

Official-Sensitive-Commercial

SP-19-042

FRAMEWORK AGREEMENT

-between-

THE SCOTTISH MINISTERS (THE “AUTHORITY”)

-and-

VITAL ENERGI UTILITIES LIMITED

AND OTHER FRAMEWORK CONTRACTORS

-relating to the provision of-

Non Domestic Energy Efficiency (NDEE) sub £1 Million Projects Framework 2020-2024

-for the benefit of-

THE SCOTTISH MINISTERS AND OTHER PUBLIC BODIES

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PREAMBLE:

- ONE The Authority requires the supply of Services to Framework Public Bodies;
- TWO On 25 November 2019 the Authority's contract notice relating to the Services was published in the Official Journal of the European Union with reference number OJEU 562200-2019
- THREE On 09 January 2020 the Contractor completed its ESPD;
- FOUR On 28 November 2019 the Authority issued its ITT to potential Contractors (including the Contractor) in respect of the supply of Services;
- FIVE On 09 January 2020 the Contractor submitted its Tender;
- SIX On the basis of the Tender, the Authority has selected the Contractor to supply the Services under this Framework Agreement;
- SEVEN In accordance with the Public Contracts (Scotland) Regulations 2015, this Framework Agreement establishes Standard Terms of Supply under which Call-off Contracts may be entered into for the supply of Services;
- EIGHT This Framework Agreement also includes:
- a Specification setting out the Services that the Contractor has undertaken to provide , including Service Levels setting out particular levels of service that the Contractorhasundertakentomeet;
 - a Pricing Schedule setting out details of the pricing of the Services;
 - Award Procedures prescribing the mandatory procedures for entering into Call-off Contracts; and
 - Management Arrangements for the strategic management of the relationship between the Authority and the Contractor.

SECTION A

1. Definitions and Interpretation

1.1. In this Framework Agreement unless the context otherwise requires the following terms have the meanings given to them below:

“Affiliate” means in relation to a body corporate, any other entity which directly or indirectly controls, is controlled by, or is under direct or indirect control with, that corporate body from time to time;

“Award Procedures” means the procedures for entering into Call-off Contracts set out at Schedule 3.

“Baseline Personnel Security Standard” means the pre-employment controls for all civil servants, members of the Armed Forces, temporary staff and government contractors generally.

“Call-off Contract” means any contract for the Supply of Services between a Framework Public Body and the Contractor entered into in accordance with the Award Procedures and based on the Call-off Contract Terms and Conditions.

“Call-off Contract Terms and Conditions” means the terms and conditions for Call-off Contracts set out in Schedule 5.

“Commencement Date” has the meaning given in clause 4.1.

“Contracting Authority” has the meaning given in regulation 2 of the Public Contracts (Scotland) Regulations 2015;

“Contractor” means Vital Energi Utilities Limited, company number 04050190, Century House, Roman Road, Blackburn, Lancashire, BB1 2LD

“Contractor Sensitive Information” means any information provided by the Contractor to the Framework Authority (disregarding any protective marking or assertion of confidentiality) which:

- is specified as Contractor Sensitive Information in Schedule 7 and has not lost its sensitivity according to the justifications and durations set out in that Schedule; and
- is exempt information pursuant to sections 33(1) or 36, 38 or 39 of FOISA (having regard for that purpose to the public interest there might be in disclosing such information as referred to in section 2(1)(b) of FOISA).

“Control” has the meaning given in section 450 of the Corporation Tax Act 2010.

“Controller”, **“Processor”** and **“Data Subject”** have the meanings given in the Data Protection Laws.

“Data Protection Laws” means any law, statute, subordinate legislation, regulation, order, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements of any regulatory body which relates to the protection of individuals with regard to the processing of personal data to which a Party is subject including the Data Protection Act 2018 and any statutory modification or re-enactment thereof and the GDPR.

“Default” means any breach of the obligations of the Contractor (including but not limited to material breach) or any negligent act, omission or statement of the Contractor in connection with or in relation to this Framework Agreement.

“Environmental Information Regulations” means the Environmental Information (Scotland) Regulations 2004.

“ESPD” means the European Single Procurement Document completed by the Contractor and sent to the Authority on 1st October 2019.

“Exit Management” means the obligations and rights of the Parties to ensure a smooth transition of the Framework from the Contractor to the Framework Authority or any Replacement Contractor as set out in Clause 44 (Exit Management) and Schedule 8 (Exit Management).

“Exit Plan” means any exit management plan developed by the Contractor and approved by the Framework Authority in accordance with Clause 44 (Exit Management).

“Exit Management Date” means each of the following:

- (a) the date of a Termination Notice; and
- (b) if no Termination Notice has been served in relation to this Agreement except for any Partial Termination, the expiry of the later of the Initial Term and any extension of the Agreement agreed in writing.

“FOISA” means the Freedom of Information (Scotland) Act 2002.

“Force Majeure” means any event or occurrence which is outside the reasonable control of the Party concerned and which is not attributable to any act or failure to take preventative action by that Party, including industrial action, fire, flood, violent storm, pestilence, explosion, malicious damage, armed conflict, acts of terrorism, nuclear, biological or chemical warfare, or any other disaster, natural or man-made.

“Framework Agreement” or **“Agreement”** means this framework agreement between the Framework Authority and the Contractor consisting of clauses and 11 Schedules.

“Framework Authority” means the Scottish Ministers.

“Framework Authority Protected Information” means any information provided by the Framework Authority to the Contractor which:

- carries a protective marking such as “Official”, “Secret” or “Top Secret”; or
- is exempt information as set out in Part 2 of FOISA (disregarding for that purpose whether a provision of Part 2 does not confer absolute exemption within the meaning of section 2(2) of FOISA).

Framework Authority Requirements” means the operational requirements, functions and characteristics of the Framework set out in Schedule 1 (Statement of Requirements)

“Framework Public Bodies” means Scottish Ministers (including Agencies), Scottish Non-Departmental Public Bodies, offices in the Scottish Administration which are not ministerial offices, cross-border public authorities within the meaning of section 88(5) of the Scotland Act 1998, the Scotland Office, the Scottish Parliamentary Corporate Body, councils constituted under section 2 of the Local Government etc. (Scotland) Act 1994, the Scottish Fire and Rescue Service, the Scottish Police Authority, Scottish health boards or special health boards, all NHS Scotland, The Integrated Joint Boards established further to the Public Bodies (Joint Working) Act 2014, bodies registered as social landlords under the Housing (Scotland) Act 2001, Student Loans Company Limited, the Forestry Commission, the Commissioner of Northern Lighthouse operating as the Northern Lighthouse Board, Equality and Human Rights Commission, Business Stream Ltd, the Business Gateway National Unit at the Convention of Scottish Local Authorities, Further or Higher Education Institutions being fundable bodies within the meaning of section 6 of the Further and Higher

Education (Scotland) Act 2005, any public body established by or under the Scotland Act 1998 or any Act of the Scottish Parliament, any association of or formed by one or more of the foregoing, bodies financed wholly or mainly by one or more of the foregoing, bodies subject to management supervision by one or more of the foregoing and bodies more than half of the board of directors or members of which, or, in the case of a group of individuals, more than half of those individuals, being appointed by one or more of the foregoing. In addition to the contracting authorities listed, the framework agreement will be available to charities entered on the Scottish Charity Register and voluntary organisations entered on the Membership Database of the Scottish Council for Voluntary Organisations.

"Framework Contractors" means the contractors appointed to deliver the Services under NDEE Lot 2 under £1m:

- Ameresco Limited
- Vital Energi Utilities Limited
- FES Support Services Limited
- Veolia ES (UK) Limited
- Everwarm Limited

"GDPR" means the General Data Protection 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 the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

"Intellectual Property Rights" means patents, inventions, trade marks, service marks, logos, design rights (whether registerable or otherwise), applications for any of the foregoing, copyright, database rights, domain names, trade or business names, moral rights and other similar rights or obligations whether registerable or not in any country (including but not limited to the United Kingdom) and the right to sue for passing off.

"ITT" means the Framework Authority's invitation to tender dated 28 November 2019;

"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 of the European Communities Act 1972;

(c) any applicable guidance, direction, determination or regulations with which the Framework Authority and/or the Contractor is bound to comply;

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

(e) any requirements of any regulatory body,

in each case in force at any time during the period of the Framework Agreement in Scotland.

"Management Arrangements" means the arrangements for the strategic management of the relationship between the Framework Authority and the Contractor, including arrangements for monitoring of the Contractor's compliance with the Specification, the Service Levels, the Award Procedures and the terms of this Framework Agreement, set out in Schedule 4.

"Outgoing Employee" means any employee, agent, consultant and individual contractor of the Contractor, and Affiliate of the Contractor and/or of any sub-contractor who by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 2006 transfer to the Framework Authority or a Replacement Contractor.

"Party" to this Framework Agreement means either of the Framework Authority or the Contractor and does not include any other party who may have the benefit of this Framework Agreement.

"Personal Data" has the meaning given in the Data Protection Laws.

"Pricing Schedule" means the details of the pricing of the Services as at the Commencement Date set out in Schedule 2.

"Processing" has the meaning given in the Data Protection Laws and cognate expressions shall be construed accordingly.

"Replacement Contractor" means any third party contractor appointed by the Framework Authority from time to time in succession to the Contractor.

"Relevant Transfer" means a transfer of Staff to the Framework Authority from the Contractor or a transfer of staff from the Framework Authority to the Contractor governed by the Transfer of Undertakings (Protection of Employment) Regulations 2006.

"Request for Information" means a request for information within the meaning of section 8 of FOISA or the Environmental Information Regulations and any attempted or apparent such request.

"Schedule" means a schedule annexed to this Framework Agreement.

"Services" means the services as are to be supplied by the Contractor to the Framework Public Bodies as set out in the Statement of Requirements and as may be further defined in the course of a mini-competition process for the purposes of a Call-off Contract.

"Service Levels" means the particular levels of service that the Contractor has undertaken to meet under this Agreement, including the levels set out in the Statement of Requirements (Schedule 1) and the Contractor's Specific Framework Proposals (Schedule 10) and as may be further defined in the course of a mini-competition process for the purposes of a Call-off Contract.

"Specification" means the specification of the Services that the Contractor has undertaken to provide as set out in the Statement of Requirements (Schedule 1) and as may be further defined in the course of a mini-competition process for the purposes of a Call-off Contract.

"Staff" means all employees, agents, consultants and individual contractors of the Contractor, and Affiliate of the Contractor and/or of any sub-contractor.

"Supervisory Authority" means the UK Information Commissioner's Office (or its successor authority) and any authority within the meaning given in the Data Protection Laws;

"Tender" means the tender submitted by the Contractor to the Framework Authority in response to the ITT dated 28 November 2019;

"Termination Notice" means a notice to terminate this Framework Agreement or part of the Framework either immediately or at a date specified in the notice.

"Transparency Information" means the Transparency Reports and the content of this Framework Agreement.

“Transparency Reports” means a report in accordance with Schedule 7 Part 1 (Transparency Reports) containing the contract information as set out in the table for that Part for publication by the Authority in the interests of transparency.

“Working Day” means a day other than a Saturday, Sunday or bank holiday in Scotland, within the meaning of the Banking and Financial Dealings Act 1971.

“Working Hour” means an hour between 0900 hours and 1700 hours on a Working Day.

1.2. The interpretation and construction of this Framework Agreement is subject to the following provisions:

1.2.1. words importing the singular meaning include, where the context so admits, the plural and vice versa;

1.2.2. words importing the masculine include the feminine and neuter;

1.2.3. reference to a clause is a reference to the whole of that clause unless stated otherwise;

1.2.4. references to any statute, enactment, order, regulation or other similar instrument are construed as a reference to the statute, enactment, order, regulation or instrument as amended by any subsequent enactment, modification, order, regulation or instrument or re-enacted;

1.2.5. references to any person include natural persons and partnerships, firms and other incorporated bodies and all other legal persons of whatever kind and however constituted and their successors and permitted assignees or transferees;

1.2.6. the words “include”, “includes” and “including” are to be construed as if they were immediately followed by the words “without limitation”; and

1.2.7. headings are included in this Framework Agreement for ease of reference only and do not affect the interpretation or construction of this Framework Agreement.

2. Condition Precedent: Requirement for Parent Company Guarantee

It shall be a condition of this Framework Agreement that, if required by the Authority, the Contractor shall deliver a validly executed parent company guarantee in the form set out in Schedule 6 to this Framework Agreement. The rights and obligations of the Parties shall have no force or effect unless the parent company guarantee has been properly executed and delivered to the Authority. The parties acknowledge that if this condition has not been fulfilled any performance of this Framework Agreement by the Contractor shall be at the risk of the Contractor and the Authority shall not be liable for and the Contractor irrevocably waives any entitlement to payment of any fees, expenses or other payments in relation to such performance. Where the Contractor has failed to fulfil this condition within 14 days of the date of last subscription of the Framework Agreement the Authority shall have the right to terminate the Framework Agreement by notice in writing to the Contractor.

3. Nature of this Agreement

3.1. This Agreement is a framework agreement within the meaning of regulation 2(1) of the Public Contracts (Scotland) Regulations 2015. Call-off Contracts are public contracts within the meaning of that regulation.

- 3.2. This Agreement is a multi-user framework agreement and the public bodies that are party to it are the Framework Public Bodies. No other public bodies are party to the Framework Agreement.
- 3.3. Save to the extent specifically provided for in this Agreement, the Contractor acknowledges that it is not the exclusive supplier of the Services to Framework Public Bodies and as such no guarantee of work or volume of work has been granted by the Authority or any Framework Public Body.
- 3.4. The Contractor acknowledges that the Framework Public Bodies are separate legal persons and as such the Authority has no liability in relation to the performance or non-performance of other Framework Public Bodies' obligations under this Framework Agreement or any Call-off Contracts.

4. Period

- 4.1. The period of this Framework Agreement is from and including 01 October 2020 (the "Commencement Date") to and including 30 September 2023 unless it is terminated earlier or extended under Clause 4.2.
- 4.2. The Authority may, by giving notice to the Contractor, extend the period of the Framework Agreement to a date falling no later than four years from the Commencement Date. Subject to that constraint, the Authority may extend the period of the Framework Agreement on more than one occasion.
- 4.3. The period of Call-off Contracts is addressed in the Standard Terms of Supply. The period of a Call-off Contract may continue notwithstanding that the Framework Agreement has expired or terminated.

5. Break

The Authority may terminate the Contractor's interest in the Framework Agreement at any time by giving not less than 3 months' notice to the Contractor.

6. Specification and Service Levels

The Specification sets out the Services that the Contractor has undertaken to provide. The Specification includes Service Levels setting out particular levels of service that the Contractor has undertaken to meet.

7. Price

- 7.1. The Pricing Schedule sets out details of the pricing of the Services as at the Commencement Date.
- 7.2. The prices in the Pricing Schedule may be varied in accordance with the arrangements set out in the Pricing Schedule (Schedule 2).
- 7.3. Accordingly, the Contractor may not unilaterally increase the prices in the Pricing Schedule. But nothing in this Framework Agreement prevents the Contractor from improving on the prices in the Pricing Schedule for the purposes of a Call-off Contract.

8. Award Procedures

- 8.1. The Award Procedures may be invoked by the Authority **or** any Framework Public Body and Call-off Contracts may be entered into at any time during the period of the Framework Agreement.
- 8.2. But the Award Procedures may not be invoked and Call-off Contracts may not be entered into with the Contractor if:
- 8.2.1. the period of the Framework Agreement has expired;
 - 8.2.2. the Contractor's interest in the Framework Agreement has been terminated; or
 - 8.2.3. the Contractor's appointment to provide Services to the Authority **or** Framework Public Bodies has been suspended in accordance with clause 9.2 (Management Arrangements).
- 8.3. The the Authority **or** Framework Public Bodies and the Contractor must comply with the Award Procedures and must establish each Call-off Contract without amendment to the Standard Terms of Supply.
- 8.4. The Contractor must maintain the capacity to enter into and perform Call-off Contracts throughout the period of the Framework Agreement.

9. Management Arrangements

- 9.1. The Management Arrangements set out the arrangements for the strategic management of the relationship between the Authority and the Contractor, including arrangements for monitoring of the Contractor's compliance with the Specification, the Service Levels, the Award Procedures and the terms of this Framework Agreement.
- 9.2. The Authority may by notice to the Contractor suspend the Contractor's appointment to provide Services to the Authority **or** Framework Public Bodies for a notified period of time:
- 9.2.1. if the Authority becomes entitled to terminate this Framework Agreement under clause 42 (Termination Rights) or 43 (Termination on Insolvency or Change of Control); or
 - 9.2.2. in any other circumstance provided for in the Management Arrangements.
- 9.3. Suspension under clause 9.2 shall terminate upon cessation of all of any circumstances referred to in subclauses 9.2.1 and 9.2.2.
- 9.4. The Contractor must continue to perform existing Call-off Contracts during any period of suspension under clause 9.2.

10. Official Secrets Acts

The Contractor undertakes to abide and procure that the Contractor's employees abide by the provisions of the Official Secrets Acts 1911 to 1989.

SECTION B

11. Contractor's Status

At all times during the term of this Framework Agreement the Contractor is an independent Contractor and nothing in this Framework Agreement establishes a contract of employment, a relationship of agency or partnership or a joint venture between the Parties. Accordingly, neither Party is authorised to act in the name of, or on behalf of, or otherwise bind the other Party save as expressly permitted by the terms of this Framework Agreement.

12. Notices

12.1. Any notice or other communication which is to be given by a Party to the other under this Framework Agreement must be:

12.1.1. given in writing;

12.1.2. addressed in accordance with clause 12.3; and

12.1.3. sent by letter (delivered by hand, first class post or by recorded delivery or special delivery), fax or e-mail.

12.2. Provided the relevant communication is not returned or rejected as undelivered, the notice or communication is deemed to have been given:

12.2.1. 2 Working Days after the day on which the letter was posted; or

12.2.2. 4 Working Hours, in the case of fax or e-mail.

12.3. For the purposes of this clause, the address of each Party is:

12.3.1. For the Authority:
Scottish Government
Area 3A South, Victoria Quay
Edinburgh EH6 6QQ
For the attention of: REDACTED
Tel: REDACTED
E-mail: REDACTED

12.3.2. For the Contractor:
Vital Energi Utilities Limited
Office G8 Duart House, 3 Finch Way
Strathclyde Business Park
Bellshill
Glasgow
ML4 3PR
For the attention of REDACTED
Tel: REDACTED
E Mail: REDACTED

12.4. Either Party may change its address details by serving a notice in accordance with this clause.

13. Recovery of Sums Due

Wherever under this Framework Agreement any sum of money is recoverable from or payable by the Contractor to the Authority, the Authority may deduct that sum from any sum due to the Contractor whether under a Call-off Contract or otherwise, provided that the Authority:

- (a) provides advance notice to the Contractor and explains the reason for such set-off; and
- (b) provides evidence of any such set-off.

14. Data Protection

14.1. The Contractor will, in conjunction with the Authority and in its own right and in respect of the Services, ensure it will be compliant with the Data Protection Laws.

14.2. Both Parties agree to negotiate in good faith any such amendments to this Framework Agreement that may be required to ensure that both Parties meet all their obligations under Data Protection Laws. The provisions of this clause 14 are without prejudice to any obligations and duties imposed directly on the Parties under Data Protection Laws and the Parties agree to comply with those obligations and duties.

14.3. The Parties acknowledge that the Contractor may Process Personal Data in delivery of Services under a Call-off Contract under this Framework Agreement. For the purposes of any such Processing, Parties agree that the Contractor acts as the Data Processor and the Authority acts as the Data Controller.

14.4. The Contractor will provide the Authority with the contact details of its data protection officer or other designated individual with responsibility for data protection and privacy to act as the point of contact for the purpose of observing its obligations under the Data Protection Laws.

14.5 To comply with section 31(3) of the Public Services Reform (Scotland) Act 2010, the Authority publishes an annual statement of all payments over £25,000. In addition, in line with openness and transparency, the Scottish Government publishes a monthly report of all payments over £25,000. The Contractor should note that where a payment is made in excess of £25,000 there will be disclosure (in the form of the name of the payee, the date of the payment, the subject matter and the amount of payment) in the both the monthly report and the annual Public Services Reform (Scotland) Act 2010 statement.

15. Transparency and Freedom of Information

15.1 The Contractor acknowledges that the Authority is subject to the requirements of FOISA and the Environmental Information Regulations. The Contractor shall:

- (a) provide all necessary assistance and cooperation as the Authority may reasonably request to enable the Authority to comply with its obligations under FOISA and Environmental Information Regulations;
- (b) transfer to the Authority all Requests for Information relating to this Agreement that the Contractor receives as soon as practicable and in any event within 2 Working Days of receipt;
- (c) provide the Authority with a copy of all information held on behalf of the Authority which is requested in a Request For Information and which is in the Contractor's possession or control. The information must be provided within 5 Working Days (or such other period as the Authority may reasonably specify) in the form that the Authority requires.

- (d) not respond directly to a Request For Information addressed to the Authority unless authorised in writing to do so by the Authority.
- 15.2 If the Request for Information appears to be directed to information held by the Authority, the Contractor must promptly inform the applicant in writing that the Request for Information can be directed to the Authority.
- 15.3 If the Authority receives a Request for Information concerning the Framework Agreement, the Authority is responsible for determining at its absolute discretion whether the information requested is to be disclosed to the applicant or whether the information requested is exempt from disclosure in accordance with FOISA or the Environmental Information Regulations.
- 15.4 The Contractor acknowledges that the Authority may, acting in accordance with the Authority's Code of Practice on the Discharge of Functions of Public Authorities issued under section 60(5) of FOISA (as may be issued and revised from time to time), be obliged under FOISA or the Environmental Information Regulations to disclose information requested concerning the Contractor or the Framework Agreement:
- 15.4.1 in certain circumstances without consulting the Contractor, or
- 15.4.2 following consultation with the Contractor and having taken its views into account.
- 15.5 Where 15.4.1 applies the Authority must take reasonable steps, if practicable, to give the Contractor advance notice of the fact of disclosure or, failing that, draw the fact of disclosure to the attention of the Contractor after such disclosure to the extent that it is permissible and reasonably practical for it to do.
- 15.6 Where a Request for Information concerns Contractor Sensitive Information specified in Schedule 7 (having regard to the justifications and durations set out there), the Authority must take reasonable steps, where practicable, to consult with the Contractor before disclosing it pursuant to a Request for Information.
- 15.7 The Contractor acknowledges that Transparency Reports and the content of this Agreement including any Amendments, agreed from time to time, (together the "Transparency Information") are not Contractor Sensitive Information. However, if the Authority believes that publication of any element of the Transparency Information should be treated as Contractor Sensitive Information the Authority may, in its discretion exclude such information from publication.
- 15.8 Notwithstanding any other provision of this Agreement, the Contractor hereby gives consent for the Authority to publish to the general public, the Transparency Information in its entirety. The Authority shall, prior to publication, consult with the Contractor on the manner and format of publication and to inform its decision regarding any redactions but shall have the final decision in its absolute discretion.
- 15.9 The Contractor shall assist and co-operate with the Authority to enable the Authority to publish the Transparency Information including the preparation of Transparency Reports.
- 15.10 The Authority shall publish the Transparency Information in a format that assists the general public in understanding the relevance and completeness of the information being published to ensure the public obtain a fair view on how the Agreement is being performed, having regard to the context of the wider commercial relationship with the Contractor.
- 15.11 The Contractor agrees that any further Information it holds that is not included in the Transparency Reports but is reasonably relevant to or that arises from the provision of the Services shall be provided to the Authority upon request, unless the cost of doing so would exceed the appropriate limit prescribed under section 12 of FOISA. The Authority may disclose such information under FOISA and the EIRs and may (except for Commercially Sensitive Information, Confidential Information,(subject to clause 17.3.3) publish such Information. The Contractor shall provide to the Authority within 5 working days (or such other

period as the Authority may reasonably specify) any such Information requested by the Authority.

16. Authority Protected Information

16.1. The Contractor must:

16.1.1. treat all Authority Protected Information as confidential and safeguard it accordingly, implementing appropriate technical and organisational measures to protect Authority Protected Information against disclosure;

16.1.2. only use the Authority Protected Information for the purposes of performing its obligations under the Framework Agreement;

16.1.3. only disclose the Authority Protected Information to such Contractor Representatives that are directly involved in the performance of the Framework Agreement and need to know the information; and

16.1.4. not disclose any Authority Protected Information without the prior written consent of the Authority.

16.2. The Contractor must immediately notify the Authority of any breach of security concerning the Authority Protected Information. The Contractor must fully co-operate with the Authority in any investigation that the Authority considers necessary to undertake as a result of any such breach of security.

16.3. Clause 16 does not apply to the extent that:

16.3.1. disclosure is required by law or by order of any competent court or tribunal;

16.3.2. information is in the possession of the Contractor without restriction as to its disclosure prior to its disclosure by the Authority;

16.3.3. information is obtained from a third party (who lawfully acquired it) without restriction as to its disclosure;

16.3.4. information is already in the public domain at the time of disclosure otherwise than by a breach of the Framework Agreement; or

16.3.5. information is independently developed without access to the Authority Protected Information.

16.4 Breach of this clause or the Official Secrets Acts 1911 to 1989 by the Contractor is a material breach for the purposes of clause 42 (Termination Rights).

17. Contractor Sensitive Information

17.1. The Authority must:

17.1.1. treat all Contractor Sensitive Information as confidential and safeguard it accordingly; and

17.1.2. not disclose any Contractor Sensitive Information to any other person without the prior written consent of the Contractor.

17.2. Clause 17.1 does not apply to the extent that:

17.2.1. disclosure is required by law or by order of any competent court or tribunal;

- 17.2.2. information is in the possession of the Authority without restriction as to its disclosure prior to its disclosure by the Contractor;
 - 17.2.3. information is obtained from a third party (who lawfully acquired it) without restriction as to its disclosure;
 - 17.2.4. information is already in the public domain at the time of disclosure otherwise than by a breach of the Framework Agreement; or
 - 17.2.5. information is independently developed without access to the Contractor Sensitive Information.
- 17.3. Nothing in this Framework Agreement prevents the Authority from disclosing any Contractor Sensitive Information or any other information concerning the Contractor or the Framework Agreement:
- 17.3.1. pursuant to a Request for Information concerning the information (see clause 15 (Transparency and Freedom of Information));
 - 17.3.2. in accordance with the Authority's publication scheme (within the meaning of section 23 of FOISA) as reviewed from time to time;
 - 17.3.3. in accordance with the requirements of Part 3 of the Public Services Reform (Scotland) Act 2010;
 - 17.3.4. in accordance with any future policies of the Authority concerning the routine disclosure of government information in the interests of transparency;
 - 17.3.5. to any consultant, contractor or other person engaged by the Authority, for example to conduct a gateway review;
 - 17.3.6. in response to a Parliamentary Question from a Member of the Scottish Parliament, a Member of the United Kingdom Parliament or any other department, office or agency of Her Majesty's Government in Scotland or the United Kingdom, and their servants or agents, when disclosing such information to either the Scottish Parliament or the United Kingdom Parliament it is recognised and agreed by both parties that the Authority shall if the Authority sees fit disclose such information but is unable to impose any restrictions upon the information that the Authority provides to Members of the Scottish Parliament, or Members of the United Kingdom Parliament;
 - 17.3.7. in response to any inquiry of the European Commission concerning the Framework Agreement; or
 - 17.3.8. for the purpose of any examination by any auditors of the Authority (including Audit Scotland, the Auditor General for Scotland and the Scottish Parliament) of the economy, efficiency and effectiveness with which the Authority has used its resources.
- 17.4. The Contractor consents to the publication of the Framework Agreement by the Authority, subject to such redactions as the Authority may decide to make. The Authority may consult with the Contractor to inform its decisions concerning redaction (for example to exclude any Contractor Sensitive Information) but any decisions taken by the Authority are final and conclusive.

18. Audit

- 18.1. The Contractor must retain and maintain until 5 years after the end of the Framework Agreement period full and accurate records of the Framework Agreement including the Orders placed, the Services provided and payments made and reimbursed under it.
- 18.2. The Contractor must on request, and without any charge to the Authority, afford the Authority, or the Authority's representatives, such access to those records as may reasonably be requested by the Authority in connection with the Framework Agreement.

19. Publicity

The Contractor must not make any press announcement or otherwise publicise the Framework Agreement in any way, except with the written consent of the Authority.

SECTION C

20. Key Individuals

- 20.1. The Contractor acknowledges that the Key Individuals are essential to the proper provision of the Services to the Authority.
- 20.2. The Key Individuals must not be released from providing the Services without the approval of the Authority, except by reason of long-term sickness, maternity, paternity, adoption or parental leave, termination of employment or equivalent extenuating circumstances. Where such extenuating circumstances arise or are foreseeable, the Contractor must immediately give notice of that fact to the Authority.
- 20.3. The Contractor may propose a replacement to a Key Individual (and must do so when a Key Individual is to be released from providing the Services), in which case:
- 20.3.1. appropriate arrangements must be made to minimise any adverse impact on the Framework Agreement which could be caused by the change in Key Individuals (including, wherever possible, a transfer period of sufficient duration to allow for the transfer of know-how and skills); and
- 20.3.2. the replacement must be of at least equal status and of equivalent qualifications, experience, training and skills to the Key Individual being replaced and must be fully competent to carry out the responsibilities of that person in relation to the Services.
- 20.4. Any proposed replacement to a Key Individual is subject to the approval of the Authority. Subject to the Contractor's compliance with this clause, the Authority must not unreasonably withhold such approval.

21. Offers of Employment

- 21.1. For the duration of the Framework Agreement and for a period of 12 months thereafter the Contractor must not employ or offer employment to any of the Authority's employees who have been associated with the Framework Agreement and/or the contract management of the Framework Agreement without the Authority's prior approval.
- 21.2. This clause does not prevent the Contractor from employing or offering employment to any person who has applied for employment in response to an advertisement placed in the normal course of business and not placed with the objective of soliciting the Authority's employees.

22. Staff transfer at commencement

- 22.1. The Parties agree that the commencement of the provision of the Services by the Contractor does not involve a Relevant Transfer.

- 22.2. The Parties agree that the commencement of the provision of the Services by the Contractor may constitute a Relevant Transfer in respect of the Incoming Employees.
- 22.3. The Contractor is responsible for all emoluments and outgoings in respect of the Incoming Employees (including, without limitation, all wages, bonuses, commission, premiums, subscriptions, pay as you earn and national insurance contributions and pension contributions) which are attributable in whole or in part to the period from the date of the Relevant Transfer, including bonuses or commission which are payable on or before the date of the Relevant Transfer but attributable in whole or in part to the period from the date of the Relevant Transfer.
- 22.4. The Contractor indemnifies the transferor (as defined in TUPE) against all Employee Liabilities which the transferor may incur in respect of the emoluments and outgoings referred to in clause 22.3.

23. Information about Employees

- 23.1. The Authority may at any time by notice require the Contractor to disclose such information as the Authority may require to the Authority or at the direction of the Authority to any prospective Replacement Contractor relating to the manner in which the Services are organised or information about any employee who is wholly or mainly assigned to carrying out activities in provision of the Services whether employed by the Contractor or Affiliate of the Contractor or a sub-contractor ("Assigned Employee"). The information required by the Authority about Assigned Employees may include Employee Liability Information and/or Staffing Information.
- 23.2. The Contractor must disclose by notice all such information as is required by the Authority under clause 23.1, within such reasonable period specified by the Authority. The Contractor acknowledges that the Data Protection Laws do not prevent the disclosure of anonymised data that is not Personal Data.
- 23.3. The Contractor warrants for the benefit of the Authority and any Replacement Contractor that all information provided pursuant to this clause shall be true and accurate in all material respects at the time of providing the information. The Authority may at any time require the Contractor to confirm whether information provided under this clause remains true and accurate in all material respects or ask it to provide updated information.
- 23.4. The Authority shall be permitted to use and disclose the information provided by the Contractor under this clause for the purpose of informing any prospective Replacement Contractor.

24. Staff transfer on expiry or termination

- 24.1. The Parties agree that the ceasing of the provision of the Services by the Contractor does not involve a Relevant Transfer.
- 24.2. The Parties agree that the ceasing of the provision of the Services by the Contractor may constitute a Relevant Transfer in respect of the Outgoing Employees.
- 24.3. The Contractor shall comply and shall procure that each Affiliate of the Contractor and each sub-contractor shall comply with all of its obligations under TUPE and shall perform and discharge and procure that each Affiliate of the Contractor and each sub-contractor shall perform and discharge all its obligations in respect of all the Outgoing Employees arising in respect of the period up to (and including) the date of the Relevant Transfer.
- 24.4. The Contractor indemnifies the Authority and any Replacement Contractor against any and all Employee Liabilities which the Authority or any Replacement Contractor may suffer as a result of or in connection with:
- 24.4.1. the provision of information pursuant to clause 24;

- 24.4.2. any claim or demand by any Outgoing Employee (whether in contract, delict, under statute or otherwise) and whether made before, on or after the date of the Relevant Transfer arising directly or indirectly from any act, fault or omission of the Contractor or any Affiliate of the Contractor or any sub-contractor in respect of any Outgoing Employee on or before the date of the Relevant Transfer;
 - 24.4.3. any failure by the Contractor or any Affiliate of the Contractor or any sub-contractor to comply with its obligations under regulations 13 or 14 of TUPE or any award of compensation under regulation 15 of TUPE save where such failure arises from the failure of the Authority or any replacement Contractor to comply with its obligations under regulation 13 of TUPE;
 - 24.4.4. any claim (including any individual employee entitlement under or consequent on such a claim) by any trade union or other body or person representing any Outgoing Employees arising from or connected with any failure by the Contractor or any Affiliate of the Contractor or any sub-contractor to comply with any legal obligation to such trade union, body or person;
 - 24.4.5. any act or omission of the Contractor or any Affiliate of the Contractor or any sub-contractor whether occurring before, on or after the date of the Relevant Transfer or any other matter, event or circumstance occurring or having its origin on or before the date of the Relevant Transfer;
 - 24.4.6. the breach or non-observance by the Contractor or any Affiliate of the Contractor or any sub-contractor occurring on or before the date of the Relevant Transfer of any collective agreement applicable to the Outgoing Employees or any custom or practice in respect of any Outgoing Employees that a Replacement Contractor is contractually obliged to honour;
 - 24.4.7. any claim made by or in respect of any person employed by the Contractor or any Affiliate of the Contractor or any sub-contractor other than an Outgoing Employee for whom it is alleged the Authority or a Replacement Contractor may be liable by virtue of this Framework Agreement or TUPE.
- 24.5. The Contractor is responsible for all emoluments and outgoings in respect of the Outgoing Employees (including, without limitation, all wages, bonuses, commission, premiums, subscriptions, pay as you earn and national insurance contributions and pension contributions) which are attributable in whole or in part to the period up to and including the date of the Relevant Transfer (including bonuses or commission which are payable after the date of the Relevant Transfer but attributable in whole or in part to the period on or before the date of the Relevant Transfer).
- 24.6. The Contractor indemnifies the Authority and any Replacement Contractor against all actions, suits, claims, demands, losses, charges, damages, costs and expenses and any other liabilities which the Authority or replacement Contractor may incur in respect of the emoluments and outgoings referred to in clause 24.5.
- 24.7. The Contractor shall and shall procure that each Affiliate of the Contractor and each sub-contractor shall promptly provide to the Authority and any Replacement Contractor in writing such information as is necessary to enable the Authority and/or the Replacement Contractor to carry out their respective duties under regulation 13 of TUPE as the case may be.
- 24.8. The Contractor shall provide and shall procure that each Affiliate of the Contractor and each sub-contractor shall provide all reasonable co-operation and assistance to the Authority and any Replacement Contractor to ensure the smooth transfer of the Outgoing Employees including without prejudice to the foregoing generality providing sufficient information in advance of the date of the Relevant Transfer to ensure that all necessary payroll arrangements can be made to enable the Outgoing Employees to be paid as appropriate.

- 24.9. The Contractor warrants to the Authority that during the period of 6 months immediately prior to the expiry of the Framework Agreement it will not (and will ensure that any Affiliate of the Contractor and any sub-contractor will not) without the prior consent of the Authority:
- 24.9.1 increase the total employment costs of the Assigned Employees in any material way;
 - 24.9.2 amend or vary (or purport or promise to amend or vary) the terms and conditions of employment or engagement (including for the avoidance of doubt pay) of any Assigned Employee other than where such amendment or variation has previously been agreed in the normal course of business and where any such amendment or variation is not in any way related to the transfer of the Services;
 - 24.9.3 terminate or give notice to terminate the employment or engagement of any Assigned Employee other than in circumstances in which the termination is for reasons of misconduct or lack of capability;
 - 24.9.4 transfer away, remove, reduce or vary the involvement of any of the Assigned Employees from or in the provision of the Services other than where such transfer or removal:
 - 24.9.1.1. was planned as part of the individual's career development;
 - 24.9.1.2. takes place in the normal course of business; and
 - 24.9.1.3. will not have any adverse impact upon the delivery of the Services by the Contractor provided that any such transfer, removal, reduction or variation is not in any way related to the transfer of the Services.
 - 24.9.5 recruit or bring in any new or additional individuals to provide the Services who were not already involved in providing the Services 6 months prior to the expiry of the Framework Agreement.

25. Security

- 25.1 The Contractor must comply with the Authority's policies concerning Baseline Personnel Security Standard clearance and such modifications to those policies or replacement policies as are notified to the Contractor from time to time.
- 25.2 The Contractor must notify the Authority of any matter or other change in circumstances which might adversely affect future Baseline Personnel Security Standard clearance.

SECTION D

26. Parties' pre-existing Intellectual Property Rights

Except as expressly provided for in the Framework Agreement, neither Party acquires any interest in or license to use the other Party's Intellectual Property Rights as they subsist at the Commencement Date or as developed independently of the Framework Agreement.

27. Specially Created Intellectual Property Rights

- 27.1. All Intellectual Property Rights and any reports, guidance, specification, instructions, toolkits, plans, data, drawings, databases, patents, patterns, models, designs or other material prepared by or for the Contractor on behalf of the Framework Authority for use, or intended use, in relation to the performance by the Contractor of its obligations under the Framework Agreement belong to and shall vest in the Framework Authority.

- 27.2. The Contractor assigns to the Framework Authority, with full title guarantee, all Intellectual Property Rights which may subsist in the materials referred to in clause **Error! Reference source not found.** This assignation takes effect on the Commencement Date or as an assignation of future rights that will take effect immediately on the coming into existence of the Intellectual Property Rights produced by the Contractor. The Contractor must execute all documentation necessary to effect this assignation and without further cost to the Framework Authority.

28. Claims relating to Intellectual Property Rights

- 28.1. The Contractor must not infringe any Intellectual Property Rights of any third party in performing its obligations under the Framework Agreement and must ensure that the provision of the Services and the use or possession of the Deliverables does not infringe such Intellectual Property Rights.
- 28.2. The Contractor must not without the prior written consent of the Framework Authority make any admissions which may be prejudicial to the defence or settlement of any claim to which this clause applies.

29. Assignation and Change of Control - Contractor

- 29.1. The Contractor may not assign its interest in the Framework Agreement without the prior written consent of the Framework Authority.
- 29.2. The Contractor must notify the Framework Authority:
- 29.2.1. whenever it proposes to undergo a change of Control, or a change of control is likely to occur;
 - 29.2.2. immediately following a change of Control that has occurred; and
 - 29.2.3. where it proposes to make any change to its sub-contractor named by the Contractor in its tender.

30. Assignation and Change of Control – Framework Authority

- 30.1. Subject to clause 30.3, the Framework Authority may assign, novate or otherwise dispose of its rights and obligations under the Framework Agreement or any part thereof to:
- (a) any Contracting Authority; or
 - (b) any other body established by the Crown or under statute in order substantially to perform any of the functions that had previously been performed by the Framework Authority; or
 - (c) any private sector body which substantially performs the functions of the Framework Authority,
- provided that any such assignation, novation or other disposal shall not increase the burden of the Contractor's obligations under the Framework Agreement.
- 30.2. Any change in the legal status of the Framework Authority such that it ceases to be a Contracting Authority shall not, subject to clause 30.3, affect the validity of the Framework Agreement. In such circumstances, the Framework Agreement shall bind and inure to the benefit of any successor body to the Framework Authority.
- 30.3. If the rights and obligations under the Framework Agreement are assigned, novated or otherwise disposed of pursuant to clause 30.1 to a body which is not a Contracting Authority or if there is a change in the legal status of the Framework Authority such that it ceases to

be a Contracting Authority (in the remainder of this clause both such bodies being referred to as the “**Transferee**”):

- (a) the rights of termination of the Framework Authority in clauses 42 (Termination Rights) and 43 (Termination on Insolvency and Change of Control) shall be available to the Contractor in the event of respectively, the bankruptcy or insolvency, or Default of the Transferee; and
- (b) the Transferee shall only be able to assign, novate or otherwise dispose of its rights and obligations under the Framework Agreement or any part thereof with the prior consent in writing of the Contractor.

30.4. The Framework Authority may disclose to any Transferee any Confidential Information of the Contractor which relates to the performance of the Contractor’s obligations under the Framework Agreement. In such circumstances the Framework Authority shall authorise the Transferee to use such Confidential Information only for purposes relating to the performance of the Contractor’s obligations under the Framework Agreement and for no other purpose and shall take all reasonable steps to ensure that the Transferee gives a confidentiality undertaking in relation to such Confidential Information.

31. Sub-Contracting

31.1. The Contractor may not sub-contract its obligations under the Framework Agreement without the prior written consent of the Framework Authority. Sub-contracting of any part of the Framework Agreement shall not relieve the Contractor of any obligation or duty attributable to the Contractor under the Framework Agreement. The Contractor shall be responsible for the acts and omissions of its sub-contractors as though they are its own.

31.2. The Contractor shall include in every sub-contract:

31.2.1. a right for the Contractor to terminate that sub-contract if the relevant sub-contractor fails to comply in the performance of its contract with legal obligations in the fields of environmental, social or employment law or if any of the termination events (involving substantial modification of the Framework Agreement, contract award despite the existence of exclusion grounds or a serious infringement of EU legal obligations) specified in Clause 42.4 occur; and

31.2.2. a requirement that the sub-contractor includes a provision having the same effect as 31.4.1 in any sub-contract which it awards.

In this Clause 31.2, ‘sub-contract’ means any contract between two or more contractors, at any stage of remoteness from the Authority in a sub-contracting chain, made wholly or substantially for the purpose of performing (or contributing to the performance of) the whole or any part of this Framework Agreement.

32. Amendment

32.1. The Framework Agreement may be amended only by the written agreement of both Parties. Accordingly, the Contractor may not unilaterally amend the Framework Agreement.

SECTION E

33. Warranties and Representations

The Contractor warrants and represents that:

33.1.1. it has full capacity and authority and all necessary consents (including where its procedures so require, the consent of its parent company) to enter into and perform its

obligations under the Framework Agreement and that the Framework Agreement is executed by a duly authorised representative of the Contractor;

- 33.1.2. in entering the Framework Agreement it has not committed any offence under the Bribery Act 2010 or of fraud or uttering at common law or any other kind referred to in the Public Contracts (Scotland) Regulations 2015;
- 33.1.3. it has not committed any breach of the Employment Relations 1999 Act (Blacklists) Regulations 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992, or committed any breach of the Data Protection Laws by unlawfully processing personal data in connection with any blacklisting activities;
- 33.1.4. as at the Commencement Date, all information contained in the ESPD and Tender remains true, accurate and not misleading, save as may have been specifically disclosed in writing to the Authority prior to execution of the Framework Agreement;
- 33.1.5. no claim is being asserted and no litigation, alternative dispute resolution procedure or administrative proceeding is presently in progress or, to the best of its knowledge and belief, 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 the Framework Agreement;
- 33.1.6. it is not subject to any contractual obligation, compliance with which is likely to have a material adverse effect on its ability to perform its obligations under the Framework Agreement;
- 33.1.7. no proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge, are threatened) for the winding up of the Contractor or for its dissolution or for the appointment of a receiver, administrative receiver, liquidator, manager, administrator or similar officer in relation to any of the Contractor's assets or revenue; and
- 33.1.8. as at the Commencement Date, all insurances that must be effected under the Standard Terms of Supply have been effected.

34. Indemnity

Without prejudice to any rights or remedies of the Authority, the Contractor will indemnify the Authority against any and all claims, proceedings, actions, damages, costs, expenses and any other loss and liabilities which may arise out of, or in consequence of, any Default of the Contractor, its agents and employees.

35. Limitation of Liability

- 35.1. Neither Party is liable to the other Party under the Framework Agreement for any:
 - 35.1.1. loss of profits, business, revenue or goodwill; or
 - 35.1.2. indirect or consequential loss or damage.
- 35.2. But clause 35.1 does not exclude any liability of the Contractor for additional operational, administrative costs or expenses or wasted expenditure resulting from the Default of the Contractor.
- 35.3. The liability of either Party under the Framework Agreement for Defaults is limited to £3,000,000.
- 35.4. But neither Party excludes or limits liability to the other Party for:
 - 35.4.1. death or personal injury caused by its negligence;

35.4.2. misrepresentation;

35.4.3. any breach of any obligations implied by section 12 of the Sale of Goods Act 1979 or sections 2 or 11B of the Supply of Goods and Services Act 1982.

36. Insurance

36.1. The Contractor must effect and maintain with a reputable insurance company:

36.1.1. public liability insurance in the sum of not less than **ten million pounds sterling (£10,000,000) for each and every claim;**

36.1.2. professional indemnity insurance in the sum of not less than **ten million pounds sterling (£10,000,000) for each and every claim** and

36.1.3. employer's liability insurance in the sum of not less than **ten million pounds sterling (£10,000,000) for each and every claim** and.

36.1.4. product liability insurance in the sum of not less than **ten million pounds sterling (£10,000,000) for each and every claim** and.

36.1.5. Third Party Motor Vehicle Liability Insurance in the sum of not less than **5 million pounds sterling (£5,000,000)** in respect of each claim, without limit to the number of claims.

36.2. Such insurance must be maintained for the duration of the Framework Agreement and for a minimum of 5 years following the expiry or termination of the Framework Agreement.

36.3. The Contractor must give the Authority, on request, a broker's verification of insurance to demonstrate that the appropriate cover is in place.

37. Dispute Resolution

37.1. The Parties must attempt in good faith to resolve any dispute or difference between them arising out of or in connection with the Framework Agreement, including any question regarding its existence, validity or termination, in accordance with the Management Arrangements.

37.2. Any dispute or difference arising out of or in connection with this Framework Agreement, including any question regarding its existence, validity or termination, which cannot be resolved in accordance with the Management Arrangements, shall be determined by the appointment of a single arbitrator to be agreed between the Parties, or failing agreement within fourteen days after either Party has given to the other a written request to concur in the appointment of an arbitrator, by an arbitrator to be appointed by the Scottish Arbitration Centre on the written application of either Party. The seat of arbitration shall be Scotland. The language used in the arbitral proceedings shall be English.

37.3. Any arbitration under clause 37.2 is subject to the Arbitration (Scotland) Act 2010.

38. Severability

If any provision of the Framework Agreement is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision is severed and the remainder of the provisions of the Framework Agreement continue in full force and effect as if the Framework Agreement had been executed with the invalid, illegal or unenforceable provision eliminated.

39. Waiver and Cumulative Remedies

- 39.1. Any failure of either Party to insist upon strict performance of any provision of the Framework Agreement, or the failure of either Party to exercise, or any delay in exercising, any right or remedy does not constitute a waiver of that right or remedy and does not cause a diminution of the obligations established by the Framework Agreement.
- 39.2. Accordingly, no waiver is effective unless it is expressly stated to be a waiver and communicated to the other Party in writing in accordance with clause 12 (Notices).
- 39.3. The rights and remedies provided by this Framework Agreement are cumulative and may be exercised concurrently or separately, and the exercise of any one remedy shall not be deemed an election of such remedy to the exclusion of other remedies.

40. Force Majeure

- 40.1. Neither Party is liable to the other Party for any delay in performing, or other failure to perform, its obligations under the Framework Agreement to the extent that such delay or failure is a result of Force Majeure. Nonetheless, each Party must use all reasonable endeavours to continue to perform its obligations under the Framework Agreement for the duration of such Force Majeure. However, if Force Majeure prevents either Party from performing its material obligations under the Framework Agreement for a period in excess of 3 Months either Party may terminate the Framework Agreement with immediate effect by notice.
- 40.2. Any delay or other failure by the Contractor in performing its obligations under the Framework Agreement which results from any failure or delay by a Contractor Representative is only to be regarded as due to Force Majeure if that Contractor Representative is itself impeded by Force Majeure from complying with an obligation to the Contractor.
- 40.3. If either Party becomes aware of Force Majeure which gives rise to, or is likely to give rise to, any delay or failure on its part as described in clause 40.1, it must immediately notify the other Party of the Force Majeure and the estimated period for which the failure or delay is to continue.
- 40.4. The only events that afford relief from liability for failure or delay under the Framework Agreement are Force Majeure events or failure of the Authority/Public Body to satisfy its obligations under the contract.

41. Disruption

- 41.1 The Contractor shall take reasonable care to ensure that in the performance of its obligations under the Framework Agreement it does not disrupt the operations of the Authority, its employees or any other Contractor employed by the Authority.
- 41.2 The Contractor shall immediately inform the Authority of any actual or potential industrial action, whether such action be by their own employees or others, which affects or might affect its ability at any time to perform its obligations under the Framework Agreement.
- 41.3 In the event of industrial action by the Staff, the Contractor shall seek Approval to its proposals to continue to perform its obligations under the Framework Agreement.

41.4 If the Contractor's proposals referred to in clause 41.3 are considered insufficient or unacceptable by the Authority acting reasonably, then the Authority may by notice terminate the Framework Agreement with immediate effect.

