") for the time being used and the terms of the Model Mediation Agreement attached as Appendix 1 (*CEDR Mediation Agreement*) to this Schedule 22.

4.5 The Mediator(s) shall be accredited mediator(s) agreed between the parties to the Dispute, or in the absence of agreement within fourteen (14) days of notice to mediate served pursuant to paragraph 4.7, appointed by CEDR.

4.6 During the course of the mediation the relevant Parties shall co-operate fully, promptly and in good faith with CEDR and the Mediator(s) in the performance of their obligations under this paragraph 4,

⁵⁰ Participants to consider and confirm.

including the signing of CEDR's standard agreement to mediate subject to any reasonable amendments agreed by the parties to the Dispute. Any breach or default by any relevant Party to the Dispute of this paragraph 4 shall forthwith release:

4.6.1 the other(s) from further compliance with this paragraph 4; and

4.6.2 CEDR and the other relevant Parties from any mediation agreement signed between them (save for any accrued financial obligations to CEDR and/or the Mediator(s)),

and the mediation shall be deemed to be abandoned.

4.7 Mediation shall commence by any Party to the dispute serving on the other(s) written notice to mediate pursuant to this paragraph (a "**Notice to Mediate**").

4.8 Unless they agree otherwise, the Parties shall share equally the fees, costs and expenses relating to the mediation and each Party shall pay its own expenses of preparation for, and participant and representation in, the mediation.

5. **ARBITRATION**

5.1 All Disputes, to the extent not finally resolved pursuant to the procedures set out in the foregoing paragraphs of this Schedule 22, shall subject to any agreement of the relevant Parties to the Dispute to resolve the Dispute by the commencement of legal proceedings, be referred to Arbitration pursuant to the provisions of this paragraph 5.

5.1.1 The Arbitration shall be governed by the Arbitration Act 1996 and the CI Arb Arbitration Rules, as amended; varied or replaced from time to time, save that the relevant Parties shall procure that the Arbitrator complies with, where appropriate, paragraph 8 (*Joinder of Disputes*) of this Schedule 22.

5.2 The Party initiating the Arbitration shall give a notice of Arbitration to the other Party to the Dispute (copied to the other Parties) (the "**Notice**") stating:

5.2.1 that the dispute is referred to Arbitration;

5.2.2 details of the issues to be resolved; and

shall invite the other Party to concur in the appointment of a sole arbitrator who shall be a solicitor or barrister or arbitrator recognised by the Chartered Institute of Arbitrators of not less than ten (10) years' standing as an arbitrator. If the relevant Parties are unable within fourteen (14) days to agree the identity of the Arbitrator, the initiating Party shall request that the Chartered Institute of Arbitrators make the appointment in accordance with Article 8 of the CI Arb Arbitration Rules. Arbitration proceedings shall be deemed to have been instituted on the date on which the Notice has been given.

5.3 Any party to the subsisting Arbitration proceedings may apply to the Chartered Institute of Arbitrators to challenge the office of Arbitrator in accordance with the CI Arb Arbitration Rules.

5.4 If it is required that the Arbitrator is replaced in terms of paragraph 5.3 above, the office shall be reconstituted in accordance with Article 14 of the CI Arb Arbitration Rules.

5.5 The Arbitration is to be held in England, in the English language and London shall be the seat of Arbitration.

5.6 Subject to any further agreement, the Parties agree that the following Articles of the CI Arb Arbitration Rules shall not apply to any Arbitration raised in accordance with this paragraph 5:

5.6.1 [List any Articles that parties do not wish to apply]

5.7 The Arbitrator shall have the power to open up, review and revise any opinion, certificate, instructions, determination or decision of whatever nature given or made under this Agreement.

5.8 Unless this Agreement has already been terminated, the Parties shall, (notwithstanding that any dispute is subject to the Dispute Resolution Procedure set out in this Schedule 22), continue to carry out their obligations in accordance with this Agreement.

6. SUBMISSIONS

6.1 If any Dispute between WEPCo and a Participant raises issues which relate to any dispute between WEPCo and any Partnering Subcontractor arising under a Supply Chain Agreement or otherwise affects the relationship or rights of WEPCo and/or the Partnering Subcontractor under such Supply Chain Agreement (the "**Supply Chain Agreement Dispute**") then WEPCo may include as part of its submissions made to the Arbitrator, submissions made by the Partnering Subcontractor as appropriate.

6.2 The Arbitrator shall not have jurisdiction to determine the Supply Chain Agreement Dispute but the decision of the Arbitrator shall be binding on WEPCo and the Partnering Subcontractor insofar as it determines the issues relating to the Supply Chain Agreement Dispute.

6.3 Any submissions made by the Partnering Subcontractor shall:

6.3.1 be made within the time limits applicable to the delivery of submissions by WEPCo to the Arbitrator; and

6.3.2 concern only those matters which relate to the Dispute between the relevant Participant and WEPCo.

6.4 Where a Partnering Subcontractor makes submissions in any reference before the Arbitrator, the costs of the Arbitration shall be at the discretion of the Arbitrator.

6.5 No Participant shall have liability to any Partnering Subcontractor arising out of or in connection with any decision of the Arbitrator or in respect of the costs of the Partnering Subcontractors in participating in the resolution of any Dispute under this Agreement.

6.6 WEPCo shall not allow any Partnering Subcontractor access to any document relevant to the issues in dispute between any Participant and WEPCo save where:

6.6.1 the document is relevant also to the issues relating to the Supply Chain Agreement Dispute as the case may be; and

6.6.2 WEPCo has first delivered to the relevant Participants a written undertaking from the Partnering Subcontractor addressed to the relevant Participants that they shall not use any such document otherwise than for the purpose of the dispute resolution

proceedings under this Agreement and that they shall not disclose such documents or any information contained therein to any third party other than the Arbitrator or any professional adviser engaged by the Partnering Subcontractor (as appropriate) to advise in connection with the Dispute.

7. **NO LOSS**

Where any Participant would otherwise be expressly liable to make a payment by way of compensation to WEPCo including amounts which, in turn, comprise compensation to any Partnering Subcontractor payable by WEPCo and/or which will be payable by way of compensation to any Partnering Subcontractor by WEPCo, the Participant shall not be entitled to withhold, reduce or avoid any such payment to WEPCo in reliance only on the fact that the amount which is due from WEPCo to the Partnering Subcontractor or the entitlement of the Partnering Subcontractor to payment of such amount, as a result of the circumstances giving rise to the Participant's obligation to pay such compensation, is conditional on the entitlement of, or receipt of payment by WEPCo from the Participant.

8. **JOINDER OF DISPUTES**

8.1 If a Dispute to which paragraph 5 applies (the "**Original Dispute**") raises issues which are substantially the same as or connected with issues in a Dispute between a party to the Dispute and any other party to this Agreement in connection with or arising out of this Agreement (the "**Related Dispute**"), a party to the Original Dispute may cause the Original Dispute to be joined with the Related Dispute in the manner provided in this paragraph 8.

8.2 A party wishing to join the Original Dispute with a Related Dispute shall, within five (5) Business Days of giving or receiving the Notice in respect of the Original Dispute, serve on each other party to the Original Dispute and to the Related Dispute, and the Arbitrator, a notice (a "**Related Dispute Notice**") stating they wish to join the Original Dispute with the Related Dispute. The Related Dispute Notice shall include:

- 8.2.1 a concise summary of the Related Dispute and issues arising therefrom, including a preliminary statement setting out the basis and grounds for joining the Related Dispute with the Original Dispute, together with (where applicable):
- (a) a statement of claim from each party to the Related Dispute;
 - (b) details of each Related Dispute party;
 - (c) a statement of the relief sought by any party to the Related Dispute;
 - (d) reference to any reports relating to the subject matter of the Related Dispute;
 - (e) a statement of any matters which the parties to the Related Dispute have already agreed in relation to the Related Dispute; and
 - (f) copies of all documents not exceeding, where possible, one lever arch file in total which have a direct bearing on the issues in the Related Dispute, and on which the party serving the Related Dispute Notice intends to rely (or a list of such documents if each party to the Related Dispute has already seen them).

- 8.3 The party giving notice under paragraph 8.2 shall give each Related Dispute party a copy of the following documents:
- 8.3.1 the Notice relative to the Original Dispute together with any counterclaims given or received, and any further notices to/from the other party to the Original Dispute; and
 - 8.3.2 the Notice relative to the Related Dispute.
- 8.4 Within five (5) Business Days after receiving a Related Dispute Notice, any party to the Original Dispute or Related Dispute may make written representations to the Arbitrator objecting to the joinder of the Related Dispute with the Original Dispute, simultaneously providing copies to all parties to such disputes.
- 8.5 If no representations are made in accordance with paragraph 8.4, the Arbitrator shall immediately order that that the Original Dispute shall be joined with the Related Dispute.
- 8.6 Where the Arbitrator receives objections under paragraph 8.4, the Arbitrator shall consider whether or not in his or her opinion there is any reasonable basis or ground for the objection received and shall render a final and binding written decision within three (3) Business Days of receiving an objection as to whether the Related Dispute shall be joined with the Original Dispute.
- 8.7 Subject to the provisions of this paragraph 8, the provisions of paragraph 5 (*Arbitration*) shall apply to the resolution of a Related Dispute and the Arbitrator shall, insofar as practicable, apply the same reasoning and analysis in reaching a decision on both the Original Dispute and the Related Dispute.
- 8.8 When a Related Dispute is joined to an Original Dispute, the Arbitrator shall consider both Disputes together but shall render separate decisions on the Original Dispute and the Related Dispute.

APPENDIX 1- CEDR MEDIATION AGREEMENT

Model Mediation Agreement



CEDR Model Mediation Agreement

THIS AGREEMENT dated **IS MADE BETWEEN**

Party A

.....*of*

Party B

..... *of*

(together referred to as “**the Parties**”)

The Mediator

..... *of*

(a term which includes any agreed **Assistant Mediator**)

and

CEDR Solve of IDRC, 70 Fleet Street, London EC4Y 1EU

in relation to a mediation to be held

on

at

(“**the Mediation**”)

concerning a dispute between the Parties in relation to

.....
.....
.....

(“the Dispute”)

IT IS AGREED by those signing this Agreement THAT:

The Mediation

1 The Parties agree to attempt in good faith to settle the Dispute at the Mediation. All signing this Agreement agree that the Mediation will be conducted in accordance with its terms and consistent with the CEDR Solve Model Mediation Procedure and the CEDR Code of Conduct for Mediators current at the date of this Agreement.

Authority and status

2 The person signing this Agreement on behalf of each Party warrants having authority to bind that Party and all other persons present on that Party’s behalf at the Mediation to observe the terms of this Agreement, and also having authority to bind that Party to the terms of any settlement.

3 The Mediator is operating as an independent contractor (unless an employee of CEDR Solve), and neither the Mediator nor CEDR Solve is an agent for any of the Parties in relation to the Dispute or this Agreement.

4 Neither the Mediator nor CEDR Solve shall be liable to the Parties for any act or omission in relation to the Mediation unless the act or omission is proved to have been fraudulent or involved wilful misconduct.

Confidentiality and without prejudice status

5 Every person involved in the Mediation:

5.1 will keep confidential all information arising out of or in connection with the Mediation, including the fact and terms of any settlement, but not including the fact that the Mediation is to take place or has taken place or where disclosure is required by law to implement or to enforce terms of settlement; and

5.2 acknowledges that all such information passing between the Parties, the Mediator and/or CEDR Solve, however communicated, is agreed to be without prejudice to any Party's legal position and may not be produced as evidence or disclosed to any judge, arbitrator or other decision-maker in any legal or other formal process, except where otherwise disclosable in law.

6 Where a Party privately discloses to the Mediator any information in confidence before, during or after the Mediation, the Mediator will not disclose that information to any other Party or person without the consent of the Party disclosing it, unless required by law to make disclosure.

7 The Parties will not call the Mediator or any employee or consultant of CEDR Solve as a witness, nor require them to produce in evidence any records or notes relating to the Mediation, in any litigation, arbitration or other formal process arising from or in connection with the Dispute and the Mediation; nor will the Mediator nor any CEDR Solve employee or consultant act or agree to act as a witness, expert, arbitrator or consultant in any such process. If any Party does make such an application, that Party will fully indemnify the Mediator or the employee or consultant of CEDR Solve in respect of any costs any of them incur in resisting and/or responding to such an application, including reimbursement at the Mediator's standard hourly rate for the Mediator's time spent in resisting and/or responding to such application.

8 No verbatim recording or transcript of the Mediation will be made in any form.

Settlement formalities

9 No terms of settlement reached at the Mediation will be legally binding until set out in writing and signed by or on behalf of each of the Parties.

Fees and costs of the Mediation

10 The Parties will be responsible for the fees and expenses of CEDR Solve and the Mediator ("**the Mediation Fees**") in accordance with CEDR Solve's Terms and Conditions of Business current at the date of this Agreement.

11 Unless otherwise agreed by the Parties and CEDR Solve in writing, each Party agrees to share the Mediation Fees equally and also to bear its own legal and other costs and expenses of

preparing for and attending the Mediation (“each Party’s Legal Costs”) prior to the Mediation. However, each Party further agrees that any court or tribunal may treat both the Mediation Fees and each Party’s Legal Costs as costs in the case in relation to any litigation or arbitration where that court or tribunal has power to assess or make orders as to costs, whether or not the Mediation results in settlement of the Dispute.

Legal status and effect of the Mediation

12 Any contemplated or existing litigation or arbitration in relation to the Dispute may be started or continued despite the Mediation, unless the Parties agree or a Court orders otherwise.

13 This Agreement is governed by the law of [England and Wales] and the courts of [England and Wales] shall have exclusive jurisdiction to decide any matters arising out of or in connection with this Agreement and the Mediation.

14 The referral of the dispute to the Mediation does not affect any rights that exist under Article 6 of the European Convention of Human Rights, and if the Dispute does not settle through the Mediation, the Parties’ right to a fair trial remains unaffected.

Changes to this Agreement

15 All agreed changes to this Agreement and/or the Model Procedure are set out as follows:

Signed

Party A _____

Party B _____

Mediator

CEDR Solve

APPENDIX 2 - CEDR MODEL MEDIATION PROCEDURE

Model Mediation Procedure



CEDR Solve Mediation Model Procedure

1 What is mediation?

Mediation is a flexible process conducted confidentially in which a neutral person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

The principal features of mediation are that it:

- involves a neutral third party to facilitate negotiations;
- is quick to set up and is inexpensive, without prejudice and confidential;
- involves party representatives with sufficient authority to settle;
- is flexible, with no set procedure, enabling the process to be designed and managed by the Mediator to suit the parties, in consultation with them;
- enables the parties to devise solutions which are not possible in an adjudicative process such as litigation or arbitration, and which may benefit all the parties, particularly if there is the possibility of a continuing relationship between them;
- can be used in both domestic and cross-border disputes, two-party and multi-party disputes, and whether or not litigation or arbitration has been commenced.

Many commercial and government contracts now require parties to use mediation in accordance with CEDR's Model Procedure. While mediation is essentially flexible, the Model Procedure set out in this document, taken with the CEDR Solve Mediation Agreement, will give sufficient certainty to enable the process to be set up and used.

If settlement terms cannot be agreed at a mediation, the parties are free to revert to litigation or arbitration.

2 Referral to mediation

Referral of a dispute to a mediator or to CEDR Solve for mediation may be as a result of:

- voluntary referral by all parties;

- referral by one party who asks CEDR Solve to secure the involvement of other parties into a mediation;
- responding to a Pre-action Protocol, the Civil Procedure Rules 1998, a Court Order or a recommendation by a judge before trial or appeal;
- the provisions of a clause in a commercial or government contract requiring the use of mediation as a step in the parties' agreed dispute resolution process.

3 Choosing the mediator

Parties may choose their own mediator directly, or may ask CEDR Solve to nominate one or more persons to act as mediator for a dispute in accordance with the wishes of the parties or any relevant Court Order (a copy of which must be supplied to CEDR Solve by the parties as soon as possible after CEDR Solve has been instructed). If the parties require it, more than one mediator can be appointed to work as co-mediators, or the parties can agree on an independent neutral expert to advise the mediator on technical matters.

CEDR Solve will only nominate or appoint a mediator who, in their view, possesses the relevant skills and experience to mediate the dispute for the parties effectively, and who will comply with the CEDR Solve Code of Conduct for Third Party Neutrals (“the Code”). Any nominated mediator will be required to confirm immediately to CEDR Solve if there is any matter which might prevent the nominated mediator from complying with the Code in relation to the mediation of the dispute, such as a conflict of interest. CEDR Solve will then notify the parties of any such matter immediately it is disclosed to them.

If required by either the parties or the Court, or under the published terms of any CEDR Solve dispute resolution scheme, CEDR Solve will **appoint** a mediator to be used in relation to a dispute, subject always to that mediator not being prevented from complying with the Code in relation to the mediation of that dispute.

The parties may be asked by CEDR Solve to approve the appointment by them of an assistant mediator (who will be a CEDR Accredited Mediator) or an observer to attend a mediation at no cost to the parties, provided that they too comply with the Code in respect of the mediation of that dispute. The identity of any assistant mediator or observer proposed to attend the mediation will be made known in advance of the mediation to the parties, who are free to object to any such nomination or decline any such appointment. The mediator’s signature of the mediation agreement binds any assistant mediator or observer to its terms.

4 Preparation for the mediation

Depending on the CEDR Solve service selected by the parties, either CEDR Solve or the mediator when agreed or appointed, will make the necessary arrangements for the mediation as required or agreed by the parties or under the terms of any scheme, including:

- drafting the agreement, submitting it for approval by the parties and preparing the final form for signature, incorporating any agreed amendments;

- facilitating agreement as to the date, venue and start time for the mediation;
- organising exchange of case summaries and document bundles between the parties and the mediator;
- setting up any pre-mediation meetings agreed by the parties and the mediator.

The parties will:

- agree the appointment of the mediator or a process to select or appoint the mediator;
- agree with CEDR Solve the date, venue and start time for the mediation;
- pay CEDR Solve's fees and expenses as agreed under CEDR Solve's Terms and Conditions of business;
- each prepare and exchange a case summary in respect of their approach to the dispute at the mediation and endeavour to agree with all other parties what documents are needed for the mediation;
- send to the mediator (direct or through CEDR Solve) a copy of their case summary and two copies of the document bundles no less than two weeks before the date set for the mediation, making clear whether case summaries have or have not yet been exchanged, whether or not and when CEDR Solve is to effect exchange, and whether all or any part of any case summary or documentation is intended to be confidential for the mediator only;
- notify the mediator direct or through CEDR Solve of the names and roles of all those attending the mediation on their behalf, so that CEDR Solve can inform all Parties and the mediator in advance of the mediation;
- ensure that a lead negotiator with full authority to settle the dispute (or not) attends the mediation to sign the mediation agreement;
- alternatively notify the mediator, CEDR Solve and (unless very good reason exists to the contrary) the other parties of any limitation on authority to settle, for instance lack of legal capacity, or the need for ministerial committee or board ratification, in which case the lead negotiator will need to have power to recommend acceptance of any settlement. Late disclosure of limited authority to settle can call into question that party's good faith involvement in the mediation process, and have detrimental effects on the prospects of success of any mediation.

The mediator will:

- ensure at all times that the Code is complied with in respect of the mediation of the dispute, reporting any conflict of interest or other relevant matter, if any, to CEDR Solve

and (subject to any question of confidentiality or privilege) the parties immediately it emerges;

- attend any pre-mediation meetings on terms and agenda agreed by the parties;
- read each case summary and document bundle submitted in advance of the mediation by the parties;
- make contact with a representative of each of the parties before the mediation to assist in preparation for the mediation.

5 Documentation

Documentation intended to be treated as confidential by the mediator or CEDR Solve (such as a counsel's opinion, an undisclosed expert report, a draft proof of evidence or a confidential briefing for the mediator) must be clearly marked as such, and will not be circulated further without express authority.

One of the advantages of mediation is that its success is not dependent on exhaustive disclosure of documents. Bundles can usually be relatively limited in size, containing only key documents, and case summaries can be quite brief, and can to advantage be prepared jointly by the parties. The parties can ask CEDR Solve to effect simultaneous exchange of case summaries if required.

While documents brought into existence for the purpose of the mediation, such as case summaries, are clearly privileged from later production in those or other proceedings, the fact that a document which is otherwise disclosable in proceedings is produced for the first time during the mediation does not normally confer privileged status on it. The parties must take legal advice on such matters if they arise.

6 The mediation agreement

The agreement to mediate provides the essential legal basis for the mediation. Its signatories (the parties to the dispute, the mediator and CEDR Solve) all agree by signing it that the mediation is to be conducted consistent with both this CEDR Solve Model Procedure and the Code.

A draft mediation agreement will be sent for approval to the parties as part of the preparation process for the mediation, and any proposed amendments can then be discussed and inserted if agreed. The mediation agreement will normally be signed at the beginning of the mediation day on behalf of each of the parties and the mediator, having been pre-signed on behalf of CEDR Solve. In any pre-mediation contact with the parties, CEDR Solve staff and any CEDR mediator once appointed will observe its terms as to confidentiality, even though the agreement has not yet been signed.

7 The mediation

It is normal for each of the parties to have a private room for confidential consultations on their own and with the mediator during the mediation. There should also be a further room large enough for all parties to meet with the mediator jointly.

The mediator will chair and take responsibility for determining the procedure at the mediation, in consultation with the parties.

The likely procedure will comprise:

- preliminary meetings with each of the parties when they arrive at the venue;
- a joint meeting of all attending the mediation, at which each of the parties will normally be invited to make an oral presentation;
- a mix of further private meetings and joint meetings (which may involve all or some of each party's team), as proposed by the mediator and agreed by the parties.

Professional advisers, particularly lawyers, can and usually do attend the mediation. Such advisers play an important role in the exchange of information and opinion on fact, evidence and law; in supporting their clients (particularly individuals) in the negotiations; in advising clients on the implications of settlement; and in drawing up the settlement agreement and any consent order.

Although the agreement provides that no verbatim recording or transcript will be made of the whole mediation by the parties or the mediator, they can make their own private notes which will be undisclosed to anyone else, including in any subsequent litigation or arbitration.

Mediations can last beyond a normal working day and it is important that the key people present for each of the parties remain present or at worst available by telephone for so long as the mediation continues. Any time constraints should be reported to CEDR Solve or the mediator as soon as known, as any unexpected departure can be detrimental to the progress of the mediation and perceived as disrespectful by other parties.

8 Confidentiality in relation to the mediation

The CEDR Solve standard agreement provides that what happens at the mediation is to be treated as confidential by the parties, the mediator and CEDR Solve, including the fact and terms of settlement. However, the fact that the mediation is to take place or has taken place is not normally made confidential, as either or both of the parties may wish to claim credit for agreeing to engage in the process. If it is desired to make the fact that the mediation is taking place confidential also, the agreement can be amended.

Apart from where the parties agree in writing to consent to disclosure of what would normally be confidential, there may be rare circumstances in which the confidentiality of the mediation process cannot be preserved, such as where:

- the mediator or any party or their representative is required by law to make disclosure;
- the mediator reasonably considers that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed; or
- the mediator reasonably considers that there is a serious risk of being personally subject to criminal proceedings unless the information in question is disclosed.

Such questions might arise in relation to duties under the Proceeds of Crime Act 2002 or related legislation or under any other legislation. Legal representatives (who may themselves be under a comparable duty of disclosure in their own capacity) must take full responsibility for advising their clients of the implications of disclosure in relation to any such matters at a mediation.

9 Conclusion of the Mediation

The mediation may end in a number of ways:

- by settlement of the dispute in whole or part, when all agreed matters must be written down and signed by the parties to be binding;
- by one or more parties leaving the mediation before settlement is achieved;
- by an agreed adjournment for such time and on such terms as the parties and the mediator agree;
- by withdrawal of the mediator in accordance with the mandatory and optional circumstances set out in the Code.

The mediator will facilitate the drawing up of any settlement agreement, though the drafting is normally done by the lawyers representing each of the parties. Where proceedings **have not** been started in respect of the dispute, the settlement agreement will (if so intended and

drafted) be a contract enforceable by legal action. Where proceedings **have** been issued in relation to the dispute, it is normal for a Consent Order to be agreed either at or after the mediation and later lodged to end the proceedings on the terms agreed.

Where the mediation does not end in complete settlement, the Mediator may make contact with the parties thereafter to see whether further progress might be possible. Many disputes which do not settle at the mediation settle later, usually as a result of what occurred or was learned at the mediation.

CEDR Solve endeavours to make contact with all the parties after every mediation to obtain their feedback on both the process itself and, in particular, the mediator. Any feedback obtained regarding the mediator will be given in full to the mediator as part of the mediator's continuing learning and development.

10 Complaints

Any formal complaint about CEDR Solve or any mediator nominated by CEDR Solve should follow the procedure set out on the CEDR website at www.cedr.com.

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol

WEP STRATEGIC PARTNERING DELIVERY MODEL
SUMMARY OF STRATEGIC PARTNERING AGREEMENT

1 INTRODUCTION¹

- 1.1 The WEP Strategic Partnering Agreement (**SPA**) is the agreement entered into between the Local Authorities and Further Education Institutions (**Participants**)² and WEPCo (being the joint venture company established between the Private Sector Delivery Partner (**PSDP**) and a subsidiary of the Development Bank of Wales).
- 1.2 The SPA provides for how the parties act together over the long term in a collaborative partnering, non-adversarial and open manner to support the effective planning, procurement and delivery of education and community facilities in Wales and the delivery of infrastructure services.
- 1.3 The SPA sets out the high level principles that underpin the delivery of the parties' obligations; the behaviours, vision and values of WEPCo; the establishment of a framework that promotes excellence and value for money; and the monitoring and management of WEPCo's performance.
- 1.4 Under the SPA, WEPCo will be required to provide **partnering services** to the Participants. These services include (i) project development and delivery; (ii) supply chain assembly and management and (iii) other professional services necessary to fund and deliver education and community facilities.
- 1.5 The initial term of the SPA is 10 years. This may be extended by 5 years by any one or more Participants. Certain protections in the SPA continue in force beyond the term of the SPA until the end of the last associated Project Agreement entered into by the Participant(s) for the delivery of individual education facilities.
- 1.6 WEPCo will have the sole and exclusive right for the term of the SPA to nominate a subsidiary of the PSDP (which will be a special purpose vehicle that holds the majority of voting rights, or a wholly owned subsidiary of such a company) (**Project Co**) to deliver MIM Projects, provided that the relevant criteria in the SPA are met. Approved MIM Projects will be developed by WEPCo, but delivered by Project Co which will enter into a Project Agreement with the relevant Participant to deliver the relevant MIM Project.
- 1.7 Participants will be able to request that WEPCo, or a nominated wholly owned subsidiary of WEPCo, provides other **project services** such as the delivery of design and build capital projects for education or community facilities under the SPA, provided that the relevant criteria in the SPA are met. WEPCo and/or its subsidiaries shall enter into all required agreements for the delivery of capital projects and/or FM services directly with the relevant Participant, which in the case of education sector capital projects shall be substantially in the form of the Template Education Design and Build Development Agreement appended to the SPA.

2 NEW PROJECTS

- 2.1 WEPCo shall, if requested to do so by one or more Participants, develop proposals for the implementation and delivery of new projects by a Project Service Provider. For MIM Projects, the Project Service Provider will be the Project Co that will be created for such purpose and for other approved projects shall be WEPCo or a Subsidiary of WEPCo. The role of WEPCo will include the raising of finance, project development, project management and supply chain assembly and management of a new project up to contractual/financial close, during the construction period and operational period.

¹ Capitalised terms have the meaning provided for in the Strategic Partnering Agreement unless otherwise stated.
² Note those named as a "Contracting Authority" in the OJEU notice will be entitled to sign and enter into the SPA.

- 2.2 The obligations on WEPCo and the relevant Participant in relation to the identification, approval and delivery of a new project are set out in Schedule 5 (*Approval Process for New Projects*).
- 2.3 For an overview of Schedule 5 and a flow chart outlining the Approval Process for New Projects, please see **separate guidance**.
- 2.4 WEPCo is obliged to assist Participants in developing local delivery plans, which will form the basis of an annual Strategic Delivery Plan (**SDP**) developed between the Participants and WEPCo. The Participants' requirements for new projects will in most cases be initiated through the inclusion of such projects in the latest edition of the SDP.
- 2.5 WEPCo will assist Participants in developing proposals for the delivery of new projects, the preparation of an outline business case and the obtaining of all necessary approvals to progress any new project request by a Participant.
- 2.6 With each approved new project, WEPCo will (or will procure a Project Service Provider will) enter into a Project Agreement, a template form of which is appended to the SPA at Schedule 7 (*Template Project Agreements*). For an overview of the Template Project Agreement, please see **separate guidance**. For every MIM Project, the Project Service Provider will enter into a Shareholders' Agreement to establish the relevant Project Co.³
- 2.7 WEPCo must evidence value for money both at the beginning and continuously throughout the development and delivery of new projects in accordance with Schedules 3 (*Partnering Services*), 5 (*Approval Process for New Projects*) and 6 (*New Project Pricing Report*).
- 2.8 The Participants will develop with WEPCo the approach to supply chain assembly for the delivery of a new project, the market testing of design and construction, hard facilities management services and the funding of the new project to ensure value for money. WEPCo and the relevant Participant(s) will work together to ensure that the pricing of a new project provides the relevant Participant(s) with robust, transparent and auditable information as to the costs, fees and prices included within WEPCo's proposals.
- 2.9 WEPCo shall, for all projects, monitor and update (where applicable) the predicted capital, whole life cost and any increase or reduction in estimated costs, the final cost of design and construction and the actual cost of maintaining and repairing each project. WEPCo will be expected to demonstrate to Participants through a WEPCo Performance Report and Annual Review, lower costs and/or greater value for money over the term of the SPA.
- 2.10 Planning permission for approved projects to be delivered by WEPCo must be obtained by WEPCo prior to signing the relevant Project Agreement.