42. Termination Rights

42.1. The Authority may terminate the Contractor's interest in the Framework Agreement by notice to the Contractor with immediate effect if the Contractor commits a Default and if:

42.1.1. the Contractor has not remedied the Default to the satisfaction of the Authority within 20 Working Days, or such other period as may be specified by the Authority, after issue of a notice specifying the Default and requesting it to be remedied;

42.1.2. the Default is not in the opinion of the Authority, capable of remedy; or

42.1.3. the Default is a material breach of the Framework Agreement.

42.2. The Authority may also terminate the Framework Agreement:

42.2.1. in accordance with any provision of the Schedules;

42.2.2. in accordance with any provisions of the Standard Terms of Supply relating to the following activities:

42.2.2.1. entering, attending or occupying the Authority's premises;

42.2.2.2. making use of the Authority's property or information technology systems, or giving the Authority the use of the Contractor's property or information technology systems;

42.2.2.3. having dealings with the Authority's employees, Contractors, suppliers or contractors;

42.2.2.4. soliciting the Authority's employees;

42.2.2.5. making representations or giving professional advice to the Authority;

42.2.2.6. generating information for or giving information to the Authority;

42.2.2.7. receiving information from or holding information on behalf of the Authority; and

42.2.2.8. carrying out publicity or marketing activities;

42.2.3. where a Call-off Contract with the Contractor under this Framework Agreement has been terminated prior to the termination date of that Call-off Contract.

42.2.4. where, at any time before the term of the Framework Agreement, the Contractor or any person falling within the description set out in paragraph (2) of regulation 58 of The Public Contracts (Scotland) Regulations 2015 commits or is convicted of an offence referred to in paragraph (1) of that regulation.

42.3 The Authority may terminate the Framework Agreement if a Call-off Contract is terminated because of a Default by the Contractor.

42.4 The Authority may terminate the Contract in the event that:

- (a) the Contract has been subject to substantial modification which would have required a new procurement procedure in accordance with regulation 72(9) (modification of contracts during their term) of The Public Contracts (Scotland) Regulations 2015;
- (b) the Contractor has, at the time of contract award, been in one of the situations referred to in regulation 58(1) (exclusion grounds) of The Public Contracts (Scotland) Regulations 2015, including as a result of the application of regulation 58(2) of those regulations, and should therefore have been excluded from the procurement procedure; or
- (c) the Contract should not have been awarded to the Contractor in view of a serious infringement of the obligations under the Treaties and the Directive 2014/24/EU that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of the Treaty on the Functioning of the European Union.

In this Condition, 'the Treaties' has the meaning given in the European Communities Act 1972.

42.5 The Authority may also terminate the Framework Agreement in the event of a failure by the Contractor to comply in the performance of its obligations under the Framework Agreement with legal obligations in the fields of environmental, social or employment law.

43. Termination on Insolvency and Change of Control

43.1. The Authority may terminate the Framework Agreement with immediate effect by notice where in respect of the Contractor:

43.1.1. a proposal is made for a voluntary arrangement within Part I of the Insolvency Act 1986 or of any other composition scheme or arrangement with, or assignment for the benefit of, its creditors;

43.1.2. a shareholders' meeting is convened for the purpose of considering a resolution that it be wound up or a resolution for its winding-up is passed (other than as part of, and exclusively for the purpose of, a bona fide reconstruction or amalgamation);

43.1.3. a petition is presented for its winding up (which is not dismissed within 14 days of its service) or an application is made for the appointment of a provisional liquidator or a creditors' meeting is convened pursuant to section 98 of the Insolvency Act 1986;

43.1.4. a receiver, administrative receiver or similar officer is appointed over the whole or any part of its business or assets;

43.1.5. an application order is made either for the appointment of an administrator or for an administration order, an administrator is appointed, or notice of intention to appoint an administrator is given;

43.1.6. it is or becomes insolvent within the meaning of section 123 of the Insolvency Act 1986;

43.1.7. being a "small company" within the meaning of section 382 of the Companies Act 2006, a moratorium comes into force pursuant to schedule A1 to the Insolvency Act 1986;

43.1.8. a debt relief order is entered into; or

43.1.9. any event similar to those listed above occurs under the law of any other jurisdiction.

43.2. The Authority may terminate the Framework Agreement by notice with immediate effect within 6 months of:

- 43.2.1. being notified that a change of Control has occurred in accordance with clause 30 (Assignment and Change of Control); or
 - 43.2.2. where no such notification has been given, the date that the Authority becomes aware of the change of control.
- 43.3. But the Authority may not terminate the Framework Agreement under clause 43.2 where approval of the change of control has been granted by notice by the Authority.

44. Exit Management

The Contractor shall perform its relevant Exit Management obligations as part of the Framework whether applicable on either the expiry or early termination of this Agreement.

- 44.1 The Contractor agrees that if it breaches (or attempts or threatens to breach) its obligation to provide Exit Management, the Authority and their respective customers and stakeholders shall be irreparably harmed. In such circumstance, the Contractor agrees that the Authority may proceed directly to court notwithstanding anything to the contrary in the dispute resolution procedure outlined in Clause 37 (Dispute Resolution). If a court of competent jurisdiction finds that the Contractor has breached (or attempted or threatened to breach) any such obligation, the Contractor agrees that without any additional findings of irreparable injury, or other conditions to interdict, the Contractor shall not oppose the entry of an appropriate order compelling performance by the Contractor and restraining the Contractor from any further breaches or attempted or threatened breaches of its obligations in relation to Exit Management.
- 44.2 A draft of the Exit Plan shall be produced by the Contractor and supplied to the Authority within three (3) months after the Commencement Date and shall include or address the matters specified in Clause 44.3. The Authority shall provide to the Contractor the Authority's comments on the plan within one (1) month of the Authority's receipt of the plan. The Contractor shall take into account the comments and suggestions of the Authority and shall issue the final version of the Exit Plan to the Authority within ten (10) Working Days of receipt of the Authority's comments.
- 44.3 The Contractor shall throughout the period of the Agreement review, maintain and continuously update the Exit Plan which shall include:
 - 44.3.1 the activities required to enable the Authority to re-tender the Authority Requirements and/or the provision of the Services;
 - 44.3.2 the activities necessary to support any Replacement Contractor or the Authority in carrying out any necessary due diligence relating to all or part of the Services;
 - 44.3.3 details of the Exit Management to be provided by the Contractor prior to the Exit Management Date;
 - 44.3.4 support for the Replacement Contractor or the Authority during their preparation of any relevant plan for the transition of the System to the Replacement Contractor or Authority, including prior to and during such transition period;
 - 44.3.5 the maintenance of a 'business as usual' environment for the Authority during the period when Exit Management obligations are applicable; and
 - 44.3.6 all other necessary activities to support the preparation for, and execution of, a smooth and orderly Exit Management and transfer of all or part of the Services to either a Replacement Contractor or the Authority.
- 44.4 No amendment of the Exit Plan shall be made without prior written consent of the Authority.

45. Compliance with the Law and Changes in the Law

- 45.1 The Contractor shall, in complying with all obligations incumbent upon it in terms of the Framework Agreement or any other contract with the Authority, comply in all respects with, and shall ensure that the Contractor's agents, employees and representatives whomsoever comply with the Law.
- 45.2 Without prejudice to the generality of clause 45.1 above (general compliance with the Law provision), the Contractor must not unlawfully discriminate against any person in terms of the Equality Act 2010 in its activities relating to the Framework Agreement or any other contract with the Authority.
- 45.3 The Contractor shall take all reasonable steps to ensure the observance of the provisions of clause 45.1 above by all of their servants, employees, agents, consultants and sub-contractors.
- 45.4 If the cost to the Contractor of the performance of its obligations under the Framework Agreement shall be increased or reduced by reason of the making after the date of the Framework Agreement of any relevant Law that shall be applicable to the Framework Agreement the amount of such increase shall be borne by the Contractor.

46. Offences

- 46.1. The Contractor must not commit or attempt to commit any offence:
 - 46.1.1. under the Bribery Act 2010;
 - 46.1.2. of fraud, uttering, or embezzlement at common law; or
 - 46.1.3. of any other kind referred to in regulation 58(1) of the Public Contracts (Scotland) Regulations 2015.
- 46.2. Breach of clause 46.1 is a material breach for the purposes of clause 42 (Termination Rights).

47. Tax Arrangements

- 47.1 Where the Contractor is liable to be taxed in the UK in respect of consideration received under this contract, it shall at all times comply with the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) and all other statutes and regulations relating to income tax in respect of that consideration.
- 47.2 Where the Contractor is liable to National Insurance Contributions (NICs) in respect of consideration received under this Framework Agreement, it shall at all times comply with the Social Security Contributions and Benefits Act 1992 (SSCBA) and all other statutes and regulations relating to NICs in respect of that consideration.
- 47.3 The Authority may, at any time during the term of this Framework Agreement, request the Contractor to provide information which demonstrates how the Contractor complies with sub-clauses 47.1 and 47.2 above or why those clauses do not apply to it.
- 47.4 A request under sub-clause 47.3 above may specify the information which the Contractor must provide and the period within which that information must be provided.
- 47.5 The Authority may supply any information which it receives under clause 47 to the Commissioners of Her Majesty's Revenue and Customs for the purpose of the collection and management of revenue for which they are responsible.
- 47.6 The Contractor shall take all reasonable steps to ensure the observance of the provisions of this clause 47 by all of their servants, employees, agents, consultants and sub-contractors.
- 47.7 Where the Contractor enters into any sub-contract with any of its servants, employees, agents, consultants and/or sub-contractors, the Contractor must ensure that a provision is included which is in the same terms as this clause 47 subject only to modification to refer to the correct designation of the equivalent party as the Contractor.

48. Blacklisting

The Contractor must not commit any breach of the Employment Relations Act 1999 (Blacklists) Regulations 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992, or commit any breach of the Data Protection Laws by unlawfully processing personal data in connection with any blacklisting activities. Breach of this clause is a material default which shall entitle the Authority to terminate the Framework Agreement.

49. Conflicts of interest

- 49.1. The Contractor must take appropriate steps to ensure that the Authority is not placed in a position where, in the reasonable opinion of the Authority, there is an actual or potential conflict between the interests of the Contractor and the duties owed to the Authority under the Framework Agreement.
- 49.2. The Contractor must disclose by notice to the Authority full particulars of any actual or potential conflict of interest which may arise and must take such steps as are necessary to avoid or remove the conflict of interest.
- 49.3. Breach of this clause by the Contractor is a material breach for the purposes of clause 42 (Termination Rights).

50. Consequences of Expiry or Termination

- 50.1. Where the Authority terminates the Contractor's interest in the ; Framework Agreement under clause 42 (Termination Rights) and makes other arrangements for the supply of Services, the Contractor indemnifies the Authority against all costs incurred in making those arrangements.
- 50.2. The termination of this Framework Agreement in accordance with clause 42 (Termination Rights) and/or clause 43 (Termination on Insolvency and Change of Control) or its expiry shall not affect the accrued rights of either party.
- 50.3. Following the service of a termination notice, the Contractor shall continue to perform its obligations in accordance with the provisions of this Framework Agreement until termination.
- 50.4. The following provisions survive the expiry or termination of this Framework Agreement
 - 50.4.1. clause 1 (Definitions and Interpretation);
 - 50.4.2. clause 8 (Award Procedures);
 - 50.4.3. clause 10 (Official Secrets Acts);
 - 50.4.4. clause 13 (Recovery of Sums Due);
 - 50.4.5. clause 14 (Data Protection);
 - 50.4.6. clause 15 (Transparency and Freedom of Information);
 - 50.4.7. clause 16 (Authority Protected Information);
 - 50.4.8. clause 17 (Contractor Sensitive Information);
 - 50.4.9. clause 18 (Audit and Records Management);
 - 50.4.10. clause 19 (Publicity);
 - 50.4.11. clause 21 (Offers of Employment);
 - 50.4.12. clause 23 (Information about Contractor Employees);
 - 50.4.13. clause 26 (Parties pre-existing Intellectual Property Rights);
 - 50.4.14. clause 27 (Specially created Intellectual Property Rights);
 - 50.4.15. Clause 28 (Claims relating to Intellectual Property Rights);
 - 50.4.16. clause 33 (Warranties and Representations);
 - 50.4.17. clause 34 (Indemnity);
 - 50.4.18. clause 37 (Dispute Resolution Procedure);
 - 50.4.19. clause 39 (Waiver and Cumulative Remedies);
 - 50.4.20. clause 47 (Tax arrangements);
 - 50.4.21. this clause 50 (Consequences of Termination); and
 - 50.4.22. clause 52 (Governing Law and Jurisdiction).

- 50.5. Immediately upon termination of the Framework Agreement for any reason whatsoever the Contractor shall render such reasonable assistance to the Authority or third party nominated by the Authority, if requested, as may be necessary to effect an orderly assumption by a Replacement Contractor of the Services previously performed by the Contractor under the Framework Agreement. The Contractor shall be entitled to charge for such termination services in accordance with clause 7 (Price).
- 50.6. On expiry or termination of the Framework Agreement the Contractor must:
- 50.6.1 immediately return to the Authority all Authority Property and Authority Protected Information in its possession; and
- 50.6.2 destroy or delete any copies of Authority Protected Information (whether physical or electronic) in its possession.

51. Entire Agreement

- 51.1 This Framework Agreement constitutes the entire agreement between the Parties in respect of the matters dealt with herein. This Framework Agreement supersedes all prior negotiations between the Parties and all representations and undertakings made by one Party to the other, whether written or oral, except that this clause does not exclude liability in respect of any misrepresentation (whether in the ESPD or Tender or otherwise).
- 51.2 In the event of, and only to the extent of, any conflict between the clauses of this Framework Agreement, the Schedules and any document referred to in this Framework Agreement, the following order of precedence applies:
- 51.2.1 the clauses of this Framework Agreement;
- 51.2.2 the Standard Terms of Supply;
- 51.2.3 the other Schedules; and
- 51.2.4 any other document referred to in the clauses of this Framework Agreement.

52. **Governing Law and Jurisdiction**

This Framework Agreement is governed by and interpreted in accordance with Scots law and, subject to clause 37 (Dispute Resolution), the Parties submit to the exclusive jurisdiction of the Scottish courts.

IN WITNESS WHEREOF these presents typewritten on this and the 32 preceding pages together with the 11 Schedules annexed hereto are executed as follows:

SIGNED for and on behalf of the Scottish Ministers **SIGNED** for and on behalf of Vital Energi
Utilities Limited REDACTED

At.....	At.....
On.....	On.....
Signature.....	Signature.....
Full name	Full name.....
Position	Position.....
Address.....	Address.....

In the presence of

Signature.....
Full name

Address.....

In the presence of

Signature.....
Full name.....

Address.....

This and the following 14 pages comprise Schedule 1 to the Framework Agreement between the Scottish Ministers and Vital Energi Utilities Limited

SCHEDULE 1 – STATEMENT OF REQUIREMENTS

Background

- 1.1. The Scottish Government is the devolved government for Scotland and has a range of responsibilities that include: the economy, education, health, justice, rural affairs, housing, environment, equal opportunities, consumer advocacy and advice, transport and taxation. The core Government consists of six Director Generals: Organisational Development and Operations; Economy; Scottish Exchequer; Health & Social Care; Education, Communities and Justice; Constitution & External Affairs.
- 1.2. The Scottish Government Energy and Climate Change Directorate work to deliver a low carbon society, with sustainable economic growth and reduced greenhouse gas emissions. They are responsible for:
 - helping Scotland become a prosperous low carbon economy, with secure, affordable and sustainable energy
 - promoting Scotland's climate change, clean energy and energy efficiency programmes internationally
 - working locally to help individuals, businesses and communities make sustainable choice
- 1.3. Scottish Procurement delivers innovative strategies and contractor relationships that enable public sector organisations in Scotland to access the goods and services they commonly need at market leading prices and terms. We do this through pursuing opportunities for collaborative procurement, and the implementation of leading practices, whilst promoting the economic and sustainable development of the wider Scottish market place.
- 1.4. The objectives of this Framework are to deliver Best Value to Scottish Public Bodies and Scottish Third Sector Bodies while maximising opportunities for suppliers of all sizes and contributing to the Scottish Government's Purposes (more information available at <https://nationalperformance.gov.scot/>) and to provide Scottish Public Bodies and Scottish Third Sector Bodies with tailored support to help deliver their Energy Efficiency and Zero Carbon energy needs whilst supporting Scotland's Energy Strategy and the Energy Efficient Scotland (EES) Programme.
- 1.5. Non Domestic Energy Efficiency (NDEE) has been identified as having particular relevance to The Climate Change (Scotland) Act 2009, (Section 63, Energy Performance of Non Domestic Buildings), Scotland's Energy Strategy and the EES Programme. These Scottish Government policy objectives set stringent carbon reduction and energy efficiency targets which the NDDE Framework will look to support and deliver:
 - by 2030 the equivalent of 50% of the energy for Scotland's heat, transport and electricity consumption to be supplied from renewable sources;
 - increase the productivity of energy use across the Scottish economy by 30% by 2030;
 - By 2032 where technically feasible, all buildings – both in the residential and services sectors – will be insulated to the maximum appropriate level;
 - By 2032 70% of heat and cooling for non-domestic buildings will be supplied using low carbon heat technologies;
 - improvements to the building fabric of Scotland's buildings will result in a 20% reduction in non-residential heat demand.
- 1.6. Increasing sustainable economic growth is a key driver of economic growth and promoting the transition to a low carbon economy is seen as a strategic priority within this. Best Value is

the most appropriate balance of cost of acquisition (including but not limited to price), delivery, service provision and quality.

2. Glossary of Terms

In this Statement of Requirements the following words have the meanings given to them as detailed below.

Capitalised terms within this Statement of Requirements shall, where defined in the Legal Documents or Technical Documents have the meaning ascribed to them therein and otherwise are defined as follows.

"Contractor" means an economic operator appointed under the Framework Agreement

"Energy Conservation Measure(s)" (ECM(s)) means the energy efficiency asset(s) installed by the Contractor to meet the Guaranteed Energy Cost Performance, including but not limited to [to be populated on a project specific basis].

"EnPC " means the contract for supply of services between a Framework Public Body and Contractor entered into in accordance with the Award Procedures and based on either Schedule 5a or 5b of the Framework Agreement.

"Framework Authority" means the Scottish Ministers as represented by Scottish Procurement

"Framework Public Body/Bodies" – means Scottish Ministers (including Agencies), Scottish Non-Departmental Public Bodies, offices in the Scottish Administration which are not ministerial offices, cross-border public authorities within the meaning of section 88(5) of the Scotland Act 1998, the Scotland Office, the Scottish Parliamentary Corporate Body, councils constituted under section 2 of the Local Government etc. (Scotland) Act 1994, the Scottish Fire and Rescue Service, the Scottish Police Authority, Scottish health boards or special health boards, all NHS Scotland, The Integrated Joint Boards established further to the Public Bodies (Joint Working) Act 2014, bodies registered as social landlords under the Housing (Scotland) Act 2001, Student Loans Company Limited, the Forestry Commission, the Commissioner of Northern Lighthouse operating as the Northern Lighthouse Board, Equality and Human Rights Commission, Business Stream Ltd, the Business Gateway National Unit at the Convention of Scottish Local Authorities, Further or Higher Education institutions being fundable bodies within the meaning of section 6 of the Further and Higher Education (Scotland) Act 2005, any public body established by or under the Scotland Act 1998 or any Act of the Scottish Parliament, any association of or formed by one or more of the foregoing, bodies financed wholly or mainly by one or more of the foregoing, bodies subject to management supervision by one or more of the foregoing and bodies more than half of the board of directors or members of which, or, in the case of a group of individuals, more than half of those individuals, being appointed by one or more of the foregoing. In addition to the contracting authorities listed, the framework agreement will be available to charities entered on the Scottish Charity Register and voluntary organisations entered on the Membership Database of the Scottish Council for Voluntary Organisations. Information about agencies of the Scottish Ministers and offices in the Scottish Administration which are not ministerial offices is available at: <http://www.scotland.gov.uk/Topics/Government/public-bodies/about/public-bodies-guide/government-scotland> Scottish Non-Departmental Public Bodies are listed at: <http://www.scotland.gov.uk/Topics/Government/public-bodies/about/Bodies> Information about the Review of Public Procurement in Scotland and links to the other Centres of Expertise are available at: <http://www.scotland.gov.uk/Topics/Government/Procurement>.

"Good Industry Practice" means standards, practices, methods and procedures conforming to the law and the exercise of the degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person or body engaged within the relevant industry or business sector.

"Scottish Procurement" – A branch within the Scottish Procurement & Commercial Directorate responsible for facilitating User Intelligence Groups, National Category Forums and collaborative procurement exercises for goods and services classified as Category A and B following the review of public procurement in Scotland ([McClelland Report](#)).

3. Introduction

- 3.1. This requirement is to establish a National Framework Agreement for the provision of Non Domestic Energy Efficiency (NDEE) Works to the Scottish Public Sector and Scottish Third Sector Bodies.

4. Project Support Unit

- 4.1. To provide Framework Public Bodies with additional technical and project support Scottish Procurement is procuring a Project Support Unit (PSU) which will work alongside this framework.
- 4.2. The PSU provides project support to public bodies undertaking projects through the NDEE framework. This support includes technical support and expertise, energy audits, business case development, project management, measurement and verification and procurement support.

5. Call-off Contract documentation / EnPCs

- 5.1. It is a requirement of submitting a bid in response to this ITT that a Contractor agrees to enter into Call-off-Contracts in accordance with the Framework Agreement Schedules, as further developed for project specific requirements/terms in a mini-competition.
- 5.2. The Call-off Contract Terms and Conditions (including: the Development Contract (Legal Document 2 - Schedule 5a to the Framework Agreement); the EnPC-D&B Contract (Legal Document 3 – Schedule 5b to the Framework Agreement) and the EnPC-DBFM Contract (Legal Document 4 – Schedule 5c to the Framework Agreement) set out a considerable number of requirements that a Contractor must adhere to in delivery of projects under the Framework Agreement.
- 5.3. Call-off Contract Terms and Conditions will be more fully developed to reflect project specific requirements through a mini-competition process so as to be appropriate and proportionate to the specific EnPC requirements.
- 5.4. The Technical Documents provided to bidders set out a number of technical and/or technical process requirements (which may be further developed by Framework Public Bodies to reflect project specific requirements).
- 5.5. Call-off contracts may include the scope and option for future phases and/or work packages.

6. Project Bank Account (PBA)

- 6.1. Within this framework there is an ability to make use of a PBA. Where applicable Framework Bodies should include for this provision within their ITMC.
- 6.2. A PBA allows participating firms ("beneficiaries") to be paid for work done without the money flowing through the main contractor's bank account. Beneficiaries in a PBA project are the main contractor (tier 1) and firms in tiers 2 and 3 which join the PBA. The main contractor retains control of the amount due to beneficiaries but no longer exclusively controls when it is paid. All beneficiaries, including the main contractor, are paid simultaneously. A main contractor, whether solvent or insolvent, cannot withdraw money allocated to other supply chain beneficiaries from the PBA i.e. it is "ring-fenced".
- 6.3. Beneficiaries are paid within five days of the amount certified under the main contract being deposited into the PBA. Money is moved along the supply chain and into the general economy more quickly, amplifying the multiplier effect of infrastructure investment leading to wider economic benefits beyond project delivery.

6.4. Where deemed applicable the successful bidder must include the PBA provisions in all invitations to tender for work subcontracted to tier 2 businesses

6.5. Further guidance regarding the implementation and use of PBA's can be found at the following link: <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/12/construction-projects-implementing-project-bank-accounts/documents/project-bank-accounts-pba-implementation-guidance-april-2019/project-bank-accounts-pba-implementation-guidance-april-2019/govscot%3Adocument/Project%2BBank%2BAccounts%2BPBA%2B-%2Bimplementation%2Bguidance%2BApril%2B2019.pdf>

6.6. Banking services framework - <https://www.gov.scot/publications/banking-services-framework/>

7. Workforce Related Matters

7.1. The Framework Authority considers that the delivery of high quality public services is critically dependent on a workforce that is well-motivated, well-led and has appropriate opportunities for training and skills development. These factors are also important for workforce recruitment and retention, and thus continuity of service.

7.2. The Scottish Government itself has adopted workforce policies to meet these requirements. These policies include:

- a pay policy that includes a commitment to supporting the Living Wage for the duration of this Parliament;
- fair employment practices (employment practices that promote equalities)
- clear managerial responsibility to nurture talent and help individuals fulfil their potential;
- a strong commitment to Modern Apprenticeships and to the development of Scotland's young workforce;
- support for learning and development;
- no inappropriate use of zero hours contracts;
- no inappropriate use of "umbrella companies";
- flexible working;
- flexi-time; and
- career breaks.

7.3. The Scottish Government also attaches importance to ensuring effective consultation and involvement of staff and Scottish Government management work in partnership with the trade union. While it is, of course, a personal decision whether or not to join a Trade Union, the Scottish Government encourages its staff to join an appropriate Union and to play an active part within it, making sure their views are represented.

7.4. The Framework Public Bodies involved, alongside Scottish Government in establishing the Framework shares Scottish Government's views on the importance of the above.

7.5. In order to ensure the highest standards of service quality in this contract it is expected that contractors whose workers work alongside those of Scottish Government and Framework Public Bodies using the Framework take a similarly positive approach to workforce-related matters as part of a fair and equitable employment and reward package.

7.6. Sub-contractor personnel responsible for delivering services on behalf of Framework Public Bodies, are unlikely to be solely dedicated to providing Non-Domestic Energy Efficiency Services under the Framework Agreement. The Framework Authority will monitor the situation throughout the life of this Framework Agreements and, in order to ensure the highest standards of service quality, it is expected Contractors and Sub-contractors whose workers work alongside those of Framework Public Bodies will take a similarly positive approach to workforce-related matters as part of a fair and equitable employment and reward package.

8. Community Benefits

8.1. Introduction

8.1.1. The Public Procurement Reform Programme delivers value that goes beyond savings and benefits – improving Contractor access to public contracts, particularly for SMEs; maximising efficiency and collaboration; and placing the local, social and economic aspects of sustainability at the heart of the purchasing process.

8.1.2. The Procurement Reform (Scotland) Act 2014 has established a national legislative framework for sustainable public procurement that supports Scotland's economic growth through improved procurement practice – and requires public bodies to consider how their procurement activity can improve the economic, social and environmental wellbeing of the authority's area.

8.1.3. It also specifically requires public bodies to consider imposing community benefit requirements as part of a major contract; these might relate to, for example, employment opportunities or to sub-contracting opportunities. An extract from the relevant section of the Act is as follows:

8.1.4. For the purposes of this Act, a community benefit requirement is a contractual requirement imposed by a contracting authority—

- relating to—
- training and recruitment, or
- the availability of sub-contracting opportunities, or
- which is otherwise intended to improve the economic, social or environmental wellbeing of the authority's area in a way additional to the main purpose of the contract in which the requirement is included.'

8.2. Expectations

8.2.1. During Contract Mobilisation the successfully awarded Contractor is required to finalise the timescales and details of the Community Benefits which the Contractor has committed to within their tender submission.

8.2.2. Monitoring arrangements will also be established during Contract mobilisation, to set up a process for ongoing review both at Contract Management meetings and through general discussions across the full Contract term.

8.2.3. Contractors will be expected to deliver a range of community benefits including:

- Targeted recruitment and training
- Work placements
- Curriculum support
- Community enhancement
- SME supply chain development based on evidence of local need

8.2.4. The Contractor must be able to demonstrate their intention to integrate trainees and new entrants into the labour market without distinction of sex, marital status, race, ethnic origin or political or religious beliefs.

8.2.5. Table 1 sets out the number of Community Benefit Points (CBP) attributed to annual contract value.

8.2.6. The annual value is the cumulative annual value of all Clients spend through the Contract.

■ Table 1 Community Benefits Points Matrix

Community Benefits Points (CBP) Matrix	
Annual Value	Points to be Achieved
£100 - 250k	20
£250 – 500k	30
£500 – 1m	50
£1–3m	75
£3 -5m	100
£5-10m	125
£10-20m	150
£20-30m	175

8.2.7. The Community Benefit Outcomes (Appendix A) provides a selection of the types of Community Benefits that the Scottish Government would expect this Contract to deliver and allocates Community Benefits Points (CBPs) to each of them.

8.2.8. The Contractor must achieve the CBPs in line with Table 1, however, it is up to the tenderer as to what Community Benefits are to be put forward from the menu. All points assigned to each chosen Community Benefit will be added together to achieve the CBPs requirement. The types of Community Benefit that the Contractor proposes to deliver will not form part of the Tender Evaluation.

8.2.9. The applicable Community Benefits are to be delivered in the 12 months following (i.e Year 1 Community Benefits are to be delivered in Year 2).

8.2.10. In the last 12 months of the framework the contractor will be expected to work with the Framework Authority and Framework Public Bodies (as applicable) to ensure all Community Benefits are delivered.

8.3. Remuneration

8.3.1. Trainees and recruits must, as a minimum, be paid in accordance with National Minimum Wage rates (or Living Wage for over 25's) and industry norms and must have terms and conditions of employment that are at least equivalent to those provided to workers that have equivalent skills and experience. Employers are encouraged to increase the remuneration of trainees in line with their experience and productivity.

8.4. Contractor and Sub-contractor Compliance

8.4.1. It is the Contractor's responsibility to develop a working method that will deliver the targeted recruitment and training requirements and related monitoring and verification data, and obtain the full co-operation of Contractors and Subcontractors in delivering these requirements for the full duration of the Contract.

8.5. Equal Opportunities

8.5.1. Framework Contractors will be required to ensure that it complies with equal opportunities and non-discrimination legislation in relation both to the delivery of the service and to employment and demonstrate the policies and practices which it will put in place to achieve this.

8.6. Insurances

- 8.6.1. Framework Contractors must ensure that insurance cover includes people aged 16 and over and staff from employment and training organisations when on site.

8.7. Definitions

- 8.7.1. **A New Entrant** is defined as a person who is employed to do a specific job and is leaving an educational establishment or a training provider, or a person that has been non-employed who has been unemployed and/or is registered with worker or job Centre Plus and is seeking employment.
- 8.7.2. **An Apprentice** is a person defined as a New Entrant to the industry who is undertaking a recognised skill qualification or an equivalent apprenticeship scheme for construction or non-construction apprenticeships.
- 8.7.3. **Work Placement** is defined as a person undertaking a short term overview of the industry and/or a related training programme with on-site instruction and supervision provided.
- 8.7.4. **Direct** indicates that the New Entrant will be employed or trained by the main Contractor.
- 8.7.5. **Indirect** indicates that the New Entrant will be employed or trained through a specialist Contractor or Sub-contractor as a result of work procured through the main contractor.

9. Sustainability

- 9.1. Sustainability is at the core of this Framework and delivery of EnPCs. Scottish Government is seeking to support the transition to a low carbon economy, as set out in the Government's Economic Strategy and contribute to Climate Change targets. The Climate Change (Scotland) Act 2009 sets legally binding targets in relation to greenhouse gas emissions reduction (42% by 2020, based on a 1990 baseline) and places various duties on public bodies. To support this there are linked ambitions; an energy efficiency target to reduce total final energy consumption in Scotland by 12% (against baseline of average consumption in 2005-07) and delivery of 11% of non-electrical heat demand by renewable sources.
- 9.2. Increasing sustainable economic growth is important if we are to create a more successful country, with opportunities for all of Scotland to flourish. Promoting the transition to a low carbon economy is seen as a strategic priority within this. The Scottish Sustainable Procurement Action Plan supports the Scottish Government's purpose for successful sustainable economic growth. National Outcomes have been established through the Concordat and Single Outcome Agreement and national environmental targets have been set by Climate Change legislation for Scotland, including the Act. Sustainable procurement promotes collaboration, best practice and best value across the public sector. Moreover, the Procurement Reform (Scotland) Act 2014 includes a sustainable procurement duty on public sector bodies.
- 9.3. Relevant to the above, it is envisaged that Framework Public Bodies will wish to focus on ensuring robust processes to not only ensure compliance with sustainability and environmental requirements but to go further in achieving sustainability outcomes through the performance of Call-off Contracts. Accordingly, the following are set out as relevant requirements and/or KPIs at Framework Level and it is expected may be developed (including potentially to expand upon) in mini-competitions conducted by Framework Public Bodies.
- 9.4. Compliance Requirements (note: Framework Contractors should be aware that Framework Public Bodies may supplement / require to supplement the following at mini-competition and the following should not therefore be read as exhaustive):

- Waste (Scotland) Regulations 2012 – see for example:
 - .1.1. (<http://www.zerowastescotland.org.uk/content/waste-scotland-regulations>)
- All relevant Producer Responsibility requirements including WEEE;
- Special Waste; (<http://www.sepa.org.uk/regulations/waste/special-waste/>)
- Public Bodies Duties under the Climate Change Act (Scotland) Act 2009; (<http://www.gov.scot/Topics/Environment/climatechange/howyoucanhelp/publicbodies/publicsector>)
- Potential / Future Requirements:
 - The Scottish Government's Zero Waste Plan;
 - <http://www.gov.scot/Topics/Environment/waste-and-pollution/Waste-1/wastestrategy>
 - (Opportunities to refer to reporting requirements here too).
 - Zero Waste Scotland's Circular Economy programme;
 - Procurement Reform (Scotland) Act 2014 and section 36 'Procurement of recycled and recyclable products etc.' as part of Amendment of Climate Change Act;
 - Procurement Reform (Scotland) Act 2014 and measures aimed at promoting fairly and ethically traded goods; and
 - Climate Change Public Bodies Duties Reporting Requirements.
 - Changes to the Scottish Building Standards

10. Pricing

- 10.1. Pricing for the initial 3 year period will be as submitted by the Contractor and ultimately set out at Schedule 2 of the Framework Agreement. It is envisaged that in response to mini-competitions, Contractors may offer lower prices than those included in Schedule 2 of the Framework Agreement.
- 10.2. The Framework Agreement provides details as to how prices will be reviewed if the final 12 month extension is taken up.

11. Continuous Improvement

- 11.1. Each Framework Contractor will deliver continuous improvement in the services provided under this contract, throughout the full duration of the Framework Agreement.
- 11.2. The Framework Authority recognises continuous improvement as on-going quantitative improvements delivered for:
 - Reduction in whole life costs to the Framework Public Bodies
 - Service quality enhancements including:
 - Reliability
 - Delivery method
 - Quality assurance
 - User satisfaction
- 11.3. Continuous improvement will be monitored by the Framework Authority as part of the process for Framework management and review.

12. Security Clearance

- 12.1. Due to the collaborative nature of this Framework Agreement, a Framework Public Body may require different security procedures to be carried out prior to an individual taking up any Call-off Contract.
- 12.2. Staff involved in the delivery of the services who require access to the Framework Public Body's premises may require as a minimum to have obtained, at their or at the Contractor's expense, a Basic Disclosure certificate from Disclosure Scotland, and to have submitted the

said certificate to the Framework Public Body, prior to obtaining access to any premises occupied by or on behalf of the Framework Public Body. Where relevant:

- Any such staff must have been resident in the United Kingdom for the twelve month period immediately preceding the date of clearance by Disclosure Scotland.
- The above checks must have been completed prior to staff being put forward for work with the Framework Public Body; however the Framework Public Body reserves the right to carry out additional and/or more in-depth checks where this is deemed necessary. Additional security requirements will be advised by the Framework Public Body prior to, Service Commencement Date.
- Costs, incurred as a result of carrying out the required security procedures, will be borne by the Contractor.
- The Contractor will also be required to inform the Framework Public Body if any staff involved in delivering the services are charged with, or convicted of any offence during the period of their assignment, and, should it be necessary, arrange for the service to be provided by another staff member.
- Since the pre-employment vetting, security and nationality checks can take up to 6 weeks to complete, the Contractor must ensure the availability of a 'pool' of pre-cleared temporary staff of sufficient size to meet the Framework Public Body's requirements.

12.3. All staff working within Central Government premises shall be subject to the Baseline Personnel Security Standard (BPSS), before access is permitted. This requires applicants to complete a BPSS Application Form which must be submitted to Central Government's Departmental Security Unit with the appropriate supporting documentation. The BPSS comprises verification of the following 4 main elements:

- identity;
- employment history;
- nationality and immigration;
- unspent' criminal record history (by means of Basic Disclosure certificates).

13. Business Continuity / Management Information

13.1. The Contractor shall maintain an up to date Business Continuity Plan, for the performance of a Call-off Contract with a Framework Public Body including a specific element relating to the ongoing, uninterrupted provision of service.

13.2. The Contractor shall meet the Management Information requirements of the Framework Agreement (Schedule 4 to the Framework Agreement) relevant to its continued involvement in the Framework together with reporting and monitoring requirements put in place under Call-off Contracts.

14. Performance Management

14.1. Nominated Representatives from Scottish Government and the Contractor shall attend all meetings relating to performance management.

14.2. The Contractor's representative at such meetings shall be a nominated director of the Contractor, the Contract Manager, or in their absence a nominated deputy.

14.3. Any issues raised during the course of these meetings will be addressed as a matter of priority unless otherwise agreed.

14.4. Notwithstanding the performance management meetings the Contractor shall attend both ad hoc and regular operational meetings as per the Terms and Conditions and as required.

14.5. The Contractor shall also attend regular progress meetings with each Framework Public Body which may include a requirement for contractor to provide a risk register and key milestone tracker. Timescales for these meetings will be agreed between the Contractor and the Client during the mobilisation period.

15. Management Information Reporting

15.1. It is a requirement of this contract that Management Information Reports are provided electronically by the Contractor.

15.2. Reports must include as a minimum, as follows:

- Quarterly summary of invoiced spend with each Framework Public Body
- Quarterly summary of verified savings delivered in quarter for each Framework Public Body
- Quarterly summary of verified carbon savings with each Framework Public Body
- Quarterly summary of verified energy savings with each Framework Public Body

16. Hours of Working

16.1. The Contractor is required to provide staff that can work flexible hours. This may include Bank and Public Holidays, weekend and evenings as well as a normal working week. The Framework Public Body will specify the working hours in the Call-off Contract Terms and Conditions.

Section 2 - Specific Requirements

1. General Requirements (Scope of Requirements)

1.1. The NDEE Sub £1m Projects Framework will cover NDEE retrofit, in its broadest sense, to public sector buildings and grounds including the installation of a wide range of energy efficiency assets that may include, but not limited to:

- prefabricated energy centres;
- combined heat and power units;
- energy efficient boilers – **zero carbon heat options must be considered where boilers are being installed through this framework**
- voltage management units;
- controls outstations;
- luminaires, lighting controllers and other lighting assets.

1.2. The maximum value of individual projects under an Invitation to Mini Competition (ITMC) from this Framework is £1,000,000.

1.3. Public Bodies have the ability to undertake a single ITMC to appoint a contractor to undertake a programme of multiple projects up to the value of £1,000,000.

1.4. The aggregate value of projects forecasted to be procured through the Framework is estimated to be in the range of £15 m - £20 m within the 4 year Framework term (including optional 12 month extensions) with the options to fund projects via revenue and capital budgets.

1.5. The financing of projects may involve:

- 1.5.1. capital funding by the procuring authority;
- 1.5.2. utilising third party finance; or
- 1.5.3. a combination of (i) and (ii)

1.6. It is anticipated that individual projects will vary in value. This framework provides public bodies with the ability to procure a programme of projects up to the value of £1m.

1.7. Ultimate delivery of services by way of Call-Off-Contract under the Framework will be based upon an EnPC with a performance guarantee capable of delivering on the basis of:

- design and build;
- design, build and operate;

1.8. At a project level, energy efficiency will be achieved through the installation of project specific energy efficiency assets, supported, where necessary, by the delivery of particular energy conservation services (ECS) and underpinned by an energy performance guarantee. Projects can be delivered through targeted and bespoke procurement for each procuring authority, provided for in an EnPC. Installed energy efficiency assets are defined as Energy Conservation Measures (ECM) and projects are envisaged to include a range of assets.

1.9. Automatic Meter Reading (AMR) is envisaged as an essential asset for the majority of NDEE projects. Where existing AMR assets require to be replaced / extended to meet the requirements of a project, the cost of their supply and installation are to be covered by the EnPC contract, but AMR will be deemed to have a zero energy cost saving.

1.10. The EnPC will include the delivery of a wide range of energy efficiency assets, from zero carbon boilers and chillers to heat emitters, meters and controllers. The following is a list of some of the ECM categories that may be delivered as part of an EnPC, listed in an order to promote energy management hierarchy and facilitate transparency of interactive effects:

- ECM1 AMR: Automatic Metering Reading (AMR) assets including meters, loggers, communication devices and reporting software.
- ECM2 Passive: Solar shading devices, natural ventilation grilles and other passive renewable energy assets.
- ECM3 Building Fabric: Insulation panels, mats etc. and other items to improve the thermal performance of the building envelope.
- ECM4 HVAC: Heating, ventilation and air conditioning (HVAC) energy efficiency assets, such as efficient boilers, fans, chillers and heat emitters etc.
- ECM5 HVAC Controls: Building energy management systems and other HVAC controllers.
- ECM6 Lighting: Lighting and lighting controllers, including internal and external lighting inventories.
- ECM7 Electrical: Electrical Equipment and Distribution assets, such as efficient motors, drives and other equipment and voltage management units
- ECM8 LZC: Low and Zero Carbon plant and equipment, such as biomass boilers, solar thermal collectors, heat pumps, photovoltaic panels, combined heat and power units, etc.
- ECM9 Specialist Systems: Energy efficiency retrofit equipment to specialist systems, e.g. swimming pool covers, lift motors, catering equipment controls, variable speed drives for process equipment, etc.)
- ECM10 Water: Devices to manage water use through outlets such as taps, WC cisterns, urinals etc.
- ECM11 Small Heat Networks as part of a wider Energy Efficiency project
- ECM12 Other: Other energy efficiency assets to improve building energy performance.

1.10.1.1. The Scottish Government are committed to promoting zero carbon heat solutions and therefore during the life of the framework it is anticipated that the ability for Public Bodies to install gas powered heating plant (this does not include using gas as a back-up/contingency) will be removed from the scope of this framework.

1.11. Mandatory Services

1.11.1. Measurement and Verification Services shall be required in all projects. The M&V service is important due to the role it has in identifying achievement of the Guaranteed Energy Cost Performance, and the Payment Mechanism Deductions associated with non-performance.

1.11.2. Section 4.26 of this document outlines requirements of the service that must be applied whilst the exact requirements and standards for the managed service shall be identified by the Framework Public Body in its Invitation to Mini-Competition (ITMC), as relevant refined at the Development Contract stage to reflect the Preferred Bidder's Investment Grade Proposal and included in Section 1 of Schedule Part 12 (Services Requirements) of the EnPC.

1.11.3. The Contractor will be required to respond to the ITMC setting out in detail the Contractor's proposals (ITMC Proposals) to managing each service element. ITMC Proposals will be complied with throughout the term of the contract, with deductions levied where unavailability and non-performance is identified.

1.12. Project Specific Services

1.12.1. The following paragraphs provide short descriptions of the elements that may form the managed services that a Contractor may be responsible for under a Call-off Contract. The nature of the service will be project specific and will be selected to meet the requirements of the Framework Public Body, i.e. not all managed services will necessarily be included in all projects. The managed services relating to energy conservation are termed Energy Conservation Services (ECS) and could include the following: -

- ECS1: Bureau Service
- ECS2: Maintenance of installed assets
- ECS3: Lifecycle
- ECS4: Behaviour Change

1.13. Measurement & Verification Service

1.13.1. The Contractor will appoint and pay for impartial and independent measurement and verification of the energy performance delivery of the ECMs within the EnPC, in the form of a Measurement & Verification Service. This service will be required for all projects.

1.13.2. The Contractor will use the principles of the International Performance Measurement and Verification Protocol (IPMVP) to increase certainty, and reliability, through the delivery of a Measurement and Verification Plan (M&V Plan) to demonstrate the project's achievement relative to its goals of improving energy efficiency and saving money.

1.13.3. The M&V Plan will identify the actions and reporting required of the Contractor in the enactment of the Measurement and Verification Service for the project term.

1.13.4. The Contractor will ensure that the M&V Plan and subsequent monitoring and related tasks are undertaken by a Certified Measurement and Verification Professional (CMVP) (or equivalent).

1.14. Bureau Service

1.14.1. The Contractor may be required to provide a Bureau Service that may include services such as:

- An Automatic Monitoring and Targeting (aM&T) and Energy Reporting Bureau Service
- A Building Energy Management System (BEMS) Bureau Service (24/7)

1.14.2. An aM&T and Energy Reporting Bureau Service may provide energy consumption monitoring, targeting and monthly reporting associated with the EnPC ECMs. Such energy reporting shall be provided to the Framework Public Body and their Energy Managers and will include clear consumption reporting, trend analysis (including reporting against agreed benchmarks/baseline performance and previous year performance), identification and resolution of issues within [the month], and where possible, improvement recommendations.

1.14.3. A BEMS Bureau Service may include the service management of identifying and monitoring performance of the ECMs, enabling Framework Public Body logging of issues and reporting on issue resolution throughout the EnPC. The BEMS Bureau Service may also provide a platform for reviewing controls and making adjustments of agreed ECMs to optimise and maintain performance.

1.15. Behavioural Change

1.15.1. The Contractor may be required to provide a programme of behavioural change initiatives to support the Framework Public Body to encourage staff and facility users to adopt more energy efficient approaches to their use of the built environment.

1.15.2. Behavioural change initiatives shall be designed to optimise energy efficiency of the Framework Public Body's facilities, and minimise interactive effects with ECMs. Initiatives may take the form of a range of approaches including information provision, training provision and awareness campaigns. The Contractor will be expected to report on, and evidence, initiatives that are agreed as part of behavioural change plan.

2. **Accreditation**

2.1. Where the contractor, or their sub-contractor, are undertaking works which are electrical in nature the contractor must ensure SELECT (or equivalent) accreditation is held.

2.2. Where the contractor, or their sub-contractor, are undertaking works which are gas related the contractor must ensure Gas Safe Register accreditation is held.

2.3. Where the contractor, or their sub-contractor, are undertaking works involving microgeneration technologies used to produce electricity and heat from renewable sources the contractor must ensure MSC (or equivalent) certification is held.

Appendix A – Community Benefit Outcomes

Please note the below will not form any part of the Tender Evaluation.

A	B	C	D
COMMUNITY BENEFIT OUTCOMES	DESCRIPTION	COMMUNITY BENEFIT POINTS PER BENEFIT DELIVERED	Examples of Community Benefits that could be achieved through the Contract
Communications / Waste Awareness Initiatives	<p>Work with the Clients to deliver annual kerbside recycling awareness raising activities</p> <p>Guidance Note: <i>To achieve the full number of points please detail what support you will provide for each year of the contract</i></p>	25	<p>Yearly Household Waste & Recycling Service awareness raising campaign</p> <p>Yearly printed materials for events</p> <p>Yearly Doors Open experience targeted at the general public</p> <p>Creation/delivery of educational initiatives/outcomes with schools. This will be to encourage on-going learning and development of 'reduce, re-use and recycling' during performance of the contract. This will be accompanied by a statement on how positive outcomes associated with that engagement will be measured;</p>
Modern Apprenticeships	<p>Create a new Apprenticeship Position registered with a sector skills body</p>	50	<p>Either onsite within the Company; within a Client; or provide support to deliver locally</p>
Graduate Internship	<p>New graduate intern position created for a university graduate</p>	50	<p>Either onsite within the Company; within a Client; or provide support to deliver locally</p>
Creation/Delivery of Employment	<p>Creation/delivery of employment opportunities persons from within disadvantaged groups to include but not necessarily be restricted to disadvantaged groups or those with protected characteristics within youth and disabled groups)</p>	50	<p>Either onsite within the Company; within a Client; or provide support to deliver locally</p>

Trainee Position	Offer structured training places to new entrant leading to industry recognised qualifications	40	Either onsite within the Company; within a Client; or provide support to deliver locally
Environmental Enhancement	Deliver or support an environmental project	25	Support for an environmental project
Community Enhancement	Deliver community enhancement projects either physical or social	25	Physical/regeneration project Organisation business development Sponsorship Support for a community project
Work Experience Placement	Provide a structure period of work experience for a pupil, student or trainee	15	(A minimum of 4 weeks is required to achieve 15 points i.e. 1 x student for 4 weeks or 4 x students for 1 week)
Education Support Initiative	Working with pupils or students to deliver education support initiatives which have a direct relevance to the contract	15	Doors Open experience targeted at schools/college Industry awareness days or workshops for school pupils or college students Structured career events for school pupils or college students Workplace visits for school pupils or college students (minimum of 10 students to qualify) School mentoring or enterprise/ vocational programme Creation/delivery of educational initiatives/outcomes with schools. This will be to encourage on-going learning and development of 'reduce, re-use and recycling' during performance of the contract. This will be accompanied by a statement on how positive outcomes associated with that engagement will be measured;
S/NVQ Training	S/NVQ Training for existing or new employees	25	S/NVQ's or equivalent for existing employees S/NVQ's or equivalent for new entrants S/NVQ's or equivalent for subcontract staff

Supply Chain Development Activity	Support for local businesses	15	Supply Chain Briefings with SME's Business Mentoring with SME's Business Support for Social Enterprises, Supported Businesses, Third Sector Organisations Mentoring Third Sector Organisations
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This and the following 1 page comprise Schedule 2 to the Framework Agreement between the Scottish Ministers and Vital Energi Utilities Limited

SCHEDULE 2 - PRICING SCHEDULE

Overheads, Profit and Risk			% make up			Accumulated %
Reference	Description	% mark up	Internal Labour Rates	Other internal costs	Sub-Contract Cost	
% Adjustment Contract Value of up to £500k	Overhead %	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED
% Adjustment Contract Value of up to £500k	Profit %	REDACTED	REDACTED	REDACTED	REDACTED	
% Adjustment Contract Value of up to £500k	Risk %	REDACTED	REDACTED	REDACTED	REDACTED	
% Adjustment Contract Value of up to £1m	Overhead %	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED
% Adjustment Contract Value of up to £1m	Profit %	REDACTED	REDACTED	REDACTED	REDACTED	
% Adjustment Contract Value of up to £1m	Risk %	REDACTED	REDACTED	REDACTED	REDACTED	

Investment Grade Proposal Costs

Investment Grade Proposal- Costs	In Scope Buildings Energy Bills of Up to £500k	In Scope Buildings Energy Bills of £500k+ to £1.5m	In Scope Buildings Energy Bills of £1.5m+ to £5m	In Scope Buildings Energy Bills of £5m+ to £7.5m	In Scope Buildings Energy Bills of £7.5m+	Total
Investment Grade Proposal- Maximum Fixed Charge (£)	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED
Independent M&V Professional IGP Costs	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED

Labour Costs

Role	Experience (for guidance)	Hourly Rate
Project Manager	Relevant professional qualification	REDACTED
Senior Professional Audit / Analysis Engineering Resource	Relevant professional qualification with at least 5 years post-qualification experience	REDACTED
Senior Professional Design Engineering Resource	Relevant professional qualification	REDACTED
Professional Audit / Analysis Engineering Resource	Relevant professional qualification with at least 5 years post-qualification experience	REDACTED
Professional Design Engineering Resource	Relevant professional qualification	REDACTED
Audit / Analysis Engineering Resource		REDACTED
Design Engineering Resource		REDACTED
Heating Engineer	Corgi Registered	REDACTED
Electrician	Relevant Professional qualification	REDACTED
General Labour		REDACTED
Joiner		REDACTED
Plasterer		REDACTED
Senior Quantity Surveyor	Relevant professional qualification with at least 5 years post-qualification experience	REDACTED
Quantity Surveyor	Professional qualification	REDACTED
Measurement and Verification Professional	Professional qualification	REDACTED
Construction Manager / Advisor	Relevant professional qualification with at least 5 years post-qualification experience	REDACTED
Bid / Commercial / Procurement Manager	Relevant professional qualification with at least 5 years post-qualification experience	REDACTED
Finance Manager	Relevant professional qualification with at least 5 years post-qualification experience	REDACTED
Director	Relevant professional qualification with at least 7 years post-qualification experience	REDACTED

SCHEDULE 3 – AWARD PROCEDURES

This and the following 4 pages comprise Schedule 3 to the Framework Agreement between the Scottish Ministers and Vital Energi Utilities Limited

1 Call Off Procedures – Option 1 (Standard Mini Competition) Notice of ITMC and Issue of ITMC

- 1.1 As the first stage of a mini-competition process, a Framework Public Body will issue a Notice of ITMC to the Framework Contractors.
- 1.2 Following receipt of the Notice of ITMC, Framework Contractors shall immediately confirm receipt of such Notice of ITMC and either:
 - 1.2.1. respond to the Notice of ITMC confirming an intention to bid; or
 - 1.2.2. notify the Framework Public Body in writing that it does not intend to take part in the mini-competition process.
- 1.3 A Framework Public Body will then:
 - 1.3.1. invite the Framework Contractors capable of performing the Call-off Contract by issuing an invitation to mini-competition ("ITMC")
 - 1.3.2. invite responses ("ITMC Proposals") to its ITMC in accordance with the applicable regulations and guidance within a certain timeframe; and
 - 1.3.3. supplement and refine the Call-off Contracts (Schedule 5) only to the extent permitted by and in accordance with applicable regulations and guidance.
- 1.4 The criteria for a mini-competition will be stated in a Framework Public Body's ITMC and shall be on the basis of the most economically advantageous response.
- 1.5 The selection process for a mini-competition may comprise of one or more stages as determined by the Framework Public Body ("Multi-Stage Tendering").
- 1.6 If a Framework Public Body decides to run Multi-Stage Tendering in a mini-competition, the Framework Public Body shall invite all suppliers on the Framework capable of supplying the Framework Public Body's requirements as outlined in the ITMC to submit bids as part of the initial tendering stage.
- 1.7 The Framework Public Body shall determine the method for shortlisting bidders in a Multi-Stage Tendering, which may cover any reasonable approach, including an outline proposal or explanation of competencies/approach in written and/or presentation format. The Framework Public Body shall ensure that the process is compliant with the relevant procurement regulations and is carried out within the EU principles of equal treatment, transparency, proportionality and non-discrimination.
- 1.8 The Framework Public Body shall determine how many stages may be used in a Multi-Stage Tendering and how selection at the end of the process will be undertaken.

2. Responding to ITMC and evaluation

- 2.1 Framework Contractors will require to respond to the Framework Public Body by the date specified in the ITMC.

- 2.2 The format, style and content of the response (including the ITMC Proposal) to be submitted by the Contractor will be defined in the ITMC.
- 2.3 The Framework Public Body will set out its requirements in the ITMC.
- 2.4 The ITMC Proposal to be submitted by the Contractor in response to the Framework Public Body's ITMC must meet or exceed minimum requirements set out in the ITMC for the Contractor to proceed.
- 2.5 The Contractor will also be required to confirm its costs and mark-up that it will apply to its costs under its ITMC Proposal.
- 2.6 Notwithstanding the type of ITMC Proposal the Framework Public Body requires to be submitted, the Contractor's ITMC Proposal shall provide a commitment that the Contractor has the capability and capacity to undertake the Investment Grade Proposal (and the Services arising out of the Investment Grade Proposal) for the portfolio of premises outlined in the ITMC and shall specify (with sufficient clarity) the cost of providing the Investment Grade Proposals across the whole of the relevant portfolio.
- 2.7 The Contractor's costs in putting together its ITMC Proposal shall be for the Contractor's own account.
- 2.8 A Framework Public Body shall have the right to decide not to select a Framework Contractor to provide the services set out in its ITMC and to discontinue a mini-competition at any stage. If it decides to do so, the Framework Public Body will notify all Framework Contractors invited to submit a response of that fact and the mini-competition shall be discontinued.
- 2.9 A Framework Public Body will evaluate ITMC Proposals in accordance with paragraphs 1.4 to 1.8 above.
- 2.10 A Framework Public Body will notify all Framework Contractors that submitted an ITMC Proposal of the outcome of its evaluation under paragraph 2.9.
- 2.11 Provided it has set out its intention to do so in its ITMC, a Framework Public Body shall have the option pursuant to its evaluation of ITMC Proposals of:
 - (i) proceeding to enter into a Development Contract (Schedule 5(a) of this Framework Agreement) in terms of paragraph 2.12 below with a single Framework Contractor, in which case it may also identify a reserve bidder with whom it may enter into a Development Contract in the event that it ultimately decides not to proceed with the first Framework Contractor in terms of paragraph 2.15 below; or
 - (ii) proceeding to enter into a Development Contract in terms of 2.12 below with more than one Framework Contractor.
- 2.12 A Framework Public Body can then proceed to enter into (a) Development Contract(s) with the successful Framework Contractor(s) who shall comply with the provisions of this Framework Agreement and requirements specified in the Development Agreement.
- 2.13 A Framework Contractor shall then complete the Investment Grade Proposal in line with the Development Agreement and submit its Investment Grade Proposal to the Framework Public Body in accordance with the Development Agreement.
- 2.14 In the event that more than one Framework Contractor has completed Investment Grade Proposals under a Development Contract, the Framework Public Body shall undertake the evaluation process set out in its ITMC in order to select the Framework Contractor with which it intends to enter into an EnPC-D&B or EnPC-DBFM Contract (Schedules 5(a) or 5(b) of this Framework Agreement).

- 2.15 A Framework Public Body shall have discretion, following the completion of the Development Contract stage, not to proceed to enter into an EnPC-D&B or EnPC-DBFM Contract with a Framework Contractor.
- 2.16 The terms of the Development Agreement and/or any relevant stipulations in the ITMC shall apply relevant to costs incurred by Framework Contractors at the Development Contract stage.
- 2.17 Subject to paragraph 2.15 above, the successful Framework Contractor can then proceed to enter into an EnPC-D&B or EnPC-DBFM Contract with the Framework Public Body and perform the services in compliance with that contract and its obligations under this Framework Agreement.

3 Call Off Procedures – Option 2 (Mini Competition with Pre Commercial Project Development Phase) Notice of ITMC and Issue of ITMC

- 3.1 As the first stage of the process, a Framework Public Body will issue a Project Brief and a Notice of ITMC to the Framework Contractors.
- 3.2 Following receipt of the Project Brief and Notice of ITMC, Framework Contractors shall immediately confirm receipt of such Notice of ITMC and either:
- 3.2.1. respond to the Notice of ITMC confirming an intention to participate; or
 - 3.2.2. notify the Framework Public Body in writing that it does not intend to take part in the mini-competition process.
- 3.3 A Framework Public Body will then:
- 3.3.1 Enter into a Pre Commercial Project Brief Development Phase with all of the Framework Contractors, to include site visits – this should last a period of 4 weeks – but may be longer.

N.B. Framework Contractors can remove themselves from the development phase process but no Framework Contractor can be eliminated by the Framework Public Body
- 3.4 A Framework Public Body will then:
- 3.4.1. develop and finalise the project brief from the Pre Commercial Project Development Phase
 - 3.4.2. invite the Framework Contractors capable of performing the Call-off Contract by issuing an invitation to mini-competition ("ITMC")
 - 3.4.3. invite responses ("ITMC Proposals") to its ITMC in accordance with the applicable regulations and guidance within a certain timeframe; and
 - 3.4.4. supplement and refine the Call-off Contracts (Schedule 5) only to the extent permitted by and in accordance with applicable regulations and guidance.
- 3.5 The criteria for a mini-competition will be stated in a Framework Public Body's ITMC and shall be on the basis of the most economically advantageous response.
- 3.6 The selection process for a mini-competition may comprise of one or more stages as determined by the Framework Public Body ("Multi-Stage Tendering").
- 3.7 If a Framework Public Body decides to run Multi-Stage Tendering in a mini-competition, the Framework Public Body shall invite all suppliers on the Framework capable of supplying the Framework Public Body's requirements as outlined in the ITMC to submit bids as part of the initial tendering stage.

3.8 The Framework Public Body shall determine the method for shortlisting bidders in a Multi-Stage Tendering, which may cover any reasonable approach, including an outline proposal or explanation of competencies/approach in written and/or presentation format. The Framework Public Body shall ensure that the process is compliant with the relevant procurement regulations and is carried out within the EU principles of equal treatment, transparency, proportionality and non-discrimination.

3.9 The Framework Public Body shall determine how many stages may be used in a Multi-Stage Tendering and how selection at the end of the process will be undertaken.

4. Responding to ITMC and evaluation

4.1 Framework Contractors will require to respond to the Framework Public Body by the date specified in the ITMC.

4.2 The format, style and content of the response (including the ITMC Proposal) to be submitted by the Contractor will be defined in the ITMC.

4.3. The Framework Public Body will set out its requirements in the ITMC.

4.4. The ITMC Proposal to be submitted by the Contractor in response to the Framework Public Body's ITMC must meet or exceed minimum requirements set out in the ITMC for the Contractor to proceed.

4.5. The Contractor will also be required to confirm its costs and mark-up that it will apply to its costs under its ITMC Proposal.

4.6. Notwithstanding the type of ITMC Proposal the Framework Public Body requires to be submitted, the Contractor's ITMC Proposal shall provide a commitment that the Contractor has the capability and capacity to undertake the Investment Grade Proposal (and the Services arising out of the Investment Grade Proposal) for the portfolio of premises outlined in the ITMC and shall specify (with sufficient clarity) the cost of providing the Investment Grade Proposals across the whole of the relevant portfolio.

4.7. The Contractor's costs in putting together its ITMC Proposal shall be for the Contractor's own account.

4.8. A Framework Public Body shall have the right to decide not to select a Framework Contractor to provide the services set out in its ITMC and to discontinue a mini-competition at any stage. If it decides to do so, the Framework Public Body will notify all Framework Contractors invited to submit a response of that fact and the mini-competition shall be discontinued.

4.9. A Framework Public Body will evaluate ITMC Proposals in accordance with paragraphs 4.4 to 4.8 above.

4.10. A Framework Public Body will notify all Framework Contractors that submitted an ITMC Proposal of the outcome of its evaluation under paragraph 2.9.

4.11 Provided it has set out its intention to do so in its ITMC, a Framework Public Body shall have the option pursuant to its evaluation of ITMC Proposals of:

- (i) proceeding to enter into a Development Contract (Schedule 5(a) of this Framework Agreement) in terms of paragraph 4.12 below with a single Framework Contractor, in which case it may also identify a reserve bidder with whom it may enter into a Development Contract in the event that it ultimately decides not to proceed with the first Framework Contractor in terms of paragraph 4.15 below; or

- (ii) proceeding to enter into a Development Contract in terms of 4.12 below with more than one Framework Contractor.
- 4.12 A Framework Public Body can then proceed to enter into (a) Development Contract(s) with the successful Framework Contractor(s) who shall comply with the provisions of this Framework Agreement and requirements specified in the Development Agreement.
- 4.13 A Framework Contractor shall then complete the Investment Grade Proposal in line with the Development Agreement and submit its Investment Grade Proposal to the Framework Public Body in accordance with the Development Agreement.
- 4.14 In the event that more than one Framework Contractor has completed Investment Grade Proposals under a Development Contract, the Framework Public Body shall undertake the evaluation process set out in its ITMC in order to select the Framework Contractor with which it intends to enter into an EnPC-D&B or EnPC-DBFM Contract (Schedules 5(a) or 5(b) of this Framework Agreement).
- 4.15 A Framework Public Body shall have discretion, following the completion of the Development Contract stage, not to proceed to enter into an EnPC-D&B or EnPC-DBFM Contract with a Framework Contractor.
- 4.16 The terms of the Development Agreement and/or any relevant stipulations in the ITMC shall apply relevant to costs incurred by Framework Contractors at the Development Contract stage.
- 4.17 Subject to paragraph 4.15 above, the successful Framework Contractor can then proceed to enter into an EnPC-D&B or EnPC-DBFM Contract with the Framework Public Body and perform the services in compliance with that contract and its obligations under this Framework Agreement.

This and the following 5 pages comprise Schedule 4 to the Framework Agreement between the Scottish Ministers and Vital Energi Utilities Limited

SCHEDULE 4 – MANAGEMENT ARRANGEMENTS

1. Roles & Responsibilities

1.1 The summary obligations of Contractors and the Framework Authority, as further developed below, are as follows:

1.1.1. The Contractor will:

- a) assist with the development of a Framework management strategy;
- b) provide Key Individuals details
- c) provide a nominated Contract Manager who will communicate with the Framework Authority;
- d) assist the Framework Authority in launching the Framework Agreement to Framework Public Bodies;
- e) meet, monitor and report on Framework Public Body spend;
- f) meet and continually improve monitoring and reporting on Contactor performance under the Framework;
- g) work with each Framework Public Body to develop and agree specific requirements and format for tailored management information reports and further developing these reports where required;
- h) maintain, prepare and submit additional management information reports to each Framework Public Body tailored to meet their needs. The format of the required information shall be agreed between the Framework Public Body and the Contractor;
- i) attend Framework management meetings as required;
- j) resolve issues and complaints;
- k) support and enable the Framework Authority and / or the Framework Public Body to carry out reviews of the Framework;
- l) support and enable the transition and closure of the Framework as appropriate e.g. TUPE information;
- m) provide feedback and input to enable continuous improvement; and
- n) work with the Framework Public Bodies and Framework Authority as required to provide timely information relevant to freedom of information requests, parliamentary questions or ministerial correspondence.

- 1.1.2. The Authority will:
- a) prepare the Framework management strategy;
 - b) prepare Framework points of contact;
 - c) prepare and communicate Framework information to Framework Public Bodies and the Contractor;
 - d) launch the Framework to the Framework Public Bodies with the Framework Contractors;
 - e) receive, review and manage continuous development;
 - f) monitor performance of all Framework Contracts under the Framework;
 - g) chair Framework management meetings as required;
 - h) support resolution of issues and complaints;
 - i) manage the transition and closure of the Framework;
 - j) collate lessons learnt from Framework Public Bodies and the Framework Contractors and feed this into future procurements to enable continuous improvement; and
 - k) work with the Framework Public Bodies and Framework Contractors as required to provide timely information relevant to freedom of information requests, parliamentary questions or ministerial correspondence

1.2 The Contractor recognises the importance of complying with Management Arrangements, including to facilitate monitoring of outputs under the Framework Agreement in order to maximise the outcomes sought under this Framework Agreement. The Contractor, in addition to complying with the following arrangements, shall comply with any relevant proposals contained in its tender leading to appointment to the Framework that go beyond the requirements set out in this Schedule and shall work with the Framework Authority to develop a strategic relationship immediately following framework award.

2. Framework Agreement Management Information Report

2.1 The Contractor recognises the importance of the Framework Authority being in a position to monitor the Framework Agreement's outputs (consisting in the main of outputs under Call-off Contracts), Accordingly, the Contractor shall maintain, at its own cost, appropriate management information systems and shall provide a Framework Agreement Management Information Report that consolidates information for the Framework Authority

2.2 The Contractor will provide a Framework Agreement Management Information Report that consolidates information for the Framework Authority on a quarterly basis. This Framework Agreement Management Information Report should be submitted to the appropriate individual within 15 calendar days of the end of each quarter.

2.3 The Framework Agreement Management Information Report will include, as a minimum, the following details (on a cumulative basis and also for the quarterly period):

- a) the number of mini-competitions that the Contractor has bid on;
- b) the number of mini-competitions that the Contractor has been successful on;
- c) the number of Development Contracts (Schedule 5(a)) the Contractor is currently performing;

- d) the number of: (i) EnPC-D&B (Schedule 5(b)); and/or (ii) EnPC-DBFM (Schedule 5(c)) contracts that the Contractor is currently performing
- e) a summary of the Contractor's activity under the Framework Agreement in the last 3 months;
- f) the level of spend with the Contractor of each Framework Public Body under Call-off Contracts pursuant to the Framework;
- g) financial savings achieved as a result of added value opportunities offered to Framework Public Bodies under Call-off Contracts;
- h) the community benefits achieved with Framework Public Bodies under Call-off Contracts;
- i) any relevant community benefits achieved relevant to the Contractor's participation in the Framework (not relating to a specific Call-off Contract);
- j) any relevant sustainability benefits achieved relevant to the Contractor's participation in the Framework (not relating to a specific Call-off Contract);
- k) the level of actual and target performance for the following key parameters to date with the Contractor of each Framework Public Body under Call-off Contracts pursuant to the Framework, updated quarterly:
 - a. Guaranteed Energy Cost Performance (GECP) expressed in pounds sterling
 - b. Total carbon emission reduction;
 - c. Low and zero carbon (LZC) technology heat generation (kWh)
 - d. Low and zero carbon (LZC) technology power generation (kWh)
- l) the number of complaints by Framework Public Bodies surrounding performance of a Call-off Contract by the Contractor;
- m) the number of complaints by Framework Public Bodies surrounding performance of a Call-off Contract that were not acknowledged within the prescribed time-limits by the Contractor; and
- n) An overview of any and all outstanding disputes between the Contractor and any Framework Public Bodies and their anticipated resolution time.

2.4 The Contractor will agree the exact content, format and style for the Framework Agreement Management Information Report with the Framework Authority during the mobilisation phase of this Framework Agreement.

2.5 The Contractor will adjust content, format and style for the Framework Agreement Management Information Report as required and on request by the Framework Authority throughout the duration of this Framework Agreement.

2.6 Unless otherwise agreed by the Framework Authority, the Contractor will continue to submit Framework Agreement Management Information Reports to the Framework Authority until its Call-Off Contracts have terminated.

General Matters relevant to Contractor Reporting obligations

- 2.7 The Contractor shall note the following (relative to units of measurement and conversion factors) when preparing Framework Agreement Management Information Reports:-
- a) All cost values are to be reported in sterling
 - b) Reporting of carbon, energy, floor area and all other physical parameters is to be in Système Internationale (SI) units;
 - c) Fuel calorific values will be consistent with Framework Public Bodies' invoiced values, as applicable to the reporting period;
 - d) Reporting conventions for carbon dioxide, and carbon dioxide equivalence of greenhouse gases will be consistent with the World Resources Institute's / World Business Council for Sustainable Development's Greenhouse Gas Protocols (for Corporate and Project Accounting) and as applied by the Climate Change (Scotland) Act 2009 and Climate Change (Reporting on Climate Change Duties) (Scotland) Order, in particular.
 - e) In the absence of any specific reporting standard or calculation methodology in the Project Brief, the Contractor shall ensure that:
 - i any calculation of CO₂e follows the principles set out in the WRI/WBCSD GHG Protocol (<http://www.ghgprotocol.org/standards/corporate-standard>);
 - ii all figures are provided in tCO₂e and all emissions are calculated using the UK national emissions factors, which are available in DEFRA's Corporate Reporting Guidelines;
 - iii conversions of non-CO₂ greenhouse gases to CO₂e are done using the Global Warming Potential (GWP) figures for the relevant gas published in the IPCC Second Assessment Report or national (Government-produced) publication; and
 - iv calculations of CO₂e savings from renewable energy and combined heat and power follow the Carbon Trust's Standard Rules.
 - f) If, after the date of this Agreement, the Framework Public Body issues a reporting standard or calculation methodology for CO₂e ("**Substitute Standard**"), this Clause shall be read and construed as if the calculation of CO₂e savings delivered shall be prepared in accordance with the Substitute Standard.
 - g) Emission factors for carbon dioxide equivalent global warming potential of energy use will be taken from the latest available published emission factors; i.e. in 2015 the Department for Environment, Food & Rural Affairs (DEFRA's) emission factors published online at: <http://www.ukconversionfactorscarbonsmart.co.uk/> for the appropriate reporting period.

3. Call-off Contract Reporting Obligations

- 3.1 The Contractor recognises the importance of Framework Public Bodies being in a position to monitor outputs under Call-off Contracts and shall maintain appropriate management information systems to enable it to provide detailed reporting to any Framework Public Body with which it enters into a Call-off Contract.
- 3.2 The Contractor will agree the exact content, format and style of reporting with each Framework Public Body.

4. Complaints

- 4.1. Complaints of any nature surrounding a Contractor's performance under this Framework must be acknowledged by the Contractor within 2 working days.
- 4.2. The Contractor shall operate a clear written protocol, as approved by the Framework Authority, for handling complaints timeously and effectively.
- 4.3. The Contractor shall maintain written details of any complaints received and how they are handled and make these available to the relevant specific Framework Public Body and to the Framework Authority as requested or required.
- 4.4. Where a complaint is made directly to the Framework Authority in relation to the Framework or in relation to the Contractor's performance of a Call-Off Contract under the Framework, the Framework Authority will pass this information to the Contractor and Framework Public Body and if deemed necessary assist the Contractor and Framework Public Body in the complaint investigation.

5. Supplier Relationship Management

- 5.1 Supplier relationship management is a two-way process to continually improve the performance of both the buying organisation and the supply organisation and to be mutually beneficial. It is not the same as, or intended to replace contract management. Supplier relationship management meetings will be held as is considered necessary by the Framework Authority. It is envisaged that this will be on an annual basis and the Contractor shall require to attend.
- 5.2 The Contractor and Framework Authority will agree a number of Key Roles and Key Individuals and the Contractor must ensure the continuity of Key Personnel throughout the Period of the Framework Agreement.
- 5.2 The Framework Authority will chair an introductory supplier relationship management meeting shortly after this Framework Agreement. This meeting will introduce the Contractor to the Framework Authority's vision and a "Supplier Relationship Management Strategy" will be agreed. Further supplier relationship management meetings will be chaired by the Framework Authority. The Framework Authority may choose to invite Framework Public Bodies to these meetings.
- 5.3 The Framework Authority will gather the outputs from these management arrangements to review under the five Supplier Relationship Management areas detailed in the table below.

Ref	Area	Description
1	Relationship Management	Developing and managing relationships to support the delivery Supplier relationship management
2	Performance & Risk Management	Developing, supporting and managing performance and risk of key supplier/s and the supply chain for continuous improvements
3	Strategic Value Management	Communication, alignment and delivery of objectives that are strategic to the Framework Authority and Framework Public Bodies
4	Capability & Efficiencies Management	Understanding the Contractor capability and seeking internal and external efficiencies through the streamlining of people, processes and/or systems

5	Financial Value & Demand Management	Pricing data analysis, and cost segmentation (e.g. open book costing) and ensuring specifications represent what is “needed” rather than what is “wished for”
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5.4 Outputs from supplier relationship management will include minutes of discussion points and actions for the way forward to deliver continuous improvement.

6. Service Levels and Framework/Performance Management

6.1 The Contractor will appoint a suitable representative to liaise with nominated individuals within the Framework Authority and will provide details of an alternative contact to cover absence from the workplace for any reason.

6.2 In addition to attending meetings held by the Framework Authority under paragraphs 5.1 and 5.2 above, the Contractor is expected to develop relationships with nominated individuals within each Framework Public Body to ensure that the level of service provided under any Call-Off Contract is satisfactory. Where specific problems are identified relevant to a Call-off Contract, the Contractor will attempt to resolve such problems with the nominated individual within the Framework Public Body.

6.3 As required the Framework Authority may organise regular meetings with the Contractor's representative to review performance under the Framework.

6.4 Performance Management consists of the monitoring, managing and communicating of the performance of the Framework / Call-off Contract. Performance Management includes the following performance measures:

- Delivery
- Service
- Quality
- Cost
- Sustainability
- Community Benefits

6.5 Performance measures and indicators will be agreed with the Contractor during the mobilisation of the Framework Agreement.

6.6 During the term of the Framework Agreement the Framework Authority shall have the right to assess and monitor overall satisfaction levels relevant to the Contractor's performance under this Framework Agreement and/or the satisfaction levels of any Framework Public Body relevant to any Call-off Contract entered into pursuant to this Framework Agreement and the Contractor shall use reasonable endeavours to assist the Framework Authority in carrying out such monitoring activity, including by providing the Framework Authority with the relevant information regarding the Framework Agreement, Call-off Contract and/or any other documentation referred to therein as and when requested to do so by the Framework Authority.

6.7 Throughout the term of the Framework Agreement, the Framework Authority will liaise regularly with the Framework Public Bodies and where common problems are identified, it will be the responsibility of the Contractor to liaise with the Framework Authority to agree a satisfactory course of action.

7. Contractor Management Information System

7.1 The Contractor shall create and/or maintain a database with up to date and accurate information at all times in order to provide the Framework Authority and/or the Framework Public Body with management information as requested.

7.2 The Contractor must be in a position to provide a strategic view of the utilisation of the Framework Agreement and high level information on the Framework Public Bodies buying under the Framework, including for the purpose of meeting reporting obligations set out in paragraph 2.

8. Continuous Improvement

8.1 The Contractor will deliver continuous improvement in the services provided under this Agreement, throughout the full duration of the Framework Agreement.

8.2 The Contractor recognises continuous improvement as on-going quantitative improvements delivered for:

- a) Reduction in whole life costs to the Framework Authority and Framework Public Bodies;
- b) Service quality enhancements including:
 - Reliability
 - Delivery method
 - Quality assurance
 - User satisfaction
 - Sustainability measures in performance
 - Community benefits measures in performance

8.3 Continuous improvement will be monitored by the Framework Authority as part of the processes set out above.

This and the following 440 pages comprise Schedule 5 to the Framework Agreement between the Scottish Ministers and Vital Energi Utilities Limited

SCHEDULE 5 –CALL-OFF CONTRACT TERMS AND CONDITIONS

5a Development Contract

AGREEMENT BETWEEN:

[●] (the **Authority**); and

[●], (registered under number [●]) whose registered office is
[●] (the **Contractor**).

WHEREAS

On 25 November 2019 the Scottish Government placed contract notice [ref SP-19-042] in the Official Journal of the European Union seeking expressions of interest in respect of the establishment of a framework for the contracting of energy efficiency projects at non-domestic public premises in Scotland;

The Authority invited potential providers (including the Contractor), by [invitation to mini competition (**ITMC**)] [letter] dated [date], to participate in a mini-competition process for the [project description] [at premises description] (**the Project**);

The Contractor submitted a tender on [date]. On the basis of this tender, the Authority selected the Contractor [by letter] dated [date] to [deliver the Project]/[participate in the final stage of the mini-competition process] [provide an Investment Grade Proposal] (**the Refinement Stage**)

As part of the [delivery of the Project]/[Refinement Stage], it is necessary for the Contractor to carry out and complete the Development Work (as hereinafter described). The Authority wishes the Contractor to undertake the Development Work on the terms and conditions set out in this Agreement.

NOW IT IS HEREBY AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

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

“Authority Policies” means [insert relevant references on a project specific basis to all and any policies provided by the Authority at ITMC stage in the ITMC pack];

“Authority Facilities” means any land, buildings or other structures, facilities and amenities and all supporting infrastructure occupied, owned or used by the Authority which is relevant to the delivery of the Project;

“Commencement Date” means [*insert date of commencement of the Refinement Stage of the mini-competition*];

“Delivery Agreement” means the [*refer to the EnPC agreement, the template form of which is included as Schedule 5 to the Framework Agreement, as issued by the Authority in ITMC Volume 2 for the purposes of the mini-competition process, the final terms of which will be progressed during Development Work*];

“Development Work” means an energy audit and (to the extent appropriate) a facilities survey of the Authority Facilities each undertaken by the Contractor, including the documenting of the same, the scope of which shall be agreed between the parties but shall at a minimum cover the following: [*to be completed on project specific basis including reference to all such work necessary for the development and production of the (i) Investment Grade Audit (ii) Investment Grade Proposal (iii) Measurement and Verification Plan and the sample savings report all in accordance with the terms of the mini-competition process including without prejudice the ITMC and the ITMC Proposal*];

“Development Work Fee” means [*note – fees and costs must relate to the amounts committed to within the Framework Agreement and within any ITMC Proposal prepared by the Contractor as part of the mini-competition process. These costs must be fixed amounts for defined periods, to give cost certainty to an Authority*];

“Investment Grade Audit” or **“IGA”** means an audit exercise undertaken by the Contractor [*to be completed on a project specific basis*] in accordance with the investment grade audit specification forming Schedule Part 1 to this Agreement, prepared in a form capable of incorporation into the Contractor’s Proposals forming Section 4 of Schedule Part 6 (Construction Matters) of the Delivery Agreement;

“Investment Grade Proposal” means a proposal from the Contractor comprising the following: [*to be completed on a project specific basis, but always to include*

- i. the Measurement and Verification Plan,*
- ii. the Investment Grade Audit;*
- iii. development and agreement of all Technical Schedules; and*
- iv. the full commercial and contractual proposal of the Contractor (Contractor’s Proposals, as defined in the Delivery Agreement).*

These shall be prepared in a form capable of incorporation into the Delivery Agreement - forming part of Schedule Parts 3 and 6 - and shall be legally enforceable and not subject to qualifications and/or caveats]

“ITMC Proposal” means [*the Contractor’s tender forming Schedule Part 4 to this Agreement*]. [*It will provide sufficient data, analysis and ranges of potential solutions in a format specified in the ITMC to enable the Authority to select the Most Economically*

Advantageous Tender. This could include the Bidders' high level commercial offers of Guaranteed Energy Cost Performance; Contract Sum; Net Present Value; Project Plan; an outline Measurement and Verification Plan; and the cost of carrying out the Investment Grade Proposal (subject to the maximum fixed fee values agreed under the Framework Agreement) and, in the case of DBFM contracts, the Annual Payment and Contract Term];

“Long Stop Date” means [●];

“Measurement and Verification Plan” means the measurement and verification documents prepared in a form capable of incorporation in Schedule Part 3 (*Measurement and Verification*) of the Delivery Agreement, prepared in accordance with the measurement and verification plan specification forming Schedule Part 2 to this Agreement;

][“Technical Schedules” *to be developed/completed on a project specific basis* - means the following technical schedules forming part of the Delivery Agreement:

a) Delivery Agreement Schedule Part 6 (*Construction Matters*) Sections:

- i. 1 (*Planning/Consents*)
- ii. 2 (*Safety During Construction/Installation*)
- iii. 5 (*Reviewable Design Data*)
- iv. 6 (*Quality Plans*)

b) Delivery Agreement Schedule Part 7 (*Programme*)

c) Delivery Agreement Schedule Part 10 (*Outline Completion Testing Programme*)

d) Delivery Agreement Schedule Part 11 (*Equipment*)

of which guidance notes and templates form Schedule Part 3 of this Agreement;]

“Term” means the term of this Agreement as determined in accordance with Clause 2;

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

1.2.1 headings 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;

1.2.2 except where the context expressly requires otherwise, references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedule are references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedule 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;

- 1.2.3 the Schedules and Attachments (if any) to this Agreement are integral parts of this Agreement and a reference to this Agreement includes a reference to the Schedule and the Attachments (if any);
- 1.2.4 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 organisation having legal capacity;
- 1.2.5 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 neuter or vice-versa;
- 1.2.6 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 the agreement or document as amended, supplemented, substituted, novated or assigned;
- 1.2.7 references to any statute, enactment, order, regulation or other similar instrument shall be construed as a reference to the statute, enactment, order, regulation or instrument as amended by any subsequent enactment, modification, order, regulation or instrument as subsequently amended or re-enacted;
- 1.2.8 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 of the relevant functions and relevant responsibilities of such public organisation;
- 1.2.9 references to other persons, other than the Authority and the Contractor, shall include their successors and assignees;
- 1.2.10 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*;
- 1.2.11 reference to “parties” means parties to this Agreement and references to a “party” means one of the parties to this Agreement;
- 1.2.12 in construing this Agreement, the rule known as *ejusdem generis* 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. TERM

2.1 This Agreement shall enter into force on the Commencement Date and shall continue (unless terminated earlier in accordance with its terms) until either:

2.1.1 the date on which the Authority and the Contractor enter into the Delivery Agreement, in circumstances where, following the completion of the Development Work, the Authority determines to enter into the Delivery Agreement; or

2.1.2 it is determined, pursuant to Clause 6.4, that the Authority and the Contractor shall not enter into the Delivery Agreement, either following the completion of or during the course of the Development Work.

3. DEVELOPMENT WORK

3.1 The Contractor shall undertake the Development Work in accordance with [*reference the programme submitted by the Contractor as part of the mini-competition process or developed by the Contractor within an agreed timescale under the terms of this agreement, which must include specific dates for the carrying out of the IGA and the submission of the IGP*].

3.2 As part of the Development Work the Contractor shall undertake the Investment Grade Audit, shall produce the Investment Grade Proposal and shall, subject to Clause 6.4, develop the Investment Grade Proposal pursuant to such further discussions with the Authority as may be appropriate.

3.3 The Contractor shall carry out the Development Work;

3.3.1 with all reasonable skill, care and diligence;

3.3.2 in accordance with all applicable laws, consents, regulations and Good Industry Practice;

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

3.3.4 in accordance with the Authority Policies.

3.4 The Contractor shall ensure that all staff, and all staff of any subcontractors of any tier, shall have a level of qualification, training and experience which is commensurate with their role in the undertaking of the Development Work.

3.5 The Contractor shall not, and shall procure that any subcontractors of any tier shall not, carry out as part of the Development Work any modifications, improvements or installations to the Authority Facilities nor make any intrusions of a material nature to any building fabric, control systems or utilities conduits without, in any case, the express written consent of the Authority.

- 3.6 The Contractor shall not, and shall procure that any subcontractors of any tier shall not, cause during the course of the Development Work any damage to the Authority Facilities or to any equipment or structures contained on or within such premises. In the event that any such damage is caused, the Contractor shall, at the Authority's option, either make good such damage or replace any damaged items at its sole expense or shall reimburse the Authority for any costs and/or expenses reasonably incurred by the Authority in repairing such damage or replacing any damaged items.

4. ACCESS TO AUTHORITY FACILITIES

- 4.1 Subject to the provisions of this Clause 4, the Contractor shall be entitled to enter the Authority Facilities solely for the purposes of carrying out its obligations under this Agreement.
- 4.2 The Contractor's entitlements under Clause 4.1 shall be exercised in accordance with [*refer to access schedule setting out proposed timings and locations which will be agreed with the Authority during the commencement meeting(s)*]. Without prejudice to the foregoing, the Contractor shall be obliged to mitigate the impact of its exercise of such entitlements upon the provision of Authority's functions and services at the Authority Facilities.
- 4.3 The Contractor shall ensure that any employees or agents engaged at the Authority Facilities, and any employees or agents of any subcontractors of any tier who are so engaged, shall conduct themselves in a responsible manner and shall follow such reasonable instructions as may be given to them by Authority members of staff. The Contractor shall immediately remove, or procure the removal of, any such agent or employee from the Authority Facilities at the request of the Authority (which request may, for the avoidance of doubt, be made at the Authority's sole discretion).

5. INFORMATION

[consider on a project specific basis whether the Authority should be obliged to provide any information to the Contractor in support of its carrying out of the Development Work and, if so, on what basis that information is to be provided. It should be assumed as a baseline that no warranty of accuracy is given and that any obligation upon the Authority is subject to any relevant provisions of the Framework Agreement, including with respect to confidentiality. If the provision of information is separately covered as part of the terms of the mini-competition process, then this clause may not be required. Bidders should refer to the Authority Data Pack included within the ITMC Pack for specific information relating to the buildings within this project. Where available, ITMC Volume 1 and the Authority Data Pack contains building specific information relating to:

- *Building usage including number of users, usage hours etc.*
- *Fuel unit costs*
- *Floor areas*

- *Energy usage data*
- *Metering details*
- *Refurbishment details*

Further building specific information within the Authority Data Pack includes past asbestos registers/surveys, site audit reports and site layout plans. Building specific information sheets are also included within the Authority Data Pack. No warranty of accuracy is given in relation to the information provided in the Authority Data Pack. The Contractor shall undertake all necessary due diligence on building information provided in the Authority Data Pack and shall take full responsibility for the accuracy of the information, carrying out survey works, where required, to inform the detailed design under the contract.]

6. SUBMISSION OF INVESTMENT GRADE PROPOSAL

- 6.1 The Contractor shall submit to the Authority the Investment Grade Proposal by the date specified in [*insert reference to relevant part of programme referred to in clause 3.1*] clause 3.1. Any failure of the Contractor to submit the Investment Grade Proposal in accordance with the timescale specified in this Clause 6.1 shall be deemed, for the purposes of Clause 8.1 of this Agreement, to be a material breach of this Agreement.
- 6.2 If it is determined by the Authority, acting reasonably, that the Investment Grade Proposal as submitted pursuant to Clause 6.1 is not complete, including as to content and scope, or is otherwise not in accordance with the requirements of this Agreement, the Authority shall within [14] days after the date of such submission notify the Contractor, such notification to include a reasonable level of detail as to the reasons for the Authority's determination. Within [14] days of receipt of the Authority's notification, the Contractor shall resubmit an updated Investment Grade Proposal in which the Contractor, acting in good faith, shall have sought to address to a reasonable degree of detail the reasons given by the Authority in making its said determination.
- 6.3 The Contractor shall procure that the Investment Grade Proposal which is submitted to the Authority pursuant to Clause 6.1, including as resubmitted pursuant to Clause 6.2 if relevant, is of a standard as would be reasonably expected of a consultant providing similar services as the Contractor.
- 6.4 The Authority shall, following consideration of the Investment Grade Proposal as submitted pursuant to this Clause 6, be entitled, at its sole discretion, to:
- 6.4.1 determine that the Authority and the Contractor shall not enter into the Delivery Agreement.
 - 6.4.2 seek to engage in further discussions with the Contractor with respect to the terms of the Investment Grade Proposal so submitted, with a view to entering into the Delivery Contract.

7. PAYMENT

7.1 In the event that:

7.1.1 either following the completion of or during the course of the Development Work, it is determined by the Authority, pursuant to Clause 6.4, that the Authority and the Contractor shall not enter into the Delivery Agreement; or

7.1.2 the Authority and the Contractor have not entered into the Delivery Contract by the Long Stop Date and there is no reasonable prospect of them entering into the Delivery Contract within a reasonable period of time following the Long Stop Date,

the Authority shall, unless the parties agree otherwise and subject to Clause 7.2, be liable to pay to the Contractor the Development Work Fee.

7.2 The Authority shall not be liable to pay the Development Work Fee in the following circumstances:

7.2.1 The Contractor has submitted an Investment Grade Proposal pursuant to Clause 6 which does not equal or improve upon the position set out in the ITMC Proposal;

7.2.2 *[to be considered on a project specific basis. It should be assumed as a baseline that the fee would not be paid where clauses 6.3, 8.1 or 8.2 apply].*

7.3 Where Clause 7.1 applies, the Contractor shall provide the Authority with an invoice for the Development Work Fee and the Authority shall pay such invoice within 30 days of receipt.

7.4 In the event of late payment of the Development Work Fee the Contractor shall be entitled to charge interest on the amount outstanding at an annual rate of [%] above [base rate], such interest accruing daily from the date on which the payment became due until the actual date of payment.

7.5 If the Authority and the Contractor enter into the Delivery Contract on or before the Long Stop Date, the Authority will not be liable to pay the Contractor the Development Work Fee, rather consideration for the Contractor carrying out the Development Work shall be incorporated into the [reference to contract payments] to be payable by the Authority to the Contractor under the Delivery Contract. For the avoidance of doubt, any such consideration as is incorporated into the [reference to contract payments] under the Delivery Contract shall be of a financial value which is fully consistent with the commitments made by the Contractor pursuant to the [reference the Framework Agreement or high level audit commitments to mirror the definition of "Development Work Fee"] and shall, where appropriate, be assessed on an open book basis.

8. TERMINATION

8.1 Either party may terminate this Agreement, by serving notice on the other party with immediate effect, if that other party materially breaches any provision of this Agreement and,

if such breach is capable of remedy, that other party has not remedied the breach within 14 days (or such longer period as may be agreed).

- 8.2 The Authority may terminate this Agreement by serving written notice on the Contractor with immediate effect if [*reference any relevant circumstances included within Framework Agreement such as insolvency*].
- 8.3 The Authority may terminate this Agreement at any time by giving 14 days' written notice to the Contractor.
- 8.4 [*Consider on a project specific basis, and in light of the terms of the relevant mini-competition, whether any compensation would be due by one or other party in the event of a termination of this Agreement pursuant to this Clause 8. It should be assumed as a baseline that no compensation is due by either party for a termination of this Agreement other than where the Authority terminates this Agreement on the basis of Clause 8.3, in which case payment shall be due to the Contractor on the basis of Clause 7 as if the Authority had notified the Contractor that it does not wish to enter into the Delivery Agreement with the Contractor. Such payment would require to be capped to relevant framework commitments and, so far as appropriate, to actual, verified time and cost reasonably incurred*]

9. FRAMEWORK AGREEMENT

- 9.1 [*Consider on project specific basis which provisions of the Framework Agreement should apply to this agreement mutatis mutandis, for example in respect of indemnity, PI/EL insurance and disputes*]

10. NO WAIVER

- 10.1 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).
- 10.2 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.

11. NO AGENCY

- 11.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Authority and the Contractor.

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

12. ENTIRE AGREEMENT

12.1 Except where expressly provided otherwise in this Agreement, this Agreement, and the [reference to Framework Agreement], constitute the entire agreement between the parties in connection with its subject matter and supersede all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

12.2 Each of the parties acknowledges that:

12.2.1 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

12.2.2 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.

13. THIRD PARTY RIGHT

13.1 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 Contractor or of any permitted assignee, it is expressly declared that no rights shall be conferred under and arising out of this Agreement (whether under the Contract (Third Party Rights) (Scotland) Act 2017 or otherwise) upon any person other than the Authority and Contractor.

14. SEVERABILITY

14.1 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.

15. AMENDMENTS

15.1 This Agreement may not be varied or amended except by an agreement in writing signed by duly authorised representatives of both parties.

16. FURTHER ASSURANCE

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

17. GOVERNING LAW AND JURISDICTION

17.1 This Agreement shall be considered as a contract made in Scotland and shall be subject to the laws of Scotland.

17.2 The parties agree that the courts of Scotland 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.

18. COUNTERPARTS AND DELIVERY

18.1 This Agreement may be executed in any number of counterparts and by each of the parties on separate counterparts.

18.2 Where executed in counterparts:

18.2.1 this Agreement will not take effect until each of the counterparts has been delivered;

18.2.2 where any counterpart is being held as undelivered, delivery will take place on the date of delivery agreed [among]/[between] the parties [(the “agreed date”). The agreed date will be inserted [in the testing clause] of this Agreement; and

18.2.3 [section 2(3) of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 is hereby excluded and shall not apply to the execution arrangements in respect of this Agreement].

IN WITNESS WHEREOF these presents consisting of this and the preceding [●] pages [together with

the schedule [in [●] parts] annexed hereto] are executed in counterpart as follows and DELIVERED on [●]:

[*signing blocks*]

[*Schedule parts, if needed*]

Schedule Part 1 - Investment Grade Audit Specification

Schedule Part 2 - Measurement & Verification Plan Specification

Schedule Part 3 – Technical Schedule guidance and templates

Schedule Part 4 – ITMC Proposal

5b EnPC-D&B Contract

AGREEMENT

between

[AUTHORITY]

and

[CONTRACTOR]

USER GUIDE – CAPITAL FUNDED (D&B) PROJECTS

This is the Energy Performance Contract (**EnPC**) as referred to in [*insert appropriate reference from Framework Agreement*].

Under the terms of the Framework Agreement, a public sector body wishing to contract for an energy efficiency retrofit project shall do so on the basis of an appropriate form of EnPC.

Users should note that this EnPC is intended for projects which comprise principally the design and construction/installation of retrofit measures, but without any substantive operational or ongoing maintenance obligations in respect of those measures. It is anticipated that projects of this nature will be publicly financed and that payments from the relevant Authority to the Contractor will be made from the Authority's capital budget on a 'design and build' basis, modified as appropriate to the specific circumstances of each project.

Users should also note the following:

- A. This EnPC is not a replacement for independent, specialist advice and public sector bodies must ensure that they have taken appropriate legal, financial and technical advice before using this document.**
- B. This EnPC should be used in conjunction with all relevant contractual, risk and accounting guidance promulgated or recommended by the Scottish Government and/or the Scottish Futures Trust from time to time.**
- C. This notice should be removed, and all optional text, drafting notes and footnotes checked or rationalised as appropriate, before finalisation of the Agreement for issue for a specific project.**
- D. Changes to the EnPC, other than project specific and minor drafting (such as completion of time periods) and to reflect issues discussed at paragraph E below, require the prior approval of the [Scottish Government].**
- E. This EnPC contains a number of footnotes and guidance notes which identify key issues the parties will need to consider when using it. This is not an exhaustive list, and the Agreement will therefore need to be analysed and reviewed in detail to ensure that it is tailored to the requirements of each project and that its terms (and their impact) are clearly understood by the parties. Customisation should not however extend to parties seeking to change the substance of commercial terms or making unnecessary drafting amendments.**
- F. It is anticipated that an Authority will decide upon the key commercial terms within this EnPC which require to be tailored to the requirements of a particular project prior to the issue of the Invitation to Mini-Competition for that project.**

EXPLANATORY NOTE

Users should note the following comments and assumptions with respect to this Agreement:

The Agreement is intended to deliver specified guaranteed energy cost performance to the Authority. In circumstances where that performance is not achieved, the Contractor will suffer contractual penalties. However, where guaranteed energy cost performance is achieved and exceeded, there will be no sharing of such excess benefit with the Contractor.

At the point of signing a contract based on this Agreement, it is assumed that the M&V Plan (see clause 19) and the baseline consumption figure(s) which are relied upon within that plan will have been agreed. Accordingly, it is assumed that any project development services or Investment Grade Proposal work will be covered in the framework arrangements, including any development contract, which precede the signing of this contract.

Measurement and Verification is fundamental to establishing whether the guaranteed energy cost performance (GECp) has been delivered. The M&V Plan (see clause 19 and Schedule Part 3 and related technical pack documents) including M&V baselines, analysis procedure, reporting and remediation works verification (as well as any related remediation works programme agreed between the Authority and Contractor in terms of clause 17.8) therefore requires to be robust and project specific. The M&V process should also be provided for in the Completion Testing Programme (see clause 17 and Schedule Part 10)

The Agreement assumes the M&V Professional will be independent of the Contractor. The Authority should ensure that the M&V Professional appointed by the Contractor owes the Authority a duty of care, and a suitable form of warranty is provided at Schedule Part 9. However if on a project specific basis the measurement and reporting of energy consumption for all of the installed measures is carried out 'in-house' by the contractor, consideration should be given to including a requirement that all data collected will be made available to an independent third party verification specialist to review and agree the level of energy performance that has been achieved.

It is assumed that appropriate insurances will be available. However, the scope and terms of insurance will require to be developed on a project specific basis. To the extent that minimum levels of insurance have been committed to as part of the framework appointment process, this should be reflected in the development of these terms.

With respect to Authority obligations, note clauses 10.3 (related to works/buildings infrastructure) and 16 (related to equipment) – these should be considered on a project by project basis because they may, once developed, impose specific contractual obligations on the Authority which are commercially necessary to facilitate the project. In particular, clause 10.3 includes the concept of "Authority Assets Condition Standard". To be considered on a project specific basis how this standard should be ascertained – for example there may be an agreed schedule of condition prepared as part of the project awards procedure envisaged within the Framework Agreement. The assets which the Authority believes to be relevant for use in the project should, where possible, be identified by the Authority in any Authority Data Pack that may be prepared.

On-site generation facilities. The potential for on-site generation has been noted in a number of relevant places in the draft Agreement but detailed drafting would need to be developed on a project specific basis. This would require a detailed review of a number of provisions, such as payment, handover and land interests.