3 PARTNERING SERVICES

- 3.1 WEPCo may provide a range of Partnering Services to Participants.
- 3.2 These fall into three categories:
 - 3.2.1 Ongoing Partnering Services;
 - 3.2.2 Project Development Partnering Services; and
 - 3.2.3 Strategic Support Services.

³ This will be substantially in the form of the Template Project Co Shareholders' Agreement appended to the SPA.

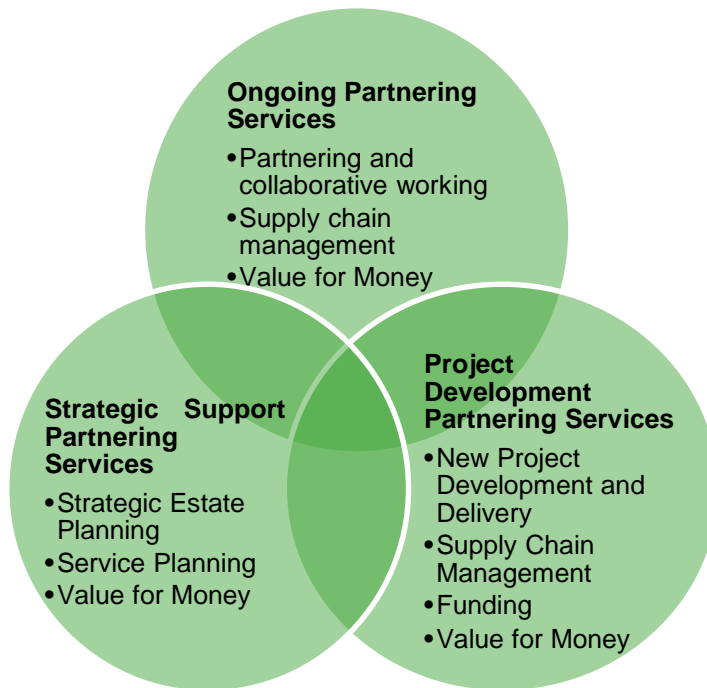


Figure 1 WEPCo Partnering Services

- 3.3 WEPCo shall provide **Ongoing Partnering Services** to the Participants that relate to the day to day operation of WEPCo, the fostering of partnering and collaborative working between the parties, supply chain management and the delivery of value for money.
- 3.4 WEPCo shall provide **Project Development Partnering Services** to implement and deliver projects identified in the SPA and all other 21st Century schools and colleges (Band B) MIM Programme Projects (**Qualifying Projects**) in accordance with the specification, KPIs (including community benefits) and rates set out in Schedule 3 (*Partnering Services*). The role of WEPCo is to develop proposals for a Qualifying Project to meet the Participant's Requirements including affordability and other agreed approval criteria (services, operational, financial and value for money). The scope and specification of the services to be provided by WEPCo will be agreed between WEPCo and the relevant Participant on a project by project basis, together with the approval criteria.
- 3.5 The relevant Participant will remain as "sponsor" for business case approval purposes. The role of WEPCo will be to support the relevant Participant in preparing agreed outputs at each business case approval stage for the delivery of a Qualifying Project.
- 3.6 WEPCo shall also, where requested, provide **Strategic Support Partnering Services**, to support Participants in strategic estate planning and strategic services planning to plan education sector services and where requested, community services. These are discrete, consultancy support services that may be required by Participants. The Participants and WEPCo will jointly develop a Strategic Delivery Plan for the delivery of new accommodation requirements.
- 3.7 WEPCo must monitor the performance of each of the Partnering Services and Project Services at its own cost and expense, meet value for money requirements and demonstrate continuous improvement wherever practicable achieved through agreed KPIs, as developed in accordance with the SPA throughout the term.
- 3.8 For all Partnering Services, WEPCo must provide the Partnering Services in compliance of the WEP Objectives and all objectives set out in the SDP agreed between the Participants and WEPCo. All Partnering Services must meet the requirements for Value of Money set out in clause 13 and seek to obtain continuous improvement in providing the services.

Payment for Partnering Services

- 3.9 Clause 10 of the SPA governs what WEPCo is entitled to charge a Participant for the provision of Partnering Services.
- 3.10 WEPCo recovers Partnering Services Costs relating to Ongoing Partnering Services and Project Development Partnering Services in accordance with Schedule 4 (*Partnering Services Costs*) of the SPA. Partnering Services Costs are recovered either from the Participant on a “pay as delivered” basis, or as a lump sum at financial close of the relevant approved Project, or such costs are rolled into the financial model for the relevant approved Project and are repaid over the term of the relevant Project Agreement.
- 3.11 WEPCo recovers the costs incurred for the delivery of Strategic Support Partnering Services on a “pay as delivered” basis or as otherwise agreed with the relevant Participant procuring such services from WEPCo. The quantum of such costs will be calculated by reference to the rate card which will be included at Schedule 4 (*Partnering Services Costs*).

Subcontracting of Partnering Services

- 3.12 WEPCo is able to subcontract its obligations in respect of the whole or part provision of the Partnering Services to a Partnering Subcontractor but will remain responsible to the relevant Participants for the provision of the contracted out services.
- 3.13 WEPCo is responsible for ensuring the performance by the Supply Chain Members of their obligations under the relevant Supply Chain Agreements.
- 3.14 On the expiry or earlier termination of the SPA, the handover provisions set out in Schedule 20 (*Handover on Expiry or Termination*) will apply. Any staff engaged in the delivery of Partnering Services will transfer under TUPE regulations to the relevant Participant or third party successor provider of services.
- 3.15 For further detail on the scope of Partnering Services in Schedule 3 (*Partnering Services*) and Schedule 4 (*Partnering Services Costs*), please see **separate guidance**.

4 PROJECT SERVICES

- 4.1 WEPCo is responsible for providing **Project Services** to Participants. These are services required under a Project Agreement in relation to the design, construction, testing, commissioning and completion of premises (including any temporary works) and the installation of equipment, together with the provision of facilities maintenance (FM) services.
- 4.2 The SPA acknowledges that Participants may have existing providers in place to provide their accommodation requirements and associated services. WEPCo agrees to work with Participants to ensure the existing providers are treated fairly and that the individuals providing the existing services are, where possible, employed by the Project Service Provider.

5 EXCLUSIVITY

- 5.1 The Participants grant WEPCo the sole and exclusive right for the 10 year term of the SPA to provide:
 - 5.1.1 Ongoing Partnering Services
 - 5.1.2 Project Development Partnering Services in respect of projects identified in the SPA and 21st Century Schools and Colleges (Band B) MIM projects (**Qualifying Projects**)
 - 5.1.3 Project Services in respect of Qualifying Projects that become Approved Projects (as developed through Schedule 5 (*Approval Process for New Projects*)).

After 10 years exclusivity will not apply.

5.2 Participants may request WEPCo to deliver other services:

- 5.2.1 Project Services relating to Major Capital Projects in the education sector, save for MIM projects for a specified period;
- 5.2.2 Project Services relating to capital projects required for the provision of education sector services or community services;
- 5.2.3 Project Services in relation to the provision of FM Services required for the provision of education sector services or community services (not provided as part of any Qualifying Project);
- 5.2.4 Strategic Support Partnering Services;
- 5.2.5 Ongoing Partnering Services and/or Project Development Partnering Services after 10 years (where the term of the SPA has been extended);
- 5.2.6 Project Development Partnering Services in respect of potential New Projects which are not Qualifying Projects.

The above services are not subject to exclusivity.

5.3 The benefits of exclusivity include:

- 5.3.1 Participants will not have to embark on another regulated procurement for the delivery of Partnering Services or Project Services for the lifetime of the SPA.
- 5.3.2 Participants can be assured of the appropriate level of commitment from WEPCo to foster the development of a successful partnership and outcomes over the long term.
- 5.3.3 Participants can be assured regarding value for money and continuous improvement for the delivery of a pipeline of new projects.
- 5.3.4 Delivery of economies of scale over time through the growth of the WEPCo estate.

5.4 Exclusivity can be suspended if WEPCo fails the “Track Record Test” and will not apply until WEPCo passes a subsequent Track Record Test. This is an assessment of whether in the most recent WEPCo Performance Report shared with Participants on an annual basis, WEPCo has met specified KPIs (including those that relate to community benefits) as evidenced.

6 REPRESENTATIVES AND STRATEGIC PARTNERING BOARD (SPB)

- 6.1 Each Participant will appoint a representative to act on its behalf in relation to the SPA. The identity of the Participant’s Representative may change at any time following written notice to WEPCo and all other Participants. Each Participant Representative may also at any time, by written notice to WEPCo, authorise others to exercise the functions and powers of that Participant.
- 6.2 The SPB governs the relationship between WEPCo and the Participants. It will comprise of representatives of each Participant, WEPCo, Welsh Government and other stakeholder representatives as agreed by the Participants.
- 6.3 The SPB will meet at least every three months to review financial and operating issues and provide strategic input into the partnering arrangements including the exchange of ideas in relation to the Participants’ accommodation and service delivery requirements.

- 6.4 A quorum of the SPB is proposed to be five Participant's Representatives (one of whom must be a representative of the Welsh Government) and the WEPCo Representative. For any adjourned meeting, the quorum shall be one Participant's Representative (who must be a representative of the Welsh Government) and the WEPCo Representative. WEPCo and stakeholder representatives will not have a vote at SPB meetings. Decisions will be taken by majority vote. A decision that affects a Participant will only bind it if that Participant's representative has voted in favour of it.
- 6.5 The SPB will approve the annual Strategic Delivery Plan, ensure New Project proposals are consistent with the SDP, manage WEPCo's performance against agreed KPIs, approve any extension to the SPA term and approve any proposed disposal of interest in share capital resulting in a loss of control by WEPCo (or subsidiary).
- 6.6 WEPCo will be obliged to report on its KPIs which will be reviewed by the SPB annually. The SPB will assess whether the Track Record Test has been passed and if any significant performance failure has occurred. Any dispute shall be resolved under Schedule 21 (*Dispute Resolution Procedure*).

7 DEFAULT

Participant Default

- 7.1 Participant Event of Default includes:
 - 7.1.1 one or more Participants being in breach of clauses 9.1, 9.2 and 9.6 (exclusivity clause);
 - 7.1.2 one or more Participants failing to attend SPB meetings which has a material adverse effect on WEPCo or any Project Service Provider;
 - 7.1.3 one or more Participants being in breach of the SPA which delays the execution of any Project Agreement relating to an Approved Project by more than 40 Business Days;
 - 7.1.4 an expropriation, sequestration, nationalisation or requisition of any Facilities or assets and/or shares of WEPCo or its Holding Company or Project Service Provider by a Participant or any other Relevant Authority (where this occurs due to a Relevant Authority, all Participants will be deemed responsible for the Event of Default); and
 - 7.1.5 any non-payment by a Participant under the SPA exceeding £100,000 60 Business Days after demand.
- 7.2 Where a Participant Event of Default occurs, WEPCo may either:
 - 7.2.1 suspend their performance of the SPA in relation to the Participant in default until that Participant can demonstrate to WEPCo's reasonable satisfaction it is capable of performing their obligations; or
 - 7.2.2 notify the Participant of the Event of Default.

If the Participant Event of Default is capable of remedy and has not been remedied within 30 Business Days or is not capable of remedy with immediate effect, WEPCo may either serve notice on each Participant in default terminating the SPA in relation to them with immediate effect or simply notify the Participants in default of the effect their default has had. Any Participants in default will be liable to pay compensation to WEPCo in accordance with section 1 of Schedule 14 (*Compensation on Participant Event of Default and Termination*). If the SPA is terminated in its entirety by the default, compensation under section 2 of Schedule 14 (*Compensation on Participant Event of Default and Termination*) will be payable.

- 7.3 If a Participant is served a Participant Default Notice more than once in any 12 months, it will not receive Project Development Partnering Services or any Strategic Support Partnering Services unless paid monthly in arrears.

- 7.4 The Participants have several liability, other than where two or more Participants have suffered an Event of Default leading to a termination of the SPA, in which case, the loss of WEPCo will be split between the defaulting Participants.

WEPCo Default

- 7.5 The SPA provides for a long list of circumstances which constitute a WEPCo Default including amongst others, WEPCo breaching the SPA, WEPCo failing to provide the Partnering Services, WEPCo breaching health and safety laws; WEPCo failing to pay Participants under the SPA which exceeds £10,000 for 60 Business Days on demand; WEPCo or a Project Service Provider suffering an Insolvency Event; and WEPCo (or WEPCo Party) committing a Prohibited Act.
- 7.6 On a WEPCo Event of Default, each Participant can (acting through the Welsh Government) suspend the exclusivity granted to WEPCo which will include any New Projects that have not yet reached Stage 2 approval. The Participants can lift that suspension at any time and the suspension of exclusivity will be lifted on remedy of the default and where the PSDP shares in WEPCo are sold.
- 7.7 The SPA provides for an escalation of remedies following a WEPCo Event of Default, proportionate to the severity of the default, which may be exercised by the Participants (acting through Welsh Government). These include: suspension of exclusivity; requiring a remediation programme to be implemented; an improvement programme to satisfy Participants that the events will not recur; termination of a non-performing supply chain member; and ultimately termination of the SPA.
- 7.8 WEPCo will reimburse each Participant for all reasonable costs incurred by each Participant as a result of WEPCo's breach of the SPA.

8 WEPCO INDEMNITIES

- 8.1 As would be expected under a long term partnering agreement, the SPA includes provisions under which WEPCo indemnifies the Participants, and the Participants indemnify WEPCo, for certain losses. These are limited to Direct Losses, and exclude Indirect Losses (such as loss of profit and loss of business opportunity), and further Participants partially exclude their liability for their negligence (see below) and claims in tort.
- 8.2 The scope of the indemnity provided by WEPCo is slightly wider than the Participants' indemnities to WEPCo, as the Participants' indemnities are limited to Direct Losses sustained by WEPCo as a consequence of any negligent act or omission by that Participant (or a Participant Party relating to that Participant) relating to the performance or non-performance of the Participant's obligations under the SPA, or a breach of an express provision of the SPA by that Participant. The indemnities provided by WEPCo relate to any act or omission of WEPCo (not just its negligence or breach of an express obligation).
- 8.3 The indemnities cover death and/or personal injury, damage to assets of the other party and third parties. In each case (and subject to the overriding limitation on the scope of the Participants' indemnities described in above), each party is liable for Direct Losses sustained in consequence of any claim for death and/or personal injury of their own employees or persons engaged by them, notwithstanding any act or omission of the other party.
- 8.4 In respect of death or personal injury to third parties, and damage to property, each party indemnifies the other for Direct Losses they cause (save to the extent caused or contributed to by the Participant's own negligence (where WEPCo is indemnifying the Participant) or WEPCo's own acts or omissions (where the Participant is indemnifying WEPCo). Physical damage to property is typically an insured risk, and the indemnity given by the Participants to WEPCo excludes insured losses. Where damage to property has been caused (or contributed to) by the Participant's own negligence, and they are claiming under the WEPCo indemnity, the Participant is responsible for the deductibles under any policy of insurance, and any sums over the maximum amount required to be insured under the SPA insurance policies.

9 DISPUTE RESOLUTION

- 9.1 Disputes are dealt with in accordance with the resolution procedure set out in Schedule 22 (*Dispute Resolution Procedure*). If a Dispute occurs, the parties must consult in good faith. If that is unsuccessful, the Dispute must be escalated to senior personnel. If that is unsuccessful, the Dispute will be escalated to mediation and failing that to arbitration. The exception to this is where a party requires an order restraining another party from doing any act or compelling another to do any act or a judgement for a liquidated sum where there is no arguable defence.

10 INSURANCE

- 10.1 The insurances listed in Schedule 9 (*Insurances*) and any others required by law must be taken out by WEPCo, subject to insurance being available in the market to cover WEPCo in its role during the lifetime of the SPA. The insurance will cover any indemnity claims against WEPCo in relation to any death or bodily injury or third party property damage arising out of or in connection with the Partnering Services.
- 10.2 If a Project Service Provider notices a risk becoming an Uninsurable Risk under the relevant Project Agreement, the Participants and WEPCo will hold a SPB meeting within 7 Business Days and will use their reasonable endeavours to agree a position with regards to the risk within 20 Business Days of notice.

11 INTELLECTUAL PROPERTY RIGHTS

- 11.1 WEPCo grants a free, irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under the SPA or following termination of the SPA) licence to each Participant to use the Intellectual Property Rights which are vested in WEPCo and where possible, where vested in third parties. WEPCo will indemnify Participants where they receive a claim as a result of the Participant infringing third party Intellectual Property Rights (other than as a result of the Participant acting outside of the terms of the SPA).

12 ASSIGNMENT AND SUBCONTRACTING

- 12.1 WEPCo cannot assign or dispose of the SPA without the prior written consent of the Participants, other than where granting security rights in a form approved by the Participants prior to grant.
- 12.2 A Participant cannot assign or dispose of the SPA other than to a limited set of organisations set out in clauses 28.4.1 to 28.4.4, including the Welsh Ministers, an agency of the Welsh Ministers, Government or Local Authority, any other Further Education Corporation or Designated Institution or any person with the legal capacity or sufficient financial resources to perform the obligations of the Participant. Depending on the transferee, the obligations may need to be guaranteed by the Participant.

Bevan Brittan LLP

11 May 2020

WEP STRATEGIC PARTNERING DELIVERY MODEL

ROLE OF THE STRATEGIC PARTNERING BOARD (SPB)

1 INTRODUCTION¹

- 1.1 The WEP Strategic Partnering Agreement (**SPA**) is the agreement entered into between the Local Authorities and Further Education Institutions (**Participants**)² and WEPCo (being the joint venture company established between the Private Sector Delivery Partner (**PSDP**) and a subsidiary of the Development Bank of Wales).
- 1.2 The purpose of the SPA is to establish a long term partnership (initial term of 10 years, which may be extended by 5 years) between WEPCo and the Participants. The SPA provides for the creation of the Strategic Partnering Board (**SPB**); this paper summarises the role of the SPB in the context of the SPA.

2 THE SPA KEY PRINCIPLES

- 2.1 The SPA commits the Participants and WEPCo to work to the following nine (9) key principles, and the SPB is the guardian vehicle of these commitments.
- 2.2 The key principles of the SPA are:
- a) to develop close working relationships between WEPCo and the Participants at all levels;
 - b) to focus on achieving the best value for money operational performance within agreed timescales;
 - c) to set in place business and cultural processes to enable the Participants and WEPCo to establish and agree challenging time and performance objectives and to meet or better them;
 - d) to recognise each other's needs, constraints, limitations, capabilities, roles and responsibilities to achieve mutually beneficial outcomes;
 - e) to identify by regular monitoring, weaknesses and strengths in the relationship between and amongst the Participants and WEPCo and to work together to overcome the weaknesses and to build on the strengths;
 - f) to commit to the early recognition and resolution of differences, conflicts and disputes between and amongst the Participants and WEPCo in a 'no surprises' environment;
 - g) to appoint within each of the Participants and WEPCo co-ordinators at senior level who will support, defend and promote the long term strategic partnership between them and its principles of operation;
 - h) to develop openness and trust in a transparent information and data sharing environment; and
 - i) in accordance with the Equality Requirements to positively promote equal opportunities and the Ethical Employment Code by combating discrimination on the grounds of race, ethnicity, religion, nationality, gender, disability, age or sexuality and promoting good relations between all sections of the community in 'everything we do' including:

¹ Capitalised terms have the meaning provided for in the Strategic Partnering Agreement unless otherwise stated.

² Note those named as a "Contracting Authority" in the OJEU notice will be entitled to sign and enter D

- a) Delivering high quality Education Sector Services and (where relevant) Community Services for end users; and
- b) Working with the local community and partners in the public, private or voluntary sectors.

3 SPB MECHANICS

3.1 SPB Structure

The SPB will comprise of:

- a) one representative from each of the Participants;
- b) one representative of WEPCo, nominated by the board of directors of WEPCo;
- c) one additional representative of Welsh Government (at Welsh Government's discretion); and
- d) a reasonable number of Stakeholder Representatives interested in or affected by Education Sector Services and/or Community Services;

3.1.1 Participant Representatives are expected to be senior representatives of the Participant, with the appropriate authority to make decisions on behalf of the Participant. They should be experienced in holding a director or similar position and have the required skills to make the decisions required to be made by the SPB. Participants will need to consider any likely conflicts of interest and ensure that conflicts of interest do not prevent the chosen representative from fulfilling their role as representative as well as any other role they hold directly in the Participant organisation.

3.1.2 The identity of a Participant's Representative in the SPB may change at any time following written notice to WEPCo and all other Participants.

3.1.3 A Participant Representative may also give written notice to WEPCo authorising others to exercise the functions and powers of that Participant at SPB meetings.

3.1.4 A Chairman will be appointed on an annual basis from amongst the Participants' Representatives. Save where agreed to the contrary by the Participants, it is intended that the post of Chairman will rotate annually amongst the Participants' Representatives in turn. The Chairman will be non-voting in his capacity as Chairman.

3.2 SPB Meetings

3.2.1 The SPB will meet regularly at least every 3 months to provide strategic input into how the partnering established by the SPA is operating, and to review financial and operating (including performance) issues.

3.2.2 Agendas for SPB meetings will be circulated on behalf of the Chairman five (5) Business Days in advance (with supporting papers) and any party wishing to raise other agenda items will notify all other members of the SPB (with supporting papers) in writing no later than three (3) Business Days in advance.

3.2.3 The SPB must have a quorum of five (5) Participants' Representatives (one of whom must be a representative from Welsh Government) and a WEPCo Representative. If a quorum is not present at any meeting of the SPB within thirty (30) minutes of that meeting's start time, the SPA requires that the meeting is adjourned to the same time and place five (5) Business Days later. For any adjourned meeting, the quorum shall be one Participant's Representative (who much be a representative of the Welsh Government) and the WEPCo Representative. Telephone conference calls or video conferences shall be valid as a meeting of the SPB.

- 3.2.4 The Participants must arrange for a person to take minutes of all SPB meetings and circulate the same to all representatives and the Chairman within five (5) Business Days after the relevant meeting.
- 3.2.5 All members of the SPB are obliged to use reasonable endeavours to ensure their regular attendance at all meetings and each Participant will, unless unavoidable, ensure that its representative on the SPB is appropriately empowered to agree matters on its behalf.
- 3.2.6 Each Participant is required to use reasonable endeavours to ensure that its representative on the SPB conducts himself in accordance with the partnering principles contained in the SPA and in a manner intended to ensure that the SPB complies with its obligations and carries out its functions in a timely manner.
- 3.2.7 Decisions will be taken by a majority vote. WEPCo and Stakeholder Representatives will not have a vote at SPB meetings. A decision that affects a Participant will only bind it if that Participant's representative has voted in favour of it.

4 PARTNERING SERVICES

- 4.1 The SPB will serve as a forum for the open exchange of ideas, and will enable the Participants to discuss their forthcoming accommodation and service delivery requirements to ensure an integrated co-ordinated and practical approach to fulfilling such requirements.

4.2 The Strategic Delivery Plan

The Strategic Delivery Plan (**SDP**) will set out objectives based on Participants' local delivery plans and will be developed annually between the Participants and WEPCo. The SPB will be required to approve:

- 4.2.1 the initial SDP put forward in accordance with Section 1 of Schedule 11 (*Initial SDP*); and
- 4.2.2 any amendments made to the SDP in accordance with Section 2 of Schedule 11 (*Updated SDP*).

4.3 The Management System

The SPB shall be required to approve the following systems established by WEPCo:

- 4.3.1 a quality management system for the purpose of ensuring and demonstrating that all aspects of the Partnering Services and all other matters for which WEPCo is responsible under the SPA are carried out fully in conformity with the relevant provisions of SPA and WEPCo's quality management policies and objectives;
- 4.3.2 an appropriate system for implementing WEPCo's occupational health and safety (**OH&S**) policies and objectives to enable it to control its OH&S risks and improve its OH&S performance over time; and
- 4.3.3 an appropriate system for achieving and demonstrating sound environmental performance by controlling the impacts of WEPCo's activities, products and services on the environment, consistent with its environmental policy and objectives.

4.4 The Partnering Services Costs Rates

- 4.4.1 WEPCo is required to provide report of the Partnering Services rates and prices by reference to:
 - a) other relevant local and national trends;
 - b) the rates and prices actually paid by WEPCo for similar services (where WEPCo has used Good Industry Practice to secure best value in respect of those services);

and taking account of value for money objectives set out in the Key Performance Indicators and the outcomes of the Partnering Services Supply Chain Refresh.

- 4.4.2 The SPB shall decide whether to approve any proposal of an increase or decrease of, or no change to the rates.

5 MANAGING WEPCO PERFORMANCE

- 5.1 The SPB will act as the primary mechanism for managing WEPCo's performance.
- 5.2 WEPCo will be required to regularly monitor and report to the SPB on its performance (and its Partnering Subcontractors) under the SPA, of the Project Service Providers and the Supply Chain Members under Project Agreements.
- 5.3 Within twenty (20) Business Days of each Review Date, WEPCo will issue to the SPB the WEPCo Performance Report, which will detail a review of whether each of the Key Performance Indicators has been met.
- 5.4 In less than one (1) month of the Review Date in that year, the SPB will hold a formal Annual Review of the operation of the SPA and WEPCo's performance in the context of the targets and objectives in the SDP and the Key Performance Indicators. As part of this review, the SPB (excluding for such purposes WEPCo's representative) will review WEPCo's progress against the partnership objectives in the SPA and the WEPCo Performance Report and the SPB and WEPCo shall agree any key findings from such review together with the implications relating to WEPCo's future activities.
- 5.5 The SPB shall be entitled to require information and/or clarification from WEPCo in relation to the WEPCo Performance Report including as to whether or not the Track Record Test has been passed and, whether any Significant Performance Failure has occurred.

6 APPROVAL PROCESS OF NEW PROJECTS

- 6.1 In respect of New Projects, the SPB will work with WEPCo and Participants to:
- 6.1.1 identify, analyse and discuss the Participants' collective and individual accommodation requirements;
 - 6.1.2 assist in the development of local delivery plans and review their applicability to the provision of Education Sector Services and Community Services in the Region;
 - 6.1.3 develop further the SDP, in particular to further refine the proposals contained in the SDP;
 - 6.1.4 decide the basis upon which New Projects are prioritised;
 - 6.1.5 identify and appraise available options for meeting the Participants' accommodation requirements and recommend (on the basis of best available value for money) which New Projects to progress;
 - 6.1.6 advise how best to bundle accommodation requirements within a New Project to ensure that the New Project is Affordable, offers value for money and provides a solution with an appropriate level of flexibility;
 - 6.1.7 take into consideration the views of relevant stakeholders in relation to the SDP and actual or potential New Projects;
 - 6.1.8 develop the Participants' requirements in relation to New Projects (which will be developed further during the Stage 2 Approval process) to enable it to form the basis for the agreement of the relevant Project Agreement;

- 6.1.9 analyse and discuss the range of potential funding options for New Projects including the feasibility of third party funding such as sponsorship when considering and developing a New Project;
- 6.1.10 assist in the preparation of outline business cases and obtaining all necessary approvals; and
- 6.1.11 for any New Project in respect of which such Participant(s) has/have indicated an intention to submit a New Project Request, agree:
 - a) the appropriate Comparator for purposes of determining any adjustments to the Project Development Fee Cap pursuant to paragraph 2 of Schedule 4 (Partnering Services Costs) in respect of such Comparator; and
 - b) each part of the Project Development Fee Cap for each stage.
- 6.2 Where the potential Relevant Participant(s) and WEPCo are unable to agree the matters referred to in paragraph 6.1.11 above within a period of three (3) months, the SPB shall determine such matters.
- 6.3 The SPB should be provided with copies of both the Stage 1 and Stage 2 Submissions and will provide a forum for discussion of whether the submissions meet the Approval Criteria. Approval of the New Projects is ultimately decided by the Relevant Participant(s).

7 EXTENDING THE SPA TERM

- 7.1 The term of the SPA may be extended for an additional five (5) years after the Initial ten year term. The SPB will meet twelve (12) months before the Initial Expiry Date to review:
 - 7.1.1 the performance of the Parties under the SPA and, in particular, the performance of WEPCo in delivering the Partnering Services to the performance standards set out in Clause **Error! Reference source not found.** (*Services Obligations*);
 - 7.1.2 the Education Sector Services and Community Services needs of the population within the Region; and
 - 7.1.3 whether it would be beneficial to the provision of all or any of the Education Sector Services and/or Community Services in the Region to extend this Agreement for a further five (5) year period from the Initial Expiry Date.
- 7.2 It will then be decided by WEPCo and one or more of the Participants whether to extend the term of the SPA by five (5) years from the Initial Expiry Date.