Clause 10 and elsewhere – it is expected that most projects will not involve significant 'greenfield' construction and that works/installation will generally take place within existing buildings. Note that the concept of "Site" in the contract is intended to refer to such works/installation areas as are relevant to the project, wherever they may be within or around the wider public sector "Facilities".

Clause 14.1 (Dates for Completion) – note that liquidated damages for late completion of works/installations are assumed not to be appropriate, however the point should be considered on a project specific basis and appropriate drafting introduced to the Agreement.

Clause 21 (Guaranteed Energy Cost Performance) – note that the operation of the M&V Plan will have the effect of adjusting the baseline energy consumption to the extent necessary to eliminate from consideration the impact of consumption factors which it is appropriate to exclude from the Guaranteed Energy Cost Performance assessment - for example, factors such as weather, hours/days of usage/occupancy of the site, number of occupants/users at the site,

Clause 29 (Change Control) – the agreement seeks to recognise that the Guaranteed Energy Cost Performance may be impacted by a range of factors which are not directly relevant to the proper performance of the Contractor's obligations under the Agreement. The normal operation of the M&V Plan will eliminate a number of these factors (see note on clause 21 above), and in respect of non-routine factors the change control mechanism includes a bespoke process (M&V Plan Change) which is intended to provide the parties with a swift and pragmatic means to agree on the impact of such non-routine factors, without the need to resort to a convoluted contract change process on each occasion. For example, non-routine factors can be adverse site conditions, additional works carried out by the Authority at the site, the Authority vacating all or part of the site, non-typical variations in the number of occupants/users at the site.

Clause 30 and related provisions – these provisions reflect a milestone payment model whereby:

the Contractor is not paid regular amounts during construction/installation, rather is paid a bullet amount at practical completion, which amount will be a set percentage of the contract price. This percentage will be set on a project specific basis – on a project by project basis, each Authority has the option to consider flexing milestone payment 1 and providing for phased milestone 1 payment(s) as appropriate, while retaining the commercial principle that no payment is made until practical completion of distinct elements e.g. phased milestone payments on completion of building/buildings and/or measures without undermining the commercial principle of payment on practical completion;

the remainder of the contract price will then be paid on satisfactory completion of the GECP Testing, which testing will be assessed as part of the M&V Plan.

Parent guarantee or bond – to the extent that covenant support for framework project opportunities has been committed to under the Framework Agreement, such commitment should be carried forward into this Agreement to the extent necessary.

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AGREEMENT BETWEEN:

[●], (the **Authority**); and

[●], a company incorporated in [●] (registered under number [●]) whose registered office is [●] (the **Contractor**).

WHEREAS:

The Authority wishes to procure [*Project*] at [*site(s)*] (the **Project**);

The Authority invited tenders, pursuant to the project award procedures of the Scottish Ministers' non-domestic energy efficiency framework (being framework reference number [●]), from framework suppliers interested in being appointed by the Authority as the delivery contractor to carry out the Project; and

Following the submission of tenders, it appears to the Authority to be expedient for the purpose of, or in connection with, the discharge of its functions to enter into this Agreement, which sets out the terms and conditions upon which the Contractor will carry out the Project.

NOW IT IS HEREBY AGREED as follows:

PART 1: GENERAL

1. DEFINITIONS AND INTERPRETATION

Schedule Part 1 (*Definitions and Interpretation*) shall apply.

2. EXECUTION AND DELIVERY OF DOCUMENTS

On or prior to execution of this Agreement:

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

2.2 the Authority shall deliver to the Contractor the documents referred to in Section 2 (*Documents to be delivered by the Authority*) of Schedule Part 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by the Contractor 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 40.5, shall terminate automatically on the expiry of the Project Term.

¹ Note that this list of documents must include an M&V Professional's Collateral Agreement

4. PROJECT DOCUMENTS²

Ancillary Documents

4.1 The Contractor 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 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 Part 8 (*Review Procedure*) and either:

- (a) there has been no objection in accordance with paragraph 0 of Schedule Part 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) the Contractor is acting in accordance with the comments of the Authority as provided in paragraph 0 of Schedule Part 8 (*Review Procedure*);

- and, in the circumstances specified in Clause 4.1.1, Project Co has complied with Clause 48 (*Assignment and Sub-contracting*).

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 the Contractor enters into a new Project Document (or any agreement which affects the interpretation or application of any Project Document), the Contractor 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 the Contractor.

² This provision may need to be adapted on a project specific basis though the Contractor's obligations around related documents (e.g. sub contracts etc) should be retained.

5. THE PROJECT OPERATIONS

Scope

5.1 Subject to and in accordance with the provisions of this Agreement, the Contractor 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 standards³

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

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

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

5.2.3 in a manner consistent with the Quality Plans;

5.2.4 except to the extent expressly stated to the contrary in the Authority's Requirements, in compliance with all applicable [*sector or Authority specific requirements*];

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

5.2.6 in so far as not in conflict with an express obligation of the Contractor under this Agreement, or where in relation to a matter there is no express obligation or standard imposed on the Contractor under this Agreement, in accordance with Good Industry Practice.

In the event that any ambiguity, uncertainty, dispute or discrepancy arises in the nature and scope of Contractor'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 the Contractor that it shall:

5.3.1 subject to the provisions of this Agreement, comply with all Laws, [*sector or Authority specific requirements*] and Consents applicable to it which relate to the Project Operations;

5.3.2 not wilfully impede the Contractor in the performance of its obligations under this Agreement (having regard always to the interactive nature of the activities of the Authority and of the Contractor and to the Authority's use of the Facilities to provide the relevant

³ To consider specific provisions on a project by project basis though principle around standards and quality should be retained

Authority Services and any other operations or activities carried out by the Authority or any Authority Related Parties on or around the Facilities for the purposes contemplated by this Agreement and any other of the Authority's statutory functions); and

- 5.3.3 inform the Contractor 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 the Contractor informed, of any course of action to remedy the situation recommended or required by the Scottish Government, the Authority or other competent authority,

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

Co-operation

- 5.4 Each party agrees to co-operate, 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 CONTRACTOR

Contractor Parties

- 6.1 Subject to the provisions of Clause 26.1.5, the Contractor shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any Contractor Party. The Contractor shall, as between itself and the Authority, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches and negligence of all Contractor Parties. All references in this Agreement to any act, default, omission, breach or negligence of the Contractor shall be construed accordingly to include any such act, default, omission, breach or negligence of a Contractor Party.

Safety

- 6.2 The Contractor shall, in carrying out the Project Operations, have full regard for the safety of all persons at the Facilities (whether lawfully or not) and keep the Site, the Facilities and the [*relevant parts of 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 The Authority shall not be liable to the Contractor for and the Contractor 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, delict or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, the Contractor, or any Contractor Party.

No warranty

- 7.2 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 the Contractor under this Agreement or under any of the Project Documents. In addition, the Authority shall not be liable to the Contractor in respect of any failure to disclose or make available to the Contractor (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 the Contractor (whether before, on or after execution of this Agreement) of any inaccuracy, error, omission, defects or inadequacy in the Disclosed Data.

Contractor investigation

7.3 The Contractor 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 Contractor Party shall) make any claim against the Authority or any Authority Party whether in contract, delict 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 the Contractor be relieved from any obligation imposed on, or undertaken by it, under this Agreement on any such ground.

8. REPRESENTATIVES

Representatives of the Authority

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

8.2 The Authority may by notice to the Contractor change the Authority's Representative.

8.3 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:

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

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

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

Representative of the Contractor

8.5 The Contractor's Representative shall be [●] or such other person appointed pursuant to Clause 8.6. The Contractor's Representative shall have full authority to act on behalf of the Contractor for all purposes of this Agreement. Except as previously notified in writing before such act by the Contractor to the Authority, the Authority and the Authority's Representative shall be entitled to treat any act of the Contractor's Representative in connection with this Agreement as being expressly authorised by the Contractor and the Authority and the Authority's Representative shall not be required to determine whether any express authority has in fact been given.

8.6 The Contractor may by notice to the Authority change the Contractor's Representative.

PART 2: LAND ISSUES

9. NATURE OF LAND INTERESTS⁴

Access During Construction/Installation

9.1 From the Commencement Date until the Actual Completion Date or (if earlier) the Termination Date, the Authority shall grant to the Contractor and the Contractor Parties, or procure that the Contractor and the Contractor Parties are granted access to the relevant parts of the Facilities and are granted the Ancillary Rights, in each case, subject only to the [Reserved Rights, the Title Conditions⁵ and the]Authority's rights under this Agreement and solely for the purposes of implementing the Works.⁶

Access Following Construction/Installation

9.2 After the occurrence of the Actual Completion Date the Authority shall grant to the Contractor and the Contractor Parties, or procure that the Contractor and the Contractor Parties are granted, access to the relevant parts of the Facilities subject only to [the Reserved Rights, the Title Conditions and]⁷the provisions of this Agreement and solely for the purposes of carrying out the Project Operations (other than those Project Operations for which the Contractor is granted rights

⁴ To consider specific provisions on a project by project basis though principle around standards and quality should be retained

⁵ Depending on the nature and specific circumstances of the project, caveats related to title may not be necessary.

⁶ The precise terms of this clause will vary from project to project. The "Site" may only be a small part of a wider public facility, and as such access routes and safe working zones will need to be considered. It may also be impractical to have a fixed concept of "Site" depending upon the nature of the installations – to be considered on a project specific basis.

⁷ As with previous comment related to title

pursuant to Clause 9.1 (*Access During Construction*)), carrying out Snagging Matters and remedying Defects and exercising the Ancillary Rights.⁸

Extent of Rights

- 9.3 The rights referred to at Clauses 9.1 (*Access During Construction/Installation*) and 9.2 (*Access Following Construction/Installation*) 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 the Contractor shall not have or be entitled to exclusive possession or any estate, right, title or interest in and to the Site or the Facilities or any part thereof except as provided herein and shall occupy 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 the Contractor and the Contractor Parties.
- 9.5 The Contractor shall procure that:
- 9.5.1 [all Project Operations carried out at the Site by or on behalf of the Contractor (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]⁹; and
- 9.5.2 there shall be no action, or omission to act by the Contractor or a Contractor Party, which shall give rise to a right for any person to obtain title to the Site or any part of it.

10. THE SITE¹⁰

- 10.1 The condition of the Site between the Commencement Date and the Actual Completion Date shall be the sole responsibility of the Contractor. Accordingly (without prejudice to any other obligation of the Contractor under this Agreement), the Contractor shall, subject to the provisions of Clause 10.3, be deemed to have:
- 10.1.1 inspected and examined the Site and any relevant parts of the Facilities and their surroundings and (where applicable) any existing structures or works on, over, under or supporting the Site and any relevant parts of the Facilities;
- 10.1.2 satisfied itself as to the nature of the ground and the subsoil (where relevant), the form and nature of the Site and any relevant parts of the Facilities, the load bearing and other relevant properties of the Site and any relevant parts of the Facilities, the risk of injury or damage to property affecting the Site and any relevant parts of the Facilities, the nature of the materials (whether natural or otherwise) to be removed 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, without prejudice to the Contractor's rights under this Agreement in respect of a breach by the Authority of its obligations under Clause 9.1 and/or Clause 9.2;

⁸ As with previous comment related to "Site".

⁹ As with previous comment related to title

¹⁰ Per related user guide notes/footnotes [6], to be considered on a project specific basis, including 'Site' definition.

- 10.1.4 satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties; and
- 10.1.5 [satisfied itself as to the Title Conditions and the Reserved Rights].¹¹
- 10.2 To avoid doubt, the Contractor accepts full responsibility for all matters referred to in Clause 10.1 and the Contractor 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 25 (*Delay Events*), on any grounds including (without limitation) the fact that incorrect or insufficient information on any matter relating to the Site or the Facilities was given to it by any person, whether or not the Authority or an Authority Party;
- 10.2.2 be responsible for, and hold the Authority harmless from, cleaning up and/or otherwise dealing with any Contamination on or at the Site or the Facilities prior to the Actual Completion Date 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 the Contractor); and
- 10.2.3 be responsible for, and hold the Authority harmless from, cleaning up and/or otherwise dealing with any Contamination which subsequently occurs on or at the Site or the Facilities to the extent that such Contamination has been caused by the Contractor either by breach of its obligations under this Agreement or otherwise due to its act or omission in carrying out the Project Operations and shall reimburse the Authority within [●] Business Days all Direct Losses resulting from such Contamination.
- 10.3 [The Authority shall be obliged to maintain, throughout the term of this Agreement, the following elements of the Authority Assets to the Authority Assets Condition Standard:
- 10.3.1 [*list relevant elements on a project specific basis such as legacy equipment*]].¹²

11. **CONSENTS AND PLANNING APPROVAL**¹³

11.1 The Contractor shall be responsible for:

- 11.1.1 [obtaining all Consents which may be required for the performance of the Project Operations]; and¹⁴
- 11.1.2 implementing each Consent within the period of its validity in accordance with its terms.

¹¹ As with previous comment related to title.

¹² This clause should list the pre-existing elements of building fabric structure, fixtures, fittings or equipment (which for the avoidance of doubt excludes any assets the Contractor is installing or improving) upon which the Contractor should justifiably be entitled to rely in the performance of the Project Operations. C/f the purpose of clause 16 and Schedule Part 11 – see footnoted comments in clause 16.

¹³ Scope of this provision to be considered on a project by project basis.

¹⁴ This provision is subject to any project specific decision that the Authority as host is better placed to obtain the relevant consents.

11.2 In the event that:

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

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

11.2.3 the Contractor 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 the Contractor, to claim or to include within its claim such sums as the Contractor acting reasonably requests and shall pay to the Contractor the part of any compensation that it receives under that scheme that relates to the sums claimed at the request of the Contractor.

PART 3: DESIGN AND CONSTRUCTION/INSTALLATION

12. THE DESIGN, CONSTRUCTION/INSTALLATION AND TESTING PROCESS

Overall Responsibility

12.1 Contractor shall carry out the Works:

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

12.1.2 in accordance with Contractor's Proposals; and

12.1.3 in accordance with the terms of this Agreement.

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

12.2.1 the fact that the Contractor has complied with the Contractor's Proposals shall not be a defence to an allegation that the Contractor has not satisfied the Authority's Requirements; and

12.2.2 the fact that Contractor has satisfied the Authority's Requirements shall not be a defence to an allegation that Contractor has failed to comply with Contractor's Proposals.

Design responsibility

12.3 The Contractor warrants that it has used, and will continue to use, the degree of skill and care in the design of the Works to 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.¹⁵

¹⁵ To be considered on a project specific basis whether to also rely on warranties to the Authority from specialist subcontractors. This will depend on the nature of the project.

Authority design approval

- 12.4 The Contractor shall develop and finalise the design and specification of the Works and [the Authority shall review the Reviewable Design Data in accordance with Schedule Part 8 (*Review Procedure*) and the provisions of this Clause 12.4:
- 12.4.1 The Contractor shall submit the Reviewable Design Data to the Authority's Representative for review under Schedule Part 8 (*Review Procedure*). The Contractor shall not commence or permit the commencement of construction or installation of the part or parts of the Works 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 the Contractor is entitled to proceed with construction in accordance with paragraph 0 of Schedule Part 8 (*Review Procedure*) or the Contractor is:
- (a) disputing the status of such Reviewable Design Data pursuant to paragraph 0 or paragraph 0 of Schedule Part 8 (*Review Procedure*); and
 - (b) proceeding at risk pursuant to paragraph 0 of Schedule Part 8 (*Review Procedure*).
- 12.4.2 The Contractor 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.]¹⁶

Rectification of Contractor's Proposals

- 12.5 Without prejudice to Clause 12.1, if it should be found that the Contractor's Proposals do not fulfil the Authority's Requirements, the Contractor shall at its own expense, and in accordance with Clause 12.6 below, amend the Contractor's Proposals and rectify the Works or any part affected. Such amendment and rectification shall have the effect that:
- 12.5.1 the Contractor's Proposals shall satisfy the Authority's Requirements; and
- 12.5.2 following the amendment or rectification, the structural, mechanical, electrical and, where relevant, energy efficiency performance of the Works (or, if applicable, to such part of the Facilities as the Works relate) will be of an equivalent standard of performance to that set out in Contractor'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).
- 12.6 Where Clause 12.5 applies, the Contractor shall submit its proposal for amending the Contractor's Proposals and rectifying the Works (or any part affected) to the Authority's Representative for review under Schedule Part 8 (*Review Procedure*) and shall not amend Contractor's Proposals or commence or allow the commencement of the rectification of the Works (or any part affected) until

¹⁶ To be considered on a project specific basis whether it would be desirable for the Authority to review, under the terms of the Review Procedure, any 'reviewable design data'. If so, the words in square brackets should be applied along with the related provisions of the Review Procedure. If no such design review is anticipated, all key elements of the Investment Grade Proposal would need to be set out in the Authority's Requirements or Contractor's Proposals.

the Authority's Representative, acting reasonably, permits it to proceed in accordance with Schedule Part 8 (*Review Procedure*).

Construction Skills Certification Scheme

- 12.7 The Contractor 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.

13. RIGHT OF ACCESS OF AUTHORITY'S REPRESENTATIVE

Access to the Site

- 13.1 The Contractor shall procure that:

13.1.1 subject to complying with all relevant safety procedures, the Authority's Representative shall have unrestricted access at all reasonable times during normal working hours to:

- (a) view the Works at the Site on reasonable prior notice appropriate to the circumstances; and
- (b) subject to obtaining the consent of the relevant manufacturer or supplier (which the Contractor 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; and

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

Increased monitoring

- 13.2 If, following any viewing, visit or inspection made pursuant to Clause 13.1.1, it is discovered that there are defects in the Works or that the Contractor has failed to comply with the Authority's Requirements or Contractor's Proposals, the Authority's Representative may (without prejudice to any other right or remedy available to the Authority) by notice to the Contractor increase the level of monitoring of the Contractor until such time as the Contractor 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. The Contractor 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, the Authority's Representative shall have the right at any time prior to the Actual Completion Date to request the Contractor to open up and inspect any part or parts of the

Works where the Authority's Representative reasonably believes that such part or parts of the Works is or are defective and the Contractor shall comply with such request.

- 13.4 Prior to exercising his right pursuant to Clause 13.3 above, the Authority's Representative shall notify the Contractor 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, the inspection shows that the relevant part or parts of the Works are not defective then Clause 25.3.4 shall apply.
- 13.6 If, following the exercise by the Authority's Representative of his right pursuant to Clause 13.3, the inspection shows that the relevant part or parts of the Works is or are defective, the Contractor 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 the Contractor at no cost to the Authority and the Contractor 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, 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 the Contractor does not agree with such opinion, the matter shall be determined in accordance with Schedule Part **18** (*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 Contractor under this Agreement save as expressly set out in this Clause 13 (*Right of Access of Authority's Representative*).

Safety during Construction/Installation

- 13.9 The provisions of Section **2** (*Safety During Construction/Installation*) of Schedule Part **6** (*Construction Matters*) shall apply to matters of safety.¹⁷

14. PROGRAMME AND DATES FOR COMPLETION¹⁸

Dates for Completion

- 14.1 The Contractor shall complete the Works by the Completion Date.

The Programme¹⁹

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

¹⁷ The concept of "safety during construction" may not be fully relevant to some projects, depending upon the nature of the installations.

¹⁸ Note that in some projects phasing may be required, whereby different measures are installed with varying completion dates.

¹⁹ Consider extent of programme change mechanism (including review, timescale provisions) on a project specific basis

- 14.3 The initial Programme is set out at Schedule Part 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 Part 8 (*Review Procedure*). The Contractor 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 Part 8 (*Review Procedure*).
- 14.4 If it appears to the Authority's Representative at any time that the actual progress of the Works has significantly fallen behind the Programme, then the Authority's Representative shall be entitled to require the Contractor 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 the Contractor (at the Authority's option):
- 14.4.1 to produce and submit to the Authority's Representative in accordance with Schedule Part 8 (*Review Procedure*) a revised Programme showing the manner and the periods in which the Works will be carried out to ensure completion; and/or
- 14.4.2 to produce and submit to the Authority's Representative in accordance with Schedule Part 8 (*Review Procedure*) a revised Programme showing the steps which are to be taken to eliminate or reduce the delay.

Early completion

- 14.5 Notwithstanding that the Works may have been completed in accordance with this Agreement, the Actual Completion Date may only occur on a date on or after the Completion Date unless the Authority, in its absolute discretion, agrees otherwise in writing.²⁰
- 14.6 The Contractor shall notify the Authority's Representative if at any time the actual progress of the Works is significantly ahead of the Programme such that the Contractor anticipates that the Actual Completion Date could occur earlier than the Completion Date in which case the Authority's Representative shall be entitled to require the Contractor to produce and submit to the Authority's Representative a revised Programme showing the manner and the periods in which the Works will be carried out and what the revised date for completion would be to enable:
- 14.6.1 the Authority to consider (at its absolute discretion) whether to agree an earlier date for completion if requested by the Contractor to do so; and
- 14.6.2 the parties to consider what modifications (if any) will be required to the Agreement in order to accommodate such earlier date for completion if agreed to by the Authority pursuant to Clause 14.5.

15. LIQUIDATED DAMAGES FOR DELAY²¹

16. EQUIPMENT

The parties shall comply with the terms of Schedule Part 11 (*Equipment*).²²

²⁰ Authorities may consider early completion provisions for projects with a longer construction/installation period.

²¹ Consider on a project specific basis whether a liquidated damages provision is appropriate.

17. PRE-COMPLETION TESTING AND COMPLETION²³

- 17.1 Not less than [[•] days / weeks / months] before the Completion Date, the Contractor shall provide the Authority with a draft of the Final Completion Testing Programme²⁴ as developed by the Contractor in accordance with the provisions of Clause 17.2. The Authority shall provide the Contractor with comments on the draft Final Completion Testing Programme submitted to it within fifteen (15) Business Days. The parties shall, within fifteen (15) Business Days of receipt by the Contractor of Authority's comments agree the terms of the Final Completion Testing Programme. If the parties are unable to agree the Final Completion Testing Programme by [•] ([•]) weeks before the Completion Date, the matter shall be referred for determination in accordance with Schedule Part **18** (*Dispute Resolution Procedure*).
- 17.2 The Final Completion Testing Programme shall be in accordance with the Outline Completion Testing Programme, unless otherwise agreed by the Authority in its absolute discretion. The Final Completion Testing Programme shall then replace the Outline Completion Testing Programme.

Pre-Completion inspection

- 17.3 The Contractor shall give the Authority's Representative not less than twenty (20) Business Days' notice and not more than thirty (30) Business Days' notice of the date upon which the Contractor considers that the Works will be complete and the tests on completion to be performed in accordance with the Final Completion Testing Programme will be carried out. Following receipt of the notice specified in this Clause 17.3 (Pre-Completion Inspection) the Authority's Representative shall be entitled to inspect the Works on the date or dates reasonably specified by the Contractor in accordance with this said Clause 17.3, and to attend any of the tests on completion (including, without limitation, the repetition of any of the tests on completion which are required to be carried out and passed in accordance with the Final Completion Testing Programme). The Contractor shall, if so requested, accompany the Authority's Representative on any such inspection.

Completion Certificate

- 17.4 The Authority's Representative shall, when he is satisfied, acting reasonably, that the Works are complete in accordance with the Completion Criteria and this Agreement, issue a Certificate of Practical Completion to that effect to the Contractor stating the date upon which, in his opinion, the Actual Completion Date occurred.²⁵
- 17.5 The issue of the Certificate of Practical Completion shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence that the Works were completed in accordance with the

²² The schedule should deal with any transfer/decommissioning of existing equipment, materials or apparatus and any other specific agreements around provision of equipment by the Contractor (with any cross-over to the provisions of Schedule Part 10 to be managed on a project specific basis). This will be determined on a project by project basis. Any proposed interface between Authority personnel and Contractor installed equipment should be dealt with in a project specific, extra-contractual interface protocol.

²³ Note that this provision sets out wording for the completion testing (i.e. practical completion) of energy efficiency works and energy management technology. The operational testing of such works/assets, following the Actual Completion Date, is dealt with in Clause 18, however it is assumed that the Outline/Final Completion Testing Programme will include the testing requirements of this clause 17 (pre-completion). The scope and timescales referred to within this Clause 17 and interplay with the M&V process will need to be reviewed on a project specific basis.

²⁴ This must include the tests for completion of relevant assets including proposals for Authority to witness those tests.

²⁵ This sign-off mechanic should be considered on a project specific basis.

Completion Criteria and this Agreement on the date stated in the Certificate of Practical Completion.

- 17.5A The Authority's Representative shall issue the Certificate of Practical Completion notwithstanding that there are Snagging Matters. Where there are Snagging Matters, the Authority's Representative shall, within [●] Business Days of the date of issue of the Certificate of Practical Completion, issue a Snagging Notice which shall specify the Snagging Matters and an estimate of the cost of rectifying such Snagging Matters.
- 17.5B Following the issue of a Snagging Notice, the Contractor shall, in consultation with the Authority's Representative and in such manner as to cause as little disruption as reasonably practicable to the Authority's use of the Facilities, rectify all Snagging Matters within [●] Business Days of the issue of the Snagging Notice.
- 17.5C If, within [●] Business Days of the issue of the Snagging Notice the Contractor has failed to rectify the Snagging Matters specified in the Snagging Notice the Authority may by itself (or engage others to) carry out the works necessary to rectify the Snagging Matters, at the risk and cost of the Contractor.
- 17.6 The issue of the Certificate of Practical Completion shall in no way affect the obligations of the Contractor under this Agreement including in respect of any Defects.

As-built specification

- 17.7 As soon as it is available, after the issue of the Certificate of Practical Completion, the Contractor shall provide to the Authority a copy of [*drawings relating to the installed Works*].

Defects

- 17.8 The Contractor shall procure that all Defects which are present or shall become apparent as a result of the GECP Testing (a "**GECP Testing Defect**") or shall otherwise appear in the Works during the Defects Liability Period for the Works shall be made good by the Contractor to the standards required by this Agreement within a reasonable time. The Authority and the Contractor, both acting reasonably, shall agree a programme for access for this purpose with the intention to cause the least practicable disruption to users of the Facilities. In the event of a GECP Testing Defect, the Authority and Contractor, both acting reasonably, shall agree and implement a remediation programme for the Contractor making good the GECP Testing Defect, including completing any additional testing required in accordance with clause 18.1A, as soon as reasonably practicable.²⁶
- 17.9 Without prejudice to Clause 17.8, not later than [●] Business Days after the expiry of the Defects Liability Period, the Authority shall procure that the Authority's Representative shall prepare a schedule of Defects (**Schedule of Defects**) specifying any Defects apparent as at the date of expiry of the Defects Liability Period which have not been made good by the Contractor by such date in accordance with Clause 17.8 and shall deliver such Schedule of Defects to the Contractor. Subject always to Clause 17.10, the Contractor shall, at its own expense, as soon as reasonably practicable after the date of issue of such Schedule of Defects (and in any event within a period of [●] of such date) make good all such Defects.

²⁶ Remediation programme, including any timescales and taking account of related savings foregone by the Authority during the remediation works period should be provided for as needs be on a project specific basis.

- 17.10 Where the Contractor fails to comply with the provisions of Clause 17.8 or Clause 17.9, 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 which event the Contractor shall reimburse the Authority, on demand, its reasonable costs of doing so.
- 17.11 Without prejudice to the Contractor's continuing obligations under this Agreement, when, following the Actual Completion Date, all Defects in the Schedule of Defects have been made good, the Authority's Representative shall issue a statement to that effect to the Contractor (a **Certificate of Making Good Defects**).
- 17.12 Following the expiry of the Defects Liability Period, the Contractor shall be liable to the Authority for the reasonable costs of, and reasonably foreseeable expenses properly incurred in, procuring the repair of Defects. For the avoidance of doubt, the provisions of this Clause 17 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 the Contractor.
- 17.13 For the avoidance of doubt, the provisions of this Clause 17 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 the Contractor to the Authority specified or referred to elsewhere in this Agreement.

18. **POST COMPLETION ACTIVITIES²⁷**

Testing

- 18.1 The Contractor shall, within [[●] days / weeks / months] following the Actual Completion Date, undertake and complete the GECP Testing in accordance with clause 19 and the Schedule Part 3 (*Measurement and Verification*).
- 18.1A In the event that the GECP Testing is not successfully passed in full, Clause 17.8 shall apply. Following the making good of any Defects pursuant to Clause 17.8, the Contractor will carry out such additional testing in accordance with Section 2 (*Remediation Works Verification*) of Schedule Part 3 (*Measurement and Verification*) [as agreed between the Contractor and Authority] or as determined in accordance with clause 47 (Dispute Resolution Procedure) as would be necessary to demonstrate that the Guaranteed Energy Cost Performance has been met. In the event such additional testing fails to demonstrate that the Guaranteed Energy Cost Performance has been met in full, clause 30.5 shall apply.

Information

- 18.2 The Contractor shall ensure that the Authority's Representative is provided with all the information he may reasonably require in relation to the GECP Testing.
- 18.3 If the Authority's Representative, acting reasonably, makes any comment in relation to the carrying out of GECP Testing, such comments shall be taken into account by the Contractor.

²⁷ The GECP Testing will comprise the testing which is required, pursuant to the M&V Plan, to determine in year 1 the extent of achievement of the Guaranteed Energy Cost Performance. This determination will be made pursuant to the terms of the M&V Plan, and then put into financial effect (in the event of underperformance) by the operation of Clauses 21 and 30.

Operational Manuals

- 18.4 The Contractor shall make available to the Authority's Representative:
- 18.4.1 at least [●] ([●]) weeks prior to the anticipated Actual Completion Date, one (1) paper and one (1) electronic copy of a [*draft operation and maintenance manual in respect of the installed Works*] in sufficient detail to allow the Authority to plan for the safe and efficient operation of the Facilities;
 - 18.4.2 on or before the Actual Completion Date two (2) paper copies and one (1) electronic copy of a [*final draft operation and maintenance manual in respect of the installed Works*] in sufficient detail to allow the Authority to operate and use the Facilities safely and efficiently;
 - 18.4.3 within [four (4)] weeks following the Actual Completion Date, the [*principal operation and maintenance manual in respect of the installed Works*];
- in each case including all manufacturers' instructions relating to Equipment installed by the Contractor and any Contractor Party.
- 18.5 The Contractor shall provide to the Authority such information after the Actual Completion Date as relates to any Snagging Matters or rectification of Defects as is reasonably necessary to allow for the updating of any of the items listed in Clause 18.4.
- 18.6 On termination of this Agreement (howsoever arising) prior to the provision by the Contractor in accordance with Clause 18.4 of the items listed therein, the Contractor 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.

Decommissioning

- 18.7 The Contractor shall, as appropriate, undertake any necessary decommissioning activities in accordance with the requirements of the Authority's Requirements.²⁸

19. MEASUREMENT & VERIFICATION PLAN²⁹

The Parties shall comply with and implement the terms of Schedule Part 3 (*Measurement and Verification*), and the Contractor shall procure that all Contractor Parties, including without limitation the M&V Professional, and any other persons for whom it is responsible shall comply with and implement the terms of Schedule Part 3 (*Measurement and Verification*), in either case throughout the term of this Agreement and as such schedule may be varied in accordance with this Agreement from time to time.

²⁸ This obligation would need to include removal of any redundant plant or equipment (including for example an old boiler) and would need to complement any relevant obligations in Schedule Part 11.

²⁹ The interplay between the M&V plan and commissioning/Schedule Part 10 (Outline Completion Testing Programme) should be considered and provided for as needs be in the completion checklist on a project specific basis.

PART 4: QUALITY ASSURANCE

20. QUALITY ASSURANCE³⁰

Quality Plans and Systems

- 20.1 The Contractor 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 above shall be reflected in appropriate quality plans, the standard of which shall be consistent with [BS EN ISO 9001 or 9002 or *[insert any additional standards references that are relevant to the specific works/installations in question]* (as the case may be) or any equivalent standard which is generally recognised as having replaced them (or any of them).]
- 20.3 Without limitation to the generality of Clause 20.2, there shall be:
- 20.3.1 a Design Quality Plan; and
- 20.3.2 a Construction Quality Plan,
- provided that the Design Quality Plan and the Construction Quality Plan may be incorporated into one document.
- 20.4 The Contractor 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 prior to their implementation. All Quality Plans shall be submitted to the Authority's Representative in accordance with Schedule Part 8 (*Review Procedure*) and the Contractor shall not be entitled to implement or procure the implementation of any Quality Plan unless the Contractor is entitled to proceed with such implementation pursuant to Schedule Part 8 (*Review Procedure*).
- 20.5 The Contractor shall implement or procure the implementation of the quality management systems referred to in Clause 20.1.
- 20.6 The Contractor shall from time to time submit to the Authority's Representative in accordance with Schedule Part 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. The Authority's Representative may raise comments on any such proposed change only on the grounds set out in paragraph 0 of Schedule Part 8 (*Review Procedure*).
- 20.7 If there is no objection under Schedule Part 8 (*Review Procedure*) to a change to any Quality Plan proposed pursuant to Clause 20.6, the Quality Plan shall be amended to incorporate such change.

Quality Management

- 20.8 The Contractor shall maintain a quality management system which shall:
- 20.8.1 ensure the effective operation of the quality systems described in this Clause 20 (*Quality Assurance*);

³⁰ Consider scope on a project specific basis while retaining Quality Assurance principle

- 20.8.2 cause an audit of the quality systems at regular intervals and the findings of such audit will be reported to the Authority's Representative;
- 20.8.3 require review of all quality systems at intervals agreed with the Authority's Representative to ensure their continued suitability and effectiveness; and
- 20.8.4 require liaison with the Authority's Representative on all matters relating to quality management

Quality Monitoring

- 20.9 The Authority's Representative may carry out audits of the Contractor's quality management system (including all relevant Quality Plans and any quality manuals and procedures) to establish that the Contractor is complying with Clauses 20.1 and 20.3. 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 the Contractor's quality management systems.

PART 5: ENERGY SAVINGS

21. GUARANTEED ENERGY COST PERFORMANCE

- 21.1 The Contractor shall be obliged to ensure that the Guaranteed Energy Cost Performance is met at the Facilities.
- 21.2 The Contractor shall submit the M&V Savings Report on the M&V Reporting Date, in a form and containing all information as required pursuant to Schedule Part 3 (*Measurement and Verification*).
- 21.3 The M&V Savings Report shall, in the absence of manifest error, bad faith or fraud, establish whether or not the Guaranteed Energy Cost Performance has been met in respect of the period between the Actual Completion Date and the M&V Reporting Date. In circumstances where the Guaranteed Energy Cost Performance has not been demonstrated to have been so met pursuant to Clause 18.1A, the provisions of Clause 30.5 shall apply.
- 21.4 Without prejudice to the provisions of this Clause 21 and Schedule Part 3 (*Measurement and Verification*), the parties shall be obliged to promptly notify one another of any activities known to them which adversely impact the Authority's ability to achieve the Guaranteed Energy Cost Performance.
- 21.5 The Contractor shall not be liable for the meeting of the Guaranteed Energy Cost Performance to the extent that such liability arises wholly out of any breach by the Authority of any of its obligations under this Agreement (where such breach materially impacts upon the achievement of the Guaranteed Energy Cost Performance).

PART 6: SITE ISSUES

22. MAINTENANCE³¹

- 22.1 [The Contractor is responsible for the maintenance of all Equipment for the duration of this Agreement, other than Legacy Equipment, as defined in and in accordance with the terms of Schedule Part 11 (Equipment).
- 22.2 The Contractor shall carry out or procure that its maintenance activities are is carried out in accordance with manufacturer's guidelines, SFG20 specifications and Good Industry Practice.
- 22.3 The Authority is responsible for maintenance of Authority Assets and Legacy Equipment, in accordance with clause 10.3 of this Agreement and Schedule Part 11 (Equipment).]

23. SITE SECURITY AND PERSONNEL ISSUES

Access

- 23.1 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) the Contractor, any Contractor 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.
- 23.2 Action taken under Clause 23.1 shall forthwith be confirmed in writing by the Authority to the Contractor and, to avoid doubt, shall not relieve the Contractor of any of its obligations under this Agreement.
- 23.3 The decision of the Authority as to whether any person is to be refused admission shall be final and conclusive.

Authority Policies

- 23.4 The Contractor shall, and shall procure that all Contractor Parties shall, comply at all times with the Authority Policies.
- 23.5 The Authority shall notify the Contractor 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 the Contractor.

Convictions and disciplinary action

- 23.6 The Contractor (to the extent permitted by Law) shall procure that all potential staff or persons performing any of the Project Operations who may reasonably be expected in the course of their employment or engagement to have access to children, the elderly and/or vulnerable adults:
- 23.6.1 are questioned concerning their Convictions; and

³¹ Relevance of a maintenance provision to be considered in the context of the Contractor's project specific operational testing obligations.

23.6.2 only in the case of potential staff who may reasonably be expected in the course of their employment to have access to children, the elderly and/or vulnerable adults, are required to complete a Protecting Vulnerable Groups Scheme form.

23.7 The completion of a Protecting Vulnerable Groups Scheme form shall not be applicable to any person engaged by the Contractor during the course of the Project Operations (who is not a member of Contractor staff nor ordinarily at the Facilities) provided that any such person is always accompanied within the Facilities by a member of the Contractor's staff who has satisfactorily completed a Protecting Vulnerable Groups Scheme form and who (if found to have any Convictions) has been employed or engaged in the Project Operations with the Authority's prior written consent pursuant to Clause 23.8.

23.8 The Contractor shall procure that no person who discloses any Convictions, or who is found to have any Convictions following the completion of a Protecting Vulnerable Groups Scheme form, in either case of which the Contractor is aware or ought to be aware is employed or engaged in the provision of the Project Operations without the Authority's prior written consent (such consent not to be unreasonably withheld or delayed).

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

24. **STOCKS CONSUMABLES, MATERIALS AND EQUIPMENT**

Hazardous substances and materials

24.1 The Contractor 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):

24.1.1 material damage to the Facilities; or

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

24.2 The Contractor 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 Contractor has complied with all relevant Law.

24.3 Without prejudice to the generality of its obligations, the Contractor shall procure that all hazardous materials and equipment used, by it or by a Sub-Contractor or used on behalf of any of them, or stored, by it or by a Sub-Contractor or stored on behalf of any of them, on the Site are kept in accordance with all relevant Law and Good Industry Practice, properly and securely labelled and stored, under appropriate supervision and used only by appropriately trained and competent staff.

PART 7: DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE

25. DELAY EVENTS

- 25.1 If, at any time, the Contractor becomes aware that there will be (or is likely to be) a delay to the Works, the Contractor 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 Part **18** (*Dispute Resolution Procedure*), that such delay or impediment has arisen as a result of the occurrence of a Delay Event, then, subject to Clause 25.2, the Authority's Representative shall allow the Contractor 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 accordingly.
- 25.2 If the Contractor is (or claims to be) affected by a Delay Event:
- 25.2.1 it shall (and shall procure that the Contractor Parties shall) take and continue to take all reasonable steps to eliminate or mitigate the consequences of such an event upon the performance of its obligations under this Agreement and, where relevant, resume performance of its obligations affected by the Delay Event as soon as practicable; and
- 25.2.2 it shall neither be relieved from liability under this Agreement nor entitled to any extension of time for the purpose of Clause 25 (*Delay Events*) to the extent that it is delayed or impeded due to its failure (if any) to comply with its obligations under Clause 25.2.1 above.
- 25.3 For the purposes of this Agreement, a Delay Event means any of the following to the extent in each case that there will be (or is likely to be) a delay in completion of the Works:³²
- 25.3.1 the occurrence of a Qualifying Change in relation to which it has been agreed or determined that the implementation of the Authority Works Change would delay the completion of the Works;
- 25.3.2 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 the Contractor or any Contractor Party;
- 25.3.3 the execution of works on the Site not forming part of this Agreement by the Authority or any contractors employed by the Authority;
- 25.3.4 opening up of the Works pursuant to Clauses 13.3 to 13.7 (inclusive) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with Schedule Part **18** (*Dispute Resolution Procedure*) that the opening up of the Works was reasonable in the light of other defects previously discovered by the Authority);
- 25.3.5 Force Majeure;
- 25.3.6 a Relief Event; or

³² Note that this list should be examined for appropriateness on a project specific basis

- 25.3.7 the suspension by the Contractor pursuant to Clause 30.11 of any or all obligations as a result of the non-payment by the Authority of sums properly due to the Contractor under this Agreement.
- 25.4 Without prejudice to the generality of Clause 25 (*Delay Events*), the Contractor shall give notice in writing to the Authority's Representative as soon as it (or the Contractor) can reasonably foresee a Delay Event occurring or, if the same is not reasonably foreseeable, as soon as it (or the Contractor) shall become aware of a Delay Event. Contractor shall within ten (10) Business Days after such notification, give further written details to the Authority's Representative which shall include:
- 25.4.1 a statement of which Delay Event the claim is based upon;
- 25.4.2 details of the circumstances from which the Delay Event arises;
- 25.4.3 details of the contemporary records which the Contractor will maintain to substantiate its claim for extra time;
- 25.4.4 details of the consequences (whether direct or indirect, financial or non-financial) which such Delay Event may have upon completion; and
- 25.4.5 details of any measures which the Contractor proposes to adopt to mitigate the consequences of such Delay Event.
- 25.5 As soon as possible but in any event within five (5) Business Days of the Contractor receiving, or becoming aware of, any supplemental information which may further substantiate or support the Contractor's claim then, provided that the Completion Date has not otherwise already been revised pursuant to Clause 25.7, the Contractor shall submit further particulars based on such information to the Authority's Representative.
- 25.6 The Authority's Representative shall, after receipt of written details under Clause 25.4, or of further particulars under Clause 25.5, be entitled by notice in writing to require the Contractor to provide such further supporting particulars as he may reasonably consider necessary. The Contractor shall afford the Authority's Representative reasonable facilities for investigating the validity of the Contractor's claim including, without limitation, on-site inspection.
- 25.7 Subject to the provisions of this Clause, the Authority's Representative shall revise the Completion Date in accordance with Clause 25.1 (*Delay Events*) as soon as reasonably practicable and in any event within five (5) Business Days of the later of:
- 25.7.1 the date of receipt by the Authority's Representative of the Contractor's notice given in accordance with Clause 25.4 and the date of receipt of any further particulars (if such are required under Clause 25.6), whichever is the later; and
- 25.7.2 the date of receipt by the Authority's Representative of any supplemental information supplied by the Contractor in accordance with Clause 25.5 and the date of receipt of any further particulars (if such are required under Clause 25.6), whichever is the later.

If the Contractor has failed to comply with the requirements as to the giving of notice under Clause 25.4, or has failed to maintain records or afford facilities for inspection to the Authority's Representative, then the Contractor shall not be entitled to any extension of time (and the Completion Date shall not be revised) in respect of any period of delay by the Contractor in giving notice or providing information under Clause 25.4 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.

25.8 If:

25.8.1 the Authority's Representative declines to fix a revised Completion Date; or

25.8.2 Contractor considers that a different Completion Date should be fixed; or

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

then the Contractor shall be entitled to refer the matter for determination in accordance with Schedule Part **18** (*Dispute Resolution Procedure*).

Compensation

25.9 If the Delay Event is a Compensation Event the Contractor's sole right to compensation shall be as provided for in Clauses 25.9 to 25.13 inclusive. To avoid doubt, no other Delay Event shall entitle the Contractor to receive any compensation save as otherwise expressly provided in Schedule Part **16** (*Change Protocol*) in the case of a Delay Event referred to in Clause 25.3.1.

25.10 For the purposes of Clause 25.9, a Compensation Event means:

25.10.1 any Delay Event referred to in Clause 25.3.2, Clause 25.3.3, Clause 25.3.4 or Clause 25.3.7 for which, in each case, it has been agreed or determined pursuant to this Clause 25 (*Delay Events*) that the Contractor is entitled to an extension of time; or

25.10.2 in the period prior to the Actual Completion Date, 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 the Contractor or any Contractor Party.

25.11 Subject to Clause 25.12, if it is agreed, or determined, that there has been a Compensation Event, and the Contractor has incurred loss (including loss of revenue) and/or expense as a direct result of such Compensation Event, the Contractor shall be entitled to such compensation as would place the Contractor in no better or worse position than it would have been in had the relevant Compensation Event not occurred. The Contractor shall promptly provide the Authority's Representative with any additional information he may require in order to determine the amount of such compensation.

25.12 The Contractor shall take all reasonable steps so as to minimise the loss and/or expense referred to in Clause 25.11 in relation to any Compensation Event and any compensation payable shall:

25.12.1 exclude any amounts incurred or to be incurred as a result of any failure of the Contractor (or any Contractor Party) to comply with this Clause 25.12; and

25.12.2 be reduced by any amount which the Contractor 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.

25.13 The amount of any compensation due to the Contractor under Clause 25.11 shall be agreed between the parties or, failing agreement, determined pursuant to Schedule Part **18** (*Dispute Resolution Procedure*) and such compensation shall be payable by the Contractor within twenty (20) Business Days of its receipt of a written demand accompanied by a valid VAT invoice for the same by the Contractor supported by all relevant information.

26. **RELIEF EVENTS**

26.1 For the purposes of this Agreement, subject to Clause 26.4, Relief Events mean any of the following events:

26.1.1 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;

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

26.1.3 accidental loss or damage to the Works and/or [*relevant part of the Facilities*] or any roads servicing the same;

26.1.4 blockade or embargo falling short of Force Majeure; or

26.1.5 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 the Contractor claiming relief, any Contractor Party and (ii) in the case of the Authority claiming relief, any Authority Party.

26.2 Subject to Clauses 26.3 and 26.4, 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 26.9, 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).

26.3 Without prejudice to the Contractor's rights under Clause 25 (*Delay Events*), the Contractor shall only be relieved of its obligations under Clauses 12 (*The Design, Construction and Testing Process*), 13 (*Right of Access of Authority's Representative*), 14 (*Programme and Dates for Completion*), 17 (*Pre-Completion Testing and Completion*) and 25 (*Delay Events*) by Delay Events in accordance with Clause 25 (*Delay Events*).

Mitigation

- 26.4 Where a party is (or claims to be) affected by a Relief Event:
- 26.4.1 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
- 26.4.2 it shall not be entitled to rely upon the relief afforded to it pursuant to Clause 26.2 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 26.4.1 above.
- 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 Relief Event. Such initial notice shall give sufficient details to identify the particular event claimed to be a Relief Event.
- 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 of the notice referred to in Clause 26.5 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 26.4, 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).
- 26.7 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.
- 26.8 If, following the issue of any notice referred to in Clause 26.6, 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.
- 26.9 To avoid doubt, the occurrence of a Relief Event shall not entitle the Contractor to any compensation.

27. FORCE MAJEURE

- 27.1 For the purposes of this Agreement, Force Majeure means any of the following events or circumstances:
- 27.1.1 war, civil war, armed conflict or terrorism; or
- 27.1.2 nuclear contamination unless in any case the Contractor and/or any Contractor Party is the source or the cause of the contamination; or
- 27.1.3 chemical or biological contamination of the Works and/or the [*relevant part of the Facilities*] and/or the Site from any of the events referred to in Clause 27.1.1 above; or
- 27.1.4 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.

- 27.2 Subject to Clauses 27.3 and 27.4 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 35 (*Termination Resulting from Force Majeure*)) the Authority shall not be entitled to terminate this Agreement for a Contractor Event of Default if such Contractor Event of Default arises from a Force Majeure event.
- 27.3 Where a party is (or claims to be) affected by an event of Force Majeure:
- 27.3.1 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
- 27.3.2 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 27.3.1.
- 27.4 Without prejudice to the Contractor's rights under Clause 25 (*Delay Events*), the Contractor shall only be relieved from its obligations under Clauses 12 (*The Design, Construction and Testing Process*), 13 (*Right of Access of Authority's Representative*), 14 (*Programme and Dates for Completion*) and 25 (*Delay Events*) by Delay Events in accordance with Clause 25 (*Delay Events*).
- 27.5 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.
- 27.6 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 27.3, 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).
- 27.7 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.
- 27.8 If, following the issue of any notice referred to in Clause 27.6, 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.
- 27.9 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 Part 18 (*Dispute Resolution Procedure*) shall not apply to a failure of the Authority and the Contractor to reach agreement pursuant to this Clause 27.9.

PART 8: CHANGES IN LAW & CHANGES

28. CHANGES IN LAW

General

28.1 The Contractor 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.

Change to be Agreed

28.2 Either party may give notice to the other of the need for a Change which is necessary in order to enable the Contractor to comply with any Change in Law, in which event:

28.2.1 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 Part **18** (*Dispute Resolution Procedure*); and

28.2.2 within ten (10) Business Days of the agreement or determination referred to in Clause 28.2.1 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 a Change Enquiry and the relevant provisions of Schedule Part **16** (*Change Protocol*) shall apply except that:

- (a) the Contractor may give notice to the Authority's Representative that it objects to such a Change Enquiry 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 [*issue a confirmation*] in respect of the Change in accordance with the relevant provisions of Section 2 of Schedule Part **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 Change Enquiry issued in accordance with this Clause 28.2 (*Change to be Agreed*); and
- (e) the Contractor 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).

29. CHANGE PROTOCOL

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

PART 9: FINANCIAL

30. PAYMENT

Contract Sum

- 30.1 In consideration for the Contractor carrying out the Works the Authority shall pay to the Contractor [●] pounds (£[●]) plus VAT (the **Contract Sum**), subject to Clause 30.5.
- 30.2 The Parties agree that the Contract Sum is a fixed and lump-sum amount for the complete execution and performance of this Agreement, the remedying of any defects, and accordingly will not be subject to changes or revisions, including, without limitation, due to changes in the prices of labour, materials, exchange rates or any other similar item, or owing to a change in any tax levied on the goods or services that are within the scope of this Agreement, except as otherwise expressly provided in this Agreement.
- 30.3 The Parties agree that the Contract Sum is sufficient for the performance and completion of its obligations hereunder, and warrants that it includes, but is not limited to, all items of costs and expenses, duties, industrial and intellectual property rights in the equipment supplied, social security and other taxes on supplies in the country of origin or destination, including import duties on the equipment (if any), as well as insurance coverage against all risks, contingencies, laws, customs, practices and other conditions that could affect the provision of the Works by the Contractor.

Payment

- 30.4 Subject to this Clause 30, the Authority shall pay the Contractor the first Milestone Payment in accordance with the schedule of payments set out at Schedule Part 12 (*Milestone Payments*)³³.
- 30.5 Subject to this Clause 30 and to Clauses 18.1 and 18.1A, the Authority shall pay the Contractor the final Milestone Payment in accordance with the schedule of payments set out at Schedule Part 12 (*Milestone Payments*). In the event that the Contractor is unable to demonstrate that the Guaranteed Energy Cost Performance has been met following GECP Testing pursuant to clause 18.1A, the final Milestone Payment shall be reduced to zero and the Contract Sum shall be deemed reduced accordingly.³⁴

Invoicing

- 30.6 Payment of a Milestone Payment shall become due on the date of achievement of the Milestone which is, in terms of Schedule Part 12 (*Milestone Payments*), related to the Milestone Payment in

³³ See related user guide comments on possible phased milestone 1 payments

³⁴ Note – it is assumed in this agreement that there will be a milestone payment or phased milestone payments related to practical completion of the works and an additional, individual milestone which amounts to the balance. The milestone amounts will be set by the Authority as part of the mini-competition award procedure, it being expected that the ‘balance’ milestone will be an amount which is broadly commensurate with financial savings which are expected to be generated for the Authority by one year of performance at the Guaranteed Energy Cost Performance level. The M&V Savings Report will establish whether the Guaranteed Energy Cost Performance has been achieved. If the GECP has not been achieved, and any defect rectification and/or retesting which may be carried out does not indicate that the GECP has in fact been achieved, the final Milestone Payment will be reduced to zero.

question. The Contractor shall issue an invoice within seven (7) days of such date (the date of receipt of such invoice by the Authority being the **Payment Due Date**).³⁵

- 30.7 The final date for payment by the Authority in relation to each invoice shall be twenty eight (28) days after the Payment Due Date (the **Final Date for Payment**).
- 30.8 The Authority shall not later than seven (7) days after the Payment Due Date give a notice to the Contractor specifying the sum that the Authority considers due to the Contractor at the Payment Due Date and the basis on which that sum is calculated.
- 30.9 If no notice is given pursuant to Clause 30.8, the amount to be paid by the Authority, subject to any Pay Less Notice under Clause 30.10, shall be the amount specified in the Contractor's invoice.
- 30.10 If the Authority intends to pay less than the amount specified in the Contractor's invoice, or the Authority's notice under Clause 30.8, it shall not later than five (5) days before the Final Date for Payment give notice to the Contractor of such intention (a **Pay Less Notice**). Such Pay Less Notice shall specify the sum that the Authority considers due on the date the notice is served and the basis on which that sum is calculated, including the reason (or reasons) for withholding any sums. If no notice is issued pursuant to Clause 30.10, the amount to be paid by the Authority, shall be the amount specified in the Authority's notice under Clause 30.8.

Late Payments

- 30.11 In the event that the Authority has not made payment by the Final Date for Payment and a Pay Less Notice has not been issued in respect of sums due pursuant to the terms of this Agreement, without prejudice to any other right or remedy, the Contractor shall be entitled to receive interest on such payment not duly made calculated from day to day at a rate per annum equal to the Default Interest Rate and from Final Date for Payment up to and including the date of payment.

Contractor's Right of Suspension

- 30.12 Without affecting any other rights and remedies of the Contractor, if the Authority, subject to any notice issued pursuant to Clause 30.10 fails to pay the Contractor in full by the Final Date for Payment, and such failure continues for seven (7) days after the Contractor has given to the Authority written notice of its intention to suspend performance of its obligations under this Agreement and the ground or grounds on which it is intended to suspend performance, the Contractor may then suspend such performance until payment in full occurs.

Manner of payment

- 30.13 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.

³⁵ The first Milestone Date should be set as the Actual Completion Date and the final Milestone Date should be set as the M&V Reporting Date.

Set-Off

- 30.14 Whenever any sum of money shall be agreed, or determined, as due and payable by the Contractor 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 the Contractor from the Authority under this Agreement provided that the Authority has issued a Pay Less Notice.
- 30.15 Whenever any sum of money shall be agreed, or determined, as due and payable by the Authority to the Contractor, such sum may at the Contractor'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 the Contractor to the Authority under this Agreement provided that the Contractor has given the Authority not less than five (5) Business Days' notice of its intention to deduct or apply such sum.

31. VAT AND CONSTRUCTION INDUSTRY TAX DEDUCTION SCHEME³⁶

VAT

- 31.1 All amounts stated to be payable by either party under this Agreement shall be exclusive of any VAT properly chargeable on any amount.
- 31.2 Each party shall pay to the other party any VAT properly chargeable on any supply made to it under this Agreement provided that it shall first have received from the other party a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.
- 31.3 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 a clearance from the Commissioners for Revenue and Customs (or, if relevant, such other body as is charged at the time with the collection and management of VAT) (referred to in this Clause as the **Commissioners**) as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request the Commissioners for such a clearance.
- 31.4 The following further provisions shall apply in respect of the application for a clearance in accordance with Clause 31.3:
- 31.4.1 prior to submitting its request for such a clearance and any further communication to the Commissioners 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;
- 31.4.2 the Second Party shall provide to the First Party copies of all communications received from the Commissioners in connection with the application for a clearance as soon as practicable after receipt; and

³⁶ Applicability of scheme to be verified on a project specific basis

- 31.4.3 the Second Party shall use all reasonable endeavours (including without limitation the provision of such additional information as the Commissioners may require) to obtain such a clearance as soon as reasonably practicable following the initial request.
- 31.5 If a ruling is required by the First Party under Clause 31.3, the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until a clearance is received from the Commissioners which states that a sum of VAT (the **VAT Sum**) is properly so chargeable or the Commissioners state that they are not prepared to give any clearance on the matter. In this case, then subject to Clauses 31.6 and 31.7 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.
- 31.6 If the First Party disagrees with any clearance obtained pursuant to Clause 31.3 by the Second Party from the Commissioners, 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.
- 31.7 The following further provisions shall apply if the First Party shall exercise its rights under Clause 31.6:
- 31.7.1 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 the Commissioners before any VAT tribunal or court of competent jurisdiction and appealing any judgement or decision of any such tribunal or court;
- 31.7.2 if the Second Party shall be required to pay to or deposit with the Commissioners 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 the Commissioners 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 the Commissioners the First Party shall pay such sum to the Second Party;
- 31.7.3 save as specifically provided in Clause 31.5, 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
- 31.7.4 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 the Commissioners in accordance with Clause 31.7.2 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

31.8 Subject to Clause 31.9, if, following a Change in Law, the Contractor becomes unable to recover VAT attributable to supplies to be made to the Authority by the Contractor pursuant to this Agreement, the Authority shall ensure that the Contractor 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 the Contractor and the Authority shall agree acting reasonably), provided that the Contractor shall use all reasonable endeavours to mitigate the adverse effects of any such Change in Law.

31.9 The provisions of Clause 31.8 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:

31.9.1 prior to the date of this Agreement; and

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

Construction Industry Tax Deduction Scheme

31.10 This Clause 31.10 (*Construction Industry Tax Deduction Scheme*) relates to the Construction Industry Tax Deduction Scheme:

31.10.1 In this Clause 31.10 (*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.

31.10.2 Each of the Authority and the Contractor shall comply with the Legislation.

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

- 31.10.4 If any payment due from the Authority to the Contractor under this Agreement is a contract payment under section 60(1) of the Act, then:
- (a) if the Contractor is registered for gross payment under section 63(2) of the Act, the Authority shall make a payment to the Contractor without any deduction;
 - (b) if the Contractor is not registered for gross payments under section 63(2) of the Act, the Authority shall make a payment to the Contractor, subject to the deduction of the relevant percentage in accordance with section 61(1) of the Act, and thereupon Clause 31.10.6 below shall apply.
- 31.10.5 If any dispute arises between the Authority and the Contractor as to whether any payment due by the Authority to the Contractor 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 31.10 (*Construction Industry Tax Deduction Scheme*) shall apply accordingly.
- 31.10.6 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 the Contractor (and not just that part of such payment which does not represent the direct cost to the Contractor 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 the Contractor) 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 Contractor.
- 31.10.7 Where any error or omission has occurred in calculating or making any payment under this Clause 31.10 (*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 the Contractor; and
 - (b) in the case of an under deduction, the Contractor shall correct that error or omission by repayment of the sum under deducted to the Authority.
- 31.10.8 The Authority shall send promptly to H M Revenue & Customs any returns required by the Legislation, and shall provide to Contractor a payment statement (where appropriate) and/or such other information as may be required by the Legislation in relation to any contract payment.
- 31.10.9 If compliance with this Clause 31.10 involves the Authority or the Contractor in not complying with any other of the terms of this Agreement, then the provisions of this Clause shall prevail.

32. **RECORDS AND OPEN BOOK ACCOUNTING**

32.1 **Records and Reports**

The provisions of Schedule Part 17 (*Record Provisions*) shall apply to the keeping of records and the making of reports.

PART 10: TERMINATION

33. **AUTHORITY EVENTS OF DEFAULT³⁷**

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

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

33.1.2 the Authority fails to pay any sum or sums due to the Contractor under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) [£[●]] 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 the Contractor; or

33.1.3 the Authority is in breach of its obligations under Clause 48.3

Contractor's options

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

33.2.1 suspend performance by it of its obligations under this Agreement until such time as the Authority shall have demonstrated to the reasonable satisfaction of the Contractor that it is capable of performing, and will perform, its obligations under this Agreement; or

33.2.2 serve notice on the Authority (or such other party as may be notified in advance in writing by the Authority to the Contractor) 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 33.1.1, or Clause 33.1.3 within sixty (60) Business Days of such notice, and in respect of Clause 33.1.2 within thirty (30) Business Days of such notice, the Contractor may serve a further notice on the Authority (or its substitute notified in accordance with this Clause 33.2.2) terminating this Agreement with immediate effect.

33.3 The Contractor 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.

³⁷ Consider scope on a project by project basis

34. CONTRACTOR EVENT OF DEFAULT³⁸

Contractor Event of Default

34.1 For the purposes of this Agreement, Contractor Event of Default means any of the following events or circumstances:

Insolvency

34.1.1 the occurrence of any of the following events in respect of the Contractor, 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 the Contractor;
- (b) a receiver, administrator, administrative receiver or other encumbrancer taking possession of or being appointed over, or any distress, execution or other process being levied or enforced (and not being discharged within ten (10) Business Days) upon, the whole or any material part of the assets of the Contractor;
- (c) the Contractor 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 the Contractor; or
- (e) if the Contractor shall suffer any event analogous to the events set out in Clauses 34.1.1(a) to 34.1.1(d) in any jurisdiction in which it is incorporated or resident;

Long stop

34.1.2 the Contractor failing to achieve the Actual Completion Date within a period of [[●] months] after the Completion Date;

Default

34.1.3 the Contractor committing a material breach of its obligations under this Agreement;

34.1.4 the Contractor abandoning the Works (other than as a consequence of a breach by the Authority of its obligations under this Agreement);

Assignment

34.1.5 the Contractor failing to comply with the provisions of Clauses 48.2;

³⁸ Consider scope and timescales on a project specific basis

Payment

34.1.6 the Contractor 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) [●] pounds (£[●]) (index linked) and such failure continues for sixty (60) Business Days from receipt by Contractor of a notice of non-payment from the Authority; or

Insurance

34.1.7 a breach by the Contractor of its obligation to take out and maintain the insurances required by Clause 44.

Notification

34.2 The Contractor shall notify the Authority of the occurrence, and details, of any Contractor 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 Contractor Event of Default, in either case promptly on the Contractor becoming aware of its occurrence.

Authority's options³⁹

34.3 On the occurrence of a Contractor 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:

34.3.1 in the case of the Contractor Events of Default referred to in Clauses 34.1.1 (*Insolvency*), 34.1.2 (*Long Stop*), 34.1.5 (*Assignment*), or 34.1.6 (*Payment*), terminate this Agreement in its entirety by notice in writing having immediate effect;

34.3.2 in the case of any Contractor Event of Default referred to in Clause 34.1.3 and 34.1.4, serve notice of default on the Contractor requiring the Contractor at Contractor's option either:

(a) to remedy the Contractor 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 Contractor Event of Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Contractor Event of Default is proposed to be remedied (the Contractor shall only have the option of putting forward a programme in accordance with this Clause 34.3.2(b) if it first notifies the Authority within ten (10) Business Days of such notice of default that it proposes to do so); and

34.3.3 in the case of any Contractor Event of Default referred to in Clause 34.1.7 (*Insurance*) serve notice of default on the Contractor requiring the Contractor to remedy the Contractor Event of Default (if the same is continuing) within twenty (20) Business Days of such notice of default.

³⁹ consider scope and timescales on a project specific basis.

Remedy provisions

34.4 Where the Contractor puts forward a programme in accordance with Clause 34.3.2(b), the Authority shall have twenty (20) Business Days from receipt of the same within which to notify Contractor (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 the Contractor 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 Contractor 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 Part **18** (*Dispute Resolution Procedure*).

34.5 If:

34.5.1 the Contractor Event of Default notified in a notice of default served under Clause 34.3.2 or Clause 34.3.3 (as the case may be) is not remedied before the expiry of the period referred to in Clause 34.3.2(a) or Clause 34.3.3 (as appropriate); or

34.5.2 where the Contractor puts forward a programme pursuant to Clause 34.3.2(b) which has been accepted by the Authority or has been determined to be reasonable and the Contractor fails to achieve any element of the programme or the end date for the programme (as the case may be); or

34.5.3 any programme put forward by the Contractor pursuant to Clause 34.3.2(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 the Contractor with immediate effect. Provided that for the purposes of Clause 34.5.2 if the Contractor's performance of the programme is adversely affected by the occurrence of Force Majeure or a Relief Event then, subject to the Contractor 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 Part **18** (*Dispute Resolution Procedure*).

Authority's costs

34.6 The Contractor shall reimburse the Authority for all reasonable costs incurred by the Authority in exercising any of its rights pursuant to this Clause 34 (*Contractor Event of Default*) (including, without limitation, any relevant increased administrative expenses). The Authority shall take reasonable steps to mitigate such costs.

34.7 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 the Contractor (or to take any action other than termination of this Agreement).

35. **TERMINATION RESULTING FROM FORCE MAJEURE**

If, in the circumstances referred to in Clause 27 (*Force Majeure*), the parties have failed to reach agreement on any modification to this Agreement pursuant to Clause 27 (*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 27 (*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.

36. **AUTHORITY VOLUNTARY TERMINATION**

The Authority shall be entitled to terminate this Agreement at any time on six (6) months' written notice to the Contractor. 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 the Contractor, where the Works (or any part or parts of the Works) have not been commenced, to refrain from commencing any such Works (or to procure the same).

37. **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, the Contractor shall not be entitled to any compensation for termination of this Agreement on the Expiry Date.

38. **CORRUPT GIFTS AND PAYMENTS**

Prohibition on corruption

38.1 The term **Prohibited Act** means:

38.1.1 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;

38.1.2 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 the Contractor 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;

- 38.1.3 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; or
- 38.1.4 defrauding or attempting to defraud or conspiring to defraud the Authority or any other public body,
- 38.1.5 committing any breach of the Employment Relations 1999 Act (Blacklists Regulations) 2010 or section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992; or
- 38.1.6 committing any breach of the Data Protection Laws by unlawfully Processing Personal Data in connection with any blacklisting activities.

Warranty

- 38.2 The Contractor warrants that in entering into this Agreement it has not committed any Prohibited Act.

Remedies

- 38.3 If the Contractor or any Contractor 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 38.3.1 to 38.3.6 below:
 - 38.3.1 if a Prohibited Act is committed by the Contractor or by an employee not acting independently of Contractor, then the Authority may terminate this Agreement with immediate effect by giving written notice to the Contractor;
 - 38.3.2 if the Prohibited Act is committed by an employee of the Contractor acting independently of the Contractor, then the Authority may give written notice to the Contractor of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice the Contractor terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Works by another person;
 - 38.3.3 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 the Contractor of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice the Contractor terminates the relevant Sub-Contract and procures the performance of the relevant part of the Works by another person, where relevant, in accordance with Clause 48 (*Assignment and Sub-Contracting*);

- 38.3.4 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 the Contractor of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice the Contractor procures the termination of the employee's employment and (if necessary) procures the performance of the relevant part of the Works by another person;
- 38.3.5 if the Prohibited Act is committed by any other person not specified in Clauses 38.3.1 to 38.3.4 above, then the Authority may give notice to the Contractor of termination and this Agreement will terminate unless within twenty (20) Business Days the Contractor procures the termination of such person's employment and of the appointment of their employer (where the employer is not the Authority and where such person is not employed by the Contractor or the Contracting Associate) and (if necessary) procures the performance of the relevant part of the Works by another person; and
- 38.3.6 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.

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

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

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

38.5 On termination of the Contractor's employment under the Agreement in accordance with Clause 38.3, the Authority shall pay the Contractor in accordance with the provisions of Clause 39.1 (*Payments following termination upon Contractor default*).

Permitted payments

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

Notification

38.7 The Contractor shall notify the Authority of the occurrence (and details) of any Prohibited Act promptly on the Contractor becoming aware of its occurrence.

39. **COMPENSATION ON TERMINATION**

39.1 If the Authority terminates the Contractor's employment under this Agreement in accordance with Clause 34 (*Contractor Events of Default*) or Clause 38 (*Corrupt Gifts and Payments*);

39.1.1 The Contractor 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 the Contractor 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; and

39.1.2 The Contractor 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 the Contractor under this Agreement less any Milestone Payments previously paid to the Contractor under this Agreement.

39.1.3 No payment shall be made to the Contractor in respect of Clause 39.1.2 until such time as the Works are complete.

39.2 If this Agreement is terminated pursuant to Clause 33 (*Authority Events of Default*) the Contractor shall be entitled to be paid:

39.2.1 the total value of the Works properly executed at the Termination Date, ascertained in accordance with this Agreement under deduction of all Milestone Payments previously made to the Contractor;

39.2.2 the reasonable cost of removal of the Contractor's property from the Site;

39.2.3 any Direct Losses caused to the Contractor by the termination; and

39.2.4 to the extent not already included in the amount calculated in accordance with Clause 39.2.1, the cost of materials or goods properly ordered for the Works for which the Contractor shall have paid or for which the Contractor 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 the Contractor arranges for any such goods or materials to be delivered to the Site.

39.3 If this agreement is terminated pursuant to Clause 35 (*Termination resulting from Force Majeure*), the Contractor shall be entitled to be paid:

39.3.1 the total value of the Works properly executed at the Termination Date, ascertained in accordance with this Agreement under deduction of all Milestone Payments previously made to the Contractor; and

39.3.2 to the extent not already included in the amount calculated in accordance with Clause 39.3.1, the cost of materials or goods properly ordered for the Works for which the Contractor shall have paid or for which the Contractor 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 the Contractor arranges for any such goods or materials to be delivered to the Site.

39.4 Without prejudice to Clause 40.5.1, the making of those payments following a termination which are required to be made by this Clause 39 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 the Contractor's employment under this Agreement and neither the Contractor nor the Authority shall be entitled to any other rights or remedies in that regard.

40. **CONSEQUENCES OF TERMINATION⁴⁰**

Continued performance

40.1 Subject to any exercise by the Authority of its rights to perform, or to procure a third party to perform, the obligations of the Contractor, 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.

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

40.2.1 in so far as any transfer shall be necessary fully and effectively to transfer property to the Authority, the Contractor shall transfer to, and there shall vest in, the Authority, such part of the Works and/or the [*relevant part of the Facilities*] as shall have been installed or constructed and such items of the Plant and Equipment as shall have been procured by the Contractor if the Authority so elects;

40.2.2 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 payments made by the Authority to the Contractor prior to the service of a notice of termination, subject to the payment by the Authority (determined as between a willing vendor and willing purchaser with any disputes determined pursuant to Clause 47 (*Dispute Resolution Procedure*));

40.2.3 the construction plant (if any) shall remain available to the Authority for the purposes of completing the Works, subject to payment of the Contractor's reasonable charges;

40.2.4 the Contractor shall deliver to the Authority (as far as not already delivered to the Authority) one complete set of:

- (a) "as built drawings" showing all alterations made to the [*relevant part of the Facilities*] since the commencement of operation of the same; and
- (b) any maintenance, operation and training manuals for the [*relevant part of the Facilities*];

⁴⁰ This drafting represents a base position which should be reviewed on a project by project basis in light of the measures actually proposed to be installed. This review will also need to consider the consequences for compensation on termination, reflective of the assets that the Authority requires to inherit on termination – the base assumption is that all installed assets will be inherited by the Authority.

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

40.2.6 the Contractor shall deliver to the Authority the records referred to in Clause 32 (*Records and Open Book Accounting*) except where such documents are required by Law to be retained by the Contractor or its Contracting Associates (in which case complete copies shall be delivered to the Authority).

40.3 The Contractor 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 the Contractor will be in a position to comply with its obligations, under Clause 40.2.

Transitional arrangements

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

40.4.1 the Contractor shall as soon as practicable remove from the Facilities all property not acquired by the Authority pursuant to Clause 40.2 (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 the Contractor;

40.4.2 the Contractor shall forthwith deliver to the Authority's Representative:

(a) any security passwords, access codes and other keys to the [*relevant part of the Facilities*] and any installed or operated equipment (including any energy management equipment); and

(b) without prejudice to Clause 46 (*Intellectual Property*), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facilities or any part of or equipment at the Facilities, including any energy management equipment; and

40.4.3 the Contractor 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

40.5 Save as otherwise expressly provided in this Agreement:

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

40.5.2 termination of this Agreement shall not affect the continuing rights and obligations of the Contractor and the Authority under Clauses 10 (*The Site*), 21 (*Guaranteed Energy Cost Performance*), 27 (*Force Majeure*), 30 (*Payment*), 31 (*VAT and Construction Industry Tax*)

Deduction Scheme), 32 (*Records and Open Book Accounting*), 39 (*Compensation on Termination*), 40.2 (*Transfer to Authority of Assets, Contracts etc.*), 40.4 (*Transitional Arrangements*), 41 (*Indemnities*), 44 (*Insurance*), 45 (*Exclusions and Limits on Liability*), 46 (*Intellectual Property*), 47 (*Dispute Resolution Procedure*), 49 (*Mitigation*), 50 (*Data Protection*), 51 (*Confidentiality*), 54 (*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.

PART 11: INDEMNITIES, WARRANTIES & INSURANCE

41. INDEMNITIES

Contractor indemnities to Authority

41.1 The Contractor shall indemnify and keep the Authority indemnified at all times from and against all Direct Losses sustained by the Authority in consequence of:

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

41.1.2 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 41.2.1) arising out of, or in the course of, the Project Operations, save to the extent caused (or contributed to) by any Unreasonable Act by the Authority or any Authority Party, breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate or negligent act or omission of the Authority or any Authority Party;

41.1.3 any physical loss of or damage to Authority Assets arising by reason of any act or omission of the Contractor or any Contractor 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

41.1.4 any loss of or damage to property or assets of any third party arising by reason of any act or omission of the Contractor or any Contractor 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 Contractor

41.2 The Authority shall indemnify and keep the Contractor indemnified at all times from and against all Direct Losses sustained by the Contractor in consequence of:

41.2.1 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 the Contractor or any Contractor Party;

- 41.2.2 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 41.1.1) 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 the Contractor or any Contractor Party;
- 41.2.3 any physical damage to any part of the Works or any assets or other property of the Contractor or any Contractor 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 the Contractor or any Contractor Party; and
- 41.2.4 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 the Contractor or any Contractor Party;
- provided that in the case of Clauses 41.2.3 and 41.2.4 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 the Contractor is obliged to insure under this Agreement (but for the avoidance of doubt, no 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.

41.3 **Conduct of claims**

This Clause 41.3 (*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:

- 41.3.1 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;
- 41.3.2 subject to Clauses 41.3.3, 41.3.4 and 41.3.5 below, on the giving of a notice by the Beneficiary pursuant to Clause 41.3.1 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;

- 41.3.3 with respect to any claim conducted by the Indemnifier pursuant to Clause 41.3.2 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;
- 41.3.4 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 41.3.2 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 41.3.1 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 41.3.3 above;
- 41.3.5 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 41.3.2 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 41.3.5, then the Indemnifier shall be released from any liability under its indemnity under Clause 41.1 (Contractor Indemnities to Authority) or Clause 41.2 (Authority Indemnities to the Contractor) (as the case may be) and, without prejudice to any accrued liabilities, any liability under its indemnity given pursuant to Clause 41.3.2 in respect of such claim;
- 41.3.6 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,

41.3.7 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

41.3.8 any person taking any of the steps contemplated by Clauses 41.3.1 to 41.3.5 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

41.4 To avoid doubt the provisions of Clause 49 (*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 49 (*Mitigation*).

42. 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.

43. COMMUNITY BENEFITS AND SUSTAINABILITY REPORTING

The Contractor shall comply with and implement the terms of [*insert reference to community benefits/sustainability method statement from Framework Agreement schedule and/or community benefit/sustainability method statement from ITMC Proposal and any community benefits or sustainability reporting requirements embedded within Schedule Part 4 of this Agreement*].

44. **INSURANCE**⁴¹

Contractor Insurances

- 44.1 The Contractor shall, at its own cost, take out the Insurances, details of which are set out in Section [●] of Schedule Part **15** (*Insurance Requirements*), prior to the commencement of the Works and maintain the same for the periods specified in Section [●] of Schedule Part **15** (*Insurance Requirements*).
- 44.2 Without prejudice to the other provisions of this Clause 44 (*Insurance*), the Contractor 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.
- 44.3 All Insurances referred to in Clauses 44.1 shall:
- 44.3.1 be maintained in the names of the parties specified in Schedule Part **15** (*Insurance Requirements*) and shall be composite policies of insurance (and not joint) unless stated otherwise in Schedule Part **15** (*Insurance Requirements*);
 - 44.3.2 be placed with insurers who are acceptable to the Authority (such acceptance not to be unreasonably withheld or delayed);
 - 44.3.3 in so far as they relate to damage to assets (including the Facilities), cover the same for the full reinstatement value;
 - 44.3.4 comply with the relevant provisions of Section [●] and Section [●] of Schedule Part **15** (*Insurance Requirements*).
 - 44.3.5 provide for thirty (30) days prior written notice of their cancellation, non-renewal or amendment to be given to the Authority in accordance with [*reference to applicable policy endorsements*] of Schedule Part **15** (*Insurance Requirements*);
- 44.4 The Contractor shall ensure that its brokers give the Authority a letter of undertaking substantially in the form set out in Section [●] of Schedule Part **15** (*Insurance Requirements*) at the Commencement Date.

Subrogation and Vitiating

- 44.5 The Contractor shall:
- 44.5.1 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 [*reference to applicable policy endorsements*] of Schedule Part **15** (*Insurance Requirements*); and

⁴¹ This drafting represents a base position which should be reviewed on a project by project basis. This base drafting generally assumes that insurance is placed on a project specific basis, however it is appreciated that a Contractor may wish to use a corporate/group policy to effect insurance. Any such proposal would require to be considered in detail by the Authority to ensure that the level of protection afforded to the Authority, and to the facilities, is appropriate.

44.5.2 provide for non-vitiation protection in respect of any claim made by the Authority as co-insured in accordance with [*reference to applicable policy endorsements*] of Schedule Part 15 (*Insurance Requirements*);

provided that, to avoid doubt, this Clause 44.5 shall not by itself prevent the Contractor 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.

44.6 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 Contractor's Insurance

44.7 Not less than twenty (20) Business Days prior to the amendment or expiry of any relevant insurance policy, the Contractor 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.

44.8 The Contractor shall provide to the Authority:

44.8.1 copies on request of all insurance policies referred to in Clauses 44.1 to 44.2 (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

44.8.2 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 44 (*Insurance*) and Schedule Part 15 (*Insurance Requirements*).

44.9 Renewal certificates 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 20 Business Days of the renewal date.

44.10 If the Contractor 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 the Contractor as a debt.

Acceptance and compliance

44.11 The supply to the Authority of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause 44 (*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.

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

Risk Management

- 44.13 With effect from the date of this Agreement, the Authority and the Contractor shall each designate or appoint an insurance and risk manager and notify details of the same to the other party. Such person shall:

44.13.1 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 44.13;

44.13.2 advise and report to that party on such matters; and

44.13.3 ensure that any report or survey conducted by any insurer of any relevant procedures in relation to the Project is disclosed to the parties.

- 44.14 Without prejudice to the provisions of Clause 44.13, the parties shall notify one another, and in the Contractor's case the relevant insurer, of any circumstances which may give rise to a claim of a value equal to or in excess of [●] (£[●]) (index linked) under the Insurances within [●] Business Days of becoming aware of the same (or earlier, if so requested by the terms of the relevant insurance policy). If any insurer disputes any such claim, the Contractor shall provide the Authority with full details of any disputed claim and the parties shall liaise with one another to ensure that the relevant claim is preserved or pursued.

Application of Proceeds

- 44.15 All insurance proceeds received by the Contractor under the insurances referred to in [*list relevant insurances by cross-reference to Schedule Part 15*] shall be paid into the Insurance Proceeds Account and shall be applied in accordance with this Agreement and in accordance with the Insurance Proceeds Account Agreement.

- 44.16 The Contractor shall apply any proceeds of any policies of Insurance:

44.16.1 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

44.16.2 in the case of any other insurance [*other than delay in start up or business interruption insurance*], so as to ensure the performance by the Contractor 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.

- 44.17 Where reinstatement monies are required to be released from the Insurance Proceeds Account the Contractor 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 the Contractor (provided that such consent must not be unreasonably withheld).

44.18 If the proceeds of any insurance claim are insufficient to cover the settlement of such claims, the Contractor will make good any deficiency forthwith.

44.19 **Reinstatement**

44.19.1 [Without prejudice to Clause 41 (*Indemnities*) the Contractor shall be responsible for repairing, rectifying and/or reinstating all damage caused to the Facilities by the Contractor or a Contractor Party in the conduct of the Project Operations after the Actual Completion Date.]⁴²

44.19.2 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):

(i) the Contractor 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 the Contractor 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 44.19.2(ii)(D) below. The Reinstatement Plan shall set out:

(A) 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

(B) 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 by which the Reinstatement Works will be completed), the final terms of which shall be subject to the prior written approval of the Authority, which approval shall not be unreasonably delayed;

(ii) provided that the Authority is satisfied that the Reinstatement Plan will enable the Contractor to comply with Clause 44.19.2(ii)(D) below within a reasonable timescale:

(A) the Reinstatement Plan will be adopted and carried out by the Contractor;

(B) the Contractor shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the Reinstatement Plan approved by the Authority;

(C) 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

⁴² To be considered on a project specific basis. Authorities may prefer to rely on the indemnity in clause 41.

the Contractor 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 44.19.2(ii)(B) above, and to meet any other reasonable costs and expenses of the Contractor for the sole purposes of funding the Reinstatement Works and the parties shall operate the signatory requirements of the Insurance Proceeds Account in order to give effect to such payments. Following the earlier to occur of the Termination Date and the Expiry Date, the Authority may withdraw amounts standing to the credit of the Insurance Proceeds Account for the purposes of funding any Reinstatement Works;

- (D) the Authority agrees and undertakes that, subject to compliance by the Contractor with its obligations under this Clause, and provided that the Contractor procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in Clause 44.19.2(ii)(B), 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;
- (E) the Authority undertakes to use reasonable endeavours to assist the Contractor in the carrying out of the Reinstatement Plan; and
- (F) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Authority and in accordance with Clause 44.19.3 below the Authority shall permit withdrawal by the Contractor of any Relevant Proceeds then held in the Insurance Proceeds Account that have not been paid under Clause 44.19.2(ii)(B) above, in respect of the Relevant Incident, together with any interest accrued.
- (G) subject to the provisions of Clause 41.1 (*Contractor Indemnities to Authority*) the Contractor shall be solely responsible for the payment of any deficiency.

44.19.3 Where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate or replace any part of the Facilities, the Contractor shall carry out the work in accordance with the Authority's Requirements so that on completion of the work, the provisions of this Agreement are complied with.

44.19.4 If and to the extent that a breach by the Contractor of its obligations under Clause 44.19.2(ii) leads to a delay in the completion of the Reinstatement Works, any entitlement that the Contractor has to relief under Clause 26 (*Relief Events*) shall be suspended.

45. EXCLUSIONS AND LIMITATIONS ON LIABILITY

Exclusions

- 45.1 The indemnities under this Agreement shall not apply and there shall be no right to claim damages for breach of this Agreement, in delict 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. Nothing in Clause 34.1 shall exclude any right of the Authority to seek damages from the Contractor 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.
- 45.2 The Authority shall not be liable in delict to the Contractor or any Contractor 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 the Contractor shall procure that no Contractor Party shall bring such a claim against the Authority. The Contractor has accepted this on the basis that it and each Contractor Party will cover the risk of negligent acts or omissions by insurance or in such other manner as it (or they) may think fit.

No Double Recovery

- 45.3 Subject to Clause 33 (*Authority Events of Default*) and any other express right of the Contractor pursuant to this Agreement, the Contractor's sole remedy in respect of any breach of this Agreement which is a Compensation Event shall be pursuant to Clause 25 (*Delay Events*).
- 45.4 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.
- 45.5 Neither party shall have the right to terminate this Agreement for breach of contract save as expressly set out in this Agreement.

Liability Cap⁴³

- 45.6 Subject to Clause 45.7, but notwithstanding any other provision of this Agreement the maximum aggregate liability of the Contractor to the Authority pursuant to and arising out of this Agreement shall not exceed the Liability Cap.
- 45.7 The limitation of the Contractor's liability under Clause 45.6 shall not apply to:
- 45.7.1 any liability in relation to death or personal injury; or
 - 45.7.2 any liability where such is caused or contributed to by:
 - (a) the wilful default of the Contractor and/or any Contractor Party or abandonment by the Contractor and/or any Contractor Party; or

⁴³ Appropriateness of including a cap to be considered on a project by project basis

(b) fraud of the Contractor and/or any Contractor Party; or

45.7.3 any liability, where and to the extent that the Contractor makes recovery from any other third party or from insurances maintained by either party pursuant to Clause 44 (*Insurance*) in respect of such liability or where the Contractor would have made recovery:

(a) had the relevant third party or insurer met its obligations under the relevant agreement or policy; or

(b) had the Contractor complied with its obligations under this Agreement and/or the terms of any applicable insurance policy; or

(c) had the Contractor diligently pursued such recovery; or

(d) had the Contractor or a Contractor Party, through its acts or omissions, not caused the relevant insurance policy to become void, voidable, unenforceable, suspended or impaired; or

45.7.4 breach of any obligation under the Data Protection Laws or Clause 50 (*Data Protection*),

- 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 the Contractor or a Contractor Party).

45.7.5 any liability of the Contractor arising under paragraph 0 of Schedule Part 18 (*Dispute Resolution Procedure*) or in respect of any indemnity arising out of breach of Law by the Contractor or a Contractor Party.

45.8 The Contractor's liability under this Agreement shall

45.8.1 end on the date falling twelve (12) years after the Actual Completion Date; or

45.8.2 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 (6) months of such date.

PART 12: MISCELLANEOUS

46. INTELLECTUAL PROPERTY

Project Data

46.1 The Contractor 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 the Contractor shall ensure that it can make the Project Data available to the Authority on these terms, for such purposes as the Authority at its sole discretion may require, 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. Neither the Contractor nor any Contractor Party shall be liable to the Authority in respect of use by or on behalf of the Authority of the Project Data other than in relation to the Project.

Intellectual Property Rights

46.2 The Contractor:

46.2.1 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 the Contractor; and

46.2.2 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 46.2.1 above to the Authority,

in both cases, for such purposes as the Authority may at its sole discretion require.

The Contractor 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 the Contractor and the Contractor shall enter into appropriate agreements with any Contractor Party (or other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

Maintenance of data⁴⁴

46.3 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, the Contractor 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, the Contractor 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.

46.4 The Contractor shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Clause 46.3 in accordance with Good Industry Practice.

Claims

46.5 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

⁴⁴ To be considered on a project specific basis whether measure-specific data maintenance provisions may be required. For example, energy management measures may feature real-time data which would be of interest to both parties.

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, the Contractor shall indemnify the Authority at all times from and against all such claims and proceedings and the provisions of Clause 41.3 (*Conduct of Claims*) shall apply.

47. **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 Part 18 (*Dispute Resolution Procedure*).

48. **ASSIGNATION AND SUB-CONTRACTING**

Assignment

48.1 This Agreement and any other agreement in connection with the Project to which both the Authority and the Contractor are a party shall be binding on, and shall enure to the benefit of, the Contractor 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 Scottish 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 the Contractor are both a party.

48.2 The Contractor shall not, without the prior written consent of the Authority, assign, novate transfer, sub-contract or otherwise dispose of any interest in this Agreement, and any other contract entered into by the Contractor for the purposes of performing its obligations under this Agreement.

48.3 The Authority shall be entitled to assign, transfer or dispose of the whole of this Agreement and/or of any agreement entered into in connection with this Agreement to which the Authority and the Contractor are both party to:

48.3.1 the Scottish Ministers, or [a public body equivalent to or replacing the Authority]; or

48.3.2 any other person or body with the prior written consent of the Contractor (not to be unreasonably withheld or delayed);

provided that nothing in this Clause shall restrict the rights of the Scottish Ministers to effect a statutory transfer.

48.4 The Contractor shall, without prejudice to Clause 48.1 (*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

[key sub-contractor]

[key subcontract]

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 48.6 shall be a reasonable ground for withholding consent and (ii) consent shall, without prejudice to the

other provisions of Clause 48.4, not be required in respect of the appointment of any party currently approved by the Authority as a suitable replacement.⁴⁵

48.5 If the contract set out next to the name of any person referred to in Clause 48.4 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, the Contractor shall forthwith appoint a replacement (subject to compliance with Clause 48.4).

48.6 The Contractor shall procure that any replacement for any person referred to in Clause 48.4 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.

48.7 Where the Contractor 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, the Contractor shall cause a term to be included in such contract:⁴⁶

48.7.1 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 provides that, for the purpose of payment alone, where the Authority has made payment to the Contractor 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

48.7.2 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

48.7.3 in the same terms as this Clause 48.7 (including for the avoidance of doubt this Clause 48.7.3) 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.

49. **MITIGATION**

Each of the Authority and the Contractor 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.

⁴⁵ Clause 48.4 to be reviewed on a project specific basis in light of subcontracting structure.

⁴⁶ [As with previous footnote – each Authority should also consider whether Project Bank Account provisions are required.

50. DATA PROTECTION

Data Protection

- 50.1 The Contractor acknowledges that Personal Data described in Schedule Part 20 (*Data Protection*) may be Processed in performing its obligations under this Agreement. For the purposes of any such Processing, the parties agree that the Contractor acts as the Processor and the Authority acts as the Controller.
- 50.2 Both parties agree to negotiate in good faith any such amendments to this Agreement that may be required to ensure that both parties meet all their obligations under Data Protection Laws. The provisions of this Clause 50 are without prejudice to any obligations and duties imposed directly on the Contractor under Data Protection Laws and the Contractor hereby agrees to comply with those obligations and duties.
- 50.3 The Contractor will, in conjunction with the Authority and in its own right and in respect of its obligations under this Agreement, take all necessary steps to ensure it is compliant with Data Protection Laws.
- 50.4 The Contractor will provide the Authority with the contact details of its data protection officer or other designated individual with responsibility for data protection and privacy to act as the point of contact for the purpose of observing its obligations under the Data Protection Laws.
- 50.5 The Contractor must:
- 50.5.1 Process Personal Data only as necessary in accordance with the Contractor's obligations under the Agreement in accordance with any written instructions given by the Authority (which may be specific or of a general nature), including with regard to transfers of Personal Data outside the UK or the European Economic Area unless required to do so by UK, European Union or European Union Member state law to which the Contractor is subject; in which case the Contractor must, unless prohibited by that law, inform the Authority of that legal requirement before Processing the Personal Data only to the extent, and in such manner as is necessary for the performance of the Contractor's obligations under this Agreement or as is required by that law;
 - 50.5.2 subject to Clause 50.5.1, only Process or otherwise transfer any Personal Data in or to any country outside the UK or the European Economic Area with the Authority's prior written consent;
 - 50.5.3 take all reasonable steps to ensure the reliability and integrity of any Contractor Parties who have access to the Personal Data and ensure that the Contractor Parties:
 - (a) are aware of and comply with the Contractor's duties under this Clause;
 - (b) are subject to appropriate confidentiality undertakings with the Contractor or the relevant Sub-contractor or other Contractor Party;
 - (c) are informed of the confidential nature of the Personal Data and do not publish, disclose or divulge any of the Personal Data to any third party unless directed in writing to do so by the Authority or as otherwise permitted by this Agreement; and
 - (d) have undergone adequate training in the use, care, protection and handling of Personal Data.

50.5.4 implement appropriate technical and organisational measures, including those required in accordance with Article 32 of the GDPR, to protect Personal Data against unauthorised or unlawful Processing and against accidental loss, destruction, damage, alteration or disclosure, such measures being appropriate to the harm which might result from any unauthorised or unlawful Processing, accidental loss, destruction or damage to the Personal Data and having regard to the nature of the Personal Data which is to be protected.

50.6 The Contractor shall not engage a Sub-contractor to carry out Processing in connection with this Agreement without prior specific or general written authorisation from the Authority. In the case of general written authorisation, the Contractor must inform the Authority of any intended changes concerning the addition or replacement of any other Sub-contractor and give the Authority an opportunity to object to such changes.

50.7 If the Contractor engages a Sub-contractor for carrying out Processing activities on behalf of the Authority, the Contractor must ensure that same data protection obligations as set out in this Agreement are imposed on the Sub-contractor by way of a written and legally binding contract, in particular providing sufficient guarantees to implement appropriate technical and organisational measures. The Contractor shall remain fully liable to the Authority for the Sub-contractor's performance of the obligations.

50.8 The Contractor must provide to the Authority reasonable assistance including by such technical and organisational measures as may be appropriate in complying with Articles 12-23 of the GDPR.

50.9 The Contractor must notify the Authority if it:

(a) receives a request from a Data Subject pursuant to Article 15 of the GDPR (or a purported request);

(b) receives a request to rectify, block or erase any Personal Data;

(c) receives any other request, complaint or communication relating to either party's obligations under the Data Protection Laws;

(d) receives any communication from the Supervisory Authority or any other regulatory authority in connection with Personal Data Processed under this Agreement; or

(e) receives a request from any third party for disclosure of Personal Data where compliance with such request is required or purported to be required by law or regulatory order;

and such notification must take place as soon as is possible but in any event within 3 Business Days of receipt of the request or any other period as agreed in writing with the Authority from time to time.

50.10 Taking into account the nature of the Processing and the information available, the Contractor must assist the Authority in complying with the Authority's obligations concerning the security of Personal Data, reporting requirements for Personal Data Breaches, data protection impact assessments and prior consultations in accordance with Articles 32 to 36 of the GDPR. These obligations include:

- (a) ensuring an appropriate level of protection through technical and organisational measures that take into account the circumstances and purposes of the Processing as well as the projected probability and severity of a possible infringement of the Law as a result of security vulnerabilities and that enable an immediate detection of relevant infringement events;
- (b) notifying a Personal Data Breach to the Authority without undue delay and in any event no later than 24 hours after becoming aware of a Personal Data Breach;
- (c) assisting the Authority with communication of a Personal Data Breach to a Data Subject;
- (d) supporting the Authority with preparation of a data protection impact assessment; and
- (e) supporting the Authority with regard to prior consultation of the Supervisory Authority.

50.11 At the end of the provision of services relating to Processing the Contractor must, on written instruction of the Authority, delete or return to the Authority all Personal Data and delete existing copies unless UK, EU or EU Member State law requires storage of the Personal Data.

50.12 The Contractor must:

a)

50.12.1 provide such information as is necessary to enable the Authority to satisfy itself of the Contractor's compliance with this Clause 50;

50.12.2 allow the Authority, its employees, auditors, authorised agents or advisers reasonable access to any relevant premises, during normal business hours, to inspect the procedures, measures and records referred to in this Clause 50 and contribute as is reasonable to those audits and inspections;

50.12.3 inform the Authority, if in its opinion, an instruction from the Authority infringes any obligation under Data Protection Laws.

50.13 The Contractor must maintain written records including in electronic form, of all Processing activities carried out in the performance of the Agreement or otherwise on behalf of the Authority containing the information set out in Article 30(2) of the GDPR.

50.14 If requested, the Contractor must make such records referred to Clause 50.13 available to the Supervisory Authority on request and co-operate with the Supervisory Authority in the performance of its tasks.

50.15 The parties acknowledge that the inspecting party will use reasonable endeavours to carry out any audit or inspection under Clause 50.12.2 with minimum disruption to the Contractor's day to day business.

50.16 To comply with section 31(3) of the Public Services Reform (Scotland) Act 2010, the Authority publishes an annual statement of all payments over £25,000. In addition, in line with openness and transparency, the Scottish Government publishes a monthly report of all payments over £25,000. The Contractor should note that where a payment is made in excess of £25,000 there will be disclosure (in the form of the name of the payee, the date of the payment, the subject matter and

the amount of payment) in the both the monthly report and the annual Public Services Reform (Scotland) Act 2010 statement.

51. **CONFIDENTIALITY**

51.1 The Authority shall, subject to Clause 51.2 be entitled to make the documents and information listed in this Clause 51.1 freely available to the public (which may include, without limitation, publication on the Authority's website):

51.1.1 this Agreement;

51.1.2 [*project specific reporting points – to include reporting to the public (i) changes in the consumption of gas, electricity, water or other consumables at the facility in question; the extent of generation of green energy at the Facilities (if relevant) and (iii) performance of the Contractor/Facilities relative to the energy performance guarantee(s) within the Agreement*]

and the Contractor acknowledges and agrees that, subject to the exclusion of information referred to in Clause 51.2.2, the provision or publication of the documents and information listed in this Clause 51.1 shall not give rise to any liability under the terms of this Agreement or otherwise. The Authority shall notify the Contractor in writing not less than ten (10) Business Days prior to any intended provision or publication of information pursuant to this Clause 51.1.

51.2

51.2.1 The parties agree that the provisions of this Agreement and each Ancillary Document shall, subject to Clause 51.2.2 below, not be treated as Confidential Information and may be disclosed without restriction and the Contractor acknowledges that the Authority shall, subject to Clause 51.2.2 below, be entitled to make this Agreement and each Ancillary Document available in the public domain.

51.2.2 Clause 51.2.1 above shall not apply to provisions of this Agreement or an Ancillary Document designated as Commercially Sensitive Information and listed in Schedule Part **13** (*Commercially Sensitive Information*) to this Agreement which shall, subject to Clause 51.3 be kept confidential for the periods specified in that Schedule Part **13** (*Commercially Sensitive Information*).

51.2.3 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

51.3 Clauses 51.2.2 and 51.2.3 shall not apply to:

51.3.1 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;

- 51.3.2 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;
- 51.3.3 any disclosure to enable a determination to be made under Schedule Part **18** (*Dispute Resolution Procedure*) or in connection with a dispute between the Contractor and any of its subcontractors;
- 51.3.4 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;
- 51.3.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 51.3.6 any provision of information to the parties' own professional advisers;
- 51.3.7 any disclosure by the Authority of information relating to the design, installation, 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; or
- 51.3.8 any registration or recording of the Consents and property registration required;
- 51.3.9 any disclosure of information by the Authority to any other department, office or agency of the Government or their respective advisers or to the Scottish Futures Trust or to any person engaged in providing services to the Authority for any purpose related to or ancillary to this Agreement;
- 51.3.10 any disclosure for the purpose of:
- (a) the examination and certification of the Authority's or the Contractor's accounts;
 - (b) any examination pursuant to section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Authority has used its resources;
 - (c) complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies; or
 - (d) (without prejudice to the generality of Clause 51.3.4) compliance with the FOI(S)A and/or the Environmental Information (Scotland) Regulations;
- 51.3.11 disclosure pursuant to Clause 51.1; or
- 51.3.12 disclosure to the extent required pursuant to Clause 53.2,

provided that, to avoid doubt, neither Clause 51.3.10(d) nor Clause 51.3.4 above shall permit disclosure of Confidential Information otherwise prohibited by Clause 51.2.3 where that information is exempt from disclosure under section 36 of the FOI(S)A.

- 51.4 Where disclosure is permitted under Clause 51.3, other than under Clauses 51.3.2, 51.3.4, 51.3.5, 51.3.8 and 51.3.10, 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.
- 51.5 The Contractor 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.
- 51.6 Where the Contractor, in carrying out its obligations under this Agreement, is provided with information relating to any Authority Party, the Contractor shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the Contractor has obtained the prior written consent of that person and has obtained the prior written consent of the Authority.
- 51.7 On or before the Expiry Date, the Contractor shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to any Authority Party are delivered up to the Authority.
- 51.8 The parties acknowledge that Audit Scotland has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament.
- 51.9 The provisions of this Clause 51 (*Confidentiality*) are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

Announcements

- 51.10 Unless otherwise required by any Law or any regulatory or governmental authority (but only to that extent), neither party shall make or permit or procure to be made any public announcement or disclosure (whether for publication in the press, the radio, television screen or any other medium) of any Confidential Information or in the case of the Contractor of its (or any Contractor 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).