8 DISPOSAL OF PROPERTIES AND/OR SHARES

- 8.1 SPB approval will be required in respect of any action, which would result in a loss of control (direct or indirect) by WEPCo of any Subsidiary of WEPCo, which is a Project Service Provider. The SPB is obliged to act reasonably and without undue delay, taking into account any proposals put forward. If the SPB does not approve the proposed action, WEPCo must use all reasonable endeavours to procure that its Subsidiary and/or the relevant Project Service Provider shall not proceed with that proposed action.
- 8.2 It will be deemed to constitute a material breach of the SPA by WEPCo if:
 - 8.2.1 any Project Service Provider takes any action under its Project Agreement, which under the terms of such agreement, requires the SPB's consent without such consent having first been obtained, or
 - 8.2.2 WEPCo or any Subsidiary of WEPCo takes any action, which requires the SPB's consent or agreement under the SPA without such consent or agreement having first been obtained.

9 INSURANCE

- 9.1 Where a Project Service Provider for a MIM Project has notified a Project Agreement Counterparty of a risk becoming an Uninsurable Risk (pursuant to the provisions of the relevant Project Agreement), the Participants and WEPCo must ensure that a meeting of the SPB is held as soon as is reasonably practicable (and in any event within seven (7) Business Days of receipt by the Project Agreement Counterparty of such notice).
- 9.2 At that meeting the SPB will consider the situation and the parties will work together to use all their respective reasonable endeavours to obtain an agreed position from the SPB in relation to the risk becoming an Uninsurable Risk within twenty (20) Business Days of the Project Service Provider notifying the Project Agreement Counterparty as described above.

10 CONCLUSION

The SPB will be the central forum in which the Participants can work together with WEPCo, Welsh Government and Stakeholder Representatives to ensure that the key principles of the SPA are met. The SPB's role will be to approve the SDP; ensure any New Project proposals are consistent with the SDP; monitor WEPCo's performance against agreed KPIs; approve any extension to the SPA term; and approve any proposed disposal of interest in share capital resulting in a loss of control by WEPCo (or subsidiary).

WEP STRATEGIC PARTNERING DELIVERY MODEL

APPROVAL PROCESS FOR NEW PROJECTS

1 INTRODUCTION

- 1.1 The WEP Strategic Partnering Agreement (**SPA**) is the agreement entered into between the Local Authorities and Further Education Institutions (the **Participants**) and WEPCo (being the joint venture company established between the Private Sector Delivery Partner and a subsidiary of the Development Bank of Wales).
- 1.2 Schedule 5 of the SPA sets out the procedure by which WEPCo and the Participants will work together to agree which New Projects will be taken forward and approved for development by WEPCo and on what basis. Schedule 5 sets out a two stage Approval Process for such New Projects. The approval process (as discussed in more detail below) shall only apply in relation to Qualifying Projects regardless of whether the period of ten (10) years from the Commencement Date has expired.
- 1.3 The Parties may agree to utilise this process (amended as appropriate) in respect of other Project Services under Clause **Error! Reference source not found.** but are not obliged to do so.
- 1.4 A flow diagram outlining the Approval Process for New Projects is appended to this guidance note at Appendix A.
- 1.5 Capitalised terms in this guidance note shall have the meaning given to them in the SPA unless otherwise defined in this guidance note.

2 OBLIGATIONS OF THE PARTIES

How are New Projects identified at the outset?

- 2.1 WEPCo will work with Participants to develop local delivery plans (addressing Participants' requirements) which will form part of the annual Strategic Delivery Plan (**SDP**). WEPCo will then review the applicability of the SDP to the provision of education services in the Participant's Region to decide which New Projects should progress. The SPB shall ensure that WEPCo's proposals for New Projects are consistent with delivery of the latest SDP.

How far will WEPCo's role extend in developing New Projects and obtaining approval?

- 2.2 Paragraphs 2.1 and 2.2 of Schedule 5 lists WEPCo's general obligations in developing New Projects. WEPCo has a full set of obligations, including:
 - 2.2.1 identifying Participants' requirements for future New Projects;
 - 2.2.2 prioritising New Projects and advising on best timeframes for New Projects;
 - 2.2.3 engaging with stakeholders and advising on the preferred funding options;
 - 2.2.4 preparing outline business cases;
 - 2.2.5 obtaining all necessary approvals;
 - 2.2.6 agreeing an appropriate Comparator for determining adjustments to the Project Development Fee Cap; and
 - 2.2.7 agreeing each part of the Project Development Fee Estimate..
- 2.3 WEPCo shall (pursuant to Paragraph 2), without entitlement to specific or additional payment, work with the Participants and other members of the Strategic Partnering Board (**SPB**) to (including but not limited to) analyse and discuss the range of potential funding options for New Projects, as well as

develop the Participants' requirements in relation to New Projects (as more explicitly set out in Paragraphs 2.2.1 to 2.2.11).

What are the Participants expected to do by way of the Approval Process for New Projects?

- 2.4 Paragraph 2.3 of Schedule 5 sets out the Participants' obligations, which mainly includes obligations of co-operation with WEPCo, including providing necessary information; identifying its needs and funding opportunities (including benchmarks); and providing assistance in obtaining necessary Consents.
- 2.5 Each Participant will co-operate with WEPCo in its performance of its obligations (as set out in Paragraphs 2.2.1 to 2.2.11) in relation to any New Project or any potential New Project being developed by WEPCo. Where the potential Participant and WEPCo are unable to agree the matters referred to in paragraph 2.2.11 within a period of three (3) months, the SPB shall determine such matters.

3 NEW PROJECT REQUEST

- 3.1 Any Participant wishing to procure a New Project (**Relevant Participant**) shall first submit a New Project Request to WEPCo to produce a Stage 1 Submission (Paragraph 3.1). This New Project Request will need to set out matters, including but not limited to, the Affordability Cap, Specific Requirements, a clear detailed Project Brief and any requirements in relation to a New Project that must be satisfied as part of a Stage 1 Submission and/or Stage 2 Submission (as set out more explicitly in Paragraphs 3.1.1 to 3.1.3).
- 3.2 WEPCo shall be entitled (pursuant to paragraph 3.2) to raise any queries and request clarification from the Participant in relation to the New Project Request to enable it to fully assess the request and provide a meaningful response.
- 3.3 WEPCo shall then (in accordance with Paragraph 3.3) confirm in writing to the Participant, within twenty (20) Business Days of receipt of a New Project Request, whether it will submit a Stage 1 Submission to the Participant. If WEPCo confirms that it does not intend to do so, or fails to give the necessary confirmation, then the Participant shall be entitled to procure such New Project outside the terms of the SPA and shall not be in breach of the exclusivity provisions as set out in Clause 9 of the SPA (Exclusive Nature of this Agreement).
- 3.4 It is important to note that where the reason for WEPCo not proceeding is the Affordability Cap being unrealistically low, the parties shall (pursuant to Clause 3.3.1) work together in good faith to seek to agree an alternative Project Brief and/or Affordability Cap which will form the basis of a revised New Project.
- 3.5 If the parties fail to agree such terms within six (6) months of WEPCo's original confirmation, the Participant shall be entitled to procure the New Project outside the terms of the SPA and shall not be or be deemed to be in breach of the Clause **Error! Reference source not found.** exclusivity provisions. If the New Project is a Qualifying Project and they commence to procure such New Project prior to the expiry of ten (10) years from the Commencement Date at a substantially greater cost than the Affordability Cap, the Clause 9 exclusivity provisions will still apply.

4 STAGE 1 SUBMISSION AND APPROVAL

- 4.1 Upon WEPCo's confirmation of the New Project Request, WEPCo will (pursuant to Paragraph 4.1) produce outline proposals for New Projects, which develop and are consistent with the SDP where so requested. This is known as the Stage 1 Submission.
- 4.2 All Stage 1 Submissions will be produced within three (3) months (or such longer period up to a maximum of six (6) months where necessary) from the New Project Request. A Stage 1 Submission shall (as set out in Paragraph 4.2) be produced in accordance with the relevant Partnering Services Method Statement (to be incorporated into the SPA) and contain as a minimum (more expressly set out in Paragraphs 4.2.1 to 4.2.13):

- 4.2.1 a value for money assessment in respect of the New Project Request;
 - 4.2.2 a concept design (to RIBA Stage 2) of the New Project;
 - 4.2.3 a desktop study meeting the requirements of the Partnering Services Method Statements, site investigation studies and environmental impacts (as appropriate and as set out in Clause 4.2.3 more explicitly);
 - 4.2.4 confirmation as to whether the New Project requires the transfer of properties by the Participant to WEPCo, to a Project Service Provider, or to a wholly owned Subsidiary of WEPCo;
 - 4.2.5 the identity of the contractual structure and proposed corporate structure;
 - 4.2.6 a schedule of all material amendments required to the New Project Specific Project Agreement and template Project Agreement for MIM Projects taking into account the Approval Criteria;
 - 4.2.7 the identity of the Participant and/or other parties who will become Project Agreement Counterparties;
 - 4.2.8 an explanation as to how the New Project fits into the service delivery strategy as set out in the latest SDP;
 - 4.2.9 the effect (if any) on any employees of the Participant or relevant third party service providers;
 - 4.2.10 a planning brief;
 - 4.2.11 a maximum time period for submission of a Stage 2 Submission on the assumption that the New Tender Project achieves Stage 1 Approval;
 - 4.2.12 the proposed Project Development Fee Estimate; and
 - 4.2.13 a BIM Execution Plan.
- 4.3 The Stage 1 Submission must also be accompanied by a copy of the most recent WEPCo Performance Report and confirmation as to whether or not the Track Record Test has been passed at the date of submission of the Stage 1 Submission.
- 4.4 In developing a Stage 1 Submission, WEPCo shall (pursuant to Paragraph 4.3) liaise with the Participant and relevant end users as necessary to ensure the best available value for money is achieved through the appropriate consideration of all viable options and informed choices by WEPCo, stakeholders and the Relevant Participant(s). WEPCo shall also be obliged to enter into the Project BIM Agreement for the New Project and comply with its obligations thereunder. The Participant shall also (pursuant to Paragraph 4.4) without prejudice to the requirements of Schedule 6 of the SPA, provide WEPCo with such information as to its requirements and other inputs as WEPCo may reasonably require.
- 4.5 As part of its preparation for each Stage 1 Submission, WEPCo shall, save in respect of Pathfinder Projects, carry out a desktop study of the relevant site or sites and report to the Participant of such studies (in accordance with Paragraph 4.5).
- 4.6 Following receipt of a Stage 1 Submission by the Participant, (pursuant to Paragraph 4.6), the Participant shall have a period of two (2) months from the date of receipt of the Stage 1 Submission in which to notify WEPCo that it approves or rejects the Stage 1 Submission. If approved, this then becomes a Stage 1 Approved Project (Paragraph 4.6).

- 4.7 WEPCo's costs in relation to the preparation of a Stage 1 Submission that has been submitted in accordance with Paragraph 4 of Schedule 5 shall be borne by WEPCo unless in certain circumstances e.g. where the New Project subsequently becomes an Approved Project and the relevant costs are included as part of the Project Development Fee for such Approved Project (as more explicitly set out in Paragraphs 4.8.1 – 4.8.3).
- 4.8 It should be noted that if a Stage 1 Submission does not become a Stage 1 Approved Project, then in certain limited circumstances (as set out in detail in Paragraphs 4.9.1 – 4.9.3 including but not limited to where the New Project in question is not a Qualifying Project, then the Participant shall be entitled to procure the New Project outside the terms of the SPA and shall not be deemed to be in breach of the exclusivity provisions as set out in Clause 9 of the SPA, unless (in the case of Paragraph 4.9.1(a)) they seek to commence procurement of such New Project during any period when exclusivity in respect of the Participant has been reinstated pursuant to Clause **Error! Reference source not found.**, Clause **Error! Reference source not found.** or Clause **Error! Reference source not found.**
- 4.9 Finally, in relation to the Stage 1 Submission, where in respect of a New Project demolition of an existing facility is anticipated within the scope of a New Project and an Asbestos Management survey has not been carried out by the Participant and included within the New Project Request, WEPCo, shall then procure an Asbestos Management Survey with the support and guidance of the Participant, in accordance with the provisions as set out in Paragraphs 4.10.1 to 4.10.5.

5 STAGE 2 SUBMISSION AND APPROVAL

- 5.1 Once the Stage 1 Submission becomes a Stage 1 Approved Project, WEPCo, will (pursuant to Paragraph 5.1) when requested to do so in writing by the Participant, provide further Project Development Partnering Services to proceed regularly and diligently to develop a Stage 1 Approved Project into a detailed submission. This is known as a Stage 2 Submission. This shall then be presented to the Participant as soon as reasonably practicable and in any case within the maximum period specified in the Stage 1 Submission.
- 5.2 WEPCo shall, in developing a Stage 2 Submission (pursuant to Paragraph 5.2) continue to liaise with the Participant and relevant end users (Paragraph 5.2.1) and WEPCo shall be obliged to comply with its BIM protocol obligations under the Project BIM Agreement and submit a BIM Execution plan to the Participant within one month of commencing Stage 2.
- 5.3 As part of the Stage 2 process, the Participant shall provide WEPCo with any such information as to its/their requirements (including the Specific Requirements) and other inputs as WEPCo may reasonably require and shall assist WEPCo in the review of any draft designs and proposals in relation to the Stage 2 Submission (Paragraph 5.3.1) and generally co-operate with WEPCo in relation to any Stage 2 Submission (Paragraph 5.3.2).
- 5.4 WEPCo shall produce each Stage 2 Submission in accordance with the relevant Partnering Services Method Statement and shall procure that the Stage 2 Submission shall address all issues that have a potential impact on risk and/or price in respect of the proposed New Project and shall include as a minimum (including but not limited to and as set out in more detail in Paragraphs 5.4.1 to 5.4.18):
- 5.4.1 a value for money assessment in respect of the option given Stage 1 Approval;
 - 5.4.2 terms for the transfer of properties agreed between WEPCo and the relevant Participants or third parties;
 - 5.4.3 a mark-up of the Project Specific Project Agreement with Project Co's proposals;
 - 5.4.4 detailed design work (to RIBA Stage 4) and submission of relevant building warrant applications;
 - 5.4.5 requirements for planning approvals and all associated costs;
 - 5.4.6 an explanation as to why the Stage 2 Submission meets the Approval Criteria (as set out below);

- 5.4.7 a timetable setting out the stages and timescales for the period between achieving Stage 2 Approval and the execution of the Project Agreement in relation to that New Project;
 - 5.4.8 commitment letters from any proposed tenants or sub-tenants of the Facilities;
 - 5.4.9 details of the competency assessments undertaken and the results of the same, in respect of the potential 'Principal' Contractor for purposes of the CDM Regulations;
 - 5.4.10 the Corporate Structure of the Project Service Provider;
 - 5.4.11 a draft Project Co Shareholders' Agreement relating to any New Project which is a MIM Project;
 - 5.4.12 fully developed sub-contracts for each of the Contractor and (in the case of MIM Projects) the Service Provider and any relevant [Key Sub-Contractors]¹;
 - 5.4.13 details of the proposed security package; and
 - 5.4.14 commitment letters from the senior funders confirming acceptance of the documents submitted by WEPCo (in the case of MIM Projects).
- 5.5 The Approval Criteria consists of the criteria against which any New Project is judged in determining whether it achieves Stage 2 Approval. The criteria are set out in Paragraphs 5.5.1 to 5.5.10 in more detail, but include (and are not limited to) a requirement that the cost of the New Project is within the Affordability Cap; that it has been demonstrated that the New Project provides value for money; and that the New Project meets the Specific Requirements.
- 5.6 After the above has been complied with, WEPCo shall then submit its Stage 2 Submission to the Participants, copied to SPB (Paragraph 5.6). It is then expected that the SPB will provide a forum for discussion of such Stage 2 Submission. If, acting reasonably, the Participant finds that any material aspects of the Stage 2 Submission are unsatisfactory to them, the Participant shall notify WEPCo of the same and offer reasonable assistance to WEPCo to address such deficiencies.
- 5.7 Within sixty (60) Business Days of the later of submission to the Participant of a Stage 2 Submission and the date on which WEPCo provides them with all reasonable further information that has been requested and provided, the Participant shall give written notice of whether they reject or approve the Stage 2 Submission (as per Paragraph 5.7). If approved, this becomes a Stage 2 Approved Project.
- 5.8 Alternatively, the Participant may give notice that they reject the New Project on the grounds set out in Paragraph 5.7.2. One of the grounds is that there has been a change to the Affordability Cap since the New Project Request which has rendered the New Project not Affordable. If WEPCo has not been notified of the Participant decision then they shall be deemed to have rejected the New Project (Paragraph 5.8). In certain limited circumstances, where the Participant has rejected the New Proposal, WEPCo may be entitled to recover its Incurred Project Development Fee and procure the New Project outside the terms of the SPA (Paragraph 5.10).
- 5.9 Where a New Project has been rejected by the Relevant Participant on the grounds that it did not meet the Approval Criteria (Paragraph 5.7.2(b)), WEPCo shall be entitled, should it wish to do so, to refer the matter for consideration under the Dispute Resolution Procedure within ten (10) Business Days after receiving notice of the Rejection by the Participant (Paragraph 5.11).
- 5.10 Where a New Project becomes an Approved Project, WEPCo shall (pursuant to Paragraph 5.14) carry out further work to develop appropriate Project Agreements to implement the Approved Project on the terms of the Stage 2 Submission. The Participant shall (as set out in Paragraph 5.15) notify WEPCo

¹ Where applicable.

in writing as soon as they become aware of any matter which may adversely affect the viability of any New Project.²

- 5.11 The Participant shall then provide all reasonable assistance to WEPCo in relation to the procurement by WEPCo of all relevant Consents and the entering into of the relevant Project Agreement (Paragraph 5.16) and WEPCo shall (pursuant to Paragraph 5.18) novate all of its past, present and future rights, obligations and liabilities under a Project BIM Agreement to the Project Service Provider on or prior to the date of execution of the Project Agreement for the Approved Project.

6 CHANGES TO THE RELEVANT PARTICIPANT REQUIREMENTS

- 6.1 If there are any material variations to the Specific Requirements, Affordability Cap or Approval Criteria, in relation to a New Project by the Relevant Participant after a Stage 1 Submission has been submitted, then (pursuant to the provisions of Paragraph 6.1), WEPCo and the Relevant Participant shall negotiate in good faith as to the implications on the Stage 1 Submission and/or Stage 2 Submission (as appropriate) and shall seek to agree the changes to accommodate such variations.
- 6.2 The Participant may, (pursuant to Paragraph 6.2) at any time, give notice in writing to WEPCo that they propose to cancel a New Project without completing the Stage 1 Submission and Stage 2 Submission process (Paragraphs **Error! Reference source not found.** to **Error! Reference source not found.**). This is known as a Cancellation Notice.
- 6.3 Where the Participant issues a Cancellation Notice to WEPCo, the Participant shall (pursuant to Paragraph 6.2) pay WEPCo the Incurred Project Development Fee in respect of the cancelled New Project. The relevant date for calculation being the date of the Cancellation Notice.
- 6.4 It is important to note that, unless the period of ten (10) years after the Commencement Date has expired then, to the extent the New Project in question is a Qualifying Project, the Participant shall not be entitled to procure the Required Facilities and/or the provision of the Project Services outside the terms of this Agreement without recommencing this New Project Approval Process.

7 SUSPENSION OF EXCLUSIVITY

- 7.1 Where the Participant exercises any right to suspend exclusivity in accordance with Clause 9.7, Clause 23.3 or 23.10.1 of the SPA, while WEPCo is preparing a Stage 1 Submission or a Stage 2 Submission in respect of any New Project, then (pursuant to Paragraph 7) the Participant may notify WEPCo at any time while such suspension subsists to cease work on producing the relevant Stage 1 Submission or Stage 2 Submission.
- 7.2 In such circumstances, WEPCo shall then cease work and the Participant shall pay WEPCo the Incurred Project Development Fee in respect of the relevant New Project with the relevant date for calculation being the date of the notice from the Participant.

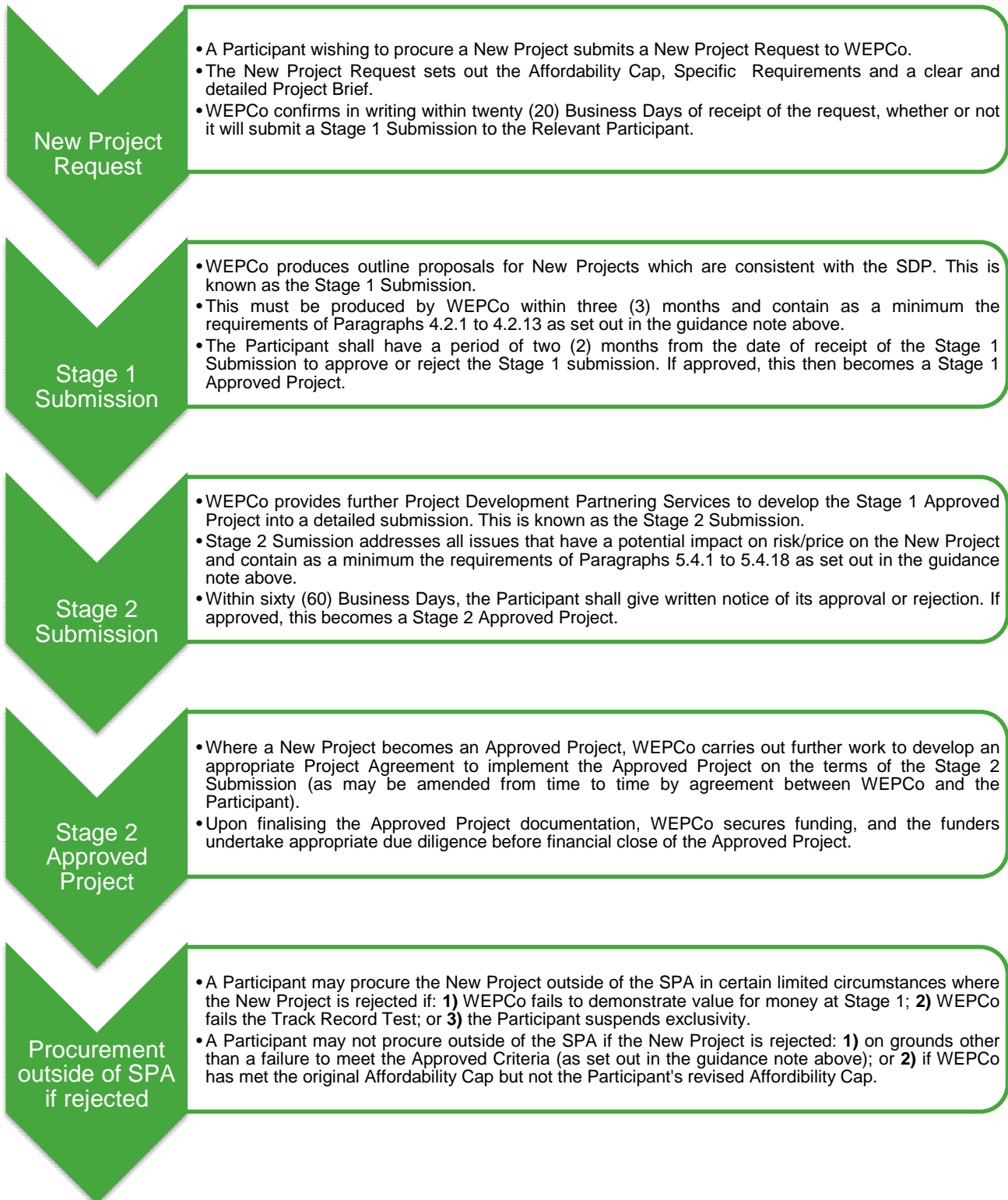
8 SURVEYS

- 8.1 Where WEPCo recommends that surveys, studies and/or investigations (other than desktop studies) are required for the purposes of a Stage 1 Submission, WEPCo will procure such surveys, studies and/or investigations on the terms and at prices agreed with the Participant.
- 8.2 The cost of the surveys, studies and/or investigations will be payable by the Participant to WEPCo within twenty five (25) Business Days of receipt of a valid invoice. This cost will not form part of the Project Development Fee unless the Participant and WEPCo agree to the contrary.

² The provisions of Paragraph 5.15 shall not apply to any Relevant Participant which is a Local Planning Authority exercising its functions as such.

APPENDIX A

APPROVAL PROCESS FOR NEW PROJECTS



CYNGOR SIR POWYS COUNTY COUNCIL.

CABINET EXECUTIVE
15th September 2020

REPORT AUTHOR: County Councillor Aled Davies
Portfolio Holder for Finance

REPORT TITLE: Consultation Decision for Long Term Empty Property
Premium Increase

REPORT FOR: Decision

1. Purpose

- 1.1 The report purpose is to advise Cabinet of the current situation around the Council Tax premium for long term empty properties and the potential for further financial incentives around these properties.
- 1.2 The report is also seeking approval of Cabinet to understand the views of Powys Citizens and other stakeholders via a consultation process.

2. Background

- 2.1 At the Council meeting on the 9th March 2016, Members resolved to introduce a Council Tax premium of 50% for: -
- Properties that were periodically occupied and furnished (called second homes) and,
 - Properties that were long term empty. (a long-term empty property is one that is unfurnished and unoccupied for a period exceeding one year.)
- 2.2 Regulations allow for a premium of up to 100% to be charged, seeing a total charge to the liable party of 200%.
- 2.3 The policy intention of introducing the premium was to increase housing stock available within communities. The table below shows actual number of long-term empty properties as of April for each financial year since the introduction of the premium:

Date	No: long-term empty properties
April 2017	1,060
April 2018	862
April 2019	990
April 2020	996

- 2.4 The above data shows initially following the introduction of the 50% premium there was a reduction in year one, but since April 2018 the number of long-term empty properties have gradually increased year on year.
- 2.5 The following table details the length of time properties has been empty. As can be seen from the table, the number of homes that remain empty for some years remains high.

Years Empty	No: Properties
1 to 2	356
2 to 3	189
3 to 4	108
4 to 5	50
5 to 6	58
6 to 7	41
7 to 8	24
8 to 9	25
9 to 10	18
10 years and over	124

3. Advice

- 3.1 The policy intention was to encourage empty homes back into use. As this has not been effective in some cases, it is time to explore further options for term empty properties to encourage owners to bring them back into use.
- 3.2 One of the incentives could be that the premium on long term empty homes is increased to encourage property owners to do so.
- 3.3 The Council recognises in certain instances properties may require repair and renovation works in order to become available for sale/let or to move into as a main residence and this can take time due to resources and finances of the individuals.
- 3.4 Therefore the premium can be graduated and increase as the length of time that the property has been empty increases, for instance the 50% premium could be applied once property empty for one year and then increase to say 100% once empty for a continuous period 3 or 5 years.
- 3.5 Before considering this proposal fully, it is appropriate to undertake a consultation to gather the views and opinions of stakeholders and the Council Taxpayers, including owners of empty premises, to understand why properties are empty and what is preventing occupation.
- 3.6 This report therefore seeks Cabinet approval to undertake consultation and then to consider the option of increasing the premium if appropriate.

- 3.7 From a Housing Services perspective, this proposal is very welcomed and should enable the authority to establish a far better understanding of the problem, thereby facilitating a more strategic and targeted approach to effectively tackle the issue locally.

4. Resource Implications

- 4.1 There are no resource implications at this stage.
- 4.2 The Section 151 Officer confirms approval of this report to undertake the consultation stage, and gauge views on a further rise to the empty home premium.

5. Legal implications

- 5.1 Legal : The recommendation can be supported from a legal point of view
- 5.2 The Head of Legal and Democratic Services (Monitoring Officer) has commented as follows: “ I note the legal comment and have nothing to add to the report”.

6. Data Protection

- 6.1 This does not involve the processing of personal data.

7. Comment from local member(s)

- 7.1 Not applicable.

8. Integrated Impact Assessment

- 8.1 Not applicable

9. Recommendation

- 9.1 It is recommended that Cabinet allow a consultation process to seek views of taxpayers and stakeholders to inform a potential premium increase of long-term empty homes.

Contact Officer: David Morris

Email: david.morris@powys.gov.uk

Head of Service: Jane Thomas

Corporate Director: Ness Young

Council Tax Premium on Long-term Empty Properties

Overview

Regulations allow for a 100% Council Tax premium to be charged on long-term empty properties resulting in a total charge of 200%. (A long-term empty property is one that is unfurnished and unoccupied for a period exceeding one year.)

On 9th March 2016, Members resolved to introduce a Council Tax premium of 50%, effective from 1st April 2017, on long-term empty properties, resulting in a total Council Tax charge of 150%.

Why we are consulting

Powys County Council is keen to understand:

- why properties are left empty for long periods of time
- the benefits of fewer empty properties within local communities
- what impact increasing the premium may have on numbers of long-term empty properties.

The survey should take no more than **15 minutes** to complete.

The results will help the Council determine the appropriate premium charge on long-term empty properties.

Please Note: Powys County Council is responsible for ensuring and protecting your privacy when you respond to a survey using this portal. If you were to give us any personal data (your full name, address or phone number), we would like you to know that it will be stored securely for a limited period only, used only for the purposes described in the survey and in compliance with the new General Data Protection Regulation (GDPR). Click on the Privacy tab at the bottom of the page to find out more.

Your Council Tax Responsibilities

Tudalen 1601

Are you responsible for paying Council Tax on a long-term empty property?

(Required)

Please select only one item

Yes No

Your relationship to Powys

Are you responding to this survey as....?

Please select only one item

A Powys resident An individual living outside of Powys An organisation

Council Tax Premium - Long-term Empty Property Owners

I confirm that the property has been unoccupied and substantially unfurnished for a continuous period of at least one year.

Please select only one item

Correct Incorrect

If you answered 'incorrect' to the above question, please confirm the current status of the property, including the property address and the date the change took place:

Council Tax Premium - Long-term Empty Properties Owners

Tudalen 1602

Please tell us what your CURRENT intentions for the property are (please select one option):

Please select only one item

- Continue to leave it empty
- I intend to move into property myself as my main residence
- I intend to use property as a second/holiday home
- I intend to put the property up for sale
- I intend to let out the property on a long-term tenancy
- I intend to run a holiday let business I intend to undertake repairs or renovations
- Other, please tell us more:

Tudalen 1603

If we were to increase the Council Tax premium currently charged on your long-term empty property, which of the following would apply (please select one option):

Please select only one item

- I would continue to leave it empty
- I would move into the property myself as my main residence
- I would use property as a second/holiday home I would put the property up for sale
- I would let out the property on a long-term tenancy
- I would run a holiday let business I would undertake repairs or renovations
- Other, please tell us more:

Council Tax Premium - Long-term Empty Properties

Tudalen 1604

We are considering increasing the Council Tax premium charge on long-term empty properties (currently 50%), based on the length of time a property has been empty. Please indicate what you think would be the most appropriate option:

Please select only one item

- Leave it at 50% Once empty for 2-3 years increase the premium to 100%
- Once empty for 3-5 years increase the premium to 100%
- Once empty for 5-10 years increase the premium to 100%
- Once empty for 10 years or more increase the premium to 100%

Please use this space to suggest how you think we could manage Council Tax arrangements for long-term empty properties:

What impact, if any, do you think increasing the Council Tax premium would have in bringing long-term empty properties back into use?

Please select only one item

Positive Neutral Negative

If you have answered 'negative', please tell us how this could be minimised:

What impact, if any, do you think increasing the Council Tax premium would have on supporting an increase in affordable housing?

Please select only one item

Positive Neutral Negative

If you have answered 'negative', please tell us how this could be minimised:

What impact, if any, do you think increasing the Council Tax premium would have on the local community generally?

Please select only one item

Positive Neutral Negative

If you have answered 'negative', please tell us how this could be minimised:

Please use this space to make any other comments or raise any concerns you have:

About You

Are you?

Please select only one item

Male Female Gender fluid/Non-binary/Gender neutral Prefer not to say

How old are you?

Please select only one item

Under 16 16-24 25-34 35-44 45-54 55-64 65-74
 75-84 85 + Prefer not to say

Tudalen 1607

What is your preferred language?

Please select only one item

- Welsh English BSL - British Sign Language Other
 Prefer not to say

If you chose Other please state (if you wish to)

Do you have any concerns or evidence to suggest that the Council is treating/using the Welsh language less favourably than English in relation to the equality objectives listed in this survey?

Please select only one item

- Yes No I don't know

If yes, please give details and state how the proposal / changes suggested in this survey will affect opportunities to use the Welsh language in your view?

Please give your views here

Tudalen 1608

What changes could be made in order to have a more positive effect on the Welsh language?

Please give your views here

Tudalen 1609

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol

CYNGOR SIR POWYS COUNTY COUNCIL

CABINET EXECUTIVE

15th September 2020

REPORT AUTHOR: Shaun James, Senior Manager Highways Technical & Business Manager

REPORT TITLE: Capital Schemes in Highways

REPORT FOR: Decision

1. Purpose

The Capital Strategy was agreed at Full Council in February with the final business cases being approved more recently by Cabinet and EMT. The Highways capital proposals that were set out in the Capital Strategy, included:

- HAMP £5m per annum for the next 10 years
- Street lighting £1m per annum for the next 10 years
- Structures including Bridges £0.5m per annum for the next 10 years (excluding essential works in excess which will be billed separately)

In recent weeks however, the Section 151 Officer asked that services to reconsider their capital programmes with the view to paring them back; to support the financial position (i.e. less capital reduces the cost of borrowing).

This report provides an update about the capital requirement for Highways and confirms what other funding is available in 2020/21.

2. Capital Requirements

HAMP

The HAMP business case makes the case for an additional amount of funding of £7.75M per year over and above the £1.5m Core Capital and £1.5m Structural Maintenance, to maintain a steady state of repair to its highways. The business case explored alternative options; a Do minimum option of £4M (maintaining the rate of deterioration we currently have), and a Do Something more option of £10m (to improve the condition of the network and work towards the Welsh road condition average). Whilst the £5m HAMP approved by Cabinet and set out in the Capital Strategy will slow the rate of the deterioration, it will nonetheless continue to deteriorate, and the service's Road Condition performance indicator will continue to widen from the Welsh average. To note, Powys is currently ranked 22nd for its road condition.

As a service we have therefore been progressing based on the £5M indicated in the agreed budget and pulled together a reduced programme to reflect this. However, in light of the £1.5m roads grant and due to the exceptional circumstances that have occurred this year including Storm Dennis and Covid, we have made the decision to delay £2.6m of programmed works, due to both resource issues and to reflect the request of the Section 151 officer.

The programme has therefore been pared back to equate to the Do minimum position described above, if we include and take account of this year's £1.5m WG grant funding, totalling £3.9m (£2.4m HAMP plus £1.5m WG).

With the £1.5m Core Capital and £1.5m Structural Maintenance this year's investment totals £6.9m.

This year we therefore require £2.4M of HAMP funding and we ask that the delayed programme of £2.6M is rolled forward and split across the next 2 future years (to allow HGSS to maximise their in-house contribution) £1.3m in 21/22 and £1.3m in 22/23.

It is understood that the Council's capital strategy will be reviewed in its entirety in due course and this requested roll forward will form part of that review.

We do not recommend reducing this further as it would take us below the Do minimum position, and would have more serious consequences such as HGSS income, the current revenue budget would be pressurised with increased defects, the risk of 3rd party claims would increase and it impacts on all future sites in delaying them (cost increases would be additional deterioration and inflation).

Structures

The Service have based this year's programme on the £500K indicated at budget settlement.

With regards the bridges, we have had to bring forward the Llangrwny Bridge from 2023/24 to this year, as it has been closed due to its deteriorating condition, and we have consequently delayed Ty Mawr bridge.

Recently, two structures (Pennant Pound & Gwern-y-Gaufronhave) on the B4355 between Dutlas and Lloyney have been severely damaged and the road is presently closed. We will try and manage this within the budgeted funding, by re-prioritising some HAMP/Core funding.

It should be noted that our bridge stock is also deteriorating and whilst there is no public account measure for structures, climate change continues to increase the risk of significant events occurring and structures being damaged.

We do not see that we can reduce this funding further.

Glasbury Bridge which carries the A438 Class 1 road over the River Wye has been identified as a pipeline scheme and will probably need to be replaced within the next 5 to 8 years; with a current estimate of £6m+. It may also need significant interim structural maintenance works to arrest its condition, and we will begin to prepare a specific capital business case for this structure. It is requested that this estimate is added to the Capital Strategy as part of the ten year plan and will be highlighted within the Integrated Business Plan.

Street Lighting

The use of capital funding, £1m per annum, is linked to savings as well as replacing a worn-out asset that is beyond its life. As we replace lights, we will re-design lighting and will take the opportunity to reduce lights where we can and upgrade to include the capacity for part-night lighting in all units (revenue savings).

The service could manage with less resource, but this then slows down the upkeep and replacement of the asset and slows down the delivery of savings. We do not presently see that we can reduce this without impacting on the savings but will monitor as we progress through the year.

The current level of revenue savings for street lighting is profiled as £200k (21/22) in addition to the £49k that has been rolled forward to this year. These savings are interdependent on the capital investment above. The estimated 200k (21/22) will however need to be reviewed and potentially reprofiled.

3. Resource Implications

The Head of Finance (Section 151 Officer) has acknowledged the reduced borrowing requirement in the HAMP for 2020/21 as part of the request for Services to review their capital programme to enable the Council to reduce its capital borrowing. It is suggested the decision to roll forward this unused budget is made as part of the wider future Capital discussions by EMT and Cabinet in September.

4. Legal implications

The Monitoring Officer has no specific concerns with this report.

5. Comment from local member(s)

This report relates to service areas across the whole county.

6. Integrated Impact Assessment

No impact assessment is required

7. Recommendation

- That the contents of this report are noted and the reduced capital funding for the Hamp is actioned as a virement with the decision about reprofiling the £2.6 million or reducing the overall programme made by EMT / Cabinet in September.
- The Capital requirement for Glasbury Bridge is included in the Capital Strategy

Contact Officer: Shaun James
Tel:
Email:
Corporate Director: Nigel Brinn

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol

CYNGOR SIR POWYS COUNTY COUNCIL

CABINET EXECUTIVE
15th September 2020

REPORT AUTHOR: James Evans, Portfolio Holder for Economic Development, Housing and Public Protection

REPORT TITLE: Machynlleth Gypsy and Traveller Site

REPORT FOR: Decision

1. Purpose

A project to build a Gypsy and Traveler site in Machynlleth was approved by Full Council in February 2020 based on the details set out in the Capital Strategy. Although the scheme cost was estimated at £1.285 million at that time, only £0.87 million was set out in the Capital Strategy leaving a funding gap of £0.415 million.

After a tender process the winning bid has been returned with an increased cost of £41k, due to additional COVID-19 measures required, therefore the scheme cost is now £1.326 million. In total the project requires additional funding approval of £0.456 million.

2. Capital Requirements

This scheme was included in the capital programme with an allocation of £0.87 million, comprising of £0.75 million from Welsh Government grant funding and £0.12 million supported borrowing. The project costs are now estimated at £1.326 million. It is proposed to fund the £0.456 million shortfall from the Homefinder Receipts Reserve.

A grant bid has been submitted to Welsh Government for £0.75 million but has not yet been confirmed. In order to fund any gap between the grant request and subsequent offer; and to allow the scheme to progress as planned without grant confirmation, it is proposed that up to an additional £0.75 million funding is approved in principle.

If the grant offered is less than £0.75 million, a formal virement will be submitted to address any shortfall in funding. This would be funded from the balance remaining in the Homefinder reserve and supported borrowing if necessary.

A request is made that the remainder of the project be funded by £0.456 million which is to be vired from the Homefinder Receipts Reserve. The balance of the reserve currently stands at £1.186 million.

3. Resource Implications

The Head of Finance (Section 151 Officer) acknowledges that the full cost of this scheme should have been included in the capital strategy approved by Council in February and recommends that the scheme funding is based on grant, Homefinder reserve and supported borrowing.

4. Legal implications

The Monitoring Officer has no specific concerns with this report.

5. Comment from local member(s)

Cllr Michael Williams has been informed of the virement and supports this in order that the development can be progressed.

6. Integrated Impact Assessment

No impact assessment is required.

7. Recommendation

- That the contents of this report are noted.
- That Cabinet approves the virement request for £0.456 million.
- That Cabinet approves in principle a virement of up to a further £0.75 million, should the value of grant award be less than anticipated.

Contact Officer: Dafydd Evans / Carol Gittins Tel: 07775704531 / 07773055209 Email: dafydd.evans@powys.gov.uk / carol.gittins@powys.gov.uk Corporate Director: Nigel Brinn
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CYNGOR SIR POWYS COUNTY COUNCIL.**CABINET EXECUTIVE****15 Sept 2020**

**REPORT AUTHOR: County Councillor Rachel Powell
Portfolio Holder for Young People and Culture**

REPORT TITLE: Community library partnerships

REPORT FOR: Decision

1. Purpose

1.1 The purpose of this report is to feedback on the willingness of communities to work with Powys Library Service in order to sustain local libraries, and to agree a period of 5 years' commitment of support for community partners.

1.2 The report relates to the small libraries which we are seeking to pass to the communities. We (as the Council or as a cultural trust) would then work alongside the communities, in terms of the provision of the book stock, training and support to them.

2. Background

2.1 The library service has transformed significantly over recent years, in order to reduce the cost of delivering the service. Work with communities and volunteers has been key to this transformation.

2.2 During Feb-April 2019, further extensive public consultation was held with communities and town and community councils, over the future of libraries, which face further significant budgetary reductions over the next 3 years. The multi-faceted value of libraries within our communities was highly recognised and articulated, contributing to the local economy, lifelong learning, digital connectivity, community cohesion and holistic wellbeing.

2.3 The overwhelming outcome of the consultation was that every option should be explored for maintaining as much of the network as possible. This clearly links to the future development of community hubs and wellbeing hubs, aims under the Vision 2025 and the Health & Social Care strategy, and to supporting the PCC digital transformation.

2.4 Since the consultation period, some Town & Community Councils, Community groups and volunteer groups have come forward to express a firm commitment and enthusiasm to work with Powys County Council in order to sustain their local libraries.

2.5 A key request from these key groups is for a fixed 5 year period of agreement, in order to allow them time to develop their local

solutions for libraries, and to embed working practices and funding streams.

- 2.6 The agreement would cover the following elements, but no additional costs:
- a commitment to the ongoing provision and circulation of library stock,
 - regular weekly deliveries to each library,
 - access to library specific online resources and management systems,
 - access to supported general IT equipment and internet usage for the public,
 - professional staff support and training from the library service.
- 2.7 This report seeks Cabinet's support for the principle of a 5 year agreement with communities in order to sustain and develop local libraries, whilst at the same time as reducing expenditure thus delivering cost reductions year on year.
- 2.8 Specific individual agreements will be worked up with each community group that has come forward, depending on local circumstances and solutions proposed. Those communities which have come forward to date requesting a firm period of commitment for their efforts are Llanfair Caereinion, Llanwrtyd, Talgarth and Hay.

3. **Advice**

- 3.1 The library service would be pleased to agree support for a 5 year period in order to facilitate and develop pro-active community partnerships, and foresees no difficulty in providing the support requested whilst also working to achieve the most cost effective solution.
- 3.2 The library service would therefore continue to provide the following in principle, acknowledging that local partnerships will all differ in the specific content:
- Library books as part of circulating and refreshing stock
 - Weekly deliveries of requested items
 - Access to the library management system and computer management system
 - Access to online resources for libraries
 - Computers and internet access for public use
 - Training and support for volunteers
 - Support from trained staff
- 3.3 ICT colleagues confirm that they would continue to maintain the ICT network and equipment as is, in order to maintain secure access for all council data and systems. This would only include equipment covered by the refresh programme such as laptops, PC's and monitors. Printers, tablets, scanners, etc would not be

covered by ICT. Network links would be maintained as is, however any upgrades and subsequent rental increases would not be met by ICT funding.

- 3.4 Detailed contracts would need to be developed with each community, depending on local circumstances and funding agreements.
- 3.5 Such an agreement is critical to mitigating the outcome of decreased funding on the library service, preventing lengthy and costly legal challenge over what would otherwise have to mean closure of local libraries. Impact assessment of budgetary proposals shows community involvement as the only feasible mitigation to otherwise poor outcomes.
- 3.6 Closure of libraries would mean the loss of many beneficial outcomes, impacting significantly on rural isolation (physical and virtual) and poverty agendas. Limited public transport makes accessing other libraries difficult, a theme raised consistently during the public consultation. The report by Dr Greg Langridge-Thomas, "Poverty in the Green Heart of Wales; an assessment of multiple deprivation in Powys", recommends working with partners across Powys to offer the best possible opportunities for our residents, through early intervention and a removal of barriers. *"In order to tackle poverty in Powys it will be vital to ensure that we develop cohesive communities which are engaged, and have ownership of their local areas. Due to financial constraints facing the authority and the lack of policy levers, the third sector will have an increasing role in tackling poverty. We need to ensure that we develop the trust and support of the third sector and local communities, and their engagement will be essential in reducing poverty."*
- 3.6 The need for a 5 year commitment was also brought forward by a member in a meeting of the Economy, Residents, Communities and Governance Scrutiny Committee, in January 2020. It was stressed that local communities are showing a willingness to work with Powys County Council in a positive spirit of co-production; if the support is not reciprocated, then that trust and goodwill will be lost.
- 3.7 An example of community commitment comes from Llanfair Caereinion, where the Town Council has led on very positive discussions. The Institute Management Committee (where the library is situated) has agreed to develop a library sub-group within its charitable organisation, and has a sub-committee and bank account in place in preparation. There is also a team of trained volunteers in place and ready to take over the day to day running of the library as soon as there is commitment from Powys County Council to provide ongoing resources and support.
- 3.8 It is important that we consider the views of young people in the future direction of the library service, in terms of the Wellbeing of Future Generations. Young people took an active part in the public consultation drop-in sessions during Feb 2019, with a strong deputation from Llanfyllin High School in particular. Written feedback was also received from pupils at Knighton Primary and Ysgol Dolafon in Llanwrtyd Wells, and a specific session was held

with the Youth Forum. An extract from the feedback report highlights the emphasis that young people place on libraries for their contribution to literacy:

“Why is literacy and language and vocabulary such a low priority? The high school has lost its library. Children of all ages need books and the library provides perfect access to the high school. Teenagers need words to describe feelings more than ever as anxiety and depression becomes more and more an issue. Official reports that some children are starting school unable to speak let alone read are worrying. Reading is key to education and an articulate society.”

3.9 The Communications Manager states: The report is of public interest and requires use of proactive communication action to publicise the recommendation/decision.

3.10 The Finance Business Partner supports the proposal for a 5 year period in order to facilitate and develop pro-active community partnerships, providing the service can continue to deliver the required budgetary cost reductions.

3.11 The Vibrant, Resourceful and Connected Communities Recovery Cell considered this paper on 9 July 2020, and recommended that a commitment should be agreed for a period of 5 years, to support community recovery post pandemic. This period of stability would enable development of cohesive transformational approaches to the council presence in communities, linking to the locality front door concepts (with digital connectivity), and with potential to support businesses, new enterprises and town centre recoveries. It was stressed that this transformational work needs to be broad in scope, to avoid duplication of effort and resource where possible.

4. Resource Implications

4.1 The library service is required to provide a range of resources for public library use under the terms of the Welsh Public Library Standards, including books and other resources, online and computer facilities. These resources are already in place within the service, therefore no additional resource is required. This proposal should see cost reductions being achieved each year.

4.2 Over time some libraries may move into community buildings freeing up council property for sale and a capital receipt.

4.3 The Head of Finance (Section 151 Officer) can support the proposal to agree support for a 5 year period whilst work continues to achieve the most cost effective solution.

5. Legal implications

- 5.1 **Legal : The recommendation can be supported from a legal point of view** It is important the requirements of the Public Library and Museums Act 1964 and the Welsh Public Library Standards are duly considered in all local partnership agreements; for example, books must be loaned for free.
- 5.2 The Head of Legal and Democratic Services (Monitoring Officer) has commented as follows: “ I note the legal comment and have nothing to add to the report”.

6. Data Protection

- 6.1 Community groups and volunteers using the computerised library management system for the loan of library resources will be required to undertake GDPR and Cyber Security training.
- 6.2 A data sharing and non-disclosure agreement will be drawn up between the library service and the community library group, and must be signed by each volunteer.

7. Comment from local member(s)

7.1 County Cllr Timothy Van-Rees commented as follows, re community based commitment to Llanwrtyd Library:

“Treflys Community Council have already agreed to make a financial contribution to keep the Library open and support the volunteers and I will be asking Llangammarch Community Council at their meeting on Thursday next also to pledge financial support.
Certainly what is proposed, has my support.”

7.2 Cllr Gareth Jones of Llanfair Caereinion commented:

“Since becoming a County Councillor three years ago this is the second time I have had to work with our Town Council and community to save the library. The commitment and desire to keep the library within the Town is overwhelming, to many people this is a vital service that needs protecting. . There is a willingness within communities to work with Powys but they need a guarantee that there will be a minimum commitment of five years, if this cannot be offered by Powys then that trust and goodwill that does exist will be lost.”

7.3 Cllr Huw Williams stressed the importance of the library to his community:

“Ystradgynlais Library is a long established cornerstone of the community providing equal access opportunities. It is a civic information centre and a hub for volunteer and statutory groups. A place that offers a broad mix of community services. For example, it currently offers a digital drop-in centre, Welsh language conversation sessions, various child activities, a Ukelele group, Cuppa with a Copper sessions, resident association meetings and

Brecknock Wildlife Trust educational classes amongst others. The Credit Union, the Registrar and Powys County Council officers and Councillors also use the Library. Its proximity to the bus terminal provides access to the wider community.

Of course, it also offers reference facilities and opportunities for children who need to study out of school. Ystrad is the most deprived ward in Powys and some families cannot afford internet subscription. Access to job search, training and support is also offered. The Library is a busy and important community hub with a healthy mix of volunteer and statutory provision.”

7.4 Councillor William Powell, local member for Talgarth, comments: ‘Talgarth Library, co-located with our new area primary school, Ysgol y Mynydd Du, is a genuine hub of our community, promoting equal opportunities and ready to help to lessen inequalities. These have come to light especially during the Covid-19 crisis, with regard to home schooling. It is an information centre on local services and attracts residents from Talgarth, as well as, increasingly, from adjacent communities including Bronllys, Llyswen and Llangorse.

‘The library currently offers a digital drop-in facility and hosts meetings of the emerging Talgarth Energy Cooperative, sustainability workshops and Pilates sessions. Clearly, there has been a hiatus, due to the Covid-19 lockdown and associated restrictions, but we hope that there is some light at the end of the tunnel.

‘The local TiRC, working in partnership with Talgarth Regeneration Group and backed by Talgarth Town Council, has successfully applied for Comic Relief funding through PAVO, to take on a Project Officer, to give fresh impetus to the Library and TiRC and to promote the role of volunteering in sustaining services for the future. An appointment has just been made and the successful person starts work on 7th September, with an initial contract up to 30th June 2021. We believe that this local partnership will give us a genuine chance to explore alternative and innovative ways of working for the future.’

8. Integrated Impact Assessment

8.1 Individual impact assessments will be completed for each community partnership arrangement. The impact assessment for the transfer of Llanfair Caereinion Library to a locally managed volunteer run facility is attached, as the foremost development which has strong community commitment in place.

9. Recommendation

9.1 It is recommended that Powys County Council agrees to support community libraries with stock, ICT, relevant staffing and training for a period of 5 years, to allow them a period of stability in order to develop, fundraise and become sustainable for the long term, enabling the library service to work towards achieving a lower cost of delivery.

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Head of Service: Nina Davies

Corporate Director: Nigel Brinn

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol

CYNGOR SIR POWYS COUNTY COUNCIL.

CABINET EXECUTIVE

15 September 2020

REPORT AUTHOR: Councillor Rosemarie Harris
Leader

REPORT TITLE: Powys Recovery Planning

REPORT FOR: Decision / Discussion / Information

1. Purpose

To seek approval for the Council's Strategic response and recovery plans to the pandemic.

2. Background

2.1 In March 2020 the Council invoked its Business Continuity Plan to respond to the extraordinary challenges presented by novel coronavirus (COVID-19). This meant that a range of services were either adapted, suspended or, in some instances, established for the first time.

2.2 In accordance with the latest advice and guidance issued by Public Health Wales and UK/Welsh Government, the following principles (as detailed in figure 1) established by the Cabinet have informed our response to COVID-19:

- Responding to COVID-19
- Keeping our communities safe and resilient
- Running the Council.

2.3 Most council services have been operating on a business continuity footing, with essential front-line services being in operation and staff working from home wherever possible.

Figure 1 – Our COVID-19 response

OUR COVID-19 RESPONSE

CORONAVIRUS HAS HAD AN UNPRECEDENTED IMPACT ON LIFE AS WE KNOW IT. We're here to help Powys through these difficult times. As an open and enterprising council, we have embraced new ways of working and delivering services. **WE ARE WORKING WITH COMMUNITIES, RESIDENTS AND BUSINESSES TO HELP GET POWYS ON THE ROAD TO RECOVERY.**

For more information please visit www.powys.gov.uk/coronavirus

1 RESPONDING TO COVID-19

ADULT SOCIAL CARE working with the health board to support those with the virus, providing care at home and residential care.

CHILD CARE establishing safe child care for key workers and vulnerable children.

CONTINUITY OF LEARNING ensuring pupils continue to learn and have access to educational resources and support.

Reopening our **SCHOOLS**

HOMELESSNESS people who are homeless (sofa surfing or rough sleeping) need to be brought indoors and adequately housed.

PUBLIC PROTECTION maintaining public health which includes enforcing closures of premises where necessary, and managing regional contact tracing.

2 KEEPING OUR COMMUNITIES SAFE AND RESILIENT

Providing care and support for **EXTREMELY VULNERABLE RESIDENTS**

SUPPORTING BUSINESSES and the self-employed in line with Welsh Government guidance.

Providing **REFUSE AND RECYCLING** services including Household Waste Recycling Centres.

Maintaining an emergency **HOUSING REPAIRS** and maintenance service.

HIGHWAY MAINTENANCE ensuring essential repairs are carried out and an emergency response is available.

CHILDREN'S SERVICES ensuring children are protected and safeguarded.

LIBRARIES re-opening in a phased manner.

3 RUNNING THE COUNCIL

FINANCIAL Management and Reporting.

CUSTOMER SERVICES AND COMMUNICATIONS ensuring that the public, our councillors and our staff are regularly updated and informed.

Maintaining our essential **CORPORATE SUPPORT SERVICES** including workforce, finance and ICT.

OUR VALUES

- Professional**: Whatever role we play in the council, we act with professionalism and integrity.
- Positive**: We take a positive attitude in all we do.
- Progressive**: We take a proactive and responsible approach to planning for the future.
- Open**: We keep each other informed, share knowledge and act with honesty and integrity.
- Collaborative**: We work constructively and willingly on joint initiatives.

Powys

2.4 On 15 May 2020 the Welsh Government set out their national framework 'Unlocking our Society and Economy'. This document outlines the reopening process, with restrictions being eased more quickly in some areas than others, based on advice from Public Health Wales.

2.5 The Welsh Government's framework makes clear that the environment within which the Council will be delivering services, and within which the economy must operate, will for the foreseeable future involve: mandatory social distancing alongside a clear direction to work from home, where possible; the phased 'restart' of wide range of public services and of the economy; and continued proactive work to prevent the further spread of the virus whilst also planning for potential future 'peaks'.

2.6 This report sets out the critical challenges associated with restarting or repurposing council services to function effectively, sustainably and safely, and establishes the principles and planning assumptions to achieve the following goals:

- Deliver a balanced budget for 2020-21
- Clear Integrated Business Planning (IBP) objectives and actions for delivery between now and March 2021, that will enable us to deliver a balanced budget with minimal effort
- Effective budget planning for 2021-2022
- New and revised IBP Objectives for 2021-2024, that embrace the new opportunities presented by the current pandemic
- An updated Corporate Improvement Plan (CIP), with key transformation/improvement objectives for delivery between April 2021 – March 2025, with a focus on our five new outcomes

- An effective balance between Business Continuity Planning and Recovery Planning.

3. Advice

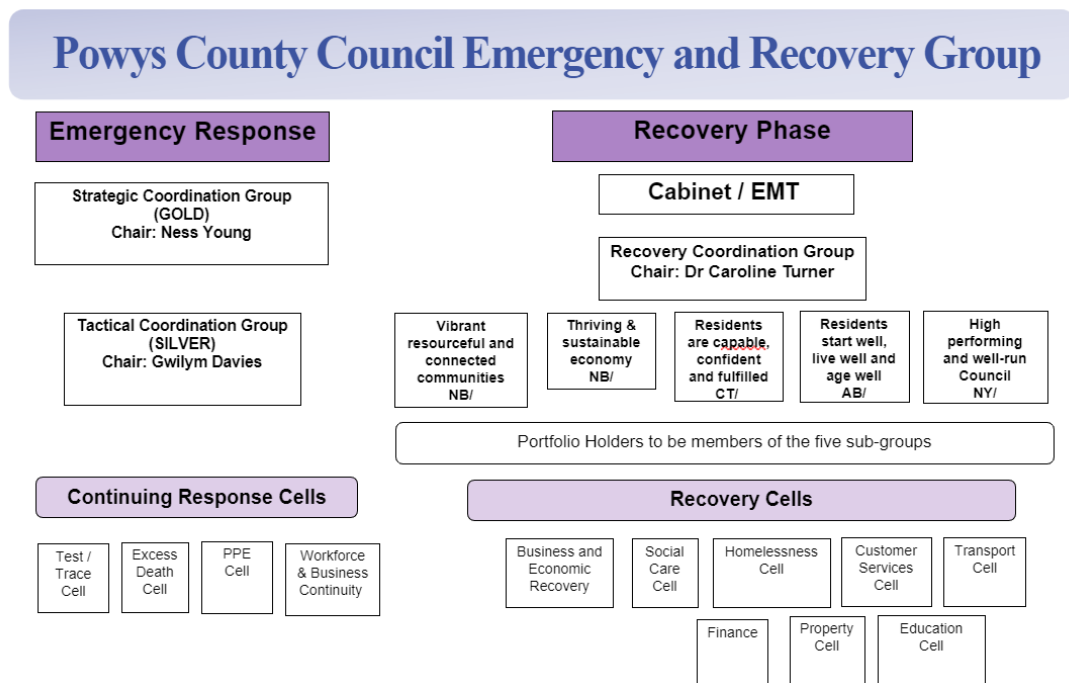
3.1 Internal – inward facing governance and approach

3.1.1 In May 2020, Senior Leadership Team discussed and recommended Strategic Aims of the recovery work and are now recommending these to the Cabinet:

- Minimise the risk to the population and council staff from COVID-19
- Co-ordinate the recovery of services and identify appropriate changes to our traditional ways of working
- Understand the impact of the COVID-19 pandemic on the council and the county
- Support communities and businesses to recover from the impact of 2020 emergencies (i.e. COVID-19 and flooding)
- Work with partners to develop and implement a robust recovery plan for the county.