52. FREEDOM OF INFORMATION

- 52.1 The Contractor acknowledges that the Authority is subject to the requirements of the FOI(S)A and the Environmental Information (Scotland) 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 52.2 to 52.8.
- 52.2 Where the Authority receives a Request for Information in relation to Information that the Contractor is holding on its behalf and which the Authority does not hold itself the Authority shall refer to the Contractor such Request for Information as soon as practicable and in any event within five (5) Business Days of receiving such Request for Information and the Contractor shall:
- 52.2.1 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

52.2.2 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 FOI(S)A or Regulation 5 of the Environmental Information (Scotland) Regulations.

52.3 Following notification under Clause 52.2, and up until such time as the Contractor has provided the Authority with all the Information specified in Clause 52.2.1, the Contractor 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:

52.3.1 whether Information is exempt from disclosure under the FOI(S)A and the Environmental Information (Scotland) Regulations;

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

in no event shall the Contractor respond directly, or allow its Sub-Contractors to respond directly, to a Request for Information unless expressly authorised to do so by the Authority.

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

52.5 The Contractor shall transfer to the Authority any Request for Information received by the Contractor as soon as practicable and in any event within two (2) Business Days of receiving it.

52.6 The Contractor 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 FOI(S)A and the Environmental (Scotland) Regulations.

52.7 In the event of a request from the Authority pursuant to Clause 52.2 the Contractor shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Authority of the Contractor'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 FOI(S)A 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 FOI(S)A and as set out in the Fees Regulations (the **Appropriate Limit**) the Authority shall inform the Contractor in writing whether or not it still requires the Contractor to comply with the request and where it does require the Contractor 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 the Authority is entitled to under section 10 of the FOI(S)A. In such case, the Authority shall notify the Contractor of such additional days as soon as practicable after becoming aware of them and shall reimburse the Contractor for such costs as the Contractor incurs in complying with the request to the extent it is itself entitled to reimbursement of such costs in accordance with its own FOI(S)A policy from time to time.

52.8 The Contractor acknowledges that (notwithstanding the provisions of Clause 51 (*Confidentiality*)) the Authority may, acting in accordance with the Scottish Ministers Code of Practice on the Discharge of Functions of Public Authorities under Part 6 of the Freedom of Information (Scotland) Act 2002 (the **Code**), and/or having full regard to any guidance or briefings issued by the Scottish Information Commissioner or the Scottish Ministers, be obliged under the FOI(S)A, or the Environmental Information (Scotland) Regulations to disclose Information concerning the Contractor or the Project:

52.8.1 in certain circumstances without consulting with the Contractor; or

52.8.2 following consultation with the Contractor and having taken their views into account,

provided always that where Clause 52.8.1 above applies the Authority shall, in accordance with the recommendations of the Code, draw this to the attention of the Contractor prior to any disclosure.

52.9 In the event that the Contractor is or becomes subject to Environmental Information (Scotland) Regulations or FOI(S)A it shall comply with its obligations under Environmental Information (Scotland) Regulations and FOI(S)A. 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 the Contractor.

53. **INFORMATION AND AUDIT ACCESS**

53.1 The Contractor shall provide to the Authority's Representative all information, documents, records and the like in the possession of, or available to, the Contractor (and to this end the Contractor shall use all reasonable endeavours to procure that all such items in the possession of the Contractor shall be available to it and the Contractor has included, or shall include, relevant terms in all contracts with the Contractor or the Service Provider to this effect) as may be reasonably requested by the Authority's Representative for any purpose in connection with this Agreement.

53.2 For the purpose of:

53.2.1 the examination and certification of the Authority's accounts; or

53.2.2 any examination pursuant to section 23 of the Public Finance and Accountability (Scotland) Act 2000 of the economy, efficiency and effectiveness with which the Authority has used its resources,

the Auditor General for Scotland may examine such documents as he may reasonably require which are owned, held or otherwise within the control of the Contractor (and the Contractor shall procure that any person acting on its behalf who has such documents and/or other information shall also provide access) and may require the Contractor to produce such oral or written explanations as he considers necessary.

53.3 The Contractor 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, any applicable fire codes, environmental

health, the Scottish Government's Sustainable Procurement Action Plan and the Climate Change (Scotland) Act 2009 (and related orders).⁴⁷

54. **NOTICES**

54.1 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 or by hand, leaving the same at:

If to the Contractor Address:

If to the Authority Address:

54.2 Where any information or documentation is to be provided or submitted to the Authority's Representative or the Contractor Representative it shall be provided or submitted by sending the same by first class post or by hand, leaving the same at:

If to the Contractor's Representative Address:

If to the Authority's Representative Address:

(copied in each case to the Authority)

54.3 Either party to this Agreement (and either Representative) may change its nominated address by prior notice to the other party.

54.4 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.

55. **NO WAIVER**

55.1 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

55.2 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.

56. **NO AGENCY**

56.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Authority and the Contractor.

⁴⁷ Any additional project specific reporting points to be added.

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

56.3 Without limitation to its actual knowledge, the Contractor 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 Contractor Party.

57. **ENTIRE AGREEMENT**

57.1 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.

57.2 Each of the parties acknowledges that:

57.2.1 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

57.2.2 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.

58. **THIRD PARTY RIGHTS**

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 Contractor or of any permitted assignee, it is expressly declared that no rights shall be conferred under and arising out of this Agreement (whether under the Contract (Third Party Rights) (Scotland) Act 2017 or otherwise) upon any person other than the Authority and Contractor.

59. **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.

60. **CONFLICTS OF AGREEMENTS**

In the event of any conflict between this Agreement and the Project Documents, the provisions of this Agreement shall prevail.

61. **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.

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 Scotland and shall be subject to the laws of Scotland.

63.2 Subject to the provisions of the Dispute Resolution Procedure, both parties agree that the courts of Scotland 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.

64. **COUNTERPARTS AND DELIVERY**

This Agreement may be executed in any number of counterparts and by each of the parties on separate counterparts.

Where executed in counterparts:

this Agreement will not take effect until each of the counterparts has been delivered;

where any counterpart is being held as undelivered, delivery will take place on the date of delivery agreed [among]/[between] the parties [(the “**agreed date**”). The agreed date will be inserted [in the testing clause] of this Agreement; and

[section 2(3) of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 is hereby excluded and shall not apply to the execution arrangements in respect of this Agreement].

IN WITNESS WHEREOF these presents consisting of this and the preceding [●] pages [together with the schedule [in [●] parts] annexed hereto] are executed in counterpart as follows and DELIVERED on [●]:

SCHEDULE PART 1
DEFINITIONS AND INTERPRETATION⁴⁸

SECTION 1

In this Agreement unless the context otherwise requires:

Actual Completion Date means the later of:

the date stated in the Certificate of Practical Completion issued by [the Authority]; and

the Completion Date; or

in the event of a dispute as such date may be determined in accordance with Schedule Part 18
(*Dispute Resolution Procedure*);

Adjudicator has the meaning given in paragraph 0 of Schedule Part 18 (*Dispute Resolution Procedure*);

Agreement means this Agreement including the Schedule;

Ancillary Documents means the *[[to be inserted]]*, all as the same may be amended or replaced from time to time;⁴⁹

Ancillary Rights means the rights referred to in Section 3 of Schedule Part 5 (*Land Matters*);

Authority Assets means the *[insert details of 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, other than the *[reference part of the Facilities relevant to Works of the Contractor]*;

Authority Assets Condition Standard means *[insert on a project specific basis]*;

Authority Works Change has the meaning given in Schedule Part 16 (*Change Protocol*);

Authority Events of Default has the meaning given in Clause 33.1;

Authority Party means any of the Authority's agents, contractors and sub-contractors of any tier and its or their directors, officers and employees at the Facilities with the authority of the Authority but excluding the Contractor, any Contractor Party and statutory undertakers and utilities and "Authority Parties" shall be construed accordingly;

Authority Policies means, subject to Clause 27.5, 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 Clause 23.5 and Schedule Part 16 (*Change Protocol*);⁵⁰

Authority's Representative means the person so appointed by the Authority pursuant to Clause 8 (*Representatives*);

⁴⁸ Definitions to be reviewed/developed on a project by project basis

⁴⁹ To be considered on a project by project basis.

⁵⁰ Relevant policies to be identified on a project specific basis.

Authority's Requirements means the requirements of the Authority set out or identified in Section 3 (*Authority's Requirements*) of Schedule Part 6 (*Construction Matters*) as amended from time to time in accordance with the terms of this Agreement;

Authority Services means [*to be completed on a project specific basis*];

Base Date has the meaning given in paragraph 0 of Section 2 (*Interpretation*) of Schedule Part 1 (*Definitions and Interpretation*);

Baseline Consumption shall have the meaning given in Schedule Part 3 (*Measurement and Verification*);

Business Day means a day other than a Saturday, Sunday or a bank holiday in Edinburgh;

CDM Regulations has the meaning given in Section 2 (*Safety During Construction/Installation*) of Schedule Part 6 (*Construction Matters*);

Certificate of Making Good Defects has the meaning given in Clause 17.11 and in the form set out in Schedule Part 19 (*Certificates*);

Certificate of Practical Completion means a certificate in the relevant form set out in Schedule Part 19 (*Certificates*);

Change has the meaning given in Schedule Part 16 (*Change Protocol*);

Change Enquiry has the meaning given in Schedule Part 16 (*Change Protocol*);

Change in Law means the coming into effect or repeal (without re-enactment or consolidation) in Scotland 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 Scotland in each case after the date of this Agreement;

Collateral Agreements means the M&V Professional's Collateral Agreement, [*add others as appropriate to project structure*];

Commencement Date means [*the date of this Agreement*];

Commercially Sensitive Information means the sub set of Confidential Information listed in [column 1 of Schedule Part 13 (*Commercially Sensitive Information*) in each case for the period specified in column 2 of Schedule Part 13 (*Commercially Sensitive Information*)];

Commissioners has the meaning given in Clause 31.3;

Compensation Event has the meaning given in Clause 25.10;

Completion Criteria means the [*Completion Tests*] as defined in Appendix [●] of Schedule Part 10 (*Outline Completion Testing Programme*);

Completion Date means the date described as such in Schedule Part [●] or such revised date as may be specified by the Authority's Representative pursuant to Clause 25 (Delay Events) or such other date as may be agreed by the parties;

Confidential Information means:

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

Commercially Sensitive Information;

Consents means all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorisations required by Law, and all necessary consents and agreements from any third parties (including, without limitation, any Planning Permission), needed to carry out the Project Operations in accordance with this Agreement;

Construction Quality Plan means the document at Section 6 (*Quality Plans (Design and Construction)*) of Schedule Part 6 (*Construction Matters*);

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;

Contracting Associate means any entity which performs on behalf of the Contractor any material function in connection with this Agreement or the Project Operations;

Contract Sum has the meaning given in Clause 30.1;

Contractor Event of Default has the meaning given in Clause 34 (Contractor Events of Default);

Contractor Party means any person engaged by the Contractor in the performance of its obligations under this Agreement including the Contractor's agents, service providers, carriers and contractors and its and their sub-contractors of any tier and its and their directors, officers, employees, workers and workmen in relation to the Project and "Contractor Parties" shall be construed accordingly;

Contractor's Pre-Completion Testing means the Contractor's testing activities to be carried out in accordance with Clause 17 (*Pre Completion Testing and Completion*);

Contractor's Proposals means the document at Section 4 (*Contractor Proposals*) of Schedule Part 6 (*Construction Matters*) as amended from time to time in accordance with Clause 29 (*Change Protocol*);

Contractor's Representative means the person appointed by the Contractor pursuant to Clause 8 (Representatives);

Controller has the meaning given in the Data Protection Laws;

Convictions means, other than in relation to minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding-over 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) and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003 Scottish SI 2003/231) or any replacement or amendment to those Orders);

Data Protection Laws means any law, statute, declaration, decree, directive, legislative enactment, order, ordinance, regulation, rule or other binding restriction (as amended, consolidated or re-enacted from time to time) which relates to the protection of individuals with regards to the processing of personal data to which a party is subject, including the Data Protection Act 2018 and the GDPR or, in the event that the UK leaves the European Union, all legislation enacted in the UK in respect of the protection of personal data;

Data Subject has the meaning set out in the Data Protection Laws; **Default Interest Rate** means [two per cent (2%) over LIBOR/base rate];

Defects means any defect, fault or performance failure in the Works (not being a Snagging Matter) which occurs due to a failure by the Contractor to meet the Authority's Requirements and/or Contractor's Proposals (including but not limited to the Guaranteed Energy Cost Performance) or otherwise to comply with its obligations under this Agreement;

Defects Liability Period means the period of [[●] days / weeks / months] from the Actual Completion date;⁵¹

Delay Event has the meaning given in Clause 25.3;

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 [*relevant part of the Facilities*];

Design Quality Plan means the document at Section 6 (*Quality Plans (Design and Construction)*) of Schedule Part 6 (*Construction Matters*);

Direct Losses means, subject to the provisions of Clause 45.1, 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, data and documents made available or issued to the Contractor or any Contractor 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;⁵²

⁵¹ To reflect the period specified in clause 18.1 in light of the scope of GECF Testing in the context of assessment of energy performance of the Works.

⁵² Specific consideration will need to be given to the status of 'reliance data'/historic consumption data to the extent that any such data is used as part of the Investment Grade Proposal process for a project,

Dispute has the meaning given in paragraph 0 of Schedule Part 18 (*Dispute Resolution Procedure*);

Dispute Resolution Procedure means the procedure set out in Schedule Part 18 (*Dispute Resolution Procedure*);

Emergency means an event causing or, in the reasonable opinion of a party, threatening to cause death or injury to any individual, or serious disruption to the lives of a number of people or extensive damage to property, or contamination of the environment, in each case on a scale beyond the capacity of the emergency services or preventing the Services operating under normal circumstances and requiring the mobilisation and organisation of the emergency services;

Encumbrance means any option, right of pre-emption, pledge, security, interest, lien, charge, mortgage, lease, licence, claim, condition, retention or other encumbrance or restriction whether imposed by agreement, by law or otherwise;

Energy Conservation Measure or **ECM** means the energy efficiency asset(s) installed by the Contractor to meet the Guaranteed Energy Cost Performance, including but not limited to [*to be populated on a project specific basis*];

Environmental Information (Scotland) Regulations means the Environmental Information (Scotland) Regulations 2004 together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant Government Department in relation to such regulations;

Equipment means [●];⁵³

Expiry Date means [midnight] on [date];

Facilities means the [*insert reference to public building or buildings at which ECMs are being installed and any relevant areas of curtilage*] together with all supporting infrastructure and other amenities located at [*public building*], as required to enable Contractor 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;

Fees Regulations means the Freedom of Information (Fees for Required Disclosure (Scotland)) Regulations 2004;

Final Completion Testing Programme means the programme jointly developed and agreed by the Authority and Contractor in accordance with the provisions of Clause 17.1;

Final Date for Payment has the meaning given in clause 30.7;

First Party has the meaning given in Clause 31.3;

FOI(S)A means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation (as defined in section 73 of the Freedom of Information (Scotland) Act 2002) made under the Freedom of Information (Scotland) Act 2002 from time to time together with any guidance and/or

⁵³ For consideration on a project specific basis

codes of practice issued by the Scottish Information Commissioner or relevant Government department in relation to such Act;

Force Majeure has the meaning given in Clause 27 (*Force Majeure*);

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 the processing of personal data and repealing Directive 95/46/EC;

GECP Testing means the Contractor's testing activities carried out in accordance with Clause 18.1;

GECP Testing Defect has the meaning given in Clause 17.8 (*Defects*);

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 Scottish Ministers;

Guaranteed Energy Cost Performance means [*insert level of guaranteed consumption saving for each Utility (being in each case the consumption reduction as compared with the Baseline Consumption which is identified and agreed through the Investment Grade Proposal which is submitted and agreed as part of the framework mini-competition award procedure)*];

Indirect Losses has the meaning given in Clause 45.1 (*Exclusions and Limits on Liability*);

Information has the meaning given under section 73 of the Freedom of Information (Scotland) Act 2002;

Insurance Proceeds Account means the account numbered [●] in the joint names of the Contractor and the Authority with the [*bank*];

Insurance Proceeds Account Agreement means the agreement in the form set out in [●];

Insurances means, as the context requires, all or any of the insurances required to be maintained by Contractor 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 Contractor, any Contractor Party or by other third parties (for the use by or on behalf of or for the benefit of Contractor) for the purposes of the design or construction of the Works, the operation, maintenance, improvement and/or testing of the [*relevant part of the Facilities*] or the conduct of any other Project Operation or otherwise for the purposes of this Agreement;

IT means information technology systems, hardware and software;

Law means:

any applicable statute or proclamation or any delegated or subordinate legislation;

any enforceable community right within the meaning of section 2(1) of the European Communities Act 1972;

any applicable guidance, direction or determination with which the Authority and/or Contractor is bound to comply to the extent that the same are published and publicly available or the existence or contents of them have been notified to Contractor by the Authority; and

any applicable judgement of a relevant court of law which is a binding precedent in Scotland,

in each case in force in Scotland;

Legacy Equipment means [●];

Liability Cap means [●];

LIBOR means the rate per annum determined by [●] Bank plc to be the offered rate for six (6) month sterling deposits in the London interbank market which appears on Telerate Page 3750 (or such other page as may replace that page on the Dow Jones Telerate service);

M&V Contract means [●]⁵⁴;

M&V Professional means [●]⁵⁵;

M&V Professional's Collateral Agreement means [●]⁵⁶;

M&V Reporting Date means [[] Business Days after] [the anniversary of the Actual Completion Date];

M&V Savings Report means the report of that name as specified in [reference] of Schedule Part 3 (*Measurement and Verification*);

Milestone means each of the events set out in the second column of the table at Schedule Part [●] (*Milestone Payments*), and **Milestones** shall be construed accordingly;

Milestone Payment means each of the amounts set out in the third column of the table at Schedule Part 12 (*Milestone Payments*) which amounts when taken together shall equal the Contract Sum, and Milestone Payments shall be construed accordingly;

NHS means the National Health Service;⁵⁷

Outline Completion Testing Programme means the programme setting out the standards, specifications, procedures and other requirements for the carrying out and completion of the testing activities of the parties set out in outline in Schedule Part **10** (*Outline Completion Testing Programme*);

⁵⁴ It is assumed that there will be a separate M&V contract let by the Contractor for each project, however the details should be considered on a project by project basis.

⁵⁵ As previous footnote

⁵⁶ As previous footnote

⁵⁷ For NHS projects

Pay Less Notice has the meaning given in Clause 30.9;

Payment Due Date has the meaning given in Clause 30.6;

Personal Data has the meaning given in Data Protection Laws;

Personal Data Breach has the meaning given in Data Protection Laws;

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 [*relevant part of the Facilities*] (including without limitation for any Authority Works Change);

Plant means the infrastructure systems, building systems, fixed, and immovable equipment systems, installed as part of the Works or pursuant to an Authority Works Change as replaced from time to time;

Process has the meaning given in the Data Protection Laws and cognate expressions shall be construed accordingly;

Processor has the meaning given in the Data Protection Laws;

Programme means the programme set out in Schedule Part 7 (*The Programme*) as revised and issued by the Contractor (or on its behalf) from time to time pursuant to Clause 14 (*Programme and Dates for Completion*);

Prohibited Act has the meaning given in Clause 38 (*Corrupt Gifts and Payments*);

Project has the meaning given in Recital A;

Project Data means:

all [Design Data];

all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the provision of the Services; and

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;

Project Operations means the carrying out of the Works, the carrying out of the Contractor's Pre-Completion Testing and GECP Testing, the activities undertaken to facilitate achievement of the Guaranteed Energy Cost Performance and the performance of all other obligations of Contractor 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;

Qualifying Change means (unless expressly stated otherwise) [*a Change under the change protocol in respect of which an approval has been issued*] provided that any necessary changes required to be made to any Project Document and/or Ancillary Document pursuant to Schedule Part 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 6 (*Quality Plans (Design and Construction)*) of Schedule Part 6 (*Construction Matters*) as required to be implemented by Contractor in accordance with Clause 20 (*Quality Assurance*);

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 Scottish Government or the Scottish Parliament);

Relevant Event has the meaning given in Schedule Part 16 (*Change Protocol*);

Relief Events has the meaning given in Clause 26 (*Relief Events*);

Request for Information has the meaning set out in the FOI(S)A or the Environmental Information (Scotland) Regulations as relevant (where the meaning set out for the term **request** shall apply);

[**Reserved Rights** means the matters referred to in Section 2 of Schedule Part 5 (*Land Matters*);]

Retail Prices Index or **RPI** means the Retail Prices Index (All Items) as published by the Office for National Statistics from time to time (the **Index**), or, failing such publication or in the event of a fundamental change to the Index, such other index as the parties may agree, or such adjustments to the Index as the parties may agree (in each case with the intention of putting the parties in no better nor worse position than they would have been in had the Index not ceased to be published or the relevant fundamental change not been made) or, in the event that no such agreement is reached, as may be determined in accordance with the Dispute Resolution Procedure;

Reviewable Design Data means the Design Data listed at Section 5 (*Reviewable Design Data*) of Schedule Part 6 (*Construction Matters*);⁵⁸

Second Party has the meaning given in Clause 31.3;

Schedule of Defects has the meaning given in Clause 17.9;

Site means the [land/buildings] made available to the Contractor for the Project outlined in red on [insert details of relevant plan];⁵⁹

Snagging Matters means minor items of outstanding work which would not materially impair the Authority's use and enjoyment of the Facilities;

Snagging Notice means the notice to be issued by the Authority's Representative in accordance with Clause 17.5A (*Completion Certificate*);

[**Sub-Contractor** means any third party who enters into any Sub-Contract;]

⁵⁸ To consider on a project specific basis the "Reviewable Design Data" concept is appropriate.

⁵⁹ The intention is that this relates to the works/installation site(s) only

[Sub-Contracts] means the contracts entered into by or between the Contractor and other third parties in relation to any aspect of the Project Operations;]

Subsidiary has the meaning given to it in Section 1159 of the Companies Act 2006;

Supervisory Authority means the UK Information Commissioner's Office (or its successor authority) and any authority within the meaning given in the Data Protection Laws;

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 of Schedule Part 5 (*Land Matters*);]

Unreasonable Act means any act or omission which is contrary to any reasonable instruction, guidance or rules for the operation or management of the Facilities;

Utilities [has the meaning [●]];

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 31 (*VAT and Construction Industry Tax Deduction Scheme*); and

Works means the design (including the preparation of all Design Data), construction, installation, testing and completion of the [*works to the Facilities*] (including any temporary works) [and the installation of [Equipment]] to be performed by the Contractor in accordance with this Agreement (as varied, amended or supplemented from time to time in accordance with this Agreement).

SECTION 2 INTERPRETATION

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

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.

Except where the context expressly requires otherwise, references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedule are references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedule 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.

The Schedule and Attachments (if any) to this Agreement are integral parts of this Agreement and a reference to this Agreement includes a reference to the Schedule and the Attachments (if any).

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.

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.

The language of this Agreement is English. All correspondence, notices, drawings, Design Data, 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 be in English.

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.

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 28 (*Changes in Law*) and Schedule Part 16 (*Change Protocol*) which shall operate in relation to a Change in Law on the basis set out in this Agreement.

Without prejudice to Clause 48.1, 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.

Without prejudice to Clause 48.1, references to other persons (other than the Authority and the Contractor) shall include their successors and assignees.

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 the Contractor 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.

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.

Reference to “parties” means the parties to this Agreement and references to “a party” mean one of the parties to this Agreement.

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.

All of the Contractor’s obligations, duties and responsibilities shall be construed as separate obligations, duties and responsibilities owed to the Authority and to be performed at Contractor’s own cost and expense.

Unless expressly stated otherwise, references to amounts or sums expressed to be “index linked” are references to amounts or sums in [give base date reference] (**Base Date**) prices which require to be adjusted whenever the provision containing the amount or sum is given effect in accordance with this Agreement to reflect the effects of inflation after that date. The adjustment shall be measured by changes in the relevant index published for that year as calculated in accordance with the following formula:

$$\text{Amount or sum in [date] prices} \times \frac{\text{RPI}_d}{\text{RPI}_0}$$

Where RPI_d is the value of the Retail Prices Index published or determined with respect to the month of [relevant month, or other date] most recently preceding the date when the provision in question is to be given effect and RPI_0 is the value of the Retail Prices Index in respect of [date] being [●].

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.

Words in parenthesis and italics appearing after a Clause reference or a reference to a Schedule Part 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.

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.

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 PART 2⁶⁰
COMPLETION DOCUMENTS

SECTION 1
DOCUMENTS TO BE DELIVERED BY THE CONTRACTOR

Unless an original document is specifically requested, a copy (certified by an officer of the Contractor as being a true copy) of each of the following documents is to be delivered by the Contractor to the Authority in accordance with Clause 2.1 (*Execution and Delivery of Documents*) of this Agreement:

[Project specific subcontracts or other items].

[Collateral Agreement executed by the M&V Professional and any other Collateral Agreements provided by key-subcontractors]

[An original of the [other relevant agreements], executed by the parties to such agreements (other than the Authority).]

[relevant corporate authorisations and documentation]

[The insurance broker's letter of undertaking, evidence of the insurances required in accordance with Clause 44 (Insurances) having been taken out by the Contractor and that the policies comply with the requirements of this Agreement]

An original duly executed copy of this Agreement.

⁶⁰ Schedule Part/sections to be developed on a project by project basis

SECTION 2
DOCUMENTS TO BE DELIVERED BY THE AUTHORITY

The Authority shall deliver to the Contractor the following documents:

An original copy of [*relevant agreements*] and this Agreement, duly executed by the Authority.

[*Authority authorisations*]

SCHEDULE PART 3⁶¹
MEASUREMENT AND VERIFICATION

[See Schedule Part 3 section of technical pack.]

⁶¹ Schedule Part to be developed on a project by project basis

**SCHEDULE PART 4
COMMUNITY BENEFITS AND SUSTAINABILITY REPORTING⁶²**

[See Schedule Part 4 section of technical pack.]

⁶² Schedule Part to be developed on a project by project basis - ote that this schedule may, on a project specific basis, include sustainability or energy efficiency reporting requirements on a monthly or quarterly basis during the GECP Testing period and summary reporting at the end of the GECP Testing Period

**SCHEDULE PART 5
LAND MATTERS⁶³**

**SECTION 1
[TITLE CONDITIONS**

⁶³ Schedule Part/sections to be developed on a project by project basis

SECTION 2
RESERVED RIGHTS

**SECTION 3
ANCILLARY RIGHTS]⁶⁴**

⁶⁴ Relevance of Schedule depends upon project specifics – see comments at clause 9.

**SCHEDULE PART 6
CONSTRUCTION MATTERS⁶⁵**

**SECTION 1
PLANNING/CONSENTS**

⁶⁵ Schedule Part to be reviewed on a project by project basis

SECTION 2
SAFETY DURING CONSTRUCTION/INSTALLATION

1. In this Section 2 (*Safety During Construction*) of Schedule Part 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**" shall have the same meaning as is ascribed to it 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, the Contractor shall make and serve on the Authority a notice in writing pursuant to CDM Regulation 4(8) that the Contractor agrees to be treated as the only client in relation to the Works for the purposes of the CDM Regulations. Notwithstanding the Contractor agreeing in writing to be 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 term of this Agreement, the Contractor shall not, and shall not seek to, withdraw, terminate or in any manner derogate from its agreement 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 agreement on the said notice and return it to the Contractor within five (5) Business Days of receipt.
3. The Contractor 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 or issued in connection with the CDM Regulations.
4. The Contractor shall provide to the Authority's Representative:
 - 4.1 in a substantially complete form on the Actual Completion Date; and
 - 4.2 in final form within four (4) weeks of the Actual Completion Date,
 - 4.3 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 pursuant to the CDM Regulations in relation to the Works and electronic or paper copies of every amendment or update made to such file and plan.

SECTION 3
AUTHORITY'S REQUIREMENTS

[The Authority's Data Pack and Investment Grade Audit Specification are expected to be relied upon by the Authority in the preparation of these requirements.]

SECTION 4
CONTRACTOR'S PROPOSALS

[These proposals must include/reflect as appropriate the terms of the Investment Grade Proposal.]

SECTION 5
REVIEWABLE DESIGN DATA

SECTION 6
QUALITY PLANS (DESIGN AND CONSTRUCTION)

SCHEDULE PART 7⁶⁶
THE PROGRAMME

⁶⁶ Schedule Part to be developed on a project by project basis

SCHEDULE PART 8 REVIEW PROCEDURE⁶⁷

REVIEW

The provisions of this Schedule Part 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 Part 8 (*Review Procedure*).

Subject to any express provision of this Agreement, the manner, form and timing of any submission to be made by the Contractor to the Authority's Representative for review under this Schedule Part 8 (*Review Procedure*) shall be a matter for the Contractor to determine. Each submission under this Schedule Part 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 Part 8 (*Review Procedure*) as a "**Submitted Item**"). In relation to each Submitted Item, the following procedure shall apply:

as soon as possible and, if the Submitted Item comprises:

an item of Reviewable Design Data; or

a revised Programme submitted pursuant to Clause 14 (Programme and Dates for Completion); or

a document or proposed course of action submitted in the case of (an emergency),

- within fifteen ([15]) 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 the Contractor endorsed "no comment" or (subject to and in accordance with paragraph 0 (*Grounds for Objection*)) "comments" as appropriate; and

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 0, within fifteen ([15]) 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 Submitted Item to the Contractor endorsed "no comment" (and, in the case of Reviewable Design Data, endorsed "Level A - no comment").

If the Authority's Representative raises comments on any Submitted Item in accordance with paragraph 0 (*Grounds for Objection*) he shall state the ground upon which such comments are based and the evidence or other information necessary to substantiate that ground. To the extent that the Authority's Representative comments on a Submitted Item other than on the basis set out in this Schedule Part 8 (*Review Procedure*), or fails to comply with the provisions of this paragraph, the Contractor may, in its discretion, either:

⁶⁷ Schedule Part to be developed on a project by project basis

request written clarification of the basis for such comments and, if clarification is not received within ten (10) Business Days of such request by the Contractor, refer the matter for determination in accordance with Schedule Part **18** (*Dispute Resolution Procedure*); or

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 Testing 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.

FURTHER INFORMATION

The Contractor 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 Part **8** (*Review Procedure*). If the Contractor does not submit any such information, data and documents, the Authority's Representative shall be entitled to:

comment on the Submitted Item on the basis of the information, data and documents which have been provided; or

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 Part **8** (*Review Procedure*).

GROUND OF OBJECTION

The expression "raise comments" in this paragraph shall be construed to mean "raise comments or make objections" unless the contrary appears from the context. The Authority's Representative may raise comments in relation to any Submitted Item on the grounds set out in paragraph 0 (*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:

in relation to any Submitted Item if:

the Contractor'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

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;

in relation to any Submitted Item submitted pursuant to Clause 4.1 (*Ancillary Documents*) if:

the Authority's ability to perform its obligations under this Agreement would be adversely affected by the proposed course of action;

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;

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;

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

the Contractor's ability to perform its obligations under this Agreement would be materially adversely affected by the proposed course of action;

[in relation to Reviewable Design Data submitted pursuant to clause 12.4:

[insert here on a project specific basis the RDD items that are anticipated in light of the content of Section 5 of Schedule Part 6, and the basis upon which the Authority may object to those specifications].]

in relation to a proposal to amend the Contractor's Proposals and rectify (part of) the Works submitted pursuant to Clause 12.5, on the grounds that, following the amendment and rectification proposed:

the Contractor's Proposals would not satisfy the Authority's Requirements; and/or

the structural, mechanical, electrical and/or energy efficiency performance of the Facilities would not be of an equivalent standard of performance to that set out in the Contractor'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);

in relation to the submission of any revised Programme pursuant to Clause 14 on the ground that the revised Programme would not (on the balance of probabilities) enable the Works to be completed by the Completion Date.

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 or Clause 20.6, 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 in the case of the Design Quality Plan and the Construction Quality Plan referred to in Clause 20 (*Quality Assurance*), the requirements referred to in Section 6 (*Quality Plans (Design and Construction)*) of Schedule Part 6 (*Construction Matters*).

EFFECT OF REVIEW

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 the Contractor.

In the case of any Submitted Item other than Reviewable Design Data, if the Authority's Representative returns the Submitted Item to the Contractor endorsed "comments", the Contractor shall comply with such Submitted Item after amendment in accordance with the comments unless the Contractor disputes that any such comment is on grounds permitted by this Agreement, in which case the Contractor or the Authority's Representative may refer the matter for determination in accordance with Schedule Part 18 (*Dispute Resolution Procedure*) and the Contractor shall not act on the Submitted Item until such matter is so determined or otherwise agreed.

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", the Contractor shall:

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;

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 0; and

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 0,

unless the Contractor disputes that any such comment or proposed amendment is on grounds permitted by this Agreement, in which case the Contractor or the Authority's Representative may refer the matter for determination in accordance with Schedule Part **18** (*Dispute Resolution Procedure*) and the Contractor 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 0.

Within ten (10) Business Days of receiving the comments of the Authority's Representative on any Submitted Item comprising Reviewable Design Data, the Contractor shall (except in the case contemplated in paragraph 0) send a copy of the Submitted Item as amended to the Authority's Representative pursuant to paragraph 0 and the provisions of paragraphs 0, 0 and 0 shall apply (changed according to context) to such re-submission.

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 0 or 0) 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 the Contractor of its obligations under this Agreement nor is it an acknowledgement by the Authority that the Contractor has complied with such obligations.

DOCUMENTATION MANAGEMENT

The Contractor shall issue three (3) copies 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.

The Contractor 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.

Save to the extent set out in this Schedule Part **8** (*Review Procedure*), no review, comment or approval by the Authority shall operate to exclude or limit the Contractor's obligations or liabilities under this Agreement (or the Authority's rights under this Agreement).

CHANGES

No approval or comment or any failure to give or make an approval or comment under this Schedule Part **8** shall constitute a Change save to the extent provided in this Schedule Part **8** (*Review Procedure*).

If, having received comments from the Authority's Representative, the Contractor considers that compliance with those comments would amount to a Change, the Contractor 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 Part **18** (*Dispute Resolution Procedure*) that a Change would arise if the comments were complied with, the Authority may, if it wishes, implement the Change and it shall be dealt with in accordance with Schedule Part **16** (*Change Protocol*). Any failure by the Contractor 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 the Contractor that any compliance with the Authority's comments shall be without cost to the Authority and without any extension of time.

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.

SCHEDULE PART 9
COLLATERAL WARRANTY⁶⁸

AMONG:

1. **[AUTHORITY]**, having its principal address at [●] (the **Beneficiary** which expression shall include its successors in title or permitted assignees under this Agreement and/or the Beneficiary's appointee); and
2. **[CONTRACTOR]**, 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
3. **[●]**, a company incorporated in [Scotland/England and Wales/Northern Ireland] under the Companies Acts (Registered Number [●]) and having its Registered Office at [●] (the **Key-Subcontractor**).

WHEREAS:

- (A) The Beneficiary and Contractor have entered into an agreement for the design and build of a project to [●] (the **Project Works**) at [●] (the **Project**) on or about the date hereof (the **EnPC Agreement**).

The Contractor has entered or intends to enter into an agreement with the Key Sub-Contractor whereby the Key Sub-Contractor will provide certain [●] services (the **Services**) in connection with the Project (the **Sub-Contract**) as more particularly described in the Sub-Contract.

It is a condition of the Sub-Contract that the Key Sub-Contractor enters this Agreement with the Beneficiary.

The Beneficiary shall be entitled to rely and is deemed to have relied on the Key Sub-Contractor'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 Key Sub-Contractor under the Sub-Contract.

NOW IT IS AGREED as follows:

1. WARRANTY AND UNDERTAKING

- 1.1 The Key Sub-Contractor 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 Sub-Contract on the Key Sub-Contractor's part to be performed and observed and shall complete the Services in accordance with the Sub-Contract.
- 1.2 Without prejudice to Clause 1.1 of this Agreement, the Key Sub-Contractor 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 contractor experienced in providing

⁶⁸ This is the form of warranty to be used for the M&V Professional's Collateral Agreement. Such form shall also be developed as appropriate for other key subcontractors who provide are to provide a collateral warranty on a project specific basis.

[testing/measurement/verification] services on projects and at Facilities similar in nature, size and complexity to the Project and the Facilities in:

- (a) the [testing/measurement/verification] of the Works and their impact on the Facilities; and
- (b) the performance of the [Services] to the Contractor under the Sub-Contract.

1.2.2 the final [testing/measurement/verification] will at practical completion and throughout the term of the Sub-Contract comply with all relevant legislation and Good Industry Practice;

2. INSURANCE

2.1 The Key Sub-Contractor 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 Sub-Contract, professional indemnity insurance in an amount of not less than [ten] million pounds (£[10],000,000) sterling on an each and every claim basis and for any one occurrence or series of occurrences arising out of any one 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 contractors.

2.2 In determining whether or not insurance is available as aforesaid, the financial characteristics and claims' record of the Key Sub-Contractor shall be ignored.

2.3 The Key Sub-Contractor shall immediately inform the Beneficiary if such insurance ceases to be available at rates which are commercially reasonable in order that the Key Sub-Contractor 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 Key Sub-Contractor to maintain such lesser amount of professional indemnity insurance as is available to the Key Sub-Contractor at rates which are commercially reasonable.

2.4 As and when it is reasonably requested to do so by the Beneficiary the Key Sub-Contractor shall produce for inspection documentary evidence satisfactory to the Beneficiary (acting reasonably) that its professional indemnity insurance is being maintained.

2.5 The Key Sub-Contractor confirms that this Agreement has been disclosed to and has been approved by the Key Sub-Contractor's Professional Indemnity Insurers or underwriters.

2.6 Should the Key Sub-Contractor 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 Key Sub-Contractor as a debt.

3. COPYRIGHT

3.1 The Key Sub-Contractor 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 assignation) 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 Key Sub-

Contractor 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 Sub-Contract 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 Key Sub-Contractor.
- 3.3 The Key Sub-Contractor 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 Key Sub-Contractor 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 Key Sub-Contractor or for any improper or negligent use by the Beneficiary or any appointee or sub-licensee.
- 3.4 The Key Sub-Contractor 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. ASSIGNATION

- 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 Key Sub-Contractor being required and such assignment shall be effective upon written notice thereof being given to the Key Sub-Contractor. No assignment of this Agreement by any other party shall be permitted.
- 4.2 The Key Sub-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 less or a different loss has been suffered by such assignee.

5. NO WAIVER OR VARIATION

- 5.1 No failure, approval, act or omission 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 Key Sub-Contractor of any of its duties or obligations under or arising out of this Agreement.
- 5.2 The Key Sub-Contractor will not seek to modify or vary any of the obligations for which it is responsible under the Sub-Contract in any respect if that modification or variation will be detrimental to the Beneficiary or affects the Beneficiary's rights or obligations under the EnPC Agreement or affects the Key Sub-Contractor's obligations under this Agreement.

6. EQUIVALENT RIGHTS

- 6.1 The obligations of the Key Sub-Contractor 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 Sub-Contract. The Key Sub-Contractor shall be entitled in any action or proceedings by the

Beneficiary to rely on any limitation in the Sub-Contract and to raise the equivalent rights in defence of liability as it would have against the Contractor under the Sub-Contract (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, consent or demand to be given or made by any party under this Agreement (hereinafter called a **Notice**) shall only be validly served if in writing and delivered personally or sent by pre-paid first class recorded delivery post or sent by fax to the following address and marked for the attention of the following person in the case of each party:

Party	Address	Fax Number	Person
Beneficiary	[●]	[●]	[●]
Contractor	[●]	[●]	[●]
Key Sub-Contractor	[●]	[●]	[●]

Any party may by Notice to the other party/parties change its address, fax number or the title of the person for whose attention Notices are to be given or made pursuant to this Clause 7. Any such Notice shall be deemed to have been received:

7.1.1 if delivered personally, at the time of delivery;

7.1.2 in the case of pre-paid first class recorded delivery post, on the first Business Day after the date of posting; and

7.1.3 in the case of a fax, at the time of transmission.

7.2 If any Notice is delivered or faxed after 5 p.m. on a Business Day, or at any time during a day which is not a Business Day, that Notice shall be deemed to have been received at 9 a.m. on the next Business Day.

7.3 For the purposes of this Clause 7 (*Notices*), **Business Day** means any day which is not a Saturday, a Sunday or a public holiday in Scotland. In proving service it shall be sufficient to prove that the envelope containing such Notice was properly addressed to the relevant party and either delivered personally to that address or delivered into the custody of the postal authorities as a pre-paid first class recorded delivery letter, or that such Notice was transmitted by fax to the correct fax number of the relevant party (as demonstrated by the transmission slip). For the avoidance of doubt, Notices shall not be validly served if sent by e-mail.

7.4 The definitions of words and phrases used in this Agreement shall be those set out in the Sub-Contract except where expressly defined in this Agreement.

7.5 This Agreement shall be governed by and construed in accordance with Scots Law and the parties hereto submit to the exclusive jurisdiction of the Scottish Courts.

7.6 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 Contractor or of any permitted assignee, it is expressly declared that no rights shall be conferred under and arising out of this Agreement (whether under the Contract (Third Party Rights) (Scotland) Act 2017 or otherwise) upon any person other than the Authority and Contractor. .

8. COUNTERPARTS AND DELIVERY

8.1 This Agreement may be executed in any number of counterparts and by each of the parties on separate counterparts.

8.2 Where executed in counterparts:

8.2.1 this Agreement will not take effect until each of the counterparts has been delivered;

8.2.2 where any counterpart is being held as undelivered, delivery will take place on the date of delivery agreed [among]/[between] the parties [(the “**agreed date**”). The agreed date will be inserted [in the testing clause] of this Agreement; and

8.2.3 [section 2(3) of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 is hereby excluded and shall not apply to the execution arrangements in respect of this Agreement].

IN WITNESS WHEREOF these presents consisting of this and the preceding [●] pages [together with the schedule [in [●] parts] annexed hereto] are executed in counterpart as follows and DELIVERED on [●]:

SCHEDULE PART 10⁶⁹
OUTLINE COMPLETION TESTING PROGRAMME

⁶⁹ Schedule Part to be developed on a project by project basis and to take account of M&V process as appropriate.

**[SEE SCHEDULE PART 10 SECTION OF TECHNICAL PACK.]SCHEDULE PART 11
EQUIPMENT⁷⁰**

[See Schedule Part 11 of technical pack.]

⁷⁰ Schedule Part to be developed on a project by project basis

SCHEDULE PART 12
MILESTONE PAYMENTS⁷¹

No.	Milestone	Milestone Payment
	Actual Completion Date	[[●]]% of Contract Sum]
	M&V Reporting Date	[[●]]% of Contract Sum]

⁷¹ Per related payment milestone comments in user guide and Payment Clause (Clause 30) provisions, on a project by project basis, each Authority has the option to consider flexing milestone payment 1 and providing for phased milestone 1 payment(s) as appropriate, while retaining the commercial principle that no payment is made until practical completion of distinct elements e.g. phased milestone payments on completion of building/buildings and/or measures.

SCHEDULE PART 13⁷²
COMMERCIALLY SENSITIVE INFORMATION

Where information or material falls within more than one category identified in column 1 of the table below, it shall be deemed to fall within the category whose corresponding period of confidentiality identified in column 2 of the table below will expire the soonest.

Category of Information/Material	Period for which information is to be kept confidential

⁷² Schedule Part to be developed on a project by project basis

SCHEDULE PART 14
[LIQUIDATED AND ASCERTAINED DAMAGES]⁷³

⁷³ To be developed if appropriate on a project specific basis

SCHEDULE PART 15
INSURANCE REQUIREMENTS⁷⁴

⁷⁴ Insurance requirements will be dealt with on a project specific basis.

**SCHEDULE PART 16
CHANGE PROTOCOL**

SECTION 1

INTERPRETATION

For the purposes of this Agreement, and in particular this Schedule Part 16 (*Change Protocol*), unless the context requires otherwise:

Authority Works Change	means a change to the Works initiated by the Authority in accordance with this Schedule Part 16 (<i>Change Protocol</i>)
Change	means an Authority Works Change
Change Confirmation	has the meaning given in paragraph 4.4 of Section 2 of Schedule Part 16 (<i>Change Protocol</i>)
Change Enquiry	has the meaning given in paragraph 2.1 of Section 2 of Schedule Part 16 (<i>Change Protocol</i>)
M&V Plan	means the measurement and verification plan comprised within Schedule Part 3 (<i>Measurement and Verification</i>) of this Agreement
M&V Plan Change	means a change to the M&V Plan which is initiated by either party pursuant to Section 4 of this Schedule Part 16 (<i>Change Protocol</i>)
M&V Plan Change Notice	means a notice served under paragraphs 2.1 or 3.1 of Section 4 of this Schedule Part 16 (<i>Change Protocol</i>)
Non-routine Adjustment	has the meaning given in Schedule Part 3 (<i>Measurement and Verification</i>)
Non-routine Adjustment Event	has the meaning given in Schedule Part 3 (<i>Measurement and Verification</i>) ⁷⁵
Qualifying Change	means a Change for which a Change Confirmation has been issued and the supplementary agreement referred to in paragraph 4.4 of Section 2 of Schedule Part 16 (<i>Change Protocol</i>) has become unconditional in all respects

⁷⁵ Note that this definition should reflect that a Non-Routine Adjustment Event meets the following principles: it relates to a change in a static factor(s); a change in month on month energy usage which may imply a change in a static factor(s); unavailability of an ECM; Relief Events or Force Majeure Events; it cannot be resolved by routine adjustment pursuant to the M&V Plan. It may also be possible for the M&V Professional to deem that a Non-Routine Adjustment Event has occurred in certain circumstances, dependent upon the project specific terms of the M&V Professional's appointment and M&V Plan.

SECTION 2

CHANGES

1. GENERAL

Subject to receiving the Change Confirmation issued in accordance with the terms of this Schedule Part 16 and to any Consent which must be obtained or modified being so obtained or modified and subject to the other provisions of this Schedule Part 16, the Contractor shall be under a duty to implement a Change. The Contractor will not be entitled to any payment or compensation for or in respect of a Change save as provided in accordance with this Schedule Part 16.

2. CHANGE ENQUIRIES

2.1 A Change Enquiry shall be a document issued by the Authority's Representative which:

2.1.1 states on its face that it is a Change Enquiry; and

2.1.2 specifies the nature of the Authority Works Change and which of the provisions of the Authority's Construction Requirements and/or the Contractor's Proposals are required to be amended to accommodate the relevant Authority Works Change.⁷⁶

2.2 The Authority's Representative may not issue a Change Enquiry other than in accordance with the provisions of this Section 2 (*Changes*) of this Schedule Part 16.

3. CONTRACTOR RESPONSE TO CHANGE ENQUIRY

Preliminary Indicative Information

3.1 Prior to giving a notice referred to in paragraph 3.2 of this Section 2 (*Changes*) of this Schedule Part 16:

3.1.1 the Contractor may at its option within ten (10) Business Days of receipt of a Change Enquiry:

(a) give to the Authority in good faith a preliminary non-binding indication of the estimated cost of implementing the Change and provide such other information about the Change as is available to the Contractor and which it believes is useful to the Authority; and

(b) such information shall include in particular the Contractor's estimated effect on the date when the Actual Completion Date will occur;

3.1.2 if the Contractor provides an indication 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 the Contractor to proceed to respond to the Change Enquiry in accordance with provisions of paragraph 3.2.

Contractor Response

⁷⁶ The reference to the Contractor'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 output specifications. This option should be used on a limited basis (so that, wherever possible, the Authority's output specifications alone are used for this purpose) taking account of risk transfer implications if the Contractor's Proposals are amended by the Authority.

3.2 Within one (1) month of receipt of a Change Enquiry or (if the provisions of paragraph 3.1.2 apply) within one (1) month of the Authority confirming that it wishes the Contractor to proceed with responding to the Change Enquiry or in either case such longer period as may be agreed by the parties or determined in accordance with Schedule Part 18 (*Dispute Resolution Procedure*) as reasonable given the nature of the Change Enquiry and all other relevant considerations⁷⁷, the Contractor shall either:

3.2.1 give notice to the Authority's Representative that it objects to the Change Enquiry stating the grounds of the objection. The Contractor may only object to a Change Enquiry on one or more of the following grounds:

- (a) that implementation of the Change would materially and adversely affect the health and safety of any person; or
- (b) that implementation of the Change 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 Change Enquiry) in a manner not compensated pursuant to this Schedule Part 16; 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 Change to be implemented or to do anything envisaged by this Schedule Part 16 in respect of, or in connection with, the Change; or
- (d) that the Change would, if implemented, result in a change in the essential nature of the [*relevant part of the Facilities*]; or
- (e) that the Change Enquiry does not comply with paragraph 2 of this Schedule Part 16; or
- (f) that the information contained in the Change Enquiry is inadequate to enable the Contractor 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

⁷⁷ Consider whether provision is to be made for a longer period of time being a possibility or whether the 1 month period should be left as it is, in which case the Contractor may give a less detailed response.

3.2.2 give notice to the Authority's Representative stating:

- (a) the steps which the Contractor proposes to take to implement the Change giving such level of detail as is reasonable and appropriate in all the circumstances the Contractor's estimated increase or decrease in the Contract Sum (including its component Milestones) calculated in accordance with paragraph 1 of this Section 2 (*Changes*) of this Schedule Part 16 in respect of the Change 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 (*Changes*) of this Schedule Part 16.
- (b) whether, in the view of the Contractor, implementing the Change Enquiry would be likely to prevent the Actual Completion Date from occurring at the Completion Date (prior to any adjustment being made to the Completion Date by reason of the implementation or proposed implementation of the Authority Works Change) 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 Change to be implemented and the latest date by which the Contractor must receive a Change Confirmation and any such Consent must be obtained or modified for the matters set out in 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 the Contractor 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 Change, 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 Change or any other adverse consequences for the Authority arising from the Change itself) the parties are in no better and no worse position in relation to the Project than they would have been in if such Change had not been implemented.