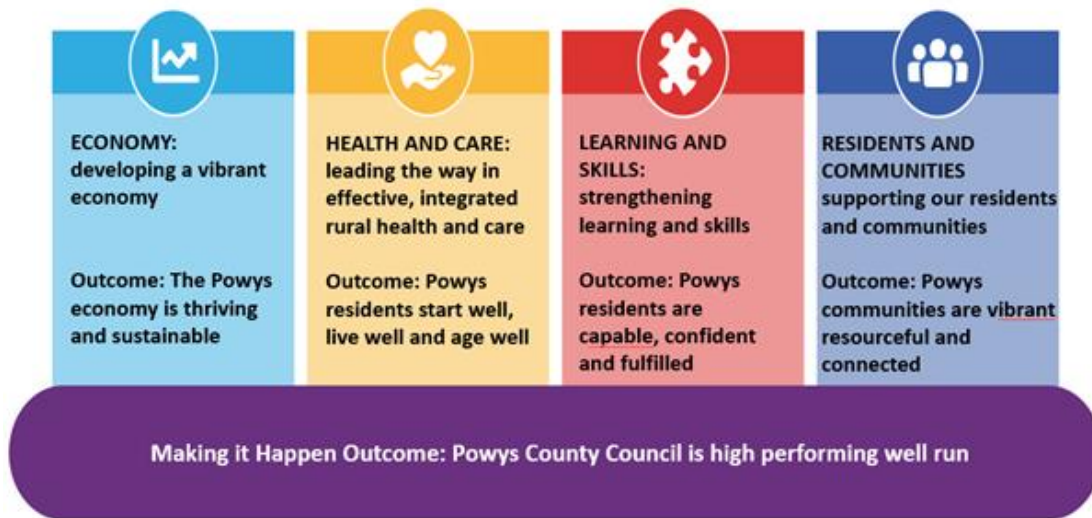
3.1.2 These aims aligned with the Local Resilience Forum 10 step recovery plan objectives and are overseen by the Council’s Recovery Co-ordination Group that reports directly to Cabinet and Executive Management Team as set out in figure 2 below.

Figure 2 – Powys County Council Emergency and Recovery Group



3.1.3 Five sub-groups have been operating, aligned to the five outcomes agreed by Cabinet (as detailed in the diagram above).

Figure 3 – Vision 2025 Well-being objectives and outcomes



3.1.4 In June 2020 the Transformation and Communications Service working collaboratively with all services conducted a COVID-19 [Impact Assessment](#). The insight that the Impact Assessment provides raises some significant areas of concern as highlighted in figure 4 below.

Figure 4 – Understanding the impact of COVID-19 in Powys ‘on a page’

Understanding the Impact of COVID-19 in Powys 'on a page'

In order to consider how Powys may look in the future, it is necessary to clearly see the current situation, what has changed or stayed the same and what this might mean for the County over the short (6 months), medium (1 year) and long term (5 years).

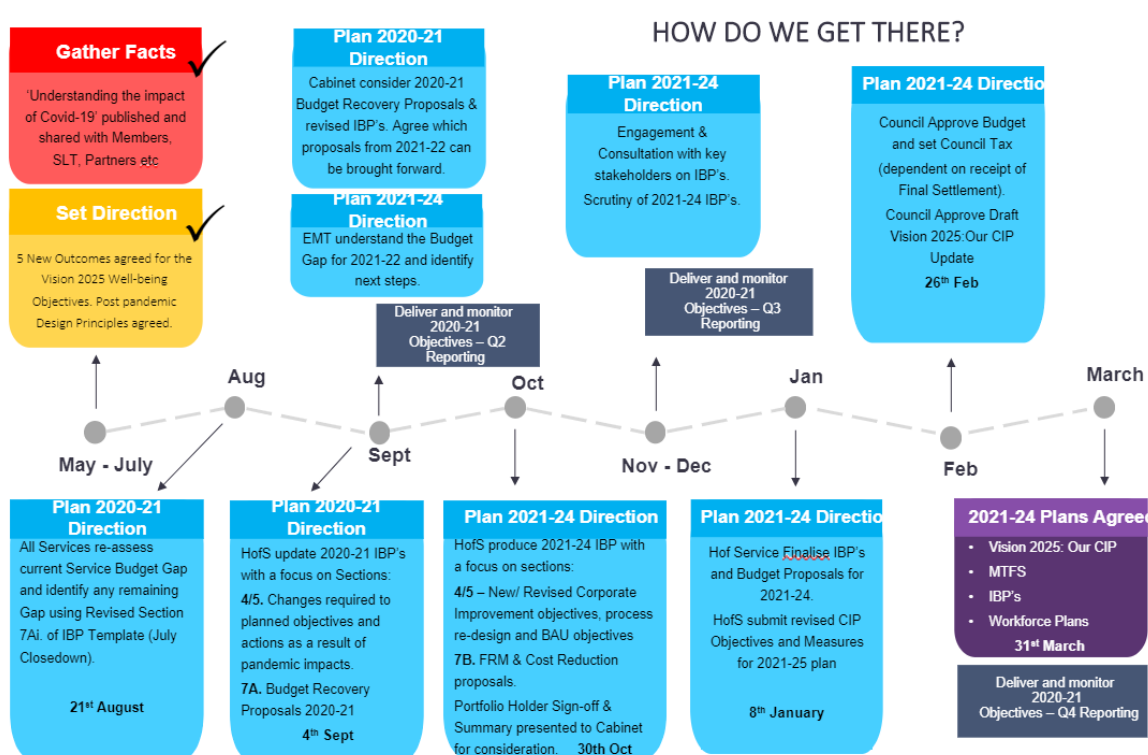
Category	Short term	Medium term	Long term	
Economy	Business Support - £46.6m paid out to 4,020 businesses with a further support package to be made available for small charities in Powys	Employment trends - 23% of Powys' workforce (13,100 employees) furloughed. From March to May claimant count increased 156% (+2,225) in Powys	Impact on key sectors - Accommodation & food services have been the worst hit since COVID-19, with an estimated fall in GDP of 92%	<p>Short, medium, long term March and April 2020 compared to 2018 Powys, it is estimated that:</p> <p>Short term Powys' GVA decreased by 24.5% with 25.2% fewer jobs</p> <p>Medium term Powys' GVA decreased by 11.8% with 18.1% fewer jobs</p> <p>Long term Powys' GVA decreased by 4.4% and 7.3% fewer jobs</p>
Vibrant, connected & resourceful communities	Volunteers - 372 health and care volunteers across PCC and PTHB. 66% volunteer increase on powys.volunteering-wales.net	Community provided services - 5,504 vulnerable persons in Powys communities are recognised	Environmental impacts - massive reduction in airborne pollution, most noticeably reduction in Nitrogen Dioxide (NO2) and particulate matter	<p>Short, medium, long term Communities with high numbers of vulnerable persons continue to need additional help</p> <p>Medium term A possible rise in the need for food banks in the most 'financially stretched and urban adverse' areas</p> <p>Long term Risk that smaller Environmental NGOs may be lost without additional funding</p>
Residents start well, live well & age well	Referral numbers – Referrals to Adult social care increased by 11%. Children's referrals have reduced, mostly because of the schools closures (schools usually refer 10%) this could imply a safeguarding risk to young people	Homelessness and housing impacts – 112 homeless as at 29th May 2020, 119% increase compared to May 2019. 80% of those accommodated are single persons		<p>Short, medium, long term Adult support will continue, delivered virtually where possible</p> <p>Medium term Referrals will increase. More homeless once private landlords can enforce evictions</p> <p>Long term Adult social care needs will be met in the community. Increase in homelessness for family groups due to unemployment</p>
Capable, confident & fulfilled residents	Pupil and student trends – 16 childcare hubs, 307 pupils accessing, 1,413 devices and MiFi dongles distributed	Free school meals- 14% increase in students who are eligible, 20% increase in free school meal take up since Sept 2019	Well-being of pupils and students - Demand for children and young people's counselling service increased by 60 referrals since lockdown to 190 active cases	<p>Short, medium, long term The impact on children, young people and education staff is yet unknown</p>
High Performing & well run council	Financial outlook for the council - potential £16m deficit for financial year 2020/21. 201 staff furloughed recouping £206k March-May	Service Performance Impacts – Significant changes to the way the council is operating. +1,100% daily VPN connections, +634% in Teams activity	Well-being of staff – 562 staff have responded so far. 66% staff reported they have increased productivity and 70% have better work/life balance	<p>Short, medium, long term Short term Significant loss of income</p> <p>Medium and long term Revisit our MTFs, austerity means we are likely to have a significantly worse financial settlement in future years</p>

3.1.5 Major changes are being felt by residents and visitors, by those working in the private and public sector, businesses and care providers and by young and old alike. Many of these changes have been disconcerting, upsetting and unwelcome and their effect on the population of Powys will be felt for a long time. However, there have also been some positive alterations in the way many of us work and live, and change provides us with the opportunity to

consider whether, when life starts to return to normal, we might wish to grasp the opportunity to do some things differently and how that might be achieved.

3.1.6 As detailed in 2.6 above, we have defined clear goals that we, as an organisation are aiming to achieve. The timeline below sets out our actions and key milestones for achieving these goals.

Figure 5 – Roadmap to recovery



3.1.7 We have gathered the facts (see red box on diagram) and Cabinet have set the direction with the five new outcomes (yellow box). Now all services are working through a process of reassessment to position their recovery proposals for 2020-21 before budget panels in September 2020. It is anticipated that a balanced budget will encompass a blend of service proposals, Welsh Government Support, Capitalisation and use of Reserves. The proposals along with revised Integrated Business Plans 2020-2024 will be scrutinised by the Recovery Working Group ahead of any Council decision.

3.1.8 The democratic governance has truly embraced digital through these challenging times. The Local Authorities (Coronavirus) (Meetings) (Wales) Regulations 2020 amended legislation to allow fully virtual meetings to be held (existing legislation required 30% of members to be in physical attendance at the place of the meeting). This was to ensure that meetings and business could continue in an environment which was safe for elected members, officers and the public. Powys County Council was one of the first Councils in Wales to hold virtual meetings, and has been praised in a recent Wales Audit Office note "Powys County Council – Covid-19 learning and recovery – Observations from online committees and meetings" (July 2020). Further information is available at appendix one.

3.1.9 Whilst there were challenges in establishing virtual committee meetings, many of the original obstacles such as Councillors' use of the software, online voting and protocols for speaking during meetings have been resolved due to extensive training. There are a few issues which remain to be resolved such as simultaneous translation, including external presenters in meetings, and work is ongoing to resolve this. However the opportunities provided over the last few months should not be lost as there are major benefits in continuing this virtual way of working, and the future should be a mixture of some face to face meetings, with the majority of meetings undertaken virtually.

3.1.10 The benefits of holding virtual meetings include:

- Shorter, more focussed meetings
- Saving of time for Councillors and officers (both in terms of time to travel to and from meetings and in attending the meeting itself)
- Cost saving for the Council in terms of travelling costs as well as assisting the Council's green agenda
- Broadcasting more meetings to the public than previously undertaken e.g. scrutiny committees and planning committees broadcast live to the public
- Assisting the scrutiny process by undertaking "virtual" scrutiny using Teams where groups can scrutinise documents and record their comments using a Teams channel rather than an email exchange.

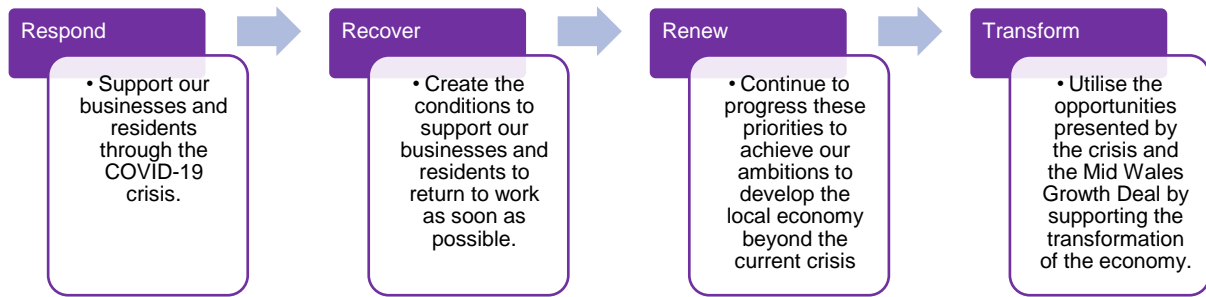
3.1.11 There are also opportunities to use this new way of working for other purposes such as using Teams Live Events for Member Development Sessions and engagement sessions within the Council using the moderated question and answer facility within the software. The ability to record these sessions for archived viewing is also beneficial at no additional cost of the Council.

3.1.12 Many of the opportunities, as outlined in the example above, will inform the revised Integrated Business Plans 2020-24 which all services will complete by 30th October 2020. In the interim, the temporary recovery co-ordination sub-groups will help to shape any Corporate and Service objectives for 2021-24, including COVID-19 recovery programme. Subsequently, Finance will review and update the Medium-Term Financial Strategy including the five-year budget plan and establish the revised budget gap.

3.2 Wider external context

3.2.1 COVID-19 has a profound impact on the economy of Powys. The virus has impacted household incomes and businesses in every sector, and its consequences will be felt for a long time. Whilst the pandemic provides an economic challenge like never experienced before, it also offers a window of opportunity to reshape the economy of Powys, leading to sustainable and resilient long-term growth. The Draft Powys Economic Recovery Strategy (Appendix 2) sets out a four-phase approach to economic recovery:

Figure 6 – Four-Phase Approach to Economic Recovery



3.2.2 We also conducted an online business survey from 11th June to 12th July 2020. There were a total of 1,016 respondents and detailed analysis of the findings can be seen at this link [Powys COVID-19 Business Survey 2020](#). The feedback received shows that many business owners across the county are battling hard to save their companies and are facing huge ongoing challenges. Key observations: more financial support is needed, lifting restrictions is key to recovery, small business' and sole traders feel overlooked, clear guidelines and timeframes are needed, and wider marketing of Powys as a tourist destination is required.

3.2.3 Since the survey was published the council has taken more action to support businesses and has directly addressed some of the key points made throughout the survey, including:

- Two hours free parking during summer holiday
- #SupportLocalPowys campaign
- A #DiscoverPowys tourism campaign to help attract visitors
- Processing over £50million in grant support to local businesses
- Free planning advice for businesses (tourism and hospitality).

3.2.4 Whilst recognising that we need to assist the wider economy the Council's must also focus on the delivery of front-line services. We continue to reassess the impact of COVID-19 on the provision of services. For instance, the impact of COVID-19 on the provision of daytime opportunities in Powys is part of understanding the phased restart of services and will feed into the revised Integrated Business Plan for Adult Social Care. This is just one example.

3.2.5 Cabinet are therefore asked to endorse the approach set out in section 3.1 and the Economic Recovery Strategy referenced in Section 3.2 (and available at appendix 2) covering both internal and external recovery and planning.

3.2.6 Cabinet are also asked to endorse the next steps which include, papers being provided to Cabinet on the future operation of Council meetings, a potential new operating model and changing the way we deliver frontline services.

4. Resource Implications

- 4.1 The Head of Finance (Section 151 Officer) notes the content of the report. The processes set out will enable the Council to clearly understand the impact of the pandemic on the councils financial position and build its financial plans for recovery, ensuring the delivery of a balanced budget for 2020-21 and sustainable budgets over the Medium Term.

5. Legal implications

- 5.1 Legal : The recommendation can be supported from a legal point of view.
- 5.2 The Head of Legal and Democratic Services (Monitoring Officer) has commented as follows: “ I note the legal comment and have nothing to add to the report”.

6. Comment from local member(s)

- 6.1 The recovery and planning for the future is applicable countywide.

7. Integrated Impact Assessment

- 7.1 Impact Assessment of COVID-19 in Powys available at:

<https://sway.office.com/sxfU525TCBDFv9PE?ref=Link&loc=mysways>

8. Recommendation

- 8.1 That Cabinet endorse the approach set out in section 3.1 above and the Draft Economic Recovery Strategy referenced in Section 3.2 (and available at appendix 2) covering both internal and external recovery and planning.

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Head of Service: Emma Palmer Head of Transformation and Communications

Corporate Director: Ness Young, Director of Resources and Transformation

Appendix one

Note from Audit Wales



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Note from Audit Wal

Appendix 2

Powys Economic Recovery Strategy

COVID-19 and the Government led containment measures have had a profound impact on the economy of Powys. The virus has impacted household incomes and businesses in every sector, and its consequences will be felt for a long time.

There has been an unprecedented scale of government investment which will continue to shape recovery. There will be no quick fix, social distancing and the need for personal protection equipment will be with us for some time, and will inevitably impact businesses as they attempt to resume trading. Given the severity of the crisis, it is prudent to plan for a recovery period of at least three to five years, and not to expect a rapid economic bounce back.

Although resilient at times of crisis, COVID-19 has placed further restrictions on rural areas such as Powys than ever before. The restrictions placed on personal travel for non-essential purposes will have had a greater impact on Powys than our urban counterparts, due to our greater dispersal of workplaces, consumer and business services, as well as our heavy reliance on the visitor economy. Whilst the impact of Coronavirus provides an economic challenge like we have never seen in our lifetimes, it also offers a window of opportunity to reshape the economy of Powys, leading to sustainable and resilient long-term growth.

Strategic Aims

1. Understand the impact of COVID-19 on the economy of Powys.
2. To develop and implement plans to mitigate against the impact of COVID-19, ensuring that these plans are aligned to the ambitions of the Mid Wales Growth Deal and other Welsh Government strategic priorities.
3. To work with partners to deliver economic recovery, including accessing funding and lobbying for additional funding/powers where necessary.
4. To maintain confidence and trust of the business community through communications and engagement.

Our recovery strategy will take a four-phases, noting that this is not necessarily a linear approach, and that timings have the potential to change based on external factors:

- Respond – support our businesses and residents through the COVID-19 crisis.
- Recover – create the conditions to support our businesses and residents to return to work as soon as possible.
- Renew – continue to progress these priorities to achieve our ambitions to develop the local economy beyond the current crisis.
- Transform – utilise the opportunities presented by the crisis and the Mid Wales Growth Deal by supporting the transformation of the economy to be an enterprising and distinctive region delivering economic growth driven by innovation, skills, connectivity and more productive jobs supporting prosperous and bilingual communities.

Our approach will follow the Powys County Council post-pandemic design principles, and more widely will ensure that we can deliver a strong, green, diverse, and resilient rural economy for the future.

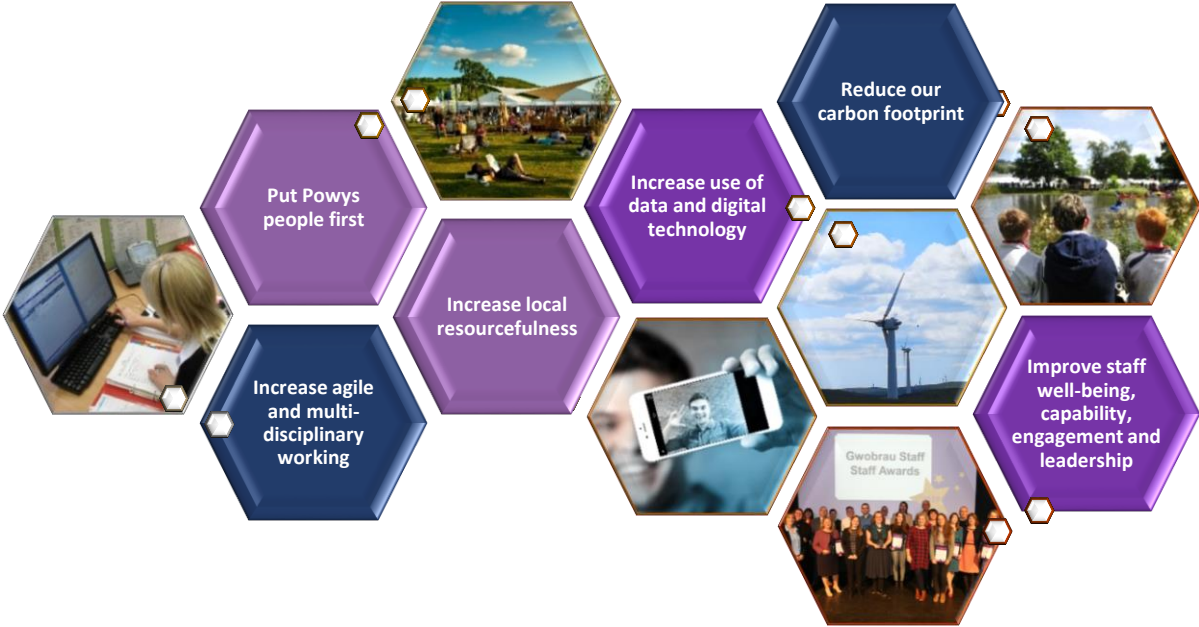


Figure 1: Powys County Council Post Pandemic Design Principles

Based on local intelligence gathering and collaboration with our partners, Powys County Council will remain agile in our response to COVID-19, particularly in response to any second outbreak of the virus. There is also the need that due to impacts of COVID-19 that Powys County Council and our partners may need to revise the Medium Term Financial Strategy and reconsider key areas of work, both of which will have an impact of the delivery of the strategy.

This strategy will support the ambitions of the Mid Wales Growth Deal and well as the Dyfed-Powys Local Resilience Forum Recovery Plan, and will be underpinned by the Wellbeing of Future Generations (Wales) Act.

Collaboration and Partnership

For economic recovery to get underway collaboration and partnership is key, Powys County Council will need to collaborate and work closely with businesses and representative groups in our county to ensure that any interventions meet their needs. Locally, we will build on our strong relationships with the local Public Service Board to try to ensure that all public sector bodies are supporting local businesses, and the strengthening of the Powys Pound.

Relationships with both the Welsh and UK Governments (and their respective bodies – such as Business Wales) will be critical in the implementation of our economic recovery plan. All our local activity needs to be aligned with Welsh Government thinking about unlocking our economy, whilst protecting public health.

Through regular contact with both governments, we will ensure that they understand the needs of Powys businesses, and try to shape any future support mechanisms so that

Powys can fully benefit. Furthermore, the recovery strategy must be dynamic and responsive in order to adapt to a rapidly changing situation, and any national economic policy interventions.

Impact of COVID-19

As yet official statistics on the impact of COVID-19 on the Powys economy are limited, the pace of change has outstripped the ability of data collection to keep up, however this plan will be regularly updated to ensure that it is based on robust evidence and intelligence.

In addition to official statistics, Powys County Council is undertaking a survey of local businesses to ensure that the plan is fully informed by local evidence, and meets business needs today, and into the future.

Given the constraints of social distancing, the response to COVID-19 is likely to go on for some time. The process of recovery will be challenging but working with partners it is a chance to renew and transform the economy of Powys. Powys will need to find a new approach to continue to benefit from the international economy, something which is particularly important to our tourism businesses. Furthermore, utilising the potential of the Mid Wales Growth Deal we need to further develop our sectors which appear to have the greatest opportunities including digital, green energy, and food and drink.

Although the food supply chain has continued to function in the period of lockdown. With the closure of the food services sector farmgate prices for livestock crashed, and dairy farmers were having to pour their milk down the drain. Problems for the sector have been compounded by the fact that farmers have been unable to access some of the business support schemes introduced by the Welsh Government. In addition, due to livestock needing constant attention, they have also been unable to furlough staff.

Even with the unprecedented levels of government support the impact of COVID-19 is expected to be long lasting and felt for many years to come. Given the disruption of normal process of securing qualifications, seeking a job, apprenticeship or attending higher education, our young people are particularly vulnerable. The long-term economic impact of this disruption is unknown, but it is likely to exacerbate existing inequalities, with those already vulnerable being the hardest hit.

Powys Business Survey – full details of the survey available at:
<https://sway.office.com/r8fhUNN0sFCqljBD?ref=Link>

Opportunities

According to Investec COVID19 has seen people place far greater value on outside space, with people prioritising access to green space for the long-term benefit of mental and physical wellbeing. In May 2020 Savills reported a 25% increase in demand for viewing in the prime country market compared to May 2019. COVID19 has proven our abilities to work from home, people have become untethered from traditional workspaces, it is no longer necessary for people to cluster in city centres. This rural renaissance brings with it opportunities for Powys, people may seek to escape city living, bringing themselves, their businesses and families to the county. To capitalise on this improved connectivity, high speed rural broadband and mobile technologies will be a priority as part of this adaption to the post-COVID-19 world. Whilst home working will become more

mainstream, on occasions people will still have to commute to meetings, and therefore working with partners we will also seek to improve the transport infrastructure of Powys.

The lockdown period has demonstrated (particularly for office-based sectors) that remote working can and does work. Although some organisations have been moving towards this model for some time, COVID-19 has seen the pace of change increase exponentially. Remote working may be the default for some time, and this could impact future business investment decisions. It has been proven through the pandemic that businesses do not need to be centrally located. Some evidence suggests that there will be a shift in demand and that businesses are questioning the value of spending £50 per square foot for an office in part of London. For Powys, this brings with it a unique opportunity to encourage businesses to relocate, and benefit from rural living.

Local food networks have developed and even flourish in Powys with people staying local and shopping local. Some independent retailers and food businesses have changed their operational models to develop home delivery box schemes or direct sales. Although this can be challenging for small businesses, opportunities exist for them to develop this market and new digital delivery methods as part of their recovery.

The COVID-19 outbreak has brought the need for digital skills to the fore and shown the importance of online services. It has further reinforced the need to end the rural/urban connectivity divide. Powys County Council will use learnings from the pandemic alongside our Digital Strategy to further lobby for the continued roll out of fibre broadband and mobile connectivity.

The impact on the tourism and hospitality sector has been profound, with the CLA estimating that the impact on rural tourism income will be a third greater than experienced during the 2001 Foot and Mouth Disease outbreak (from which it took 5 years to recover). However, closure of state borders and reluctance of people to travel is likely to see a short term revitalisation of rural destinations. With the correct marketing a visitor messaging, this is something can be capitalised on for the longer term.

Opportunities exist through the promotion of the fact that rural holidays offer a combination of limited travelling time, smaller carbon footprint than a holiday abroad, health benefits of fresh air and outdoor activities, beautiful landscape and biodiversity, and easier social distancing than in cities.

Given our demographics as a county, Powys has a thriving care market which has never been so revered as a career as it is now. Traditionally hard to recruit too, the increased profile of care as a career brings with it the opportunity for greater recruitment and retention in the sector, and with the correct support for new entrants it will allow for this essential service to be delivered at a competitive price.

We are currently within the transition period where negotiations over our future relationships with the EU are taking place. Those businesses that rely on trading with countries within the EU, both for imports and exports and those reliant on EU workers will be impacted by these negotiations. Although there are risks, Britain's exit from the EU does present opportunities, and our future relationship with EU will be an important detriment of the success of the future Powys economy.

Phase 1 – Respond

	Detail
Impact Assessment	<p>Quantitative and qualitative information from trusted sources will be gathered and tracked to monitor the initial and ongoing impact of COVID-19 on the economy of Powys. The impact to the labour market will also be examined to consider any interventions needed (working with/lobbying UK/Welsh Government for funding).</p> <p>A specific Powys business survey will be undertaken so to examine the localised impacts of COVID-19. Data from which will be actively passed to government, to help them, and to lobby for specific interventions to support the Powys Economy.</p> <p>Identify where resources are needed to fill any gaps left by national programmes supporting business recovery, and lobbying Welsh/UK Government to fill these gaps.</p>
Government Programme (on behalf of Welsh Government)	<p>Powys County Council will continue to administer grant assistance to businesses and organisations in Powys. The funding package includes £10,000 grants to all businesses eligible for Small Business Rates Relief with a rateable value of £12,000 or less, and grants of £25,000 to businesses in the retail, leisure and hospitality sector with a rateable value of between £12,001 and £51,000.</p>
Business Rate Relief	<p>Revised business rate bills have been issued to businesses and organisations qualifying under the Retail, Leisure, Hospitality Rate Relief and Small Business Rate Relief Schemes.</p> <p>All retail, leisure, and hospitality businesses in Powys with a rateable value of less than £500,000 are receiving a year-long business rates holiday.</p>
Stimulus Actions	<p>Sustain confidence in the development market by continuing to encourage pre-planning discussions, and by progressing planning applications to decision.</p>
Business Advice	<p>A dedicated COVID-19 helpline for Powys businesses is in place, and weekly meetings are taking place with Business Wales, Welsh Government and</p>

	Department of Work & Pensions to help co-ordinate support and advice to businesses across Powys.
Regulated Support and Guidance	Powys County Council Trading Standards and Environmental Health will continue to provide support and advice to all Powys businesses in relation to their operations, reopening, and social distancing.
Procurement	<p>Powys County Council has accelerated payments to contractors and suppliers (now 10 days or less) to assist with their cashflow.</p> <p>Discussions have also been held with key contractors and suppliers surrounding COVID-19 issues, and advice given where appropriate.</p>

Phase 2 – Recover

Action	Detail
#SupportLocalPowys	<p>Powys County Council will implement a communications campaign to encourage residents to #SupportLocalPowys promoting:</p> <ul style="list-style-type: none"> the traditional shops that are found on our high streets or in smaller communities that are either open currently or will be opening as restrictions begin to be relaxed. Businesses that have an online presence/website so that people can order goods which will be delivered to their door or which can be collected by them at pre-arranged time slots during the continued social distancing requirements. <p>The campaign will encourage Powys communities to:</p> <ul style="list-style-type: none"> support and shop locally; now, and in the future. wherever possible, support our local economy.
Discover Powys Safely	Powys County Council will launch a new tourism communications strategy 'Tourism Tomorrow', aligned to Visit Wales messaging aimed at visitors, the tourism sector, and local communities. The campaign will take three phases:

	<ul style="list-style-type: none"> • Reassure: messaging for a place of nurturing, empathy and compassion to build confidence. • Inspire: telling the stories of who we are, embedding connection and deeper understanding. • Renew: a collective commitment to respecting today for tomorrow. <p>#PurePowys will be an underlying principle of the campaign and will echo the beauty of our environment and society in its simplest, natural form, where the little things are values to create lasting memories and where respectful and responsible tourism is key for the visitors, sector and communities.</p>
Reprioritisation of existing externally funded projects	Powys County Council will work closely with Welsh Government to enable (where possible) existing externally funded projects/programmes to be repurposed to assist with recovery from COVID-19. Examples of which include Arwain, TRI, Town Centre Regeneration, Visit Wales Funding).
Powys Pound/Procurement	Even before the current crisis Powys County Council was committed to growing the local economy, including our ability to invest in the county and to accelerate activity through our financial resources. Even greater emphasis will now be placed on supporting local businesses through our organisational spend.
Employability Programmes/Skills for Recovery	Following the end of the UK Government furlough scheme, there is a risk that a Powys residents may become unemployed (those in tourism/hospitality are at particular risk). There will be a need to work with employers and training providers to develop an agile workforce with flexible skills, able to fill job vacancies. Initially this could be undertaken through the Communities for Work Plus programme, but longer term (depending on Welsh Government guidelines and should no national programme be put forward) it could be looked to repurpose some Rural Development Plan funding to develop a Powys employability programme.
Regulatory Support and Guidance	Powys County Council has developed a website containing a range of advice for a variety of business sectors.