4. **RESOLUTION OF DISPUTES AND CHANGE CONFIRMATION**

4.1 Within ten (10) Business Days of receipt of the notice referred to in paragraph 3.2 of this Section 2 (*Changes*) of this Schedule Part 16:

- 4.1.1 if the Contractor has served a notice under paragraph 3.2.1 but the Authority's Representative does not accept that the Contractor is entitled to object to the Change Enquiry, the matter may be referred for resolution in accordance with Schedule Part 18 (*Dispute Resolution Procedure*) and if the Dispute is resolved in favour of the Authority then the Contractor 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 the Contractor and the parties shall proceed to agree or determine all the matters referred to in paragraph 4.3 of this Section 2 (*Changes*) of this Schedule Part 16; or

4.1.3 if he wishes to consider further any matter, the Authority's Representative may give notice to that effect to provided that if no response is given under paragraph 4.1.2 of this paragraph 4.1 prior to [●], the Change 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 the Contractor 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 (*Changes*) of this Schedule Part 16 then, unless agreement has been reached with the Contractor 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 (*Changes*) of this Schedule Part 16) or the Authority's Representative withdraws the Change Enquiry, the outstanding Dispute shall be referred for resolution in accordance with Schedule Part 18 (*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 (*Changes*) of this Schedule Part 16. 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 Part 16) shall be that the Contractor shall be in no worse position in relation to the Project and the Works after the Change is implemented than it would have been in had the Change 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 Change, failing which agreement being reached in a reasonable period of time, either party may refer any matter for resolution in accordance with Schedule Part 18 (*Dispute Resolution Procedure*). The matters to be agreed or determined are:

4.3.1 in relation to the terms of the Change:

- (a) any alteration to the Completion Date;
- (b) the increase or decrease in the Contract Sum (including its component Milestones) calculated in accordance with paragraph 1 of this Schedule Part 18;
- (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 Change; and

4.3.2 the terms of a supplementary agreement under which:

- (a) as required to give effect to the Change in each case, the Authority's Requirements and/or the Contractor's Proposals are amended; and/or provision is made for the amendment of the as-built drawings and specifications, including 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 (*Changes*) of this Schedule Part 16 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 the Contractor and the Authority, the Authority's Representative shall, by notice (a **Change Confirmation**) confirm the Change. Upon the issue of the Change Confirmation, the parties shall enter into the supplementary agreement referred to in paragraph 4.3.

4.5 Upon the Change Confirmation being issued and the supplementary agreement referred to in paragraph 4.4 becoming unconditional in all respects:

4.5.1 the relevant Change shall be a Qualifying Change; and

4.5.2 the rights and liabilities of the parties under this Agreement shall be construed accordingly.

5. **CONSENT AND CHANGE**

5.1 If it shall be necessary to obtain or amend any Consent⁷⁸ in respect of any Change then the Contractor 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 the Contractor under this Schedule Part 16.

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 Change Confirmation could be given with regard to the Change in question in accordance with the notice by the Contractor pursuant to paragraph 3.2.2 of this Section 2 (*Changes*) of this Schedule Part 16, the Change Enquiry shall be deemed to be withdrawn and the provisions of paragraph 6 of this Section 2 (*Changes*) of this Schedule Part 16 shall apply accordingly.

6. **WITHDRAWAL**

The Authority's Representative may withdraw a Change Enquiry at any time prior to the issue of a Change Confirmation, or, in the case of a Change 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 the Contractor all out of pocket expenses reasonably and properly incurred by the Contractor in connection with the Change.

⁷⁸ 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 CHANGES

Adjustment to Contract Sum

1. The increase or reduction in the Contract Sum (including its Component Milestones) arising out of a Qualifying Change 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 Change.
2. Where the effect of a Qualifying Change is an increase in Contract Sum, then as part of the matters to be agreed pursuant to paragraph 4.3 of Section 2 (*Changes*) of this Schedule Part 16:
 - 2.1 The Authority and the Contractor 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 Change to the extent borne by the Contractor; and
 - 2.1.2 where payment for part of the Qualifying Change reflects the carrying out of, or specific progress towards, an element within the Qualifying Change, an objective means of providing evidence confirming that the part of the Qualifying Change 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 Part 18 (*Dispute Resolution Procedure*) in the event of the Authority and the Contractor failing to agree as to its terms) provided that where all or any part of the Qualifying Change is being carried out by a third party under a contract with the Contractor, subject to the terms of any contract between the Contractor and that third party in relation to the implementation of the Qualifying Change having been approved by the Authority (such approval not to be unreasonably withheld), the process under Schedule Part 18 (*Dispute Resolution Procedure*) shall not determine a payment schedule or evidence which would not enable the Contractor to be funded by the Authority in time to make payments to that third party in accordance with its contract with the Authority,
 - 2.2 and the relevant amendments to this Agreement shall reflect that the Authority shall make payment to the Contractor in accordance with the procedures for payment of Milestone Payments in accordance with Clause 30 (*Payment*).

SECTION 4
M&V PLAN CHANGES

1. Changes to the M&V Plan

1.1 Either party may, on the occurrence of a Non-routine Adjustment Event, request that a Non-routine Adjustment be made to the M&V Plan or the M&V Savings Report, in which case the procedure set out in this Section 4 (*M&V Plan Changes*) shall apply.

2. Contract Party Adjustments

2.1 Where a party, acting reasonably, considers that a Non-routine Adjustment Event has occurred or will occur that party (the **Notifying Party**) shall issue an M&V Plan Change Notice to the other party (the **Receiving Party**) in writing.

2.2 The parties shall agree whether or not a Non-routine Adjustment Event has occurred or will occur and if so what, if any, amendments are required to the M&V Plan or the M&V Savings Report. Failing agreement, either party shall be entitled to refer the matter to the M&V Professional for his advice.

3. M&V Professional Adjustments

3.1 The M&V Professional may issue an M&V Plan Change Notice (the **Notifying Party**) to both parties (the **Receiving Parties**) where it considers that a Non-routine Adjustment Event has occurred. On receipt of the M&V Plan Change Notice the parties shall agree whether or not a Non-routine Adjustment Event has occurred and if so what, if any, amendments are required to the M&V Plan or the M&V Savings Report.

4. M&V Plan Change Notice

4.1 Each M&V Plan Change Notice must:

4.1.1 detail the Non-routine Adjustment Event; and

4.1.2 set out the proposed changes to the M&V Plan or the M&V Savings Report.⁷⁹

4.2 Within fifteen (15) Business Days of receipt of an M&V Plan Change Notice, the Receiving Party(ies) must notify the Notifying Party in writing whether or not:

4.2.1 it agrees that a Non-routine Adjustment Event has occurred or will occur; or

4.2.2 it considers any amendments are required to the M&V Plan or the M&V Savings Report.

⁷⁹ E.g. changes to baseline consumption or Guaranteed Energy Cost Performance and period of reporting.

5. Amendments to the M&V Plan

- 5.1 Where it is agreed or determined that a Non-routine Adjustment Event has occurred or will occur and amendments are required to the M&V Plan or the M&V Savings Report, the parties shall instruct the M&V Professional to prepare an amended M&V Plan or M&V Savings Report which shall, insofar as is practicable, place the parties in a no better and no worse position as a result of the Non-routine Adjustment Event and to deliver the same to the parties for approval.
- 5.2 As soon as practicable after the parties receive the revised M&V Plan or M&V Savings Report from the M&V Professional they shall discuss and endeavour to agree the M&V Plan or M&V Savings Report. If the parties cannot agree the revised M&V Plan or M&V Savings Report the matter may be referred by either party to the Dispute Resolution Procedure to determine if the revised M&V Plan or M&V Savings Report represents a fair and reasonable approach to implementing the Non-routine Adjustment in all respects, including by placing the parties, insofar as practicable, in a no better and no worse position than they would have been in had the Non-routine Adjustment Event not occurred.
- 5.3 Once agreed or determined the revised M&V Plan or M&V Savings Report shall be implemented and replace any previous versions of the M&V Plan or the M&V Savings Report in place at the date of agreement or determination as the case may be.

6. Costs

- 6.1 The cost of a referral to the M&V Professional under paragraph 2.2 shall be borne by the Contractor unless it is agreed or determined that it is the Authority who has caused or may cause the Non-routine Adjustment Event, in which case such cost of referral shall be borne by the Authority. However, if the M&V Professional advises that the Non-routine Adjustment Event has not occurred or will not occur in that event the cost of the referral shall be borne by the Notifying Party.
- 6.2 In circumstances where the M&V Professional issues an M&V Plan Change Notice, its reasonably incurred costs shall be borne by the party giving rise to the Non-routine Adjustment Event. However, if it is agreed or determined that a Non-routine Adjustment Event has not occurred the reasonably incurred costs of the M&V Professional shall be borne by the Contractor.

SCHEDULE PART 17
RECORD PROVISIONS⁸⁰

SECTION 1
GENERAL REQUIREMENTS⁸¹

The Contractor shall retain and maintain all the records (including superseded records) referred to in Section 2 (*Records to be Kept*) of this Schedule Part 17 (*Record Provisions*) in accordance with this Section 1 (*General Requirements*) of this Schedule Part 17 (*Record Provisions*), the requirements of Good Industry Practice, in chronological order, in a form that is capable of audit and at its own expense. The Contractor 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 Part 17 (*Record Provisions*).

Wherever practical, original records shall be retained and maintained in hard copy form. True copies of the original records may be kept by the Contractor where it is not practicable to retain original records.

Those records relating to the Project Operations (including the design, construction, development and enhancement of the Facilities) shall be retained for the duration of the Agreement. The Contractor shall ensure that ECM asset registers associated with Project Operations shall be provided in a recognised Industry Foundation Class format, for interoperability with any Authority electronic building information systems.

Financial and other records (including without limitation all information provided in support of any Change) shall be retained and maintained by the Contractor for a period of at least [●] years after the end of the Project Term in sufficient detail, in appropriate categories and generally in such a manner to enable the Contractor to comply with its obligations under Clause 51 (*Confidentiality*).

Where the Contractor wishes to dispose of any records maintained as provided in this Schedule Part 17 (*Record Provisions*), or in respect of which the required period for their retention has expired, then the Contractor shall notify the Authority and if, within forty (40) Business Days of such notice, the Authority elects to receive certain of those records, then the Contractor 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 the Contractor.

Subject to paragraph 0, for a period of not more than [●] years following the termination for whatever reason of this Agreement, the Contractor shall retain in safe storage all such records as are referred to in Section 2 (*Records to be Kept*) of this Schedule Part 17 (*Record Provisions*)

⁸⁰ Schedule Part to be developed on a project by project basis

⁸¹ The timescales referred to in this Section 1 will be influenced by Authority policies and the scale/cost of the Project/Works.

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, the Contractor shall deliver up all those records (or where those records are required by statute to remain with the Contractor or a Contracting Associate of the Contractor, copies thereof) to the Authority in the manner and at the location as the Authority shall reasonably specify. The Authority shall make available to the Contractor all the records the Contractor 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:

by the Contractor where the termination arises as a result of a Contractor Event of Default; and

by the Authority where the termination arises for any other cause.

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.

The Contractor 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.

SECTION 2 RECORDS TO BE KEPT⁸²

This Agreement, its Schedule and the Project Documents including all amendments to such agreements.

The Contractor shall at all times maintain a full record of particulars of the costs of performing the Project Operations, including:

administrative overheads;

payments to the Contractor and to sub-contractors;

capital and revenue expenditure;

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 Schedule Part **16** (*Change Protocol*) and Clause 28 (*Changes in Law*),

and the Contractor shall have the books of account evidencing the items listed in paragraphs 0 to 0 above 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.

All other documents, software or other information expressly referred to in this Agreement.

Records relating to the appointment and supersession of the Authority's Representative and the Contractor's Representative.

Project Data.

Documents, drawings, design data or submissions raised in accordance with Schedule Part **8** (*Review Procedure*).

Documents relating to planning applications, consents, refusals and appeals.

Records relating to any specialist or statutory inspections of the [*relevant part of the Facilities*], including any roadways.

Notices, reports, results and certificates relating to completion of the Works and operational and verification testing of the [*relevant part of the Facilities*].

All operation and maintenance manuals and a full record of all maintenance procedures carried out during the Project Term.

Documents relating to events of Force Majeure, Delay Events and Relief Events and the consequences of the same.

⁸² This list is indicative and should be scoped on a project specific basis

Documents submitted in accordance with Schedule Part 16 (*Change Protocol*) and all documents provided in support.

Documents related to referrals to the Dispute Resolution Procedure.

Tax invoices and records related to VAT.

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.

Documents relating to insurance and insurance claims.

All other records, notices or certificates required to be produced and/or maintained by the Contractor pursuant to this Agreement or any Project Document.

SCHEDULE PART 18

DISPUTE RESOLUTION PROCEDURE⁸³

The procedure set out in this Schedule Part 18 (*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.

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:

an order (whether interlocutory or final) restraining the other party from doing any act or compelling the other party to do any act; or

a decree for a liquidated sum to which there is no stateable defence.

MEDIATION

If the parties have been unable to resolve the Dispute within twenty (20) Business Days of the Dispute arising, they may (if both parties so agree) refer the Dispute to mediation on such conditions as may be agreed between the parties. Any mediation shall be completed within thirty (30) Business Days of such referral 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.

For the avoidance of doubt, mediation shall not be a precondition to the commencement of Adjudication or court proceedings.

ADJUDICATION

Either party may at any time (notwithstanding that other dispute resolution procedures are running concurrently) give 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 4.2 below or paragraph 0 (*Related Adjudicator*) below (the **Adjudicator**).

The Adjudicator nominated to consider a Dispute referred to him shall, subject to paragraph 0, be selected by agreement between the Contractor and the Authority, each acting reasonably and having regard to the nature of the Dispute. If the Contractor and the Authority are unable to agree on the identity of the adjudicators to be selected within seven (7) days of the Notice of Adjudication, the Chairman (or Vice Chairman) for the time being of the Chartered Institute of Arbitrators Scottish Branch shall appoint such adjudicator(s) within seven (7) days of any application for such appointment by either party;

⁸³ Schedule Part to be developed on a project by project basis

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 0) 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.

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.

The Adjudicator shall reach a decision on the Dispute within twenty-eight (28) days 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.

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.

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.

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.

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 51 (*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.

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.

4.10A.1 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.

4.10A.2 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.

4.10A.3 Any correction of a decision shall form part of the decision.

If any Dispute raises issues which, in the opinion of the Contractor, 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 the Authority and the Contractor which was or has been referred to adjudication (the **Related Adjudication**) and an adjudicator has already been appointed (the **Related Adjudicator**) then the Contractor may request that the Dispute be referred to the Related Adjudicator and paragraphs 4.[●] to 4.[●] shall apply.⁸⁴

COURT PROCEEDINGS

Subject to paragraph 0 (*Adjudication*) all Disputes, to the extent not finally resolved pursuant to the procedures set out in the foregoing provisions of this Schedule Part **18** (*Dispute Resolution Procedure*), shall be referred to the Court of Session in Edinburgh (or the Sheriff Court in Edinburgh where the Dispute is of an appropriate value).

[SUBMISSIONS IN RELATION TO ADJUDICATION]

If any Dispute raises issues which relate to any dispute between the Authority and the Contractor arising under this Agreement or otherwise affects the relationship or rights of the Authority and/or the Contractor under the [*reference any relevant construction or installation sub-contract*] (the **Construction Contract Dispute**), then the Contractor may include as part of its submissions made to the Adjudicator submissions made by the [*sub-contractor*] as appropriate.

Any submissions made by the [*sub-contractor*] shall:

be made within the time limits applicable to the delivery of submissions by the Contractor to the Adjudicator; and

concern only those matters which relate to the Dispute between the Authority and the Contractor arising out of this Agreement or in connection therewith.

⁸⁴ Related disputes provisions to be added appropriate projects with a defined subcontracting delivery model.

Where the [sub-contractor] 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 the Contractor.

The Authority shall have no liability to the [sub-contractor] arising out of or in connection with any decision of the Adjudicator or in respect of the costs of the [sub-contractor] in participating in the resolution of any Dispute under this Agreement.

The Contractor shall not allow the [sub-contractor] access to any Confidential Information relevant to the issues in dispute between the Authority and the Contractor save where:

the Confidential Information is relevant also to the issues relating to the Construction Contract Dispute or the Service Contract Dispute as the case may be; and

the Contractor has first delivered to the Authority a written undertaking from the [sub-contractor] 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 [sub-contractor] (as appropriate) to advise in connection with the Dispute.]⁸⁵

NO LOSS

Where the Authority would otherwise be expressly liable to make payment to the Contractor of sums which include amounts payable in turn by the Contractor to any Sub-Contractor, the Authority shall not be entitled to withhold, reduce or avoid any such payment to the Contractor in reliance only on the fact that the amount which is due from the Contractor 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 the Contractor from the Authority.

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 Part **18** (*Dispute Resolution Procedure*)), continue to carry out their obligations in accordance with this Agreement.

⁸⁵ Relevance depends upon contracting structure of project.

**SCHEDULE PART 19
CERTIFICATES**

***Certificate of Practical Completion**

Issued by: [●]

Address: [●]

Contractor: [CONTRACTOR]

Address: [●]

Issue date:

Works:

Situated at:

Agreement dated:

Under the terms of the above-mentioned Agreement,

I/we certify that the Actual Completion Date for the Works was achieved on [●].

To be signed by or for the issuer named above.

Signed.....

[NAME]

SCHEDULE PART 20 – DATA PROTECTION⁸⁶

This Schedule Part 20 includes certain details of the Processing as required by Article 28(3) GDPR and Clause 50 of this Agreement.

1. Subject matter and duration of the Processing of Personal Data

1.1. [Include description here].

2. The nature and purpose of the Processing of Personal Data

2.1. [Include description here]

3. The types of Personal Data to be Processed

3.1. [Include list of data types here]

4. The categories of Data Subject to whom Personal Data relates

4.1. [Include categories of data subjects here]

5. The obligations and rights of the Authority

5.1. The obligations and rights of the Authority as the Controller are set out in this Agreement.

5c EnPC-DBFM Contract

⁸⁶ To be reviewed and developed/adapted as required on a project by project basis

AGREEMENT

between

[AUTHORITY]

and

[CONTRACTOR]

USER GUIDE – REVENUE FUNDED (DBFM) PROJECTS

This is the Energy Performance Contract (**EnPC**) as referred to in [*insert appropriate reference from Framework Agreement*].

Under the terms of the Framework Agreement, a public sector body wishing to contract for an energy efficiency retrofit project shall do so on the basis of an appropriate form of EnPC.

Users should note that this EnPC is intended for projects which include the design and construction/installation of retrofit measures and also a substantive service element with a significant degree of responsibility for the operation and ongoing maintenance of those measures. It is anticipated that projects of this nature will be funded using either Contractor finance or third party lender finance (although either or both of these funding sources could be utilised alongside public finance, if appropriate) and that payments by the relevant Authority to the Contractor will be made from that Authority's revenue budget.

Users should also note the following:

This EnPC is not a replacement for independent, specialist advice and public sector bodies must ensure that they have taken appropriate legal, financial and technical advice before using this document.

This EnPC should be used in conjunction with all relevant contractual, risk and accounting guidance promulgated or recommended by the Scottish Government and/or the Scottish Futures Trust from time to time including the joint Eurostat and EIB EnPC guidance, 'A Guide to the Statistical Treatment of Energy Performance Contracts' issued in May 2018, as updated and/or amended from time to time (the Eurostat EnPC Guide)

This notice should be removed, and all optional text, drafting notes and footnotes checked or rationalised as appropriate, before finalisation of the Agreement for issue for a specific project.

Changes to the EnPC, other than project specific and minor drafting (such as completion of time periods) and changes to reflect issues discussed at paragraph E below, require the prior approval of the [Scottish Government].

This EnPC contains a number of footnotes and guidance notes which identify key issues the parties will need to consider when using it including, for example, those relating to the Eurostat EnPC Guide. This is not an exhaustive list, and the Agreement will therefore need to be analysed and reviewed in detail to ensure that it is tailored to the requirements of each project and that its terms (and their impact) are clearly understood by the parties. Customisation should not however extend to parties seeking to change the substance of commercial terms or making unnecessary drafting amendments.

It is anticipated that an Authority will decide upon the key commercial terms within this EnPC which require to be tailored to the requirements of a particular project prior to the issue of the Invitation to Mini-Competition for that project.

EXPLANATORY NOTE

Users should note the following comments and assumptions with respect to this Agreement:

- *It is anticipated that the Agreement will have a duration of 8 years or longer to cover a meaningful part of the economic life of installed measures, and to satisfy the related requirements of the Eurostat EnPC Guide.*

- *The Agreement is intended to deliver specified guaranteed energy cost performance to the Authority. The principal rule is that the level of guaranteed savings over the duration of the Agreement is equal to or greater than the sum of:*
 - *the operational payments to be made by the Authority to the Contractor over the duration of the Agreement; and*
 - *any amount of government financing that is not repayable by the Contractor as calculated at financial close.*
- *In circumstances where that performance is not achieved, the Contractor will suffer contractual penalties. However, where guaranteed energy cost performance is achieved and exceeded, it is anticipated that the excess will be shared between the Authority and Contractor, 33% and 66% respectively, as required by the Eurostat EnPC Guide.*
- *At the point of signing a contract based on this Agreement, it is assumed that the M&V Plan (see clause 19) and the baseline energy consumption figure(s) which are relied upon within that plan will have been agreed. Accordingly, it is assumed that any project development services or Investment Grade Proposal work will be covered in the framework arrangements, including any development contract, which precede the signing of this contract.*
- *A typical contractor/sub-contractor structure has been assumed. A point for consideration on a project by project basis is how likely it is that there will be a subcontracting distinction between works/installation and services – as drafted, the Agreement assumes there will be.*
- *The Agreement assumes the M&V Professional will be independent of the Contractor. The Authority should ensure that the M&V Professional appointed by the Contractor owes the Authority a duty of care, and a suitable form of warranty is provided at Schedule Part 9.*
- *It is assumed that appropriate insurances will be available for the full term of the Agreement. However, the scope and terms of insurance will require to be developed on a project specific basis. To the extent that minimum levels of insurance have been committed to as part of the framework appointment process, this should be reflected in the development of these terms.*
- *With respect to Authority obligations, note clauses 10.3 (related to works/buildings infrastructure) and 16 (related to equipment) – these should be considered on a project by project basis because they may, once developed, impose specific contractual obligations on the Authority which are commercially necessary to facilitate the project. In particular, clause 10.3 includes the concept of “Authority Assets Condition Standard”. To be considered on a project specific basis how this standard should be ascertained – for example there may be an agreed schedule of condition prepared as part of the project awards procedure envisaged within the Framework Agreement. The assets which the Authority believes to be relevant for use in the project should be identified by the Authority, where possible, in any Authority Data Pack that may be prepared.*
- *On-site generation facilities. The potential for on-site generation has been noted in a number of relevant places in the draft Agreement but detailed drafting would need to be developed on a project specific basis. This would require a detailed review of a number of provisions, such as payment mechanism, handover and land interests.*
- *Clause 10 and elsewhere – it is expected that most projects will not involve significant ‘greenfield’ construction and that works/installation will generally take place within existing buildings. Note that the concept of “Site” in the contract is intended to refer to such works/installation areas as are relevant to the project, wherever they may be within or around the wider public sector “Facilities”.*
- *Clause 17 (Pre-completion Testing and Completion) - it is assumed that there will be an “Independent Tester” role as part of the construction/installation completion process. However,*

this will require specific consideration on a project by project basis, as the expense may not be justified on lower value projects.

- *Clause 21 (Guaranteed Energy Cost Performance) – note that there is intended to be a direct financial penalty for not achieving the guarantee (including when energy costs increase rather than decrease, and the Contractor, as appropriate, being required to reimburse the Authority for any such cost increase), levied under the payment mechanism, although there is no automatic breach of contract imposed for each and every such non-achievement. However, note that Clause 45 separately provides a means for specific actions to be taken by the Authority, which may lead to contract termination, in circumstances where savings materially depart from the guaranteed levels by falling below specified under-performance thresholds.*
- *Clause 21 (Guaranteed Energy Cost Performance) – note that the operation of the M&V Plan will have the effect of adjusting the baseline energy consumption to the extent necessary to eliminate from consideration the impact of consumption factors which it is appropriate to exclude from the GECP assessment - for example, factors such as weather, hours/days of usage/occupancy of the site, number of occupants/users at the site,*
- *Clause 23 (Maintenance) – note that there is no specified “lifecycle” concept. This is on the basis that any required lifecycle maintenance will be subsumed within “maintenance”)*
- *Clause 33 (Change Control) – the agreement seeks to recognise that the Guaranteed Energy Cost Performance may be impacted by a range of factors which are not directly relevant to the proper performance of the Contractor’s obligations under the Agreement. The normal operation of the M&V Plan will eliminate a number of these factors (see note on clause 21 above), and in respect of non-routine factors the change control mechanism includes a bespoke process (M&V Plan Change) which is intended to provide the parties with a swift and pragmatic means to agree on the impact of such non-routine factors, without the need to resort to a convoluted contract change process on each occasion. For example, non-routine factors can be adverse site conditions, additional works carried out by the Authority at the site, the Authority vacating all or part of the site, non-typical variations in the number of occupants/users at the site.*
- *Approach to financing of projects by Contractor – the drafting of this Agreement does not mandate any particular source of finance by the Contractor, as this is considered to be a matter for development on a project specific basis in light of the scope and scale of the project concerned. However, it is, broadly speaking, assumed that projects of a relatively smaller financial scale would be corporately funded by the Contractor and projects of a relatively larger financial scale would be funded by external, project finance debt, noting however that these comments should not limit the innovation of contractors with respect to the question of project funding.*
- *Amendments to Agreement to capture the financing solution which is developed for projects - the terms of this Agreement will require to be amended on a project specific basis to meet the Contractor’s intended funding solution. Any drafting which is developed for either a project financed solution or a corporately funded solution will require to be developed consistent with the principles of SoPC, version 4 and the requirements of the Eurostat EnPC Guide (as amended, updated or replaced from time to time). However, a number of footnoted points have been added within the clauses and definitions of the Agreement in order to provide indicative guidance as to the areas of the Agreement which would require to be developed in order to adequately cater for a project financed solution. Where, within those footnotes, reference is made to additional provisions being required to cater for project finance, the reference provisions should be drawn from or reflective of SoPC, version 4 and the Eurostat EnPC Guide unless otherwise stated. Any public finance will need to be considered in terms of the requirements of the Eurostat EnPC Guide.*

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AGREEMENT BETWEEN:

(1) [●], (the **Authority**); and

[●], a company incorporated in [●] (registered under number [●]) whose registered office is [●] (the **Contractor**).

WHEREAS:

(A) The Authority wishes to procure [*Project*] at [*site(s)*] (the **Project**);

The Authority invited tenders, pursuant to the project award procedures of the Scottish Ministers' non-domestic energy efficiency framework (being framework reference number [●]), from framework suppliers interested in being appointed by the Authority as the delivery contractor to carry out the Project;

Following the submission of tenders, it appears to the Authority to be expedient for the purpose of, or in connection with, the discharge of its functions to enter into this Agreement, which sets out the terms and conditions upon which the Contractor will carry out the Project; and

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 (Scotland) Exclusion Order 1998 (SI 1998/686).

NOW IT IS HEREBY AGREED as follows:

PART 1: GENERAL

1. DEFINITIONS AND INTERPRETATION

Schedule Part 1 (*Definitions and Interpretation*) shall apply.

2. EXECUTION AND DELIVERY OF DOCUMENTS

On or prior to execution of this Agreement:

2.1 the Contractor shall deliver to the Authority the documents referred to in Section 1 (*Documents to be delivered by the Contractor*) of Schedule Part 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by the Authority by written notice to the Contractor); and⁸⁷

⁸⁷ Note that this list of documents must include an M&V Professional's Collateral Agreement

2.2 the Authority shall deliver to the Contractor the documents referred to in Section 2 (*Documents to be delivered by the Authority*) of Schedule Part 2 (*Completion Documents*) (unless the requirement to deliver any such document is waived by the Contractor 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, shall terminate automatically on the expiry of the Project Term.

4. PROJECT DOCUMENTS

Ancillary Documents

4.1 The Contractor 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 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 0 (*Review Procedure*) and either:

(a) there has been no objection in accordance with paragraph 3 of 0 (*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) the Contractor is acting in accordance with the comments of the Authority as provided in paragraph 4.2 of 0 (*Review Procedure*);

- and, in the circumstances specified in Clause 4.1.1, Project Co has complied with Clause 57 (*Assignment and Sub-contracting*).

Changes to Funding Agreements [and Refinancing]⁸⁸

- 4.2 Subject to Clauses 4.3 and 4.4, the Contractor 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 the Contractor 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 the Contractor has obtained the prior written consent of the Authority to such increased liability for the purposes of this Clause 4.3[; or
- 4.3.2 it is a Permitted Borrowing.]⁸⁹
- 4.4 [Any amendment or variation of any Funding Agreements which constitutes a Refinancing shall be carried out in accordance with the provisions of 0 (*Refinancing*).]⁹⁰
- 4.5 Without prejudice to Clause 4.2, the Contractor 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 the Contractor enters into a new Project Document (or any agreement which affects the interpretation or application of any Project Document), the Contractor 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 the Contractor.

⁸⁸ Refinancing provisions will require to be inserted into 0 where project is being funded via project finance in accordance with the requirements of the Eurostat EnPC Guide.

⁸⁹ For development where project is being funded via project finance.

⁹⁰ Refinancing provisions will require to be inserted into 0 where project is being funded via project finance, in accordance with the requirements of the Eurostat EnPC Guide.

Funding Default

- 4.7 The Contractor shall promptly upon the occurrence of a Funding Default notify the Authority of such Funding Default.⁹¹

5. THE PROJECT OPERATIONS

Scope

- 5.1 Subject to and in accordance with the provisions of this Agreement, the Contractor 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 The Contractor shall at its own cost be solely responsible for procuring that the Project Operations are at all times performed:
- 5.2.1 in compliance with all Law and Consents (including without limitation the giving of notices and the obtaining of any such Consents) and so as not to prejudice the renewal of any such Consents;
 - 5.2.2 in a manner that is not likely to be injurious to health or to cause damage to property;
 - 5.2.3 in a manner consistent with the Quality Plans;
 - 5.2.4 except to the extent expressly stated to the contrary in the Authority's Requirements or the Service Level Specification, in compliance with all applicable [*sector or Authority specific requirements*];
 - 5.2.5 in a manner consistent with the Authority discharging its statutory duties and other functions undertaken by it as the same may be notified to the Contractor from time to time; and
 - 5.2.6 in so far as not in conflict with an express obligation of the Contractor under this Agreement, or where in relation to a matter there is no express obligation or standard imposed on the Contractor under this Agreement, in accordance with Good Industry Practice.

In the event that any ambiguity, uncertainty, dispute or discrepancy arises in the nature and scope of Contractor's obligations under this Clause 5.2 (*General Standards*), the provisions of this Clause 5.2

⁹¹ The consequences of a Funding Default occurring should be developed on a project specific basis, depending upon the financing method for the project in question.

(*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 the Contractor that it shall:

5.3.1 subject to the provisions of this Agreement, comply with all Laws, [*sector or Authority specific requirements*] and Consents applicable to it which relate to the Project Operations;

5.3.2 not wilfully impede the Contractor in the performance of its obligations under this Agreement (having regard always to the interactive nature of the activities of the Authority and of the Contractor 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 or any Authority Related Parties on or around the Facilities for the purposes contemplated by this Agreement and any other of the Authority's statutory functions); and

5.3.3 inform the Contractor 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 the Contractor informed, of any course of action to remedy the situation recommended or required by the Scottish Government, the Authority or other competent authority,

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

Co-operation

5.4 Each party agrees to co-operate, 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 CONTRACTOR⁹²

Contractor Parties

6.1 Subject to the provisions of Clause 30.1.6, the Contractor shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any Contractor Party. The Contractor shall, as between itself and the Authority, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches and negligence of all Contractor Parties. All references in this Agreement to any act, default, omission, breach or negligence of the

⁹² If an SPV structure was adopted by the contractor, there would also require to be a restriction on the Contractor engaging in other business or activities.

Contractor shall be construed accordingly to include any such act, default, omission, breach or negligence of a Contractor Party.

Safety

- 6.2 The Contractor shall, in carrying out the Project Operations, have full regard for the safety of all persons at the Facilities (whether lawfully or not) and keep the Site, the Facilities and the [*relevant parts of 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 The Authority shall not be liable to the Contractor for and the Contractor 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, delict or otherwise) from the adoption, use or application of the Disclosed Data by, or on behalf of, the Contractor, or any Contractor Party.

No warranty

- 7.2 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 the Contractor under this Agreement or under any of the Project Documents. In addition, the Authority shall not be liable to the Contractor in respect of any failure to disclose or make available to the Contractor (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 the Contractor (whether before, on or after execution of this Agreement) of any inaccuracy, error, omission, defects or inadequacy in the Disclosed Data.

Contractor investigation

- 7.3 The Contractor 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 Contractor Party shall) make any claim against the Authority or any Authority Party whether in contract, delict 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 the Contractor be relieved from any obligation imposed on, or undertaken by it, under this Agreement on any such ground.

8. REPRESENTATIVES

Representatives of the Authority

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

8.2 The Authority may by notice to the Contractor change the Authority's Representative.

8.3 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:

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

8.3.2 in the absence of an express order or authorisation under 0 (*Change Protocol*), constitute or authorise a Change.

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

Representative of the Contractor

8.5 The Contractor's Representative shall be [●] or such other person appointed pursuant to Clause 8.6. The Contractor's Representative shall have full authority to act on behalf of the Contractor for all

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

8.6 The Contractor may by notice to the Authority change the Contractor's Representative.

PART 2: LAND ISSUES

9. NATURE OF LAND INTERESTS

Access During Construction/Installation

9.1 From the Commencement Date until the Actual Completion Date or (if earlier) the Termination Date, the Authority shall grant to the Contractor and the Contractor Parties, or procure that the Contractor and the Contractor Parties are granted access to the relevant parts of the Facilities and are granted the Ancillary Rights, in each case subject only to the [Reserved Rights, the Title Conditions⁹³ and the]Authority's rights under this Agreement and solely for the purposes of implementing the Works.⁹⁴

Access Following Construction/Installation

9.2 After the occurrence of the Actual Completion Date the Authority shall grant to the Contractor and the Contractor Parties, or procure that the Contractor and the Contractor Parties are granted, access to the relevant parts of the Facilities subject only to [the Reserved Rights, the Title Conditions and]⁹⁵the provisions of this Agreement and solely for the purposes of carrying out the Project Operations (other than those Project Operations for which the Contractor is granted rights pursuant to Clause 9.1 (*Access During Construction*)), carrying out Snagging Matters and remedying Defects and exercising the Ancillary Rights. Such rights shall terminate on the Expiry Date or (if earlier) the Termination Date.⁹⁶

Extent of Rights

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

⁹³ Depending on the nature and specific circumstances of the project, caveats related to title may not be necessary.

⁹⁴ The precise terms of this clause will vary from project to project. The "Site" may only be a small part of a wider public facility, and as such access routes and safe working zones will need to be considered. It may also be impractical to have a fixed concept of "Site" depending upon the nature of the installations – to be considered on a project specific basis.

⁹⁵ As with previous comment related to title

⁹⁶ As with previous comment related to "Site".

Facilities or the Site or any part of the Facilities or the Site and the Contractor shall not have or be entitled to exclusive possession or any estate, right, title or interest in and to the Site or the Facilities or any part thereof except as provided herein and shall occupy 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 the Contractor and the Contractor Parties.

9.5 The Contractor shall procure that:

9.5.1 [all Project Operations carried out at the Site by or on behalf of the Contractor (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]⁹⁷; and

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

10. THE SITE

10.1 The condition of the Site shall be the sole responsibility of the Contractor. Accordingly (without prejudice to any other obligation of the Contractor under this Agreement), the Contractor shall, subject to the provisions of Clause 10.3, be deemed to have:

10.1.1 inspected and examined the Site and any relevant parts of the Facilities and their surroundings and (where applicable) any existing structures or works on, over, under or supporting the Site and any relevant parts of the Facilities;

10.1.2 satisfied itself as to the nature of the ground and the subsoil (where relevant), the form and nature of the Site and any relevant parts of the Facilities, the load bearing and other relevant properties of the Site and any relevant parts of the Facilities, the risk of injury or damage to property affecting the Site and any relevant parts of the Facilities, the nature of the materials (whether natural or otherwise) to be removed 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, without prejudice to the Contractor's rights under this Agreement in respect of a breach by the Authority of its obligations under Clause 9.1 and/or Clause 9.2;

⁹⁷ As with previous comment related to title

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

10.1.5 [satisfied itself as to the Title Conditions and the Reserved Rights].⁹⁸

10.2 To avoid doubt, the Contractor accepts full responsibility for all matters referred to in Clause 10.1 and the Contractor 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 29 (*Delay Events*), on any grounds including (without limitation) the fact that incorrect or insufficient information on any matter relating to the Site or the Facilities 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 on or at the Site or the Facilities which has been caused or created by the Contractor 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 the Contractor).

10.3 [The Authority shall be obliged to maintain, throughout the term of this Agreement, the following elements of the Authority Assets to the Authority Assets Condition Standard:

10.3.1 [list relevant elements on a project specific basis]].⁹⁹

11. CONSENTS & PLANNING APPROVAL

11.1 The Contractor shall be responsible for:

11.1.1 [obtaining all Consents which may be required for the performance of the Project Operations]; and¹⁰⁰

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

⁹⁸ As with previous comment related to title.

⁹⁹ This clause should list the pre-existing elements of building fabric structure, fixtures, fittings or equipment (which for the avoidance of doubt excludes any assets the Contractor is installing or improving) upon which the Contractor should justifiably be entitled to rely in the performance of the Project Operations. Cf the purpose of clause 16 and Schedule Part 11 – see footnoted comments in clause 16.

¹⁰⁰ This provision is subject to any project specific decision that the Authority as host is better placed to obtain the relevant consents.

11.2 In the event that:

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

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

11.2.3 the Contractor 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 the Contractor, to claim or to include within its claim such sums as the Contractor acting reasonably requests and shall pay to the Contractor the part of any compensation that it receives under that scheme that relates to the sums claimed at the request of the Contractor.

PART 3: DESIGN AND CONSTRUCTION/INSTALLATION

12. THE DESIGN, CONSTRUCTION/INSTALLATION AND TESTING PROCESS

Overall Responsibility

12.1 Contractor shall carry out the Works:

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

12.1.2 in accordance with Contractor's Proposals; and

12.1.3 in accordance with the terms of this Agreement.

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

12.2.1 the fact that the Contractor has complied with the Contractor's Proposals shall not be a defence to an allegation that the Contractor has not satisfied the Authority's Requirements; and

12.2.2 the fact that Contractor has satisfied the Authority's Requirements shall not be a defence to an allegation that Contractor has failed to comply with the Contractor's Proposals.

Design responsibility

12.3 The Contractor warrants that it has used, and will continue to use, the degree of skill and care in the design of the Works to 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.¹⁰¹

[Authority design approval

12.4 The Contractor shall develop and finalise the design and specification of the Works and [the Authority shall review the Reviewable Design Data in accordance with 0 (*Review Procedure*) and the provisions of this Clause 12.4:

12.4.1 The Contractor shall submit the Reviewable Design Data to the Authority's Representative for review under 0 (*Review Procedure*). The Contractor shall not commence or permit the commencement of construction or installation of the part or parts of the Works 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 the Contractor is entitled to proceed with construction in accordance with paragraph 3.3 of 0 (*Review Procedure*) or the Contractor is:

- (a) disputing the status of such Reviewable Design Data pursuant to paragraph 1.3.1 or paragraph 4.3 of 0 (*Review Procedure*); and
- (b) proceeding at risk pursuant to paragraph 1.3.2 of 0 (*Review Procedure*).

12.4.2 The Contractor 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.]¹⁰²

Rectification of Contractor's Proposals

12.5 Without prejudice to Clause 12.1, if it should be found that the Contractor's Proposals do not fulfil the Authority's Requirements, the Contractor shall at its own expense, and in accordance with Clause 12.6 below, amend the Contractor's Proposals and rectify the Works or any part affected. Such amendment and rectification shall have the effect that:

12.5.1 the Contractor's Proposals shall satisfy the Authority's Requirements; and

¹⁰¹ To be considered on a project specific basis whether to also rely on warranties to the Authority from specialist subcontractors. This will depend on the nature of the project and structure of any consortium arrangements.

¹⁰² To be considered on a project specific basis whether it would be desirable and/or appropriate for the Authority to review, under the terms of the Review Procedure, any 'reviewable design data'. If so, the words in square brackets should be applied along with the related provisions of the Review Procedure. If no such design review is anticipated, all key elements of the Investment Grade Proposal would need to be set out in the Authority's Requirements or Contractor's Proposals.

12.5.2 following the amendment or rectification, the structural, mechanical, electrical and, where relevant, energy efficiency performance of the Works (or, if applicable, to such part of the Facilities as the Works relate) will be of an equivalent standard of performance to that set out in Contractor'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).

12.6 Where Clause 12.5 applies, the Contractor shall submit its proposal for amending the Contractor's Proposals and rectifying the Works (or any part affected) to the Authority's Representative for review under 0 (*Review Procedure*) and shall not amend Contractor's Proposals or commence or allow the commencement of the rectification of the Works (or any part affected) until the Authority's Representative, acting reasonably, permits it to proceed in accordance with 0 (*Review Procedure*).

Construction Skills Certification Scheme

12.7 The Contractor 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.

13. RIGHT OF ACCESS OF AUTHORITY'S REPRESENTATIVE

Access to the Site

13.1 The Contractor shall procure that:

13.1.1 subject to complying with all relevant safety procedures, the Authority's Representative shall have unrestricted access at all reasonable times during normal working hours to:

- (a) view the Works at the Site on reasonable prior notice appropriate to the circumstances; and
- (b) subject to obtaining the consent of the relevant manufacturer or supplier (which the Contractor 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; and

13.1.3 [regular] progress meetings and site meetings are held and that the Authority's Representative shall have the right to attend such progress meetings and site meetings

and to attend such other meetings as the Authority's Representative may reasonably request.

Increased monitoring

13.2 If, following any viewing, visit or inspection made pursuant to Clause 13.1.1, it is discovered that there are defects in the Works or that the Contractor has failed to comply with the Authority's Requirements or Contractor's Proposals, the Authority's Representative may (without prejudice to any other right or remedy available to the Authority) by notice to the Contractor increase the level of monitoring of the Contractor until such time as the Contractor 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. The Contractor 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, the Authority's Representative shall have the right at any time prior to the Actual Completion Date to request the Contractor to open up and inspect any part or parts of the Works where the Authority's Representative reasonably believes that such part or parts of the Works is or are defective and the Contractor shall comply with such request.

13.4 Prior to exercising his right pursuant to Clause 13.3 above, the Authority's Representative shall notify the Contractor 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, the inspection shows that the relevant part or parts of the Works are not defective then Clause 29.3.4 shall apply.

13.6 If, following the exercise by the Authority's Representative of his right pursuant to Clause 13.3, the inspection shows that the relevant part or parts of the Works is or are defective, the Contractor 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 the Contractor at no cost to the Authority and the Contractor 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, 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 the Contractor does not agree with such opinion, the matter shall be determined in accordance with 0 (*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 Contractor under this Agreement save as expressly set out in this Clause 13 (*Right of Access of Authority's Representative*).

Safety during Construction/Installation

13.9 The provisions of Section 2 (*Safety During Construction/Installation*) of Schedule Part 6 (*Construction Matters*) shall apply to matters of safety.¹⁰³

14. PROGRAMME AND DATES FOR COMPLETION¹⁰⁴

Dates for Completion

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

The Programme

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

14.3 The initial Programme is set out at 0 (*The Programme*). Any change to the Programme shall only be made in accordance with this Clause 14 (*Programme and Dates for Completion*) and 0 (*Review Procedure*). The Contractor 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 0 (*Review Procedure*).

14.4 If it appears to the Authority's Representative at any time that the actual progress of the Works has significantly fallen behind the Programme, then the Authority's Representative shall be entitled to require the Contractor 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 the Contractor (at the Authority's option):

¹⁰³ The concept of "safety during construction" may not be fully relevant to some projects, depending upon the nature of the installations.

¹⁰⁴ Note that in some projects phasing may be required, whereby different measures are installed with varying completion dates and such measures covered in the phase are capable of performing independently and operational payments linked to each phase is not greater than the proportion of the phase's capital cost to the capital cost of all measures under the EnPC in aggregate.

14.4.1 to produce and submit to the Authority's Representative in accordance with 0 (*Review Procedure*) a revised Programme showing the manner and the periods in which the Works will be carried out to ensure completion; and/or

14.4.2 to produce and submit to the Authority's Representative in accordance with 0 (*Review Procedure*) a revised Programme showing the steps which are to be taken to eliminate or reduce the delay.

Early completion

14.5 Notwithstanding that the Works may have been completed in accordance with this Agreement, the Actual Completion Date may only occur on a date on or after the Completion Date unless the Authority, in its absolute discretion, agrees otherwise in writing.¹⁰⁵

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

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

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

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.

¹⁰⁵ Authorities may consider early completion provisions for projects with a longer construction/installation period.

Changes to terms of appointment

- 15.2 Neither the Authority nor the Contractor 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, 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 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 0 (*Dispute Resolution Procedure*).

16. EQUIPMENT

The parties shall comply with the terms of 0 (*Equipment*).¹⁰⁶

17. PRE-COMPLETION TESTING AND COMPLETION¹⁰⁷

17.1 Not less than [●] ([●]) months before the Completion Date, the Contractor shall provide the Authority with a draft of the Final Completion Testing Programme as developed by the Contractor in accordance with the provisions of Clause 17.2. The Authority shall provide the Contractor with comments on the draft Final Completion Testing Programme submitted to it within [fifteen (15)] Business Days. The parties shall, within [fifteen (15)] Business Days of receipt by the Contractor of Authority's comments agree the terms of the Final Completion Testing Programme. If the parties are unable to agree the Final Completion Testing Programme by [●] ([●]) weeks before the Completion Date, the matter shall be referred for determination in accordance with 0 (*Dispute Resolution Procedure*).

17.2 The Final Completion Testing Programme shall be in accordance with the Outline Completion Testing Programme, unless otherwise agreed by the Authority in its absolute discretion. The Final Completion Testing Programme shall then replace the Outline Completion Testing Programme.

Pre-Completion inspection

17.3 The Contractor shall give the Independent Tester and the Authority's Representative not less than twenty (20) Business Days' notice and not more than thirty (30) Business Days' notice of the date upon which the Contractor considers that the Works will be complete and the tests on completion to be performed in accordance with the Final Completion Testing Programme will be carried out. Following receipt of the notice specified in this Clause 17.3 (Pre-Completion Inspection) the Authority's Representative and the Independent Tester shall be entitled to inspect the Works on the date or dates reasonably specified by the Contractor in accordance with this said Clause 17.3, and to attend any of the tests on completion (including, without limitation, the repetition of any of the tests on completion which are required to be carried out and passed in accordance with the Final Completion Testing Programme). The Contractor shall, if so requested, accompany the Authority's

¹⁰⁶ The schedule should deal with any transfer/decommissioning of existing equipment, materials or apparatus and any other specific agreements around provision or operation of equipment by the Contractor (with any cross-over to the provisions of Schedule Part 12 to be managed on a project specific basis). This will be determined on a project by project basis. Any proposed interface between Authority personnel and Contractor installed equipment should be dealt with in a project specific, extra-contractual interface protocol.

¹⁰⁷ Note that this provision sets out wording for the completion testing (i.e. practical completion) of energy efficiency works and energy management technology. The operational testing of such works/assets, following the Actual Completion Date, is dealt with in Clause 18, however it is assumed that the Outline/Final Completion Testing Programme will include the testing requirements of this clause 17 (pre-completion). The timescales referred to within this Clause 17 will need to be reviewed on a project specific basis.

Representative and the Independent Tester on any such inspection. The parties shall procure that the Independent Tester, within five (5) Business Days of any inspection made pursuant to this Clause 17.3 (*Pre-Completion Inspection*), notifies the Contractor and the Authority of any outstanding matters which are required to be attended to before the Works can be considered to be complete in accordance with this Agreement. The Contractor shall attend to such matters and shall, if necessary, give the Independent Tester further notices in accordance with this Clause 17.3 (*Pre-Completion Inspection*) in relation to such matters so that the procedures in this Clause 17.3 (*Pre-Completion Inspection*) are repeated as often as may be necessary to ensure that all outstanding matters in relation to the Works are attended to.

Completion Certificate

- 17.4 Pursuant to the terms of the Independent Tester Contract, the parties shall procure that the Independent Tester, when he is satisfied that the Works are complete in accordance with the Completion Criteria and this Agreement, issues a Certificate of Practical Completion to that effect to the Authority and to the Contractor.
- 17.5 The issue of the Certificate of Practical Completion shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence (but only for the purpose of ascertaining the Payment Commencement Date) that the Works were completed in accordance with the Completion Criteria and this Agreement on the date stated in the Certificate of Practical Completion.
- 17.6 The Independent Tester shall issue the Certificate of Practical Completion notwithstanding that there are Snagging Matters. Where there are Snagging Matters, the Authority's Representative shall, within [●] Business Days of the date of issue of the Certificate of Practical Completion, issue a Snagging Notice which shall specify the Snagging Matters and an estimate of the cost of rectifying such Snagging Matters.
- 17.7 Following the issue of a Snagging Notice, the Contractor shall, in consultation with the Authority's Representative and in such manner as to cause as little disruption as reasonably practicable to the Authority's use of the Facilities, rectify all Snagging Matters within [●] Business Days of the issue of the Snagging Notice.
- 17.8 If, within [●] Business Days of the issue of the Snagging Notice the Contractor has failed to rectify the Snagging Matters specified in the Snagging Notice the Authority may by itself (or engage others to) carry out the works necessary to rectify the Snagging Matters, at the risk and cost of the Contractor.
- 17.9 The issue of the Certificate of Practical Completion shall in no way affect the obligations of the Contractor under this Agreement including in respect of any Defects.