	Officers will continue to provide direct support to businesses in response to inquiries and have proactively been contacting businesses with advice.
Town Centre Recovery	Powys County Council has secured Welsh Government funding to provide temporary measures in our main towns that will assist in facilitating social distancing in those high streets. Over the coming weeks and months engagement will take place with Local Members and Town/Community Councils during the development and implementation of plans.
Shop Local Powys Business App	To assist small businesses to capitalise on the localism demonstrated during COVID-19 a funding application has been submitted to Welsh Government to develop a "Eat, Shop, Drink Local" App. This App/website will provide businesses with the digital infrastructure to sell their produce to an online marketplace. This will support businesses to change their delivery model without the need for expensive development costs.
Government Lobbying	Throughout the economic recovery process, Powys County Council will use our networks to ensure that any future government economic policy is rural-proofed. In addition, given the constraints that our rural geography places on the county, we will lobby for a specific task force to develop a Welsh rural economy strategy and for specific rural business support grants.

Phase 3 – Renewal

Action	Detail
Procurement Strategy	Work will be undertaken to further understand our local supply chains, and contracts where practicable will be packaged to provide opportunities for local businesses in bidding. We will engage with Business Wales to provide support for local businesses and to give them a greater chance of success in bidding for Powys County Council contracts.

	Meet the buyer events will be held and we will ensure that the procurement process is as simple as possible for all suppliers. In addition, the Wellbeing of Future Generation Act will be built into the procurement process.
Economic Development Strategy	Existing Powys County Council economic development strategies will be reviewed to ensure that they are fit for purpose, and determine what new interventions are needed. The pandemic has identified weaknesses in current practices, new ways of working and potential lessons learnt that provide an opportunity to 'build back better' and support a smarter, more robust, and sustainable economy going forward.
Employment Site and Premises	A Mid Wales regional employment sites and premises study is underway. An action plan will be developed following its completion to ensure an adequate supply of high-quality sites and premises to encourage new business (incubator units), expansion and innovation. New sites and premises will be carbon neutral contributing towards a green recovery, whilst supporting our economy and communities.
Food and Drink Action Plan	Working with local producers a food and drink action plan will be developed in order to build stronger local food supply chains. Local food suppliers will be supported to grow and a food and drink skills plan developed. Through liaison with community groups, and supported by the Eat, Shop, Drink Local App a new local food economy will be born.

Phase 4 – Transformation

Action	Detail
Mid Wales Strategic Economic Plan	<p>The Mid Wales Strategic Economic Plan was published in March 2020 and has 8 key areas of focus, growing these sectors will be key to the overall recovery:</p> <ul style="list-style-type: none"> • Applied Research and Innovation • Strengthened Tourism Offer • Energy • Skills and Employability • Supporting Enterprise • Transport

	<ul style="list-style-type: none"> • Agriculture, Food and Drink • Digital. <p>Although no specific projects have yet been identified, COVID-19 recovery will be at the heart of developing our future economy.</p>
Mid Wales Growth Deal	<p>Much of the transformational phase of our economic recovery will be delivered through the Mid Wales Growth Deal. Although the proposition document was developed before the pandemic, much of the proposal will prepare the ground for recovery. It is proposed that the Mid Wales Growth Deal will take place as three interconnected and mutually dependent programmes:</p> <ul style="list-style-type: none"> • Broadening our Economy: Developing new opportunities from our assets – focusing on high value and growth supporting opportunities. • Strengthening our Economy: Supporting our existing industries and workforce to become more resilient through capacity building and creating the right conditions for future growth. • Connecting our Economy: Improving digital and connectivity within, across and outside the region to ensure the region is attractive to work, live, and play. <p>The Mid Wales Growth Deal will be positioned a core component within the wider regional economic recovery efforts and will be key to ensure future economic resilience of Powys (and Mid Wales).</p>
Digital Strategy	<p>Utilising the Digital Powys 2019 – 2025 strategy we will work to ensure that Powys is fully connected allowing businesses and individuals to make the most of the digital world. This will not only support businesses in opening up new markets but has the potential through using real time data to increase productivity. Assisting both with the mitigation of COVID-19 and longer-term business growth.</p>
Sustainable Transport Networks	<p>The Mid Wales Joint Local Transport Plan framework will be the delivery mechanism for this, however road and public transport will be considered as well</p>

	<p>as wider behavioural changes and decarbonisation. Development of active travel routes will continue, and a fresh emphasis will be placed a partnership approach to develop integrated sustainable transport networks.</p> <p>Whilst the closure of non-essential shops will have affected many logistics companies, the overall impact on the sector should only be relatively short to medium-term. However, how logistics firms operate in the future may change particularly as shopping habits continue to shift online. This sector will also need to respond to the low-carbon agenda. Move to shifting freight by rail, Powys being the heart of Wales the centre to be able to work with these organisations to try and expand.</p>
Low Carbon Powys	The forthcoming Powys Public Service Board Carbon Positive Strategy and the Mid Wales Energy Strategy (and delivery plan) will be the basis for Powys transforming to being a low carbon county. Although some projects may get taken forward through the Mid Wales Growth Deal, other elements could be taken forward through other means to develop holistic approach to a future green Powys economy.
Town Centre Transformation	Our towns are the heart of Powys, they are our day to day hubs, and prior to the current pandemic were already facing huge difficulties. Town centres will be supported through Powys County Council adopting a town centre first principle. Town centres will be prioritised and through improving street scene and environmental credentials they will remain attractive destinations for tourists, and a hub for residents. Funding will be applied for town centre regeneration projects, green infrastructure/biodiversity, and the town centre loan scheme promoted.

Critical to the delivery of the Powys economic recovery plan is support from UK and Welsh Governments, much will depend on the UK/Welsh Governments determining what future interventions are required in order to support public services and to underpin the economy. Full consideration needs to be given to the full financial impact of the crisis on the Council, the likely level of support for the council, and what capacity both human and physical can the Powys County Council utilise to support economic recovery.

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol

Date issued: July 2020

Powys County Council – Covid-19 learning and recovery – Observations from online committees and meetings

Background

- 1 This work is undertaken to help discharge the Auditor General's duties under section 17 of the Public Audit (Wales) Act 2004, section 18 of the Local Government (Wales) Measure 2009 and section 15 of the Well-being of Future Generations Act (Wales) 2015. Further information about our [work](#) and our [privacy notice](#) is available on our [website](#).
- 2 In Spring 2020, the Covid-19 pandemic had an unprecedented impact on our communities and public services. Councils have a key role to help keep staff and residents safe, adapt their decision-making arrangements, prioritise services and collaborate with partners to try and limit the spread and impact of the virus.
- 3 Powys County Council (the Council) invoked their business critical continuity plan on 18 March 2020 (the Social Services department invoked theirs on 16 March), which enabled the Council to focus on business critical activities. This limited the number and format of committees meeting. With the introduction of [new regulations from the Welsh Government](#) towards the end of April 2020, provision was made for council meetings during the pandemic. From May 2020, the Council began to hold a number of cabinet, scrutiny and other committee meetings online.
- 4 In addition to this document, Audit Wales has produced a blog on "[Local council democracy – coming out of lockdown.](#)" which gives a picture of how scrutiny and other formal meetings are being re-introduced across Wales.

Summary of observations

- 5 For the purposes of obtaining information to inform the Auditor General's work, we have observed the council's online meetings including cabinet and scrutiny since May 2020. The following sets out a summary of practices and information based on the limited examples and activities we have observed to date.

Democratic structures have been re-introduced relatively quickly

- 6 The Council in Powys were able to make use of technology quickly through the use of Microsoft Teams live events and meetings to allow councillors, officers and members of the public to join and/or view public meetings. With reference to the above blog covering the

national picture of council democracy, Powys, in comparison with some other councils acted quickly to reintroduce a number of meetings. In Powys it was the re-introduction of these meetings over a breadth of committees including cabinet and scrutiny which is notable compared to some other councils in Wales, who may have only restarted a more limited number of meetings.

- 7 We have observed that the online meeting technology has sat alongside existing and widely used systems for publication of documents, agendas and minutes on the council's website. This includes accessing agenda items before a meeting and accessing minutes and decisions following meetings. This has meant there is a system in place to provide a transparent record available online to the public about decisions taken by the council and its performance during lockdown.
- 8 The live viewing of meetings has the potential to encourage and help ease of access for public awareness and engagement with council activity. The Council's online meetings show the Council taking steps to involve the wider public in the activities of the council, informing the public of progress on decisions and being accountable to the public. Through Teams' events and meetings, the public have been able to access online meetings live and view recordings. Our observation of this system is that it seems a simple and easy way to access meetings without onerous steps to gain this access.

Formal scrutiny of decisions and services has been re-instated early at the Council

- 9 By mid-July half of council in Wales will have held virtual meetings of scrutiny committees. Powys Council have put in place arrangements for formal scrutiny sessions including finance; health and care; learning and skills; and economy, residents, communities and governance. Furthermore, the Council are at a point where they have had several meetings of these committees since May 2020.
- 10 The scrutiny arrangements the Council has put in place seem to give members the opportunity to gather information and challenge officers and cabinet members around business critical activities as well as some information around wider service activity and recovery work. This also provides an opportunity for the public to observe decision-making, including scrutiny of decisions.
- 11 During this period, we observed an example of arrangements in place for a scrutiny chair to feedback a scrutiny committees' views to cabinet on a key decision. The scrutiny chair had an opportunity to provide a response to proposed plans, provide recommendations and raise questions. The online attendance and input from a chair of scrutiny to a cabinet meeting suggests independent challenge on decision making from scrutiny during the lockdown period. The example seems to show the relationship between cabinet and scrutiny in a transparent way that indicates clear roles for scrutiny committees in helping to shape decision making.

There are opportunities to maintain the momentum and learn from ‘digital democracy’

- 12 Looking towards the future, there might be opportunities to learn from the experiences of holding meetings online and to consider this learning to shape future practices. The Council has shown that virtual meetings can work well, and there might be financial, time and environmental benefits to providing online meeting facilities in the future. All of which might have the potential to improve value for money.
- 13 Many councillors have shown their ability to embrace the use of technology for online meetings. There may be further opportunities to gain insights from members on any member development and training that may help them to participate more effectively in online meetings.
- 14 There are some challenges in holding formal meetings exclusively online, at this stage there may be opportunities to gain insights about the effectiveness of these arrangements. Further engagement with the public to gather views about their experiences of observing meetings during this period could also help to provide timely feedback on the effectiveness of these arrangements from their perspective.

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol

CYNGOR SIR POWYS COUNTY COUNCIL

AUDIT COMMITTEE
4th September 2020CABINET
15th September 2020

REPORT BY: Cllr. Aled Davies
Portfolio Holder for Finance
SUBJECT: Treasury Management Review 2019/20

REPORT FOR: Approval

1. Introduction:

- 1.1 The Council's Treasury Management Policy, as per the CIPFA Code of Practice, requires an annual report on Treasury Management activity to be approved by Cabinet by 30th September each year.
- 1.2 Treasury Management in this context is defined as:
"The management of the authority's cash flows, its banking, money market and capital market transactions; the effective control of the risks associated with those activities; and the pursuit of optimum performance consistent with those risks."

2. The Council's Overall Borrowing Need:

- 2.1 The Council's underlying need to borrow for capital expenditure is termed the Capital Financing Requirement (CFR). This figure is a gauge of the Council's indebtedness. The CFR results from the capital activity of the Council and resources used to pay for the capital spend. It represents the current year's unfinanced capital expenditure and prior years' net or unfinanced capital expenditure which has not yet been paid for by revenue or other resources.

Reducing the CFR – the Council's underlying borrowing need (CFR) is not allowed to rise indefinitely. Statutory controls are in place to ensure that capital assets are broadly charged to revenue over the life of the asset. The Council is required to make an annual revenue charge, called the Minimum Revenue Provision (MRP) to reduce the CFR. This is effectively a repayment of the borrowing need. This differs from the treasury management arrangements which ensure that cash is available to meet capital commitments. External debt can also be borrowed or repaid at any time, but this does not change the CFR.

The total CFR can also be reduced by:

- the application of additional capital financing resources, (such as unapplied capital receipts); or
- charging more than the statutory revenue charge (MRP) each year through a

Voluntary Revenue Provision (VRP).

- 2.2 Part of the Council's treasury activities is to address the funding requirements for this borrowing need. Depending on the capital expenditure programme, the treasury service organises the Council's cash position to ensure that sufficient cash is available to meet the capital plans and cash flow requirements. This can be sourced through external borrowing or utilising temporary cash resources within the Council.

3. Strategy for 2019/20:

- 3.1 At the start of 2019/20 the Authority had an estimated Capital Financing Requirement of £401.6m, projected to rise by £89.3m during the course of the following five years to £490.9m. The Authority's external borrowing at 1st April 2019 stood at £299.2m. In relation to the CFR figure of £401.6m, this equated to the Authority being under borrowed by £102.4m.
- 3.2 During 2019-20, the Council maintained an under-borrowed position. This meant that the capital borrowing need (CFR) was not fully funded with loan debt as cash supporting the Council's reserves, balances and cash flow was used as an interim measure. This strategy was prudent as investment returns were low.

However, based on this position, a potential cost of carry remained during the year in respect of any new long-term borrowing that was not going to be immediately used to finance capital expenditure. This is because any new borrowing would cause a temporary increase in cash balances and would have incurred a revenue cost of the difference between (higher) borrowing costs and (lower) investment returns.

The policy of avoiding new borrowing by running down spare cash balances has served well over the last few years. However, this was kept under review to avoid incurring higher borrowing costs in the future when this authority may not be able to avoid new borrowing to finance capital expenditure and/or the refinancing of maturing debt.

- 3.3 Investment returns remained low during 2019/20. The expectation for interest rates within the treasury management strategy for 2019/20 was that Bank Rate would stay at 0.75% as it was not expected that the Monetary Policy Committee (MPC) would be able to deliver on an increase until the Brexit issue was finally settled. However, there was an expectation that Bank Rate would rise after that issue was settled but that it would only rise to 1.00% during 2020. This situation changed when the coronavirus outbreak hit the UK in February/March with Bank Rate decreasing to 0.25% and then 0.10% a week later. Investment returns on deposit accounts fell alongside Bank Rate to the extent that no interest was being paid on these accounts.
- 3.4 The Capital Programme for 2019/20 incorporated £42.3m of prudential borrowing at the start of year so there was the possibility the Authority would need to externally borrow during the year. The agreed strategy for this at the start of the year, based on interest rate forecasts and discussions with Link (the Authority's advisors), was to set a benchmark of 1.9% for 5 year borrowing, 2.3% for 10 year borrowing, 2.7%

for 25 year borrowing and 2.5% for 50 year borrowing. These rates were reviewed at various times during the year as the market changed.

Further to this, HM Treasury imposed two changes in the margins over gilt yields for PWLB rates in 2019-20 without any prior warning; the first, on 9th October 2019, added an additional 1% margin over gilts to all PWLB rates. That increase was then partially reversed for some forms of borrowing on 11 March 2020, at the same time as the Government announced in the Budget a programme of increased spending on infrastructure expenditure. It also announced that there would be a consultation with local authorities on possibly further amending these margins. It is clear that the Treasury intends to put a stop to local authorities borrowing money from the PWLB to purchase commercial property if the aim is solely to generate an income stream.

- 3.5 In light of the continuing stress on the world banking system, enhanced priority was given to the security and liquidity of investments.

The strategy for investments therefore was:

- a) to ensure the security of the Authority's funds
- b) to ensure the Authority had sufficient liquidity to meet its cashflow requirements
- c) to achieve the optimum yield after ensuring a) and b) above.

4. Treasury Position:

- 4.1 The major issue for Treasury Management in 2019/20, alongside reducing cash balances, was the continuing challenging environment of previous years i.e. low investment returns and continuing counterparty risk which meant giving heightened preference to security and liquidity of investments. This resulted in the investment portfolio being in short-term investment instruments with lower rates of return but higher security and liquidity.
- 4.2 In order to balance the impact of the loss in investment income the Authority was mindful of the possibility of making premature repayments of debt if circumstances were conducive to this.

Net borrowing increased by £18.532M in the year. This increase arose as follows:

	£000s
Increase in PWLB debt	18,977
Increase in Market debt	10,000
Increase in Investments	(10,445)
	18,532

4.3 The table below summarises the borrowing and investment transactions during the year:

	Balance 01-04-19	Borrowing	Investments	Repayments	Balance 31-03-20
	£000's	£000's	£000's	£000's	£000's
PWLB *	229,238	20,000	N/A	(1,023)	248,215
LOBOs *	25,000	Nil	N/A	Nil	25,000
Market Loans	45,000	10,000	N/A	Nil	55,000
Temporary Borrowing	Nil	2,665	N/A	(2,665)	Nil
Total	299,238	32,665	N/A	(3,688)	328,215
Temporary Investments (other LA's/Deposit accts)	(8,960)	N/A	(313,510)	303,065	(19,405)
Long Term Investments	Nil	N/A	Nil	Nil	Nil
Net Borrowing	290,278	32,665	(313,510)	299,377	308,810

Note: * Public Works Loan Board / Lender's Option Borrower's Option

4.4 A summary of the economy for 2019/20 is at Appendix A.

5. Debt Rescheduling/Repayment:

5.1 No rescheduling was carried out during the year as the average 1% differential between PWLB new borrowing rates and premature repayment rates made rescheduling unviable.

6. Performance Measurement:

6.1 Whilst investment performance criteria have been well developed and universally accepted, debt performance indicators continue to be a more problematic area with the traditional average portfolio rate of interest acting as the main guide. In this context, the overall average rate of interest on all debt in 2019/20 was 3.39%.

	31.03.20 £000's	Average rate for year	31.03.19 £000's	Average rate for year
Total debt	328,215	3.39%	299,238	4.02%

6.2 The Treasury Management Policy stipulates that the Average Rate on External Investments should be compared with the 3-month un compounded LIBID rate. This is in preference to the 7-day un compounded LIBID rate and is in line with Link's advice. It reflects a more realistic neutral investment position for core investments with a medium-term horizon and a rate which is more stable with less

fluctuations caused by market liquidity. Historically, the 3-month rate has been slightly higher than the 7-day rate and is, therefore, more challenging for the cash manager.

Average investments held during 2019/20 £000's	Average rate achieved	3 month LIBID	Average investments held during 2017/18 £000's	Average rate achieved	3 month LIBID
22,350	0.58%	0.63%	13,355	0.31%	0.67%

In 2019/20 the average rate on external investments achieved was an under performance of 0.58% compared with the 3 month un compounded LIBID rate of 0.63%. This was expected, due to the reduced and short-term nature of the Council's cash balances available for investment.

7. Summary Statement of Accounts

- 7.1 The Treasury Management Policy Statement stipulates that a summary Statement of Accounts for Treasury Management be produced at the year end and reported as part of the annual review (see Appendix B).

8. Prudential/Treasury Indicators

- 8.1 During the year the Authority operated within the treasury limits as approved by Council.

9. Member Training

- 9.1 The CIPFA Code of Practice states that members charged with governance (all members as the annual strategy requires approval by Full Council) have a personal responsibility to ensure that they have the appropriate skills and training for their role. As such, the Authority provided two members' briefing sessions for treasury management in 2019/20.

10. Treasury Management Policy Statement

- 10.1 Any major changes to the Treasury Management Policy Statement are reported to Cabinet whilst any minor changes are circulated to members via the members' portal.

Advice

N/A

Resource Implications

N/A

Legal implications

N/A

Comment from local member(s)

N/A

Integrated Impact Assessment

N/A

Recommendation

It is recommended that the Treasury Management Review Report is approved.

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Head of Service: Jane Thomas

Corporate Director: Ness Young

Appendix A:

UK:

The main issue in 2019 was the repeated battles in the House of Commons to agree on one way forward for the UK over the issue of Brexit. This resulted in the resignation of Theresa May as the leader of the Conservative minority Government and the election of Boris Johnson as the new leader, on a platform of taking the UK out of the EU on 31 October 2019. The House of Commons duly frustrated that renewed effort and so a general election in December settled the matter once and for all by a decisive victory for the Conservative Party: that then enabled the UK to leave the EU on 31 January 2020. However, this still leaves much uncertainty as to whether there will be a reasonable trade deal achieved by the target deadline of the end of 2020. It is also unclear as to whether the coronavirus outbreak may yet impact on this deadline; however, the second and third rounds of negotiations have already had to be cancelled due to the virus.

Economic growth in 2019 was very volatile with quarter 1 unexpectedly strong at 0.5%, quarter 2 dire at -0.2%, quarter 3 bouncing back up to +0.5% and quarter 4 flat at 0.0%, +1.1% y/y. 2020 started with optimistic business surveys pointing to an upswing in growth, after the ending of political uncertainty as a result of the decisive result of the general election in December settled the Brexit issue. However, the three monthly GDP statistics in January were disappointing, being stuck at 0.0% growth. Since then, the whole world has changed as a result of the coronavirus outbreak. It now looks likely that the closedown of whole sections of the economy will result in a fall in GDP of at least 15% in quarter two. What is uncertain, however, is the extent of the damage that will be done to businesses by the end of the lock down period, when the end of the lock down will occur, whether there could be a second wave of the outbreak, how soon a vaccine will be created and then how quickly it can be administered to the population. This leaves huge uncertainties as to how quickly the economy will recover.

After the Monetary Policy Committee raised Bank Rate from 0.5% to 0.75% in August 2018, Brexit uncertainty caused the MPC to sit on its hands and to do nothing until March 2020; at this point it was abundantly clear that the coronavirus outbreak posed a huge threat to the economy of the UK. Two emergency cuts in Bank Rate from 0.75% occurred in March, first to 0.25% and then to 0.10%. These cuts were accompanied by an increase of £200bn in quantitative easing (QE), essentially the purchases of gilts (mainly) by the Bank of England. The Government and the Bank were also very concerned to stop people losing their jobs during this lock down period. Accordingly, the Government introduced various schemes to subsidise both employed and self-employed jobs for three months while the country is locked down. It also put in place a raft of other measures to help businesses access loans from their banks, (with the Government providing guarantees to the banks against losses), to tide them over the lock down period when some firms may have little or no income. However, at the time of writing, this leaves open a question as to whether some firms will be solvent, even if they take out such loans, and some may also choose to close as there is, and will be, insufficient demand for their services. At the time of writing, this is a rapidly evolving situation so there may be further measures to come from the Bank and the Government. The measures to support jobs and businesses already taken by the Government will result in a huge increase in the annual budget deficit in 2020/21 from 2%, to nearly 11%. The ratio of debt to GDP is also likely to increase from 80% to around 105%. In the Budget in March, the Government also announced a

large increase in spending on infrastructure; this will also help the economy to recover once the lock down is ended.

Inflation has posed little concern for the MPC during the last year, being mainly between 1.5 – 2.0%. It is also not going to be an issue for the near future as the world economy will be heading into a recession which has already caused a glut in the supply of oil which has fallen sharply in price. Other prices will also be under downward pressure while wage inflation has also been on a downward path over the last half year and is likely to continue that trend in the current environment. While inflation could even turn negative in the Eurozone, this is currently not likely in the UK.

Employment had been growing healthily through the last year but it has obviously taken a big hit as a result of the coronavirus situation and lockdown. The good news over the last year is that wage inflation has been significantly higher than CPI inflation which means that consumer real spending power had been increasing and so will have provided support to GDP growth. However, while people have not been able to leave their homes to do non-food shopping, retail sales have taken a big hit.

Appendix B:

Statement of Accounts
Treasury Management

		2019/20	2019/20	2018/19
		Actual	Budget	Actual
		£	£	£
Employees		174,123	165,000	175,513
Transport	*1	2,742,214	1,250,450	2,140,679
Supplies & Services	*2	249,464	200,000	201,750
Interest Paid		11,337,593	14,845,370	10,711,281
Debt Management Expenses		43,005	6,000	23,710
Gross Expenditure		14,546,399	16,466,820	13,226,081
Interest Received		129,141	0	51,310
Gross Income		129,141	0	51,310
Net Expenditure		14,417,258	16,466,820	13,174,771

Note 1: Transport relates to the cost of leasing/hire across the Authority and is included in the Treasury Management Statement of Accounts as leasing is classed as a Treasury Management activity.

Note 2: Supplies & Services: includes £169k dr/cr card charges, £38k bank charges

Mae'r dudalen hon wedi'i gadael yn wag yn fwriadol



Director of Social Services Annual
Report 2019/20

Powys County Council



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Tudalen 1662

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(d) Encouraging and supporting people to learn, develop and participate in society

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1. Director's Summary of Performance



In Powys County Council we are committed to working with our health board colleagues and third sector to deliver better outcomes for Powys residents. We are led in this by the Joint Health and care strategy working through the Regional Partnership Board (RPB) and through driving the changes associated with the North Powys Wellbeing programme on which I lead.

As the Director of Social Services in Powys I recognise the improvement journey that both Adults and Children Services are on. Whilst also recognising that some people may have concerns about the pace of our improvement. I want to highlight the commitment to get this right and not just for the 'here and now', but to develop a sustainable, quality social services offer which is fit for purpose and the future. I believe this report will highlight the enormity of what has been delivered to date and transparency on what we have yet to deliver.

After the inspection in July 2017 (Children's Services) & January 2018 (Adult Social Care), I came in to post on the 23rd April with over 25 years of experience of working in and leading Social Care. My personal commitment is not to just oversee the immediate improvements of our service but a long-term investment in working in Powys, to see these improvements through, develop a culture of continuous improvement and deliver the best possible outcomes for Powys Residents working with our partners in the Health Board and voluntary sector.

We have a permanent Chief Executive who has now been in post since February 2019 and we have secured a permanent leadership team including the Senior Management tier who are passionate & committed to driving new ways of working and improved outcomes for our residents whilst taking our workforce with us.

The journey over the last 2 years has been challenging and we are appreciative of all the support and constructive challenge we have had from both Cabinet, Scrutiny committee & Care Inspectorate

Wales. In addition, we have had the support and challenge of Jack Straw (independent Chair) and Phil Hodgson (Board member), and the broader improvement and assurance board who have been instrumental in our journey of improvement. For which I am immensely grateful.

I also want to mention the support of colleagues both in our Corporate support services and in our front-line teams for enabling the improvements to date.

In March 2020, Social Services invoked its business continuity plan in response to the COVID-19 pandemic. I am proud that we have been able to continue to deliver business critical services across Powys during this difficult time, which is testament to the hard work and commitment of our staff.

Alison Bulman

Director of Social Services

2. Introduction



This is the Director of Social Services' report for 2019/20 for Powys County Council. It provides an overview of how well the services achieved the intended outcomes as set out in 2018/19 report, as well as identifying new developments and aspirations for 2020/21 and beyond.

Powys County Council's Social Services Department includes Children's Services and Adults' Services, both supported by a Commissioning team. The Adults' Social Care service adopted new principles of working, as set out in its improvement plan. These included:

How We Will Work Together

We believe that everyone should be seen as unique individuals who have strengths, hopes and aspirations as well as needs or problems. We want to support people to live the best life they can, helping them to find solutions that fit. We will focus on what matters to the individual.

We will:	You can help by:
Listen, be open, honest, friendly and non-judgmental.	Having your say and telling us about your experience.
Ensure that children and young people's voices are heard and are visible in all aspects.	Making your voice heard, participate in children and young people's forums and panels.
Work with our partners to protect you from abuse and exploitation.	Being aware and raising concerns about people who may be at risk of being harmed.
Support you to maintain your personal dignity, self-respect and to focus on what matters to you.	Staying safe, being healthy and active.
Support you to make informed decisions so that you can do what's important to you.	Engaging with us and taking responsibility for your health and keeping well.
Provide good, accessible information and advice.	Using online services where possible.
Help communities to be inclusive and supportive to minimise loneliness and isolation.	Be aware of what is available in your community and getting involved.
Be open to new ways of working and to embrace technological solutions, enabling a focus on getting value for money.	Providing ideas and trying new ways of working together.

Children's Services
Guide to the Improvement Plan 2018 - 2021

“Working together to ensure that Powys children and young people are safe, healthy, fulfilled and have their voices heard, valued and acted upon.”

In this plan we will:

- Focus on early intervention and prevention
- Provide good parenting and specialist support
- Provide diverse and high-quality placements for children who are looked after
- Address the best possible outcomes for children in our care

The Improvement Plan:

- There are seven priority areas to deliver the plan
- Eligibility criteria (thresholds) and Early Help
- Partnership working
- Self-referral and good care post-work practice
- Commissioning arrangements
- Independent reviewing, quality assurance and complaints
- Infrastructure and support services
- Resilience

Links:

- The Children's Services Improvement Plan is linked to and supported by a range of strategies including:
 - The Growth Vision 2025
 - The Star Well Programme to be developed through the Regional Partnership Board
 - Children's Services (Children Looked After) Strategic Framework

The plan has been developed by all parts of the council working together. The Regional Partnership Board and Regional Independent Board will also play a big part in making the changes happen.

By continuing to work together with our partners we will ensure services which help children and families to achieve the best possible outcomes.

To view the plan, visit www.powys.gov.uk

Powys

1 - Children's Services set out its principles within the Children's Services Plan on a Page:

Children's Services

“Working together to ensure that Powys children and young people are safe, healthy, fulfilled and have their voices heard, valued and acted upon.”

In Children's Services, we will:

- Promote access to a range of Early Help services, which families can access preventing the need for statutory intervention
- Focus on early intervention and prevention ensuring access to the right support at the right time to keep families together, where possible and children safe, intervening at the earliest opportunity to ensure that children and young people do not suffer harm
- Work with children, young people and their families rather than 'do to', to co-produce plans which will bring about the changes children need as quickly as possible
- Provide and commission a flexible and affordable mix of high-quality placements for children who are looked after to meet the diverse range of their needs and circumstances, keeping children as close to home as possible
- Achieve the best possible outcomes for these children in our care by providing good parenting, specialist support and clearly planned journeys through care into adulthood
- Ensure that the service has a skilled, supported workforce, equipped to provide a high-quality service to children, young people and their families, which is compliant with the legislative framework and in line with best practice

Powys



3. How are people shaping our services?



Communicating and engaging with the public is important to how we shape the services people need and collectively evaluate how well we perform in delivering care and support to those who need it. Engaging and consulting on service development and delivery is crucial to delivering what the people of Powys require.

We are eager to hear about the services we already deliver and how we can support adults and children better. This is important for all our services and those who access them. In some areas we have done well to engage adults, but we need to improve how children are enabled to voice their opinions on the decisions that affect them.

Both service users and carers have been fully involved in the Carers' Steering Group, the Start Well, Live Well and Age Well Partnerships and other service user forums. Carers including young carers and citizens' representatives are supported through commissioned Credu and PAVO services

to enable their involvement and informed engagement at these groups, as well as at the Regional Partnership Board.

The Carers Steering Group commissioned CREDU to provide two additional Carers Support Projects using ICF Funding. The projects are for two years and will end in March 2021.

The Care Leavers Forum formed a young people's panel for recruitment in Children's Services and a Care Leaver Participation Apprentice role was established in the new structure.

- **Raising Awareness Project**

The project includes the following activities: To raise awareness among hard to reach communities, health settings and intergenerational work. Identify and recognise hidden isolated Carers; target communities with roadshows providing information, advice and assistance. Explore opportunities for young and adult carers to share experiences, use of technology, mobile apps, and intergenerational skill-building events.

- **Co-Production of Respite Project/Short Breaks for Children and Young People**

The project provides the creation of a new role to plan and arrange bespoke and innovative respite opportunities to enable Carers to have breaks when they need them, where services are not currently provided or meeting need. The project includes the following activities - Explore possibility of sharing of Carers' time by supporting Carers to provide some formal paid caring, looking at innovative and new respite opportunities, favour exchange, quick response respite while waiting for Assessments, opportunities for young people to attend residential courses to give families a break.

In response to requests for a wider choice of short breaks options for children and young people we have:

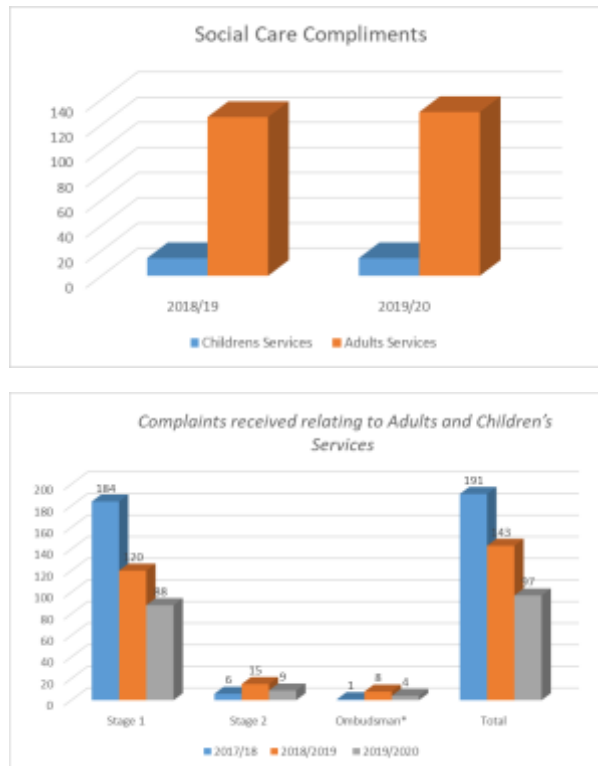
- Provided short breaks for 27 children and young people including 19 family short breaks;
- Increased Direct Payments to 62 families in receipt;
- Recruited additional personal assistants;
- Provided 606 overnight breaks for 18 children and young people at Golwg Y Bannau and Golwg Y Gamlas;
- Supported families through Integrated Disability Service Support Worker sessions.

As the project is about listening to 'What Matters' to Carers the project was able to respond immediately as a result of the COVID 19 pandemic. CREDU were able to help some families cope better with being isolated, creating respite in Carers own homes and gardens.

Feedback from the Public

To help shape our service, we collect Compliments, Comments and Complaints and we discuss this feedback on a regular basis. We categorise them into Stage 1 and Stage 2 Complaints. Stage 1 complaints are dealt with by the team or senior manager of the department. If we are unable to resolve a complaint at Stage 1, then it escalates to Stage 2 where the investigation is undertaken by

an external independent investigator. If the matter is still unresolved, the complaint escalates to the Ombudsman. In 2019/20, there has been a 33% decrease in the total number of complaints made compared to the previous year across both service areas. We are now resolving more cases at the point of enquiry, as opposed to progressing on to the complaint stage, this demonstrates our learning culture and putting things right at the earliest opportunity for the public. The Compliments for this year (144) remained about the same as last year (140). To see the full report, go to <https://en.powys.gov.uk/socialservicescomplaints>.



2 - * The number of the complaints can be double/triple counted as they are included in each stage of the complaints process. However, not all complaints at the Ombudsman or at Stage 2 will have been in Stage 1 in this year.

** Ombudsman Complaints include those that were accepted by the Ombudsman in the year being reported, not those which may still be ongoing from the previous year.

What are our priorities for next year and why?

For *Adult Services*, our aims are set out in our Integrated Business Plan 2020-2023. In Adult services, we will:

- Promote independence wherever possible by identifying what people can do for themselves, alongside community based support to achieve what matters to them.
- Support adults who require care and support through timely and strengths based assessments and care and support planning, and working to ensure that the right level of care and support is available to adults who require this support.
- Provide and commission a flexible and affordable mix of high-quality support services for adults who require care and support and their carers to meet the diverse range of their individual needs and circumstances. With a focus on outcomes.

- To increase the availability of volunteers to work in health and social care during the pandemic (and beyond), and to work with care and support providers to increase use of volunteers to increase service capacity.

For *Children's Services* our aims are set out in our Integrated Business Plan 2020-2023. We have committed to '*Work with* Children, Young People and their Families rather than *do to*, to co-produce plans to bring about the changes children need as quickly as possible.

In 2020-21 we will:

- Embed the Mind of My Own app and promote its widespread use among children and young people.
- Care experienced young people attend and actively contribute to the Corporate Parenting group
- Children who are looked after and Care Leavers fora meet regularly
- Children who are looked after and Care Leavers fora organise at least one participation event
- Children who are looked after and Care Leavers participate routinely and meaningfully in recruitment at all levels in CS
- Organise a Member Development session which enables the Young People's Forum to engage with Elected Members
- As part of our Pathway Planning Children's Services will ensure that 18 year-old care leavers are supported to be registered to vote

4. Promoting and Improving the Well-being of Powys Residents



(a) Working with people to define and co-produce personal well-being outcomes that people wish to achieve

Understanding “what matters” in our conversations with people is paramount to successfully placing the individual at the centre of what we do. “What matters” is the *golden thread* that runs throughout our services and is an important guiding principle of the Social Services and Wellbeing (Wales) Act 2014.

What did we plan to do last year?

In last year’s Annual Report, we set out several priority actions to enhance how we work with people to help them achieve their outcomes, namely that we would:

We Said - We Did!

Streamline information so that it is in one place to ensure that the Information, Advice and Assistance services are better co-ordinated across our third sector organisations. To develop our digital offer including virtual assessments and enquiries. (A-1)

- A-1 A restructure that co-located a Social Worker and Community Connector with the ASSIST team and other front-door restructures have improved call wait times from 7 minutes to under 1 minute.
- A-1 Our website now has an increased focus on getting help at home with daily living, including a service called *Ask Sara*, an online, self-assessment tool is available on both the

internal and external website. The website also has short video animations that illustrate how technology can help people to live at home for longer.

- A-1 Our dedicated front door (ASSIST) website now offers a [multi-agency, bi-lingual enquiry form](#), as well as a direct referral pathway for carers. People can now contact us via webchat.
- Expanded our home-based support services to East Radnorshire, Llanidloes and Llandrindod Wells. These early intervention and prevention pilots were evaluated at the end of the 2019. Feedback from service users and carers does show that most feel able to stay at home and where home support has been a contributing factor to this. Further expansion will be considered.

Work with professionals to develop their understanding and respect for the importance of IAA in enabling the local population to make informed decisions and take personal responsibility for their health and wellbeing. (A-2)

- A-2 Training and support enhanced the quality of the 'what matters' conversation that staff had with individuals to ensure that they got the right level of support as soon as possible. ASSIST staff and Community Connectors are trained to prescribe low level technology to enable independence or enhance care to further resolve enquiries as early as possible and where possible avoid hand offs.
- Adult Services have worked closely with the newly appointed Joint Health and Social Care Workforce Planning Manager to inform a workforce strategy looking from a wider lens to include health, social care, volunteers and the independent sectors. The work which has been undertaken will also inform a national workforce strategy for Wales which is underpinned by the principles of A Healthier Wales.
- In partnership with the Powys Teaching Health Board and PAVO, our Community Connector service comprises 13 Community Connectors and a Senior Officer. The number of referrals into the service rose from 2,189 last year to 2,994 in 2019/20, an increase of 37% over last year. Over 90% of the clients supported to access third sector services said that the Community Connectors helped deliver 'what matters' to them, showing the immense value of third sector support.
- The Community Connectors have seen a huge increase of referral to support clients during the Covid-19 pandemic. They supported 650 people shielding and many others to access help in their local communities for prescription collections, shopping, loneliness, etc. The Connectors have supported 112 local Covid-19 Community Support groups to establish, develop and deliver support to their local community.

Promote further engagement in the Children's Commissioners Ambassador Programme throughout Powys Schools. (A-3)

- We have continued to promote the 4C's Young Commissioner Programme. The 4Cs manages the All Wales Framework for the Provision of Foster Care Services & the All Wales Framework for the Provision of Residential Care Services to Children and Young People.
- Young Commissioners have played an integral part in a number of 4Cs projects since 2017. Their participation ensures the voice of young people is at the heart of their work to support

commissioning, good quality care and improved outcomes for all of the children and young people looked after

Continue to encourage young people or adults and partner agencies to partake in the interview process for positions in Social Services. A-5

- Care Leaver Panels are a routine aspect of recruitment in Children's Services
- Health partners are invited to be part of interview panels within Adult Services.
- Adult Social Services took an active part in the countywide Careers Festival for secondary school pupils which was held at the Royal Welsh Showground in March 2020. We also continue to promote our apprenticeship programme.

Work with partner agencies, particularly the health board, to adopt the Children Looked After Pledge. (A-6)

- The Children and Young People's Pledge, designed by Young People, has been adopted by Powys County Council and Powys Teaching Health Board



Stabilise the work force and drive down the reliance on agency staff. (A-7)

- The Children's Services restructure was completed and has significantly improved the stability of the workforce. All Senior Manager, Team Manager and Team Leader posts were filled permanently. The number of agency social workers was reduced to 29 as of April 2020.

Drive up and maintain the performance across Children's Services. (A-8)

- Performance against key performance indicators has improved significantly and been sustained.
- The percentage of children looked after who have had three or more placements during the year has been sustained well below the Welsh National Average of 10%. At the start of the year Children's Services performance in this indicator was 6% and it was reduced further to 4% in March 2020.
- The percentage of statutory visits for children looked after carried out on time is recorded in June 2019 at 84%, performance dramatically increased from August 2019 onwards and was sustained at 92% or over every month onwards. In December 2019 the service reported that 98% of visits were undertaken within timescales.
- The percentage of child protection statutory visits carried out on time has also remained consistently over 90% since August 2019.
- The percentage of operational staff who received case supervision on a monthly basis has improved greatly and from January 2020 onwards achieved target over 90% or over.
- The number of children on the child protection register reduced from 123 in April 2019 to 90 in March 2020.
- The percentage of contacts to the Front Door service not requiring statutory services but was managed and supported through information, advice and early Help was consistently between 85 and 89% from December 2019 onwards.

What are our priorities for next year and why?

- A1 Goal: Provide care and support for carers which will enable them to be supported to continue their caring role.
- A2 Goal: Further develop our strengths-based approach through promoting individual's own assets and community network support when determining how eligible needs can be best met.
- A3 Goal: Strengthen the Quality Assurance Framework and workforce development arrangements to ensure that assessments include the voices of children, young people and their families and plans are co-produced.
- A4 Goal: Develop the Early Help Strategy to promote Early Help as the multi-agency approach in Powys
- A5 Goal: Launch the rebranded Children's Services Front Door and Early Help Service
- A6 Goal: Review with partners the planned approach to multi-agency Early Help Hubs in the light of the Covid-19 pandemic.

(b) Working with people and partners to protect and promote people's physical and mental health and emotional well-being

What did we plan to do last year?

In the 2019/20 Directorate Plan we said that we would:

We Said - We Did!

Implement the new Health and Wellbeing phone app to supply mobile access to Dewis, Info Engine and NHS111 all in one place.

- The phone app is completed and being used. We will evaluate the effectiveness during the COVID 19 pandemic to ensure it was useful for people.

Support individuals to live independently, within communities of choice and where required deliver care closer to home, by continuing to work with partners to enable integrated or co-located working.

- For a variety of reasons, the provision of domiciliary care in Powys was challenging during the year. To address this, significant work was undertaken to reduce demand for domiciliary care, to provide support from other sources and to meet demand differently, as well as to increase capacity. The number of individuals awaiting care with no current provision reduced to 35 (403 hours per week) from a peak of 40 individuals in September 2019. There was also a reduction in the number of people receiving domiciliary care and in the number of hours of domiciliary care provided. However, the average time for providers to provide care increased to 33 days, reflecting the challenges in obtaining care in rural settings.
- Other work includes significant promotion of direct payments, TEC (Technology Enabled Care) and occupational therapy interventions such as provision of aids and adaptations, as well as specific projects:
- Moving with Dignity (Singled Handed Care) – Following a successful pilot, the Council has invested in two occupational therapists and equipment to enable reduction in the need for two care workers to visit some service users.
- Community Connectors - In collaboration with the Powys Teaching Health Board, we have commissioned a further 4 (total 13) Community Connectors who work across the county to support individuals' to engage with community groups and societies.
- AskSara - In February of 2020, the Council launched its "AskSara" service, an online self-help guide to help people find equipment or services.
- Home Based Support Pilots – The Council has invested in pilots across Radnorshire and the south of Montgomeryshire which provide 24/7 proactive floating support and rapid response service for people who use their Technology Enabled Care alarms.
- Reviews – We are working to ensure that reviews of care packages are undertaken in a prompt and regular manner, alongside providers, and are effective in releasing domiciliary care capacity where appropriate.

What are our priorities for next year and why?

In 2020/21, we intend to address the following priorities around protecting and promoting the physical and mental health and emotional well-being of our residents.

- (B1 Goal) Improve our system of tracking what services people are needing in Powys to support future commissioning decisions.
- (B2 Goal) Enable more people to remain in their own homes and reducing admissions into residential care, aided by effective partnership working in community mental health teams, and working alongside health partners to ensure that those with a primary health need have needs met through timely continuing healthcare funded support
- (B3 Goal) To develop regular conference calls with providers and to communicate effectively with providers via the conference call and by writing to them regularly with updates on national and local developments.
- (B4 Goal) Improve and revamp the Adult Social Care website to ensure that people can easily find what they want and designed to match the Social Services and Well Being Act. Including making sure that we promote greater awareness of AskSara.
- B5 Goal - Work with our partners to review the Start Well Board priorities to refocus how the partnership works together to support children's emotional wellbeing and mental health at the earliest opportunity.
- B6 Goal - Appoint an inhouse Psychologist in partnership with PTHB
- B7 Goal - Establish a trauma informed approach across Children's Services.
- B8 Goal: Increase the number of care leavers that report good wellbeing.
- B9 Goal: Further develop the range of short breaks provision available.
- B10 Goal: To improve our partnership working with the Powys Teaching Health Board's Child and Adolescent Mental Health Service.

(c) Taking steps to protect and safeguard people from abuse, neglect or harm

What did we plan to do last year?

During 2019/20 we said we would:

- C-1 To improve and maintain our practice with regards to safeguarding to ensure, as far as possible, that Adults at risk of abuse or neglect, who have care and support needs and unable to protect themselves of all ages are safe in Powys.
- C-2 To embed strengths-based practice to support people to make informed decisions about living in, and engaging with, their own communities.
- C-3 To support Powys residents (adults and children) who receive services elsewhere to return home where possible and to receive support in Powys.
- C-4 To support our staff to achieve high operational staff receiving case supervisions monthly will be over 85%.
- C-5 Develop an Early Help Hub as part of the Children's Services restructure to increase the level of support which can be provided through early intervention.

- C-6 To undertake a detailed review all Children placed on the Child Protection Register. The statutory timescales within Children's Services will be 95%.
- C-7 Children Looked After (CLA) who have three or more placements in 12 months will continue to be below or in line with the Welsh National average at 10%.
- C-8 The percentage of placements accommodated with in-house foster carers will be 70%.
- C-9 The percentage of assessments completed with an outcome of no further action will be 40% or less.

How far did we succeed and what difference did we make?

- C-1 Adult Safeguarding have completed over 95% of Safeguarding enquiries within statutory timescales.
- C-2 Adults: Strengths Based Working - The department continues to embed a strengths-based approach in all that it does. We have undertaken further redesign of our integrated assessment and care and support plan templates to ensure that we capture the strengths based conversations that we are having with our residents. and aims to empower people and support them to re-engage with their communities.

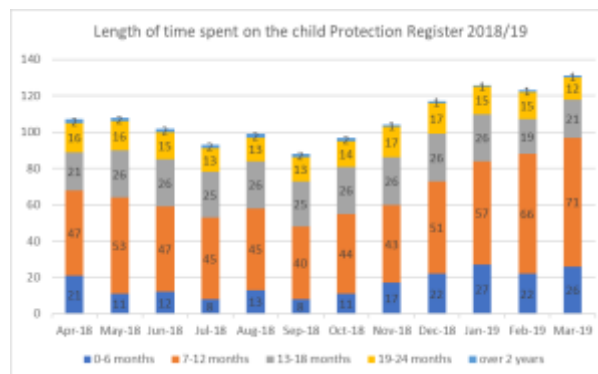
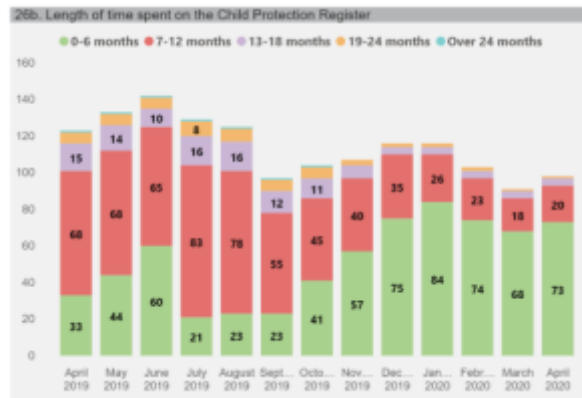
Children's Services continued to deliver the Signs of Safety implementation plan with:

1. 155 practitioners and managers attending the 2-day and 5-day Signs of Safety training,
 2. Practice leads identified in all teams,
 3. Training sessions on a range of subjects including Signs of Safety Multi Agency Partner Workshop Events, Family Network Meetings, Genograms and Reflective Supervision.
 4. Implementation of our Closer to Home Strategy has meant 34XX children moved closer to home from out of County placements during 2019/20.
- The Intervention and Prevention Service was established as part of the Children's Services restructure. Practitioners work directly with children, young people and their families and carers to stabilise arrangements which may be at risk of breaking down and prevent escalation. The number of children becoming looked after during 2019-20 was 61. In comparison the number of children becoming looked after during 2018-19 was 82. Therefore 21 fewer children have become looked after this financial year in comparison to the same time period last year.

1. C4 - Following the Children's Services restructure monthly supervision has been over 90% for every month since January 2020. Adults supervisions averaged 84.7% for the 11 months up to March 2020 when due to Business Continuity supervisions reduced to 57% for that month. Social Services Leadership Team are committed to ensuring all operational staff receive dedicated, formal 1:1 supervision every month, in addition to any informal, group and peer supervision that takes place.

2. C-5 Multi-agency Early Help Panels have been established. The Early Help Service worked with 837 children during the year. Of these only 64 children went on to receive statutory intervention.

3. C-6 We reduced the length of time children remain subject to child protection plans. We improved the process for reviewing the cases of children whose names have been on the child protection register for more than 12 months or who are re-registered within a 12-month period.



The number of children re-registered within a 12-month period was 7. Children’s Services continued to improve compliance with statutory timescales, completing 90% of visits to children with a child protection plan within statutory timescales for the last 3 Months.



4. C-7 Children’s Services has worked hard to improve the stability of placements for Children in our care. We introduced placement support workers as part of the new Intervention and Prevention Service to support foster placements and prevent placement breakdown. The figure for the number of children with more than three moves in 12 months has remained consistently low at 4% compared to the Wales average of 10%.

5. C-8 We consulted with foster carers and reviewed the support offer, whilst working with national colleagues on the harmonisation of fees for foster carers across Wales. We have invested in the Fostering Service, which is now made up of two teams covering the North and South of the County respectively. This more stable base has enabled the Teams to focus on improving the support provided and development of our carers as well as on recruiting new carers. We ran recruitment campaigns throughout the year which produced 132 enquiries, 18 assessments beginning and 14 foster families being approved

at panel. 40% of children in our care are placed with in-house foster carers and we continue to work hard to recruit more foster carers.

Our children need more foster carers, so how about recommending your friends and family?

As a foster carer, you know how challenging but rewarding it can be to provide a safe, caring home for local children, and the feeling of achievement you feel when you play a huge part of shaping their future.

So, why not encourage your friends and family to join our team of foster carers, and share the rewarding journey with them.

They can help in so many ways, by providing a caring and safe environment for local children full time or even for a weekend or a week to give carers and families a break.

Simply ask your friends and family members who would be great carers to contact our fostering team on:

0800 22 30 627
fostering@powys.gov.uk
www.powys.gov.uk/fostering

Powys

6. C9 The Assessment Teams completed 692 assessments in the year. Of these, 11% were stepped down to early help. This figure has increased through the year, as our new structure and early help approach has been embedded. 41% progressed to Care and Support and 48% were closed.

- The statutory obligation to complete Deprivation of Liberty assessments (DoLs) within 21 days continues to be a challenge. We have worked together with regional partners to outline guidance to complement the guidance from the Department of Health. Staff responsible for DoLs continue to keep themselves updated with case law and developments during the Covid period. Preparations are ongoing for the transition to the new Liberty Protection Safeguards (LPS) which comes into force sometime in 2021. An audit of the Council's DoLs service was undertaken in December 2019. This audit resulted in a number of actions which will be coordinated by our Senior Manager for Contact and Adult Safeguarding.
- We have created a Regional Threshold guidance and delivered online training to support staff with a clear process to inform safeguarding referrals. The *Wales Safeguarding Procedures* were launched in November of 2019, which is an essential part of safeguarding children and promoting their welfare. Powys has begun training staff on applying the new procedures in practise.

What are our priorities for next year and why?

During 2020/21 we will be focussed on delivering a range of outcomes, including:

- C1 GOAL: The Regional Safeguarding Board will publish the regional safeguarding response to Safeguarding which is a single document outlining the Safeguarding response to children and adults safeguarding. The purpose of this document is to provide a designated reference point for the specific processes to be followed during the COVID-19 pandemic, and to show the significant work undertaken by all our Board and partners in the development of these policies. The Senior manager has engaged with the board to produce this document and provide clarity during this time.
- C2 Goal: To develop a joint care home escalation matrix with the Powys Teaching Health Board to enable full awareness by the Care Home Steering Group (Section 33) of contract monitoring and concerns.
- C3 Goal: To convene a regular interagency, multidisciplinary team meeting to consider the needs and sustainability of care homes in Powys.
- C4: Work closely with partner agencies to improve our response to child exploitation and lead on the review of the regional arrangements for multi-agency working.
- C5: Complete phase two of the Children's Services restructure to strengthen the Safeguarding and Quality Assurance Service.
- C6: Develop the Powys Child Exploitation Strategy and Implementation Plan
- C7: Establish our Specialist Child Exploitation Intervention team.
- C8: Undertake a review of EDT and implement an out of hours response to child protection and adult safeguarding and mental health which meets demand.

(d) Encouraging and supporting people to learn, develop and participate in society

What did we plan to do last year?

During 2019/20 we said we would:

- D-1 Review our access arrangements, promoting self-service and channel shift wherever appropriate. Ensuring we have the right model to meet the demands on the service. Promoting a culture of getting it right the first time for people who contact us.
- D-2 Review the end to end customer journey/experience and ensure that each step adds value and that our systems are lean and agile.
- D-3 Continue to promote a culture which routinely meets the expectations of the Social Services and Well-being Act and other legislation which encourages co- production and reduced dependence
- D-4 Regional Rural Centre in Newtown – in partnership with health and social care professionals, a proof of concept work has been completed including identification of a preferred site for a multi-agency campus in Newtown. Work has commenced on the design of the new model of care which includes mapping of existing services and local population needs.
- D-5 The proof of concept work has been completed. This includes the identification of a preferred site for a multi-agency campus in Newtown and the testing of how the

vision/concept could fit on the preferred site through different layout options. This external report and its recommendations were approved by Council Cabinet on 19th February 2019. Further work is required to develop the multi-agency wellbeing campus model, and this will be undertaken during spring/summer of 2019.

- D-6 Continue to work with Powys County Council Housing Department and Associations on planning opportunities for Residential Units and training flats for Care Leavers.

How far did we succeed and what difference did we make?

- D-1 Significant work has been undertaken during the year to review and create a new single point of contact which provides high quality information, advice and assistance. ASSIST is now functioning more efficiently and is providing excellent results including prescribing low-level Technology Enabled Care (TEC) equipment when needed. The percentage of individuals who have contacted the service for information and advice, but who have not returned to the service in the following six months is 77% (as of April 2020). The key role of the contact officers within the ASSIST team is to get to the heart of “what matters” to the person or their carer and to identify the outcome they are looking to achieve. The team work to a prioritisation framework to assess referrals and have a clear process for prevention and co-production with third sector services. There are clear pathways for any concerns which are raised about safeguarding. A new online enquiry form and carers assessment form have been introduced. In the last Quarter of 2019/2020, 86% of all approaches to Children's Services were supported and managed through the Front Door with information, advice or via the Early Help Team, rather than a referral to statutory services. This percentage continues to be consistent each month and highlights how Children's Services is embedding the ethos of 'working with' Children, Young People and their Families rather than 'doing to' to enable children and young people to access the right support at the right time. The commissioned services, provided by 3rd sector organisations, have an important role to play with providing information, advice and assistance. Organisations, such as CREDU, provide thousands of people with information on a regular basis. It is estimated that there are 1,000 young people and approximately 16,000 adults who are looking after a family member or friend who are ill or disabled. The number of people now registered with CREDU as informal carers and who received information regularly is 3,413 as of 31 March 2020, up from 3,172 people at the same time last year.
- D-2 Work continues with the 'end to end' customer journey/experience and meetings with operational managers and Business Intelligence will continue as things return to normal.
- D-3 Since Sept 2019, our department has held quarterly Strengths Based Outcome Focussed trainings hosted by Social Care Wales. We have also added our own monthly Mentor Groups to support staff in embedding the practise. Powys has made the Strengths Based Outcome Focussed training mandatory for all frontline staff and Senior Managers. Monthly reflective practise meetings and a library of webinars, case studies and other resources further support Strengths Based Outcome Focussed practise. We are monitoring staff practise via audits to ensure staff are embedding their learning.

- D-3 In Children's Services, there have been a range of 14 different practice development sessions to promote and embed the Signs of Safety model of social work.
- D-4 Regional Rural Centre in Newtown as a part of the North Powys Programme – After extensive engagement with communities, staff and stakeholders, a new model of care has been developed taking into account population needs, existing service provision and gaps, quality of the estate and the broader challenges and opportunities at a local and national level. The new model of care was approved by the Health Board and is awaiting review by Powys County Council after being on hold due to COVID-19. It is anticipated that the model of care will need to be reviewed in light of COVID-19 to ensure it is still the best model moving forward.
- D-5 Further work has been done to develop a programme business case, but engagement has been limited due to COVID-19. Further work is required to be able to ensure full stakeholder support for the scheme before it can be considered for approval by Cabinet and the Health Board.
- D-6 Children's Services and Powys County Council Housing Department continue to work together to meet the accommodation needs of Children who are Looked After and our Care Leavers. During 2019/20, two Council properties (one in North Powys and one in South Powys) have been developed into our Springboard houses in Newtown and Brecon. These are shared houses for young people aged 16 to 25 who are leaving care and are ready for greater independence. A three-bedroom property in South Powys was also tenanted to Children's Services for use as a 2 bed children's residential home. The works commenced in 2019/20 and have been delayed due to the Covid-19 response. A further house in Mid Powys was tenanted to Children's Services at the end of 2019/20, for use as emergency accommodation due to Covid-19. Children's Services worked with Newydd Housing Association to secure two one-bedroom flats in North Powys. In January a training flat in Newtown opened its doors to young people. The aim of the flat is to give Young People leaving care a chance to spend short periods of time living there, learning skills and experiencing what it's like to live alone. It gives young people the opportunity to be fully involved with their own programme for independence. This project was set up in partnership with Care Leavers. The other flat has provided floating support accommodation for a Care Leaver.

Technology Enabled Care (TEC) has continued to develop with new services being trialled. The number of unique individuals supported, and technology enabled care prescriptions have continued to grow with 708 new prescriptions in 2019/20. TEC is helping unpaid carers to look after their loved ones with dementia in their homes for longer, some avoiding care home admission altogether or delaying the need for this. Using an average of £1,350 per person in annual savings, the projected costs which have been avoided as a result of the use of technology enabled care was £453,938 for the 2019/20 financial year.

Projected Cost Avoidance to Powys Social Care 2019/20 Number of clients - 708 (1) Estimated Annual Saving per Client - £1,350 (2,3) Estimated saving 2019/20 - **£453,938** (4)

(1) Actual number of unique clients supported with Technology Enabled Care in Powys

2) *Estimated annual net savings per client based on research but at 30% only and assumes 70% of clients retain their TEC for 12 months*

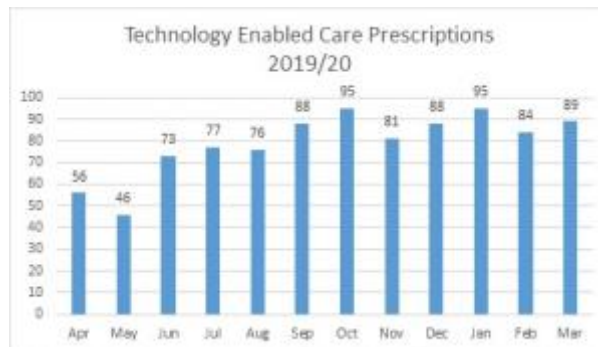
3) *Uplift applied for 2019/20 of 2%*

(4) *Savings per client reduce each month to reflect diminishing time remaining in the financial year*



3 - A series of animations were created to promote the equipment which is available to support people in Powys





4 - Technology Enabled Care Prescriptions by month

Especially popular is the *Canary Home Monitoring System* which allow non-invasive monitoring of vulnerable person to know their movements, see video at <https://www.youtube.com/watch?v=KJ350uHTC2k>. “I have gotten fantastic feedback from clients/family using the equipment. The potential cost savings from families being able to maintain their loved one at home without the need for a care package is huge.” - Health Board Occupational Therapist talking about the Canary Home Monitoring System “My gran remained at home without a care package right up until she was hospitalised over a 5-month period, and, unfortunately then required 24-hour care in a nursing home. As a family we strongly feel that the Canary was the main reason we kept her at home for so long.” – Granddaughter Overall, the number of unique individuals supported has continued to grow in line with Vision 2025 targets with a total of 708 individuals being supported using TEC items since April 2019.

What We Will Do Next Year:

D-1 Goal: To enable more adults with a disability to gain training and paid employment as our current commissioned service expires in October of 2020, we will be re-tendering by reviewing current employment needs and using a locality approach.

D-2 Goal: To review daytime activities for adults and to support people to achieve what matters to them.

D-3 Goal: To increase uptake of technology amongst the people that we support to increase social connection and reduce loneliness and isolation.

D-4 Open a Spring-Board house in mid Powys

D-5 Complete an options appraisal of how a full range of supported accommodation for Care Leavers and Young People aged 16 to 17 who are homeless, can be best delivered.

D-6 Increase the number of young people in care who achieve their educational goals.

D-7 Increase the number of care leavers who are living in permanent accommodation at the age of 25.

D-8 Increase the number of care leavers who are in full time employment, education, or training.

(e) Supporting people to safely develop and maintain healthy domestic, family and personal relationships.

What did we plan to do last year?

During 2019/20 we said we would:

- E-1 Increase awareness and challenge attitudes of violence against women, domestic abuse and sexual violence across Mid and West Wales
- E-2 Increase awareness in children and young people of the importance of safe, equal and healthy relationships and that abusive behaviour is always wrong
- E-4 Make early intervention and prevention a priority
- E-5 Relevant professionals are trained to provide effective, timely and appropriate responses to victims and survivors
- E-6 Provide victims with equal access to appropriately resourced, high quality, needs led, strength based, gender responsive services throughout the region.
- E-7 Ensure all organisations contracted to provide care services on behalf of Powys Council have a workplace domestic abuse policy and provide the same level of training as required of Council staff under the National Training Framework.

How far did we succeed and what difference did we make?

E-1 Powys Commissions two main providers across Powys who:

- Work in communities and public services to raise awareness of domestic abuse, the signs of an abuse relationship and its impacts, and promote services available to support victims i.e. national helpline
- Provide training to relevant staff, practitioners and volunteers (from a range of statutory and third sector organisations) to raise awareness of domestic abuse as an issue, communicate the responsibilities under 'Ask and Act' and provide information on support/advice and referral routes for those experiencing domestic abuse.
- Support the development and promotion of the 'Ask me' scheme and 'safe disclosure points' in communities
- Develop skills to establish and maintain positive and healthy relationships
- Work with the locality housing related support and other service providers to improve intelligence and early intervention.

E-2. Sessions have been provided across schools in Powys which:

- Promote the importance of healthy relationships and raise the awareness of children, young people and adults about the issues of Violence against Women, Domestic Abuse and Sexual Violence.
- Are delivered by qualified and experienced teachers - sessions can be delivered in Welsh or English and all resources are bilingual.
- Are cross curricular and are designed to promote peer discussion, using a range of techniques.
- Use materials that are thought provoking but are not designed to be so emotive as to cause distress, including the concept of "The Safety Zone".
- Are designed to promote discussion not disclosure.
- Conclude with information for young people on where they can access help and support both inside and outside the school.
- A parent pack has been developed with activities for all ages, from under 4 to over 14. The pack contains practical activities for children and young people

E-3 The Regional Partnership are still working closely with partners around the academic review and profiling of perpetrators across Mid and West Wales.

- As a result of the Regional MARAC review the Daily Discussion process has been reviewed and is now in practice. Evaluation is also underway with Data Cymru for the Daily Discussions Process.
- The Capital Grant Award has supported implementation of Video Conference facilities across Powys, to support the Daily Discussions Process that was implemented in November 2019.
- We are working on the regional Stalking Perpetrator Intervention Pilot with Professor Jane Monkton-Smith and the Forensic Psychology Service.

- The focus for the next year will be piloting a digital perpetrator intervention in Powys, supported by learning from the recent Powys Domestic Homicide Review.
- E-4 The Children's Services restructure included a big focus and investment in Early Help Services.
- Our new Early Help Service started their work in April 2019. 927 children received direct work (not including group work) from the team during the year. Of those 927 children only 64 were referred back for statutory assessment. For 50 of these children the reason was that their families did not engage with Early Help. We are confident that the Early Help team are working effectively alongside children, young people and their families at an early stage, avoiding the need for the involvement of statutory services.
- As part of the Early Help approach, we established early help panels to bring together multi agency partners to ensure that children, young people and their families can access the support they need at the earliest opportunity. Our partners Calan Domestic Violence Service and Montgomery Family Crisis Centre (MFCC) participate in those panels.
- The newly established Intervention and Prevention Service worked with 322 Children, Young People and their families to support with a range of issues.

Figures from June 2019 to March 2020: CE Number of referrals - 33 Number of Children - 38 Number of Adults - 17 **Crisis Work**

Number of referrals - 10

Number of Children - 17

Number of Adults - 18 **CSE**

Number of referrals - 5

Number of Children - 5

Number of Adults - 2 **Family Support**

Number of referrals - 24

Number of Children - 36

Number of Adults - 30 **Parenting Support**

Number of referrals - 2

Number of Children - 4

Number of Adults - 4 **Placement Support**

Number of referrals - 35

Number of Children - 43

Number of Adults - 26 **Reunification**

Number of referrals - 9

Number of Children - 10

Number of Adults - 9 **Support to avoid accommodation**

Number of referrals - 104

Number of Children - 169

Number of Adults - 129 **Grand total**

Number of referrals - 222

Number of Children - 322

Number of Adults - 235

- ***Children and Young People supported by Intervention and Prevention Service to avoid accommodation in Local Authority Care*** = 166 (169 - 3 multiple referrals)
- ***Average cost of a placement for a child in care 2019-20*** = Around £50,000
- ***Total cost avoided 2019-20*** = £8,300,000

- E-5 We appointed a trainer to undertake the VAWDASV training. 75% of the Social Services workforce completed their level 1 training.
- E-6 Powys Commissions Domestic Abuse Support from two main providers, one North one South. Providers provide services which include:

- Access to safe and appropriate accommodation

- Crisis Support

- Recovery Support

- Preventative Services

- Services specifically for children and young people effected by domestic Abuse

- General awareness raising services

- E-7 All Powys contracts have these requirements within the standard terms and conditions. Compliance is monitored as part of our routine contract monitoring.

What are our priorities for next year and why?

(Supporting people to safely develop and maintain healthy domestic, family and personal relationships.)

- E1 The pandemic has meant that all day services have been closed. It is likely that risk assessments will result in an inability to re-open day centres in the near future due to the requirement to physically distance, especially among vulnerable groups. Therefore, the Council will need to work with day service users to ascertain the best alternative methods of achieving what matters to them. This may mean support to access technology and use technology to maintain relationships in a different manner, or to access physically distanced befriending groups, or other types of support. In addition, we will be working alongside service users to identify suitable volunteering, work experience and employment opportunities. The service will prioritise this work during the year.
- E2 To develop supported living services which are outcome focussed and support individuals to maintain their own wellbeing within society.
- Identify those in our teams who should complete the level two and three VAWDASV training and provide the relevant training opportunities.



5 - Amy published her experiences of Shared Lives in Powys

(f) Working with and supporting people to achieve greater economic well-being, have a social life and live in suitable accommodation that meets their needs

What did we plan to do last year?

In 2019/20 we stated that we would:

- F-1 In 2019/20, the council will work with partners and providers to support their sustainability and find innovative solutions to reduce the numbers of delayed transfers of care.
- F-2 Continue to increase the capacity of carers and number of participants in the Shared Lives Service. (Asking Sandra and Hazel)
- F-3 Work with the housing service and housing associations to develop better accommodation options for older people in Powys. This will include the development of extra care schemes in Welshpool, Ystradgynlais and Brecon.

- F-4 Reduced numbers of persons (per 1000 population) aged 75 and over who experience a delay in return to their own home or social care setting following hospital treatment. (this was 1.5 in 2017/18).

How far did we succeed and what difference did we make?

Effective partnership working is crucial to improving outcomes for residents in Powys. Our service delivery plan sets out what we want to do to enable the speedy transfer of people from hospital to home through a re-abling and recovery-oriented approach. (From CIW Conf notes)

In January 2018, the number of delayed hospital transfers due to social care reasons was 18. In January 2020, the number of delayed transfers due to social care reasons was 3. I'm proud of this improvement for Powys residents, because I know the work that we have undertaken across the system that has contributed to this improvement. The main changes I'd like to highlight are around pathways and processes and creating new teams.

In terms of pathways and processes;

- We have co-developed a clear set of patient pathways, with corresponding pathway response times. We now have clear processes in place that provides a clarity that we didn't have before across social care and health.
- We have held pathway familiarisation sessions with our colleagues in District General and Community Hospitals so that these pathways are embedded.
- Senior Managers across Social Services and Health have instigated twice weekly patient flow meetings and a fortnightly delays forum. We're now managing patient flow in a calmer environment which supports clearer and more focussed discussions.
- We have created a patient flow tracker which is shared across the system. This gives the system real time intelligence on what patients are where, what discharge pathway they are on, and the work that we are undertaking across the system to support transfer to home.

In terms of teams;

- We have created a new hospital social work team that currently covers two acute settings, as well as five of our community hospitals. As soon as a patient is stable enough to start planning their transfer from hospital, our team works with them. Care and support plans, if required are signed off on a daily basis so that there is no additional delay in arranging for care and support. In January 2020, we received 73 referrals, of which 50 were appropriate. 80% of cases were allocated within 24 hours, with the remaining people allocated to a worker within 4 days.
- The reablement service is run jointly between the Council and the Health Board. Since our inspection, we have implemented alternative ways of working to expedite hospital transfers. In the South, we have utilised one worker to follow a *Home-First Model* and in the North, three workers have been seconded to the home first team, led by PTHB. This is helping us to support reductions of referrals to *The reablement service is run jointly between the Council and the Health Board. Since our inspection, we have implemented alternative ways of working to expedite hospital transfers. In the South, we have utilised one worker to follow a Home-First Model and in the North, three workers have been seconded to the home first*

Connected Persons Assessment - 22

Supported Lodgings - 8

Approvals

Foster Carers - 14

Connected Persons - 9

Supported Lodgings - 1

Our Through Care Teams work with Young People so that they are fully supported as they transition into adulthood.

The newly established Housing Gateway Panels commenced in January 2020. This is a multi-agency panel which has been set up to ensure that Care Leavers are able to access accommodation without having to present as homeless (the previous process).

The Housing options available to young people leaving care have increased, as have the opportunities for young people to prepare for their own homes. The training flat, Spring Board project and Floating Support tenancy are the first of these improvements.

What are our priorities for next year and why?

To support people in 2020/21 to achieve greater economic well-being, have a social life and live in suitable accommodation, we will:

- F-1 Goal: Further embed discharge to recover and assess pathways in partnership with health and third sector to promote as far as possible the recovery and rehabilitation of patients following their transfer from hospital.
- F-2 Goal: Conduct a review of our reablement service. Our joint partnership board has agreed to work together to commission a review of our reablement service to formalise the model we are working under; one that supports both the managing of demand from hospitals and in service users in our communities. (from CIW brief)
- F-4 Goal: To develop wellbeing calls to proactively contact vulnerable individuals in the community to support their independent living.
- F-5 Goal: To continue to develop the extra care schemes across Powys.
- F-6 Goal: To review the older persons' care home market to consider appropriate provision and evaluate provision is appropriate to meet need.
- F-7: We will continue the recruitment drive for foster carers and supported lodgings hosts
- F-8: We will improve the support provided to our foster carers
- F-9: We will increase the number of supported lodgings hosts
- F-10: We will open the first of our new Powys Residential Children's Homes.
- F-11: Undertake an analysis of range and cost of accommodation for care leavers age 18+

- F12: Following the review, we will commission or develop provision to improve the range of accommodation options for young people leaving care and homeless young people aged 16 to 17 years and deliver value for money.
- F-13: Design the model of care and therapeutic model for a Powys Children's Therapeutic Residential Home

5. How We Do What We Do?



(a) Our Workforce and How We Support their Professional Roles

Since the CSSIW inspection of Children's Services in July 2017 a permanent Head of Service has been appointed who has established a clear strategic vision for improving the service. The Service is two years into a journey of improvement.

The restructure of the Service (in 2019-20) from one based on generic teams where workers were required to undertake tasks from referral to adoption, to specialist teams. The restructure enables workers to have clarity of role and manageable workloads and makes Children's Services in Powys an attractive place to work. The specialist teams are now made up of the following:

- Early Help and Assessment
- Intervention and Prevention
- Care and Support

- Corporate Parenting
- Safeguarding and Quality Assurance

Following the restructure, staff morale has improved and colleagues report feeling better equipped to undertake their roles.

The practice framework Signs of Safety has been rolled out and embedded across the service. Training for all staff has been implemented and a Signs of Safety Implementation Group was established and meets monthly to progress the implementation plan. Team Managers and Practitioners report that using Signs of Safety has transformed the way they work with families and the focus is on developing family support networks and keeping children safely at home wherever possible.

In Adult Services strengths-based working is 'what we do'. It means that we take the time to understand what matters to those who approach us for support, to identify what they can do for themselves and what support they can draw upon from friends, family and their wider communities. We have made our Strengths-based outcome focus training a mandatory requirement for all staff in Adult operational teams.

We maintain strong links with Social Care Wales (SCW) to utilise their on-line training videos and other resources. We continue to attend the all Wales mentoring Group facilitated by SCW which enables us to network with other organisations and share their experiences of embedding the approach into practice. We have also attended workshops on outcome focussed case recording facilitated by SCW and researchers from Swansea University.

We have a pool of 36 Strengths-based outcome focussed mentors and have been running monthly support groups to increase their skills and confidence. Mentoring is undertaken formally through supervision, group reflective sessions and informally on day to day basis. We have also created an online library of guidance and good practice.

Powys is fortunate to have dedicated and hard-working social care staff who routinely demonstrate commitment and care for the individuals they serve. Despite that, Powys faces a significant long-term challenge because demographic change is leading to an increase in older people (75+) and a decline in the number of people of working age (see table below).

Age Group	2014	2019	2029	2039	Working Age (16-64)	77,200
73,500	65,200	56,900				
75+	15,100	17,600	24,000	28,200		

(Welsh Government Population Projections (2016))

This is causing recruitment and retention problems for the council. As part of a "One Council" approach, we acknowledge the need to have the right numbers of people in the right roles with the required capabilities to deliver improvement. To achieve that goal, we are investing in the following:

- Workforce planning
- Attracting and recruiting staff
- Leadership and management development

- Performance management of people
- Workforce development
- Pay reward and recognition
- Professional progression
- Workforce health and wellbeing.

The workforce in Powys are highly skilled and demonstrate an eagerness to improve services. The Council was developing agile working systems and policies throughout 2019/20, but this changed rapidly towards the end of March 2020 when the Council invoked business continuity and social services staff were supported to work from home or to be based at home where possible. The previous developments enabled this to be implemented effectively and efficiently and enabled swift transition to a new mode of working.

What we Achieved

To increase our staff engagement, we established an employee representative forum, which provides an opportunity for staff to be briefed on current issues within the Service and to have the opportunity to raise issues and ideas for discussion or escalation. The group is working collaboratively to support the wider engagement and build a stronger culture of continuous feedback and learning across Social Services.

In November 2019 a staff survey was conducted. 1,421 employees (including 35 Commissioning staff, 70 Childrens and Families staff and 207 Adults staff) responded to the survey, compared to 332 in 2018.

The survey found that:

Proud to work for the council Council average - 77% Commissioning - 77% Children and Families - 74% Adults - 81% ***Proud of the work I do*** Council average - 77% Commissioning - 71% Children and Families - 81% Adults - 84% ***I feel confident making decisions without having to seek permission from my line manager***

Council average - 83%

Commissioning - 83%

Children and Families - 78%

Adults - 84% ***I will go that extra mile to get the job done***

Council average - 91%

Commissioning - 89%

Children and Families - 93%

Adults - 95%

- Grow our own – Adults services have 5 and Children’s Services have 1 student on the Open University Degree in Social Work, all of whom are on Level 2 of their degree and have commenced their practice learning opportunity. There are also 4 members of staff in Adult Services undertaking their practice assessor qualification.
- Occupational Therapy – During 2019/20, waiting times for occupational therapy assessments in the south of the county remained a concern, however a combination of innovative working in the form of focussed whole team assessment days in specific locations with the greatest backlog of referrals, plus a return to full team capacity following one full term team member’s maternity leave, resulted in this reducing significantly during the winter months.

Securing a Stable Workforce

We attended the Compass Community Care events in both Manchester (May) and Birmingham (March). We also participated in the Careers Wales event at the Royal Welsh Showground at the beginning of March. Social Care participated in the *We Care Wales* recruitment campaign run by Social Care Wales which included adverts on national television.

A focus for Children’s Services has been on stabilising the workforce and the recruitment of a Permanent Senior Leadership Team. This has been achieved alongside key roles within the structure including Children’s Services Participation and Engagement Officer, Children’s Services Development Manager – Residential and Supported Accommodation, Safeguarding Manager, and Exploitation Manager.

The number of qualified social work vacancies has reduced along with the reliance on agency staff.

Several recruitment campaigns have been run during the year with the latest one at the beginning of 2020 before the Covid-19 pandemic. This included a social media campaign using new promotional videos with Children’s Services staff talking about their experiences working in Powys.

The Children’s Services workforce development project developed a business case for the “Grow our Own” Social Workers which sets out how we plan to expand the opportunities for existing staff to train as qualified social workers.

A Team Co-ordinator Pilot project was launched in January in the Care and Support South Team. This model has been derived from the Hackney Model. The Team Co-ordinator was allocated to work with 4 Social Workers, to support them with co-ordinating visits, arranging meetings, timely recordings and act as a contact for families. The pilot ran until end of March and delivered the anticipated outcomes – releasing social workers to spend more time doing the job they love – spending time working directly with children, young people and their families.

Children’s Services Induction Training was reviewed and revamped in February and sessions were held for all new members of staff around the County. The sessions were attended by 22 new starters and feedback was very positive.

Operational Management Team meetings have been revamped and now have a focus on learning and development for Team Managers and Leaders.

(b) Our Financial Resources and How We Plan for the Future

Many local authorities are experiencing budget challenges and Powys has received one of the worst settlements in Wales every year for the last ten years. The large variation in our expenditures makes resource management especially challenging. Decisions which affect the type and cost of services to be provided are often outside of the council's control and thus are uncontrolled and unpredictable (e.g. decisions taken by the court in children's cases).

Some individual services are very expensive, where placements for children or adults with especially complex needs can easily exceed £150,000 a year and some will cost substantially more. Expenditure incurred in one year may lock the council into financial commitments for many years to come. To balance the competing priorities of managing service demand, improving quality, meeting higher expectations and reducing expenditure is especially problematic in situations where safeguarding children and adults from harm must be the key factor in decision-making. Additionally, there are many factors making the task even more difficult in recent years: increasing demand for services; new requirements from the Welsh and UK Governments; and the need to achieve budget savings in the face of reducing revenue.

As part of the budget setting process Adult Social Care had identified significant service pressures of £9.534 million. To counter the pressures, efficiencies were identified and achieved in full of £5.052 million. The gap was bridged with cost mitigation due to early intervention and prevention through strengths-based practice and Technology Enabled Care (TEC) and the decision not to give an uplift to providers during the year. This has left the care market in a fragile position and may need to be addressed in the future.

The Children's Services budget was set with unfunded pressures of £2.599 million. Pressures of £6.25 million and the savings identified of £3.651 million, of which £1.26 million were delivered. Of the £2.391 million unachieved savings, £1.704 million has been reinstated as part of the 2020/21 budget setting process.

It is recognised that the impact of the global pandemic, COVID-19 will be felt within the service for the year 2020/21. Towards the end of 2019/20 the service had started to increase its spending in preparation for a potential surge in infection rates and demand for support. However, this was funded by the Welsh Government.

(c) Our Partnership Working, Political and Corporate Leadership, Governance and Accountability

Working in partnership our Area Plan identifies which services will receive greatest priority in respect of integrated working between the Council, the health service and others, including:

- Older people with complex needs and long-term conditions, including dementia
- People with learning disabilities;
- Carers, including young carers;
- Integrated Family Support Services;
- Children with complex needs due to disability or illness

In line with the requirements of the Social Services and Well-being Act, the Regional Partnership Board (RPB) provides cross sector leadership through a strong and shared commitment to providing

seamless and integrated health and social care services for children, young people and adults living in Powys, with a primary emphasis on prevention and early intervention.

To this end, we have developed a high-level, overarching plan called the Health and Care Strategy which sets out the strategic vision and approach to be taken in Powys. The Area Plan will outline the priorities to be delivered over the first 5 years and identify the lead agency for delivery.

The Health and Care Strategy priority areas are:

- Wellbeing;
- Early help and Support;
- Tackling the Big Four (cancer, circulatory disease, respiratory disease, mental health)
- Joined up Care.

The RPB will also address the key strategic enablers outlined in the Health and Care Strategy which will help us to develop and deliver the proposed model of care including:

- Workforce
- Innovative environments
- Digital First
- Transforming in Partnership.

Our renewed focus on our corporate leadership and governance through our vision 2025 plan sets out many challenges for us:

- The Council will ensure that it's vision for the future is promoted and understood by the officers, partners and residents.
- The Council, members and officers will be open about what the most important issues are and focus on addressing them.
- The Council will create a mutually supportive leadership culture, with clear roles between members and officers.
- By strengthening the corporate centre, the Council can support a more delegated leadership structure.
- Integrated Disability Service – We established the Integrated Disability Service (IDS) to include co-located multi-agency teams and a single management structure. An Integrated Disability Service triage process has been started. What were monthly physical meetings are now weekly meetings using Skype where needed. This gives quicker and more informed advice and action for children with disabilities or complex health needs.



Accessing Further Information and Key Documents

In publishing this annual report, we have relied upon a substantial amount of information, data, progress reports including those that have featured heavily this year following our recent inspections, and surveys.

The annual report identifies the progress of the Council in responding to the wellbeing of those people who need our help and support. This report however is not the only source of information available to members of the public, key partners and service providers.

We have a significant amount of background information that sits behind this report that provide additional detail about what we do and how we do it. Importantly if something is not mentioned in this report as a key priority it doesn't mean we're not doing it, as there is a lot of activity across social services that plays a part in helping us to provide for some of the most vulnerable groups in our community. It's not possible to capture everything which is why we are keen to signpost people to further information.

To access further information about what we do then these are some of the documents that will provide more detail:

- Powys County Council Corporate Leadership & Governance Plan 2017- 2020
- Healthy Caring Powys – Delivering the Vision (Area Plan)
- The Adult Services Improvement Plan 2018-2023
- The Powys Population Needs Assessment
- CIW Inspection Reports 2019 and 2020
- Children's Services Integrated Business Plan 2020-2023
- Vision 2025 Corporate Improvement Plan



Delegated Decision List

4 June	Leader	Approved the sale of the former Council smallholdings at Garth and Heylin, Guilsfield.
3 August	Portfolio Holder for Finance, Countryside and Transport	Approved the Treasury Management report for quarter 1.
6 August	Portfolio Holder for Corporate Governance, Housing and Public Protection	Approved the purchase of a property in Brecon to add to the social housing stock.
10 August	Portfolio Holder for Corporate Governance, Housing and Public Protection	Approved the purchase of a property in Brecon to add to the social housing stock.
10 August	Portfolio Holder for Education and Property	Approved the sale of Brecon Market Hall to the original purchaser at a lower price to reflect changes in the property market due to Covid-19.
10 August	Portfolio Holder for Education and Property	Approved the sale of a development site extending to approximately 1 acre from Rogerstone Farm, Glasbury.
12 August	Portfolio Holder for Corporate Governance and Engagement	Approved a report on the council's use of covert surveillance under the Regulation of Investigatory Powers Act 200 (RIPA)
18 August	Portfolio Holder for Adult Social Care	<p>Gave approval for social workers to work with individuals and their carers to support them to utilise different methods of achieving what matters to them while the day centres/services remain closed.</p> <p>For Adult Social Care to undertake an evaluation of the implications of maintaining closed day centres/services in the longer term (recognising that physical distancing will be required for some time), including listening to the views of day centre users, and to return to Cabinet with the findings in order to enable informed decision making about the future of day services across the county.</p>

28 August	Portfolio Holder for Corporate Governance, Housing and Public Protection	Approved the purchase of a property in Rhayader to add to the social housing stock.
8 September	Portfolio Holder for Education and Property	Approved the acceptance of an offer for the former Highways depot and vehicle workshop at Talgarth.

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