As-built specification

17.10 As soon as it is available, after the issue of the Certificate of Practical Completion, the Contractor shall provide to the Authority a copy of [*drawings relating to the installed Works*].

18. POST COMPLETION ACTIVITIES¹⁰⁸

Testing

18.1 The Contractor shall, within [[●] days / weeks / months] following the Actual Completion Date, undertake and complete GECP Testing, in accordance with Clause 19 and Schedule Part 3 (*Measurement and Verification*).

Information

18.2 The Contractor shall ensure that the Authority's Representative is provided with all the information he may reasonably require in relation to the GECP Testing.

18.3 If the Authority's Representative, acting reasonably, makes any comment in relation to the carrying out of the GECP Testing, such comments shall be taken into account by the Contractor.

Operational Manuals

18.4 The Contractor shall make available to the Authority's Representative:

18.4.1 at least [●] ([●]) weeks prior to the anticipated Actual Completion Date, one (1) paper and one (1) electronic copy of a [*draft operation and maintenance manual in respect of the installed Works*] in sufficient detail to allow the Authority to plan for the safe and efficient operation of the Facilities;

18.4.2 on or before the Actual Completion Date two (2) paper copies and one (1) electronic copy of a [*final draft operation and maintenance manual in respect of the installed Works*] in sufficient detail to allow the Authority to operate and use the Facilities safely and efficiently;

18.4.3 within [four (4)] weeks following the Actual Completion Date, the [*principal operation and maintenance manual in respect of the installed Works*];

in each case including all manufacturers' instructions relating to Equipment installed by the Contractor and any Contractor Party.¹⁰⁹

¹⁰⁸ The GECP Testing will comprise the measurement verification testing which is required, pursuant to the M&V Plan, to determine in year 1 the extent of achievement of the Guaranteed Energy Cost Performance. This determination will be made pursuant to the terms of the M&V Plan, and then put into financial effect (in the event of underperformance) by the operation of Clause 21.

- 18.5 The Contractor shall provide to the Authority such information after the Actual Completion Date as relates to any Snagging Matters or rectification of Defects as is reasonably necessary to allow for the updating of any of the items listed in Clause 18.4.
- 18.6 On termination of this Agreement (howsoever arising) prior to the provision by the Contractor in accordance with Clause 18.4 of the items listed therein, the Contractor 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.

Decommissioning

- 18.7 The Contractor shall, as appropriate, undertake any necessary decommissioning activities in accordance with the requirements of the Authority's Requirements.¹¹⁰

19. MEASUREMENT & VERIFICATION PLAN

The Parties shall comply with and implement the terms of Schedule Part 3 (*Measurement and Verification*), and the Contractor shall procure that all Contractor Parties, including without limitation the M&V Professional, and any other persons for whom it is responsible, shall comply with and implement the terms of Schedule Part 3 (*Measurement and Verification*), in either case throughout the term of this Agreement and as such schedule may be varied in accordance with this Agreement from time to time.

PART 4: QUALITY ASSURANCE

20. QUALITY ASSURANCE

Quality Plans and Systems

- 20.1 The Contractor 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 above shall be reflected in appropriate quality plans, the standard of which shall be consistent with [BS EN ISO 9001 or 9002 or [*insert any additional standards references that are relevant to the specific works/installations in question*]] (as the case may be) or any equivalent standard which is generally recognised as having replaced them (or any of them).]

¹⁰⁹ Subject to project specific review as to the extent to which the Contractor will continue to operate the equipment and that in terms of the Eurostat EnPC Guide, the Authority should not take responsibility for maintaining and/or replacing the EPC assets (either itself or via a sub-contractor). An exception to this is where the Authority undertakes light maintenance activities that do not affect the performance of the EPC assets.

¹¹⁰ This obligation would need to include removal of any redundant plant or equipment (including for example an old boiler) and would need to complement any relevant obligations in Schedule Part 11.

20.3 Without limitation to the generality of Clause 20.2, 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,

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

20.4 The Contractor 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 0 (*Review Procedure*) and the Contractor shall not be entitled to implement or procure the implementation of any Quality Plan unless the Contractor is entitled to proceed with such implementation pursuant to 0 (*Review Procedure*).

20.5 The Contractor shall implement or procure the implementation of the quality management systems referred to in Clause 20.1.

20.6 The Contractor shall from time to time submit to the Authority's Representative in accordance with 0 (*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. The Authority's Representative may raise comments on any such proposed change only on the grounds set out in paragraph 3 of 0 (*Review Procedure*).

20.7 If there is no objection under 0 (*Review Procedure*) to a change to any Quality Plan proposed pursuant to Clause 20.6, the Quality Plan shall be amended to incorporate such change.

Quality Management

20.8 The Contractor shall maintain a quality management system which shall:

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

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

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

20.8.4 require liaison with the Authority's Representative on all matters relating to quality management

Quality Monitoring

20.9 The Authority's Representative may carry out audits of the Contractor's quality management system (including all relevant Quality Plans and any quality manuals and procedures) to establish that the Contractor is complying with Clauses 20.1 and 20.3. 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 the Contractor's quality management systems.

PART 5: ENERGY SAVINGS

21. GUARANTEED ENERGY COST PERFORMANCE¹¹¹

21.1 The Contractor shall be obliged to ensure that the Guaranteed Energy Cost Performance is met at the Facilities at all times during the Operational Term.

21.2 The Contractor shall submit the M&V Savings Report to the Authority on each M&V Reporting Date, in a form and containing all information as required pursuant to Schedule Part 3 (*Measurement and Verification*).

21.3 The M&V Savings Report shall, in the absence of manifest error, bad faith or fraud, establish whether or not the Guaranteed Energy Cost Performance has been met in respect of the period to which the M&V Savings Report relates.

21.4 Any sums which are due to be paid by the Contractor to the Authority where the Guaranteed Energy Cost Performance has not been met will be calculated pursuant to Section 2 of Schedule Part 14 (*Payment Mechanism*).

21.5 In the event that the M&V Savings Report for the final Energy Performance Year establishes that sums are due by the Contractor to the Authority for failure to meet the Guaranteed Energy Cost Performance, then the Authority shall issue a valid VAT invoice in respect thereof and the Contractor shall pay the sums due to the Authority within 15 Business Days of the issue of the said invoice. The provisions of Clauses 34.3 and 34.5 of this Agreement shall apply *mutatis mutandis* to payments which are due to made under this Clause 21.5.

¹¹¹ The principal rule is that the level of guaranteed savings over the duration of the Agreement is equal to or greater than the sum of the operational payments to be made by the Authority to the Contractor over the duration of the Agreement and any amount of government financing that is not repayable by the Contractor as calculated at financial close.

21.6 The Contractor shall not be liable to account to the Authority for the sums referred to in Clause 21.4 and 21.5 to the extent that such liability arises wholly out of any breach by the Authority of any of its obligations under this Agreement and where such breach materially impacts upon the achievability of the Guaranteed Energy Cost Performance.

PART 6: SERVICES

22. THE SERVICES

General obligations

22.1 Throughout the Operational Term the Contractor shall provide or procure the provision of the Services in accordance with:

22.1.1 the Service Level Specification;

22.1.2 the Method Statements; and

22.1.3 the terms of this Agreement.

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

22.2.1 the fact that the Contractor has complied with the Method Statements shall not be a defence to an allegation that the Contractor has not satisfied the Service Level Specification; and

22.2.2 the fact that the Contractor has complied with the Service Level Specification shall not be a defence to an allegation that the Contractor has not satisfied the Method Statements;

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

Commencement and phase in of Services

22.3 The Contractor shall procure that the provision of the Services commences on the Actual Completion Date.

Contractor Services Changes

22.4 The Contractor may at any time submit to the Authority's Representative proposals for amendments to or substitution for the Method Statements or any part of them. If such proposal is approved by the

Authority's Representative (acting reasonably), then the Method Statements as so amended or substituted shall be the Method Statements for the purposes of this Agreement.

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

No disruption

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

23. MAINTENANCE

Programmed Maintenance Works¹¹²

- 23.1 No later than three (3) months prior to the Completion Date the Contractor shall submit to the Authority's Representative in accordance with 0 (*Review Procedure*) a Schedule of Programmed Maintenance for the period from the Completion Date to the expiry of that Contract Year.

- 23.2 Not later than three (3) months prior to the commencement of each Contract Year the Contractor shall submit to the Authority's Representative in accordance with 0 (*Review Procedure*) a Schedule of Programmed Maintenance for the next succeeding Contract Year.

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

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

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

- 23.4 Not later than twenty (20) Business Days prior to the commencement of any quarter (being a three (3) month period commencing on 1 April, 1 July, 1 October or 1 January), the Contractor may submit to the Authority's Representative for approval in accordance with 0 (*Review Procedure*) a revision to the Schedule of Programmed Maintenance for the Contract Year in which the relevant quarter falls showing the effect of the proposed changes to the Programmed Maintenance Information. If the Authority's Representative does not raise comments on such proposed revision in accordance with

¹¹² The extent of maintenance/equipment servicing/replacement requirements will be a project specific issue

0 (*Review Procedure*), the Schedule of Programmed Maintenance as revised shall become the Schedule of Programmed Maintenance in respect of that quarter.

23.5 Where the Authority's Representative raises comments in respect of any Programmed Maintenance periods and/or hours of work shown in a Schedule of Programmed Maintenance in accordance with paragraph 3 of 0 (*Review Procedure*), he shall indicate whether, and if so when, the Programmed Maintenance can be re-scheduled and the Contractor shall amend the relevant Schedule of Programmed Maintenance accordingly.

Programmed and Unprogrammed Maintenance

23.6 The Contractor shall not carry out any Programmed Maintenance or Unprogrammed Maintenance Works save:

23.6.1 in accordance with a Schedule of Programmed Maintenance to which no objection has been made under 0 (*Review Procedure*) or, where comment has been raised in respect of the Programmed Maintenance periods and/or time, the Schedule of Programmed Maintenance has been amended pursuant to the Service Level Specification;

23.6.2 in accordance with the procedures set out in Clause 23.7; or

23.6.3 in an emergency, in accordance with Clause 23.8.

23.7 If, in circumstances other than an emergency, the need arises for Maintenance Works (excluding any works of a *de minimis* nature in respect of which the parties have agreed this Clause shall not apply) which are not scheduled to be carried out as part of the Programmed Maintenance (**Unprogrammed Maintenance Work**), the Contractor 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.

23.8 If, as a result of an emergency, the need arises for Unprogrammed Maintenance Works, the Contractor may carry out such Unprogrammed Maintenance Works provided that the Contractor shall notify the Authority's Representative as soon as possible (and in any event within two (2) Business Days of the occurrence of the emergency) of the extent of the necessary Unprogrammed Maintenance Works and the reasons for them. The Contractor shall take all reasonable steps to minimise the duration of such Unprogrammed Maintenance Works.

[●] Year Maintenance Plan¹¹³

- 23.9 The Contractor shall deliver to the Authority's Representative not less than three (3) months prior to the Completion Date, and thereafter not less than three (3) months prior to the commencement of each Contract Year the latest version of the [●] Year Maintenance Plan.
- 23.10 The Authority shall have a right to inspect the Facilities and the Maintenance Works to ensure that the [*relevant elements of the facilities*] are being maintained in accordance with the Service Level Specification and that the [*relevant elements of the facilities*] comply with the Authority's Requirements and Contractor'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 the Contractor. 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. The Contractor shall (subject to Clause 33 (*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.

Energy Performance

- 23.11 For the avoidance of doubt, the carrying out by the Contractor, or any Contractor Parties, of Programmed Maintenance and/or Unprogrammed Maintenance shall not excuse the Contractor from the financial consequences of Clause 21 (*Guaranteed Energy Cost Performance*) and Schedule Part 14 (*Payment Mechanism*) with respect to the achievement of the Guaranteed Energy Cost Performance.

Energy for Repairs

- 23.12 Subject to Clause 23.13, the Authority is entitled to be reimbursed by the Contractor for costs incurred by the Authority for Utilities supplied to the Facilities during the Operational Term that are consumed in the process of the Contractor or any Contractor Party carrying out operations to rectify an Availability Failure. The parties agree that such consumption shall be disregarded for the purposes of assessing the achievement of the Guaranteed Energy Cost Performance.¹¹⁴
- 23.13 For the purpose of applying Clause 23.12 the cost of each Utility shall be considered separately.
- 23.14 Where the Authority claims reimbursement of Utilities costs pursuant to Clause 23.12 it must reasonably estimate those costs using all available evidence and send the Contractor a statement showing its calculation of the amount claimed along with its supporting evidence. Unless the

¹¹³ Note that the appropriate timescale for this plan shall depend upon the term of the project. It is assumed that almost all projects will require some form of long term maintenance plan.

¹¹⁴ The clause may require amendment for projects which include on-site generation

Contractor disputes the statement within ten (10) Business Days of receipt, the Authority will be entitled, pursuant to Clause 34.6, to set-off the amount claimed.

24. MONITORING OF PERFORMANCE

Monitoring

24.1 In carrying out the Services, the Contractor shall, and shall procure that all Contractor Parties and any other persons for whom it is responsible shall, comply with the provisions of 0 (*Service Requirements*).

24.2 Contractor shall be responsible for monitoring its performance of this Agreement during the Operational Term, in the manner and at the frequencies set out in 0 (*Service Requirements*). The Contractor shall provide the Authority's Representative with relevant particulars of any aspects of its performance which fail to meet the requirements of this Agreement (unless otherwise notified in writing by the Authority). The Authority may at all reasonable times observe, inspect and satisfy itself as to the adequacy of the monitoring procedures (including without limitation carrying out sample checks).

Grounds for Warning Notices

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

24.3.1 the total Availability Deductions for any Contract Month amount to more than [●] per cent ([●]%) of the Annual Payment for the current Energy Performance Year; or

24.3.2 the total Availability 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 Payment for the current Energy Performance Year;

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

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

Warning Notices Disputes

- 24.4 If the Contractor disputes that the Authority was or is entitled to serve a Warning Notice, the Contractor may refer that dispute for determination under the Dispute Resolution Procedure for resolution. 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

- 24.5 The provisions of Clauses 24.6 to 24.9 (inclusive) shall apply if the Authority, acting reasonably, considers that it needs to take action in connection with the Services:

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

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

24.5.3 because of a risk of the ability of the Authority to provide the relevant Authority Services being prejudiced to a material degree;¹¹⁵

- 24.6 If any of the circumstances set out in Clause 24.5 arise (without prejudice to its rights under Clause 40 (*Contractor 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 the Contractor in writing of the following:

24.6.1 the action it wishes to take;

24.6.2 the reason for such action;

24.6.3 the date it wishes to commence such action;

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

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

¹¹⁵ To be considered on a project specific basis whether specific additional consequences require to be listed, given measures to be installed. This may particularly be the case where energy or heat is being generated by the Contractor

24.7 Following service of such notice, the Authority shall take such action as has been notified under Clause 24.6 and any consequential additional action as it reasonably believes is necessary (together, the **Required Action**) and the Contractor 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 the Contractor hereunder or undertakes tasks that would otherwise be undertaken by the Contractor pursuant to this Agreement, the Authority shall perform such obligations or undertake such tasks to the same standard as would be required of the Contractor under the terms of this Agreement.

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

24.8.1 the Contractor shall be relieved from its obligations to provide such part of the Services; and

24.8.2 in respect of this period in which the Authority is taking the Required Action and provided that the Contractor 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 Payments due from the Authority to the Contractor shall equal the amounts that the Contractor 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 taking due account of the energy consumption at the Facilities or the relevant parts thereof prior to the taking of the Required Action) and the Authority shall indemnify the Contractor against all Direct Losses sustained by the Contractor as a result of the Authority taking the Required Action.

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

24.9.1 the Contractor shall be relieved of its obligations to provide such part of the Services; and

24.9.2 in respect of the period in which the Authority is taking the Required Action, the Monthly Payments due from the Authority to the Contractor shall equal the amounts the Contractor 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 taking due account of the energy consumption at the Facilities or the relevant parts thereof prior to the taking of the Required Action), 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

- 24.10 If an Emergency arises during the Operational Term which cannot be dealt with by performance of the Services, the Authority may instruct the Contractor to procure that such additional or alternative services are undertaken by the Contractor 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.
- 24.11 The cost of any additional or alternative services provided by the Contractor under Clause 24.10 shall be borne by the Authority and paid in accordance with Clause 34 (*Payment*). The Authority will not be entitled to levy Availability Deductions in respect of any failure to provide the Services to the extent that such failure arises by reason of the Contractor's compliance with Clause 24.10.

25. TUPE AND EMPLOYMENT MATTERS

No Employee Transfer¹¹⁶

- 25.1 The Authority and the Contractor agree that there are no individuals presently employed by the Authority or any other sub-contractor of the Authority whose contracts of employment will, by virtue of the transfer to the Contractor of responsibility for provision of (or procuring the provision by Service Provider 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 Contractor or the Service Provider.
- 25.2 If it is subsequently agreed or determined that there are persons presently employed by the Authority or any other sub-contractor of the Authority whose contracts of employment do have effect after the Relevant Service Transfer Date as if originally made between those persons and the Contractor or the Service Provider (**Transferring Staff**) then:
- 25.2.1 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;
- 25.2.2 the Contractor shall procure that no person to whom the Authority has offered a position in accordance with Clause 25.2.1 shall be dismissed by reason of redundancy until the period for acceptance of such offer has expired and the person in question has not accepted such offer; and

¹¹⁶ The base assumption within, and provisions of, this Clause to be reviewed on a project specific basis.

25.2.3 subject to Clauses 25.2.1 and 25.2.2, the Contractor or the Service Provider shall be entitled to dismiss any or all of the Transferring Staff by reason of redundancy provided that the Contractor shall use and shall procure that the 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.

25.3 The Authority shall indemnify the Contractor against any costs referred to in Clause 25.2.3 reasonably incurred by the Contractor (or by the Service Provider and for which the Contractor is responsible) and shall reimburse any costs reasonably and properly incurred by the Contractor or the Service Provider in employing any Transferring Staff prior to the expiry of the period referred to in Clause 25.2.2.

Compliance with Legislation and Authority Policies

25.4 The Contractor shall comply and shall procure that the Service Provider and all persons employed or engaged by the 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.

25.5 The Contractor shall procure that the Service Provider takes all reasonable steps to procure that all persons including any employed or engaged by the 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). The Contractor also shall take and shall procure that the 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.

Contractor Indemnities

25.6 The Contractor 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:

25.6.1 claims in respect of all emoluments and all other contractual or statutory payments unpaid by the Contractor or the Service Provider to any person entitled to such payments from the Contractor or the Service Provider who is or has been employed or engaged by the Contractor or the Service Provider on or after the Relevant Service Transfer Date but prior

to the date of expiry or termination of this Agreement, and all income tax and pension and national insurance contributions payable thereon; and

25.6.2 insofar as Clause 25.6.1 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 25) by the Contractor or the 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 the Contractor or the Service Provider occurring after the Relevant Service Transfer Date and before the expiry or termination of this Agreement;

BUT the indemnities in Clauses 25.6.1 and 25.6.2 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 25.2.

Position on expiry or earlier termination of this Agreement

25.7 On the expiry or earlier termination of this Agreement, the Authority and the Contractor agree that, with regard to the applicability or otherwise of the Transfer Regulations in respect of the provision thereafter of any service equivalent to a Service, the position shall be determined in accordance with the Law at the date of expiry or termination as the case may be and this Clause is without prejudice to such determination.

25.8 The Contractor shall not and shall procure that the Service Provider shall not 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:

25.8.1 within the period of twelve (12) months immediately preceding the expiry of this Agreement; or

25.8.2 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.

26. BEHAVIOURAL CHANGE

[This clause is intended to capture all contractual entitlements or obligations of the Contractor to work with staff or management (perhaps via training sessions, distribution of leaflets etc) in order to

facilitate the achievement of the guaranteed energy cost performance. The actual obligations/entitlements inserted would be project specific.]¹¹⁷

27. SITE SECURITY AND PERSONNEL ISSUES

Access

27.1 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) the Contractor, any Contractor Party or any sub-contractor whose presence, in the reasonable opinion of the Authority, is likely to have a material adverse effect on the provision by the Authority of the relevant Authority Services at the Facilities or who is not a fit and proper person to be in the Facilities.

27.2 Action taken under Clause 27.1 shall forthwith be confirmed in writing by the Authority to the Contractor and, to avoid doubt, shall not relieve the Contractor of any of its obligations under this Agreement.

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

Authority Policies

27.4 The Contractor shall, and shall procure that all Contractor Parties shall, comply at all times with the Authority Policies.

27.5 The Authority shall notify the Contractor 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 the Contractor.

Resources and training

27.6 The Contractor shall procure that:

27.6.1 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

27.6.2 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.¹¹⁸

¹¹⁷ In circumstances where behavioural change includes the placing of obligations on the contractor, these should be reflected in the service requirements of Schedule Part 12.

Convictions and disciplinary action

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

27.7.1 are questioned concerning their Convictions; and

27.7.2 only in the case of potential staff who may reasonably be expected in the course of their employment to have access to children, the elderly and/or vulnerable adults, are required to complete a Protecting Vulnerable Groups Scheme form.

27.8 The completion of a Protecting Vulnerable Groups Scheme form shall not be applicable to any person engaged by the Contractor during the course of the Project Operations (who is not a member of Contractor staff nor ordinarily at the Facilities) provided that any such person is always accompanied within the Facilities by a member of the Contractor's staff who has satisfactorily completed a Protecting Vulnerable Groups Scheme form and who (if found to have any Convictions) has been employed or engaged in the Project Operations with the Authority's prior written consent pursuant to Clause 27.9.

27.9 The Contractor shall procure that no person who discloses any Convictions, or who is found to have any Convictions following the completion of a Protecting Vulnerable Groups Scheme form, in either case of which the Contractor or the Service Provider is aware or ought to be aware is employed or engaged in the provision of the Project Operations without the Authority's prior written consent (such consent not to be unreasonably withheld or delayed).

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

Management

Health Requirements¹¹⁹

27.11 [The Contractor shall procure that all potential employees or persons who may otherwise perform any of the Services (other than Transferring Staff) undergo pre-employment health screening

¹¹⁸ Consider deletion of clause 27.6 if not required given nature of service provision. Project specific issue.

¹¹⁹ Clauses 27.11 to 27.14 are optional, for application in respect of healthcare facilities on a case-by-case basis, depending upon the nature of services to be performed.

(including a medical examination if necessary) by a qualified occupational health professional to establish in each case that the relevant person is medically fit for his proposed tasks in the provision of the Services and that he does not pose at that time any danger to the health of other persons (provided that the Contractor is not required to procure compliance with an obligation which contravenes the Equality Act 2010) and the Contractor shall also procure (to the extent permitted by Law) that all persons employed or engaged in the provision of the Services shall undergo such medical screening examination or treatment and provide such information during the currency of this Agreement when reasonably requested to do so by the Authority as required to ensure that the Authority is able to comply with relevant legal obligations in respect of the health of Authority staff, patients or visitors to Authority premises.

27.12 To the extent permitted by Law, records of all screenings, examinations or treatments referred to in this Clause 27 (*Site Security and Personnel Issues*) shall be held by the Contractor on behalf of and as agent for the Authority and produced (subject to requirements under the Law) for inspection upon request by the Authority's Representative provided that no such inspection shall take place unless each staff member has given his or her written consent to such inspection.

27.13 The Contractor shall (to the extent permitted by Law) procure that the Authority shall be informed upon reasonable request by the Authority of the outcome of each and every medical screening examination or treatment referred to in Clause 27.11 with reference to the purpose of the screening, examination or treatment concerned and shall receive all such other information referred to in Clause 27.11 subject to requirements under the Law.

27.14 The Authority's Representative may (acting reasonably) refuse admittance to or order the removal from the Authority's premises of any person employed or engaged in the provision of the Services whose presence poses or is reasonably believed to pose a risk to the health of Authority staff, patients or visitors and such action, which shall forthwith be confirmed in writing by the Authority, shall not relieve the Contractor of any of its obligations under this Agreement.]

28. STOCKS CONSUMABLES, MATERIALS AND EQUIPMENT

Standards

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

28.2 The Contractor 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:

- 28.2.1 maintained in a safe, serviceable and clean condition in accordance with Good Industry Practice;
- 28.2.2 of the type specified in the Service Level Specification and/or the Method Statements (where appropriate); and
- 28.2.3 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 28.2.

- 28.3 The Contractor shall procure that sufficient stocks of goods, consumables, equipment and materials are held in order to comply with its obligations under this Agreement.

Hazardous substances and materials

- 28.4 The Contractor 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):

- 28.4.1 material damage to the Facilities; or

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

- 28.5 The Contractor 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 Contractor has complied with all relevant Law.

- 28.6 Without prejudice to the generality of its obligations, the Contractor shall procure that all hazardous materials and equipment used, by it or by a Sub-Contractor or used on behalf of any of them, or stored, by it or by a Sub-Contractor or stored on behalf of any of them, on the Site are kept in accordance with all relevant Law and Good Industry Practice, properly and securely labelled and stored, under appropriate supervision and used only by appropriately trained and competent staff.

PART 7: DELAY EVENTS, RELIEF EVENTS AND FORCE MAJEURE

29. DELAY EVENTS

- 29.1 If, at any time, the Contractor becomes aware that there will be (or is likely to be) a delay to the Works, the Contractor 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 0 (*Dispute Resolution Procedure*), that such delay or impediment has arisen as a result of the occurrence of a Delay Event, then, subject to Clause 29.2, the Authority's Representative shall allow the Contractor 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 accordingly but to avoid doubt, there shall be no extension to the Project Term as a result of any such delay or impediment.

29.2 If the Contractor is (or claims to be) affected by a Delay Event:

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

29.2.2 it shall neither be relieved from liability under this Agreement nor entitled to any extension of time for the purpose of Clause 29 (*Delay Events*) to the extent that it is delayed or impeded due to its failure (if any) to comply with its obligations under Clause 29.2.1 above.

29.3 For the purposes of this Agreement, a Delay Event means any of the following to the extent in each case that there will be (or is likely to be) a delay in completion of the Works:¹²⁰

29.3.1 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 Works;

29.3.2 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 the Contractor or any Contractor Party;

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

29.3.4 opening up of the Works pursuant to Clauses 13.3 to 13.7 (inclusive) where such Works are not subsequently found to be defective (unless it is agreed or determined in accordance with 0 (*Dispute Resolution Procedure*) that the opening up of the Works was reasonable in the light of other defects previously discovered by the Authority);

29.3.5 Force Majeure; or

¹²⁰ Note that this list should be examined for appropriateness on a project specific basis

29.3.6 a Relief Event.

29.4 Without prejudice to the generality of Clause 29 (*Delay Events*), the Contractor shall give notice in writing to the Authority's Representative as soon as it (or the Contractor) can reasonably foresee a Delay Event occurring or, if the same is not reasonably foreseeable, as soon as it (or the Contractor) shall become aware of a Delay Event. Contractor shall within ten (10) Business Days after such notification, give further written details to the Authority's Representative which shall include:

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

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

29.4.3 details of the contemporary records which the Contractor will maintain to substantiate its claim for extra time;

29.4.4 details of the consequences (whether direct or indirect, financial or non-financial) which such Delay Event may have upon completion; and

29.4.5 details of any measures which the Contractor proposes to adopt to mitigate the consequences of such Delay Event.

29.5 As soon as possible but in any event within five (5) Business Days of the Contractor (or the Construction Contractor) receiving, or becoming aware of, any supplemental information which may further substantiate or support the Contractor's claim then, provided that the Completion Date has not otherwise already been revised pursuant to Clause 29.7, the Contractor shall submit further particulars based on such information to the Authority's Representative.

29.6 The Authority's Representative shall, after receipt of written details under Clause 29.4, or of further particulars under Clause 29.5, be entitled by notice in writing to require the Contractor to provide such further supporting particulars as he may reasonably consider necessary. The Contractor shall afford the Authority's Representative reasonable facilities for investigating the validity of the Contractor's claim including, without limitation, on-site inspection.

29.7 Subject to the provisions of this Clause, the Authority's Representative shall revise the Completion Date in accordance with Clause 29.1 (*Delay Events*) as soon as reasonably practicable and in any event within five (5) Business Days of the later of:

29.7.1 the date of receipt by the Authority's Representative of the Contractor's notice given in accordance with Clause 29.4 and the date of receipt of any further particulars (if such are required under Clause 29.6), whichever is the later; and

29.7.2 the date of receipt by the Authority's Representative of any supplemental information supplied by the Contractor in accordance with Clause 29.5 and the date of receipt of any further particulars (if such are required under Clause 29.6), whichever is the later.

If the Contractor has failed to comply with the requirements as to the giving of notice under Clause 29.4, or has failed to maintain records or afford facilities for inspection to the Authority's Representative, then the Contractor shall not be entitled to any extension of time (and the Completion Date shall not be revised) in respect of any period of delay by the Contractor in giving notice or providing information under Clause 29.4 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.

29.8 If:

29.8.1 the Authority's Representative declines to fix a revised Completion Date; or

29.8.2 Contractor considers that a different Completion Date should be fixed; or

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

then the Contractor shall be entitled to refer the matter for determination in accordance with 0 (*Dispute Resolution Procedure*).

Compensation

29.9 If the Delay Event is a Compensation Event the Contractor's sole right to compensation shall be as provided for in Clauses 29.9 to 29.13 inclusive. To avoid doubt, no other Delay Event shall entitle the Contractor to receive any compensation save as otherwise expressly provided in 0 (*Change Protocol*) in the case of a Delay Event referred to in Clause 29.3.1.

29.10 For the purposes of Clause 29.9, a Compensation Event means:

29.10.1 any Delay Event referred to in Clause 29.3.2, Clause 29.3.3 or Clause 29.3.4 for which, in each case, it has been agreed or determined pursuant to this Clause 29 (*Delay Events*) that the Contractor is entitled to an extension of time; or

29.10.2 in the period prior to the Actual Completion Date, 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 the Contractor or any Contractor Party.

29.11 Subject to Clause 29.12, if it is agreed, or determined, that there has been a Compensation Event, and the Contractor has incurred loss (including loss of revenue) and/or expense as a direct result of such Compensation Event, the Contractor shall be entitled to such compensation as would place the

Contractor in no better or worse position than it would have been in had the relevant Compensation Event not occurred. The Contractor shall promptly provide the Authority's Representative with any additional information he may require in order to determine the amount of such compensation.

29.12 The Contractor shall take all reasonable steps so as to minimise the loss and/or expense referred to in Clause 29.11 in relation to any Compensation Event and any compensation payable shall:

29.12.1 exclude any amounts incurred or to be incurred as a result of any failure of the Contractor (or any Contractor Party) to comply with this Clause 29.12; and

29.12.2 be reduced by any amount which the Contractor 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.

29.13 The amount of any compensation due to the Contractor under Clause 29.11 shall be agreed between the parties or, failing agreement, determined pursuant to 0 (*Dispute Resolution Procedure*) and such compensation shall be payable

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

29.13.2 in all other cases in accordance with Section [●] of 0 (*Change Protocol*) as if a Relevant Event had taken place.

30. RELIEF EVENTS

30.1 For the purposes of this Agreement, subject to Clause 30.4, Relief Events mean any of the following events:

30.1.1 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;

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

- 30.1.3 accidental loss or damage to the Works and/or [*relevant part of the Facilities*] or any roads servicing the same;
- 30.1.4 without prejudice to any obligation of Contractor to provide Utilities or stand-by power facilities in accordance with the Authority's Requirements or the Service Level Specification, failure or shortage of power, fuel or transport;
- 30.1.5 blockade or embargo falling short of Force Majeure; or
- 30.1.6 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 the Contractor claiming relief, any Contractor Party and (ii) in the case of the Authority claiming relief, any Authority Party.

- 30.2 Subject to Clauses 30.3 and 30.4, 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 30.9, 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).
- 30.3 Without prejudice to the Contractor's rights under Clause 29 (*Delay Events*), the Contractor shall only be relieved of failure to perform its obligations under Clauses 12 (*The Design, Construction and Testing Process*), 13 (*Right of Access of Authority's Representative*), 14 (*Programme and Dates for Completion*), 17 (*Pre-Completion Testing and Completion*) and 29 (*Delay Events*) caused by Delay Events in accordance with Clause 29 (*Delay Events*).

Mitigation

- 30.4 Where a party is (or claims to be) affected by a Relief Event:
 - 30.4.1 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
 - 30.4.2 it shall not be entitled to rely upon the relief afforded to it pursuant to Clause 30.2 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 30.4.1 above.

- 30.5 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.
- 30.6 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 30.5 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 30.4, 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).
- 30.7 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.
- 30.8 If, following the issue of any notice referred to in Clause 30.6, 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.
- 30.9 To avoid doubt, the occurrence of a Relief Event shall not entitle the Contractor to any compensation.

31. FORCE MAJEURE

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

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

31.1.2 nuclear contamination unless in any case the Contractor and/or any Contractor Party is the source or the cause of the contamination; or

31.1.3 chemical or biological contamination of the Works and/or the [*relevant part of the Facilities*] and/or the Site from any of the events referred to in Clause 31.1.1 above; or

31.1.4 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.

- 31.2 Subject to Clauses 31.3 and 31.4 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 Contractor Event of Default if such Contractor Event of Default arises from a Force Majeure event.
- 31.3 Where a party is (or claims to be) affected by an event of Force Majeure:
- 31.3.1 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
- 31.3.2 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 31.3.1.
- 31.4 Without prejudice to the Contractor's rights under Clause 29 (*Delay Events*), the Contractor shall only be relieved from its obligations under Clauses 12 (*The Design, Construction and Testing Process*), 13 (*Right of Access of Authority's Representative*), 14 (*Programme and Dates for Completion*) and 29 (*Delay Events*) by Delay Events in accordance with Clause 29 (*Delay Events*).
- 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 event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- 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 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 31.3, 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).
- 31.7 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.
- 31.8 If, following the issue of any notice referred to in Clause 31.6, 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.

31.9 Nothing in this Clause 31 shall affect the Authority's entitlement to make Deductions in the period during which any event of Force Majeure is subsisting.

31.10 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. 0 (*Dispute Resolution Procedure*) shall not apply to a failure of the Authority and the Contractor to reach agreement pursuant to this Clause 31.10.

PART 8: CHANGES IN LAW & CHANGES

32. CHANGES IN LAW

General

32.1 The Contractor 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.

Change to be Agreed

32.2 Either party may give notice to the other of the need for a Change which is necessary in order to enable the Contractor to comply with any Change in Law, in which event:

32.2.1 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 0 (*Dispute Resolution Procedure*); and

32.2.2 within ten (10) Business Days of the agreement or determination referred to in Clause 32.2.1 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 0 (*Change Protocol*) shall apply except that:

- (a) the Contractor 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 [*issue an approval*] in respect of the Change in accordance with the relevant provisions of 0 (*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 issued in accordance with this Clause 32.2 (*Change to be agreed*); and
- (e) the Contractor 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).¹²¹

33. CHANGE PROTOCOL

The provisions of 0 (*Change Protocol*) shall have effect in respect of Changes except as otherwise expressly provided in this Agreement.

PART 9: FINANCIAL

34. PAYMENT

Applications for Service Payments

34.1 The Contractor shall not be entitled to receive any Monthly Payments until the Payment Commencement Date. Subject to the provisions of this Agreement, the Authority shall pay the Contractor the Monthly Payments in respect of each Contract Month following the Payment Commencement Date in accordance with the provisions of this Clause 34 and 0 (*Payment Mechanism*).

Invoicing and payment arrangements

34.2 The provisions of this Clause 34.2 apply to the issue of invoices for Monthly Payments by the Contractor under this Agreement:

34.2.1 On or before the third Business Day of each Contract Month the Contractor shall submit to the Authority an invoice (**Monthly Invoice**) aggregating the following:

- (a) the Monthly Payment for that Contract Month, calculated in accordance with Section 2 of 0 (*Payment Mechanism*);
- (b) adjustments to reflect previous over-payments and/or under-payments (each adjusted stated separately);
- (c) any other amounts due by one party to the other (and where owed by the Contractor showing as a negative figure);

¹²¹ Where project is being funded via project finance, cost relief for 'discriminatory' changes in law which apply to PFI or similar SPV vehicles, and not to other persons, should be considered.

- (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 Availability Deductions incurred in the previous [six (6)] Contract Months (**Estimated Deductions**),

and setting out the date 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.

34.2.2 Subject to Clauses 34.2.3 and 34.3 and the submission of the supporting information referred to in Clause 34.2.1, where a Monthly Invoice shows a net amount owed by the Authority to the Contractor, the Authority shall pay the amount of the Monthly Invoice within fifteen (15) Business Days of receipt of a valid VAT invoice in respect thereof. Where a Monthly Invoice shows a net amount owed by the Contractor to the Authority, the Contractor shall pay that amount to the Authority within fifteen (15) Business Days of the Monthly Invoice or, at the option of the Authority, carry forward that amount to the next Monthly Invoice to reduce amounts which would otherwise be owed by the Authority to the Contractor.

34.2.3 Within ten (10) Business Days of the Expiry Date, the Contractor shall provide to the Authority a [Monthly Service Report] in respect of the final two (2) Contract Months. If the Availability Deductions incurred in the final two (2) Contract Months exceed the Estimated Deductions, Contractor shall pay to the Authority an amount equal to the excess within twenty (20) Business Days of receipt of an invoice therefor. If the Estimated Deductions exceed the Availability Deductions incurred in the final two (2) Contract Months the Authority shall pay to Contractor an amount equal to the excess within twenty (20) Business Days of receipt of an invoice therefor.

34.2.4 On or before the seventeenth (17th) day of each Contract Month the Contractor 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 Availability Deductions incurred;
- (b) other information detailed in 0 (*Service Requirements*).

34.2.5 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 34.2.4, failing which either party may refer the matter to the Dispute Resolution Procedure.

Manner of payment

34.3 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.

Disputes

34.4 If the Authority (acting in good faith) disputes all or any part of the Monthly Payments calculated in accordance with Clause 34.2 (*Invoicing and Payment Arrangements*), the undisputed amount of the Monthly Payment shall be paid by the Authority in accordance with Clause 34.2 (*Invoicing and Payment Arrangements*) and the provisions of this Clause 34.4 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 the Contractor, together with interest on such amount calculated in accordance with Clause 34.5 (*Late Payments*).

Late Payments

34.5 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

34.6 Subject to Clause 46.12 (*Rights of Set Off*), whenever any sum of money shall be agreed, or determined, as due and payable by the Contractor 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 the Contractor from the Authority under this Agreement provided that the Authority has given the Contractor not less than five (5) Business Days' notice of its intention to deduct or apply such sum.

34.7 Whenever any sum of money shall be agreed, or determined, as due and payable by the Authority to the Contractor, such sum may at the Contractor'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 the

Contractor to the Authority under this Agreement provided that the Contractor has given the Authority not less than five (5) Business Days' notice of its intention to deduct or apply such sum.

35. VAT AND CONSTRUCTION INDUSTRY TAX DEDUCTION SCHEME¹²²

VAT

- 35.1 All amounts stated to be payable by either party under this Agreement shall be exclusive of any VAT properly chargeable on any amount.
- 35.2 Each party shall pay to the other party any VAT properly chargeable on any supply made to it under this Agreement provided that it shall first have received from the other party a valid tax invoice in respect of that supply which complies with the requirements of Part III VAT Regulations 1995.
- 35.3 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 a clearance from the Commissioners for Revenue and Customs (or, if relevant, such other body as is charged at the time with the collection and management of VAT) (referred to in this Clause as the **Commissioners**) as to the VAT (if any) properly so chargeable. The Second Party shall forthwith request the Commissioners for such a clearance.
- 35.4 The following further provisions shall apply in respect of the application for a clearance in accordance with Clause 35.3:
- 35.4.1 prior to submitting its request for such a clearance and any further communication to the Commissioners 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;
- 35.4.2 the Second Party shall provide to the First Party copies of all communications received from the Commissioners in connection with the application for a clearance as soon as practicable after receipt; and
- 35.4.3 the Second Party shall use all reasonable endeavours (including without limitation the provision of such additional information as the Commissioners may require) to obtain such a clearance as soon as reasonably practicable following the initial request.

¹²² Applicability of scheme to be verified on a project specific basis

- 35.5 If a clearance is required by the First Party under Clause 35.3, the First Party shall not be obliged to pay the VAT so claimed by the Second Party unless and until a clearance is received from the Commissioners which states that a sum of VAT (the **VAT Sum**) is properly so chargeable or the Commissioners state that they are not prepared to give any clearance on the matter. In this case, then subject to Clauses 35.6 and 35.7 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.
- 35.6 If the First Party disagrees with any clearance obtained pursuant to Clause 35.3 by the Second Party from the Commissioners, 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.
- 35.7 The following further provisions shall apply if the First Party shall exercise its rights under Clause 35.6:
- 35.7.1 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 the Commissioners before any VAT tribunal or court of competent jurisdiction and appealing any judgement or decision of any such tribunal or court;
- 35.7.2 if the Second Party shall be required to pay to or deposit with the Commissioners 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 the Commissioners 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 the Commissioners the First Party shall pay such sum to the Second Party;
- 35.7.3 save as specifically provided in Clause 35.5, 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

35.7.4 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 the Commissioners in accordance with Clause 35.7.2 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

35.8 Subject to Clause 35.9, if, following a Change in Law, the Contractor becomes unable to recover VAT attributable to supplies to be made to the Authority by the Contractor pursuant to this Agreement, the Authority shall ensure that the Contractor 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 the Contractor and the Authority shall agree acting reasonably), provided that the Contractor shall use all reasonable endeavours to mitigate the adverse effects of any such Change in Law.

35.9 The provisions of Clause 35.8 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:

35.9.1 prior to the date of this Agreement; and

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

Construction Industry Tax Deduction Scheme

35.10 This Clause 35.10 (*Construction Industry Tax Deduction Scheme*) relates to the Construction Industry Tax Deduction Scheme:

35.10.1 In this Clause 35.10 (*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.
- 35.10.2 Each of the Authority and the Contractor shall comply with the Legislation.
- 35.10.3 If any payment due from the Authority to the Contractor under this Agreement is a contract payment under section 60(1) of the Act, then the Authority, as the Contractor, shall (not later than fifteen (15) Business days before the first such payment is due to be made) verify, in accordance with paragraph 6 of the Regulations, whether the sub-contractor is registered for gross payment or for payment under deduction or is not registered under Chapter 3 Part 3 of the Act.
- 35.10.4 If any payment due from the Authority to the Contractor under this Agreement is a contract payment under section 60(1) of the Act, then:
- (a) if the Contractor is registered for gross payment under section 63(2) of the Act, the Authority shall make a payment to the Contractor without any deduction;
 - (b) if the Contractor is not registered for gross payments under section 63(2) of the Act, the Authority shall make a payment to the Contractor, subject to the deduction of the relevant percentage in accordance with section 61(1) of the Act, and thereupon Clause 35.10.6 below shall apply.
- 35.10.5 If any dispute arises between the Authority and the Contractor as to whether any payment due by the Authority to the Contractor 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 35.10 (*Construction Industry Tax Deduction Scheme*) shall apply accordingly.
- 35.10.6 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 the Contractor (and not just that part of such payment which does not represent the direct cost to the Contractor 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 the Contractor) 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 Contractor.

35.10.7 Where any error or omission has occurred in calculating or making any payment under this Clause 35.10 (*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 the Contractor; and
- (b) in the case of an under deduction, the Contractor shall correct that error or omission by repayment of the sum under deducted to the Authority.

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

35.10.9 If compliance with this Clause 35.10 involves the Authority or the Contractor in not complying with any other of the terms of this Agreement, then the provisions of this Clause shall prevail.

36. TECHNOLOGY REFRESH

36.1 It is the intention of the Parties that in its performance of this Agreement the Contractor shall take advantage of any new technologies that become available after the Commencement Date and throughout the Term in order to ensure that the Authority continues to achieve the greatest possible level of energy efficiency.

36.2 Throughout the term of this Agreement, the Contractor shall, at reasonable intervals, review the technology market and submit to the Authority a report, in sufficient detail to allow proper evaluation by the Authority, identifying in any relevant new technologies which may be of benefit to the Project.

36.3 If the Authority wishes to incorporate any such new technologies into the Project, it shall do so pursuant to the provisions of Clause 33 (Change Protocol).

37. FINANCIAL MODEL¹²³

37.1 Unless otherwise agreed between the parties, any amendments to the Financial Model shall reflect, be consistent with and be made only in accordance with the provisions of this Agreement, and shall in all cases be subject to the prior written approval of the Authority (such approval not to be unreasonably withheld or delayed). In the event that the parties fail to agree any proposed amendments to the Financial Model, the matter shall be referred for resolution in accordance with 0 (*Dispute Resolution Procedure*).

¹²³ Need for and terms of clause to be reviewed in light of the funding solution for the Project.

37.2 Following any amendment of the Financial Model in accordance with this Agreement, the Contractor 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

38.1 Records and Reports

The provisions of 0 (*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 the Authority is in material breach of its obligations under Clause 9 (*Nature of Land Interests*) (other than as a consequence of a breach by the Contractor of its obligations under this Agreement) and such breach materially adversely affects the ability of the Contractor to perform its material obligations under this Agreement for a continuous period of not less than thirty (30) Business Days; or

39.1.2 the Authority fails to pay any sum or sums due to the Contractor under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) the amount of the Monthly 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 the Contractor; or

39.1.3 the Authority is in breach of its obligations under Clause 57.4; or

39.1.4 an Adverse Law or a Proposal for an Adverse Law being made]¹²⁴.

Contractor's options

39.2 On the occurrence of an Authority Event of Default, or within a reasonable time after the Contractor becomes aware of the same, and while the same is still subsisting, the Contractor 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

¹²⁴ For NHS projects only

satisfaction of the Contractor that it is capable of performing, and will perform, its obligations under this Agreement; or

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

39.3 The Contractor 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. CONTRACTOR EVENT OF DEFAULT

Contractor Event of Default

40.1 For the purposes of this Agreement, Contractor Event of Default means any of the following events or circumstances:

Insolvency

40.1.1 the occurrence of any of the following events in respect of the Contractor, 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 the Contractor;
- (b) a receiver, administrator, administrative receiver or other encumbrancer taking possession of or being appointed over, or any distress, execution or other process being levied or enforced (and not being discharged within ten (10) Business Days) upon, the whole or any material part of the assets of the Contractor;
- (c) the Contractor 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 the Contractor; or

- (e) if the Contractor 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;

Long stop

- 40.1.2 the Contractor failing to achieve the Actual Completion Date within a period of [[●] months] after the Completion Date;

Default

- 40.1.3

- (a) the Contractor 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) [the Contractor wilfully breaches 0 (*Refinancing*)];¹²⁵

- 40.1.4 the Contractor abandoning this Agreement;

Health and safety

- 40.1.5 at any time after the Actual Completion Date the Contractor 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 the Contractor or any Contractor Party or the Authority under the Health and Safety Regime (an **H&S Conviction**) provided that an H&S Conviction of a the Contractor Party or the Authority shall not constitute a Contractor 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 Contractor Party (which in the case of an individual director, officer or employee shall be deemed to include the Contractor Party of which that person is a director, officer or employee) is terminated and a replacement is appointed by the Contractor in accordance with Clause 57.5 (*Sub contracting*). In determining whether to exercise any right of termination or right to require the termination of the engagement of a Contractor Party pursuant to this Clause 40.1.5, the Authority shall:

¹²⁵ Relevant only where project is being funded via project finance.

- (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 58 (Ownership Information and Changes in Control);]¹²⁶

Assignment

40.1.7 the Contractor failing to comply with the provisions of Clauses 57.2 or 57.5;

Deductions

40.1.8 the total Availability Deductions in each of any three (3) Contract Months in any six (6) consecutive Contract Months are equal to or greater than [●] per cent ([●]%) of the Annual Payment for the current Energy Performance Year;

Notices

40.1.9 the Contractor is:

- (a) awarded a total of [four (4) or more] Warning Notices in any period of twelve (12) consecutive months;
- (b) served with an Energy Performance Notice in [three (3)] or more consecutive years (a year for this purpose being any period of twelve (12) months running from a date on which the Contractor is obliged to submit to the Authority an M&V Savings Report pursuant to Clause 21;
- (c) served with an Energy Termination Notice;

Payment

40.1.10 the Contractor 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) [●] pounds (£[●]) (index linked) and such failure continues for sixty (60) Business Days from receipt by Contractor of a notice of non-payment from the Authority; or

¹²⁶ Detail dependent upon project structure. See clause 58.

Insurance

40.1.11 a breach by the Contractor of its obligation to take out and maintain the insurances required by Clause 53 (*Insurance*).

Notification

40.2 The Contractor shall notify the Authority of the occurrence, and details, of any Contractor 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 Contractor Event of Default, in either case promptly on the Contractor becoming aware of its occurrence.

Authority's options

40.3 On the occurrence of a Contractor 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 Contractor Events of Default referred to in Clauses 40.1.1 (*Insolvency*), 40.1.2 (*Long Stop*), 40.1.3(b), 40.1.5 (*Health and Safety*), [40.1.6 (*Change in Control*),] 40.1.7 (*Assignment*), 40.1.8 (*Deductions*) 40.1.9 (*Notices*), or 40.1.10 (*Payment*), terminate this Agreement in its entirety by notice in writing having immediate effect;

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

(a) to remedy the Contractor 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 Contractor Event of Default. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Contractor Event of Default is proposed to be remedied (the Contractor 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); and

40.3.3 in the case of any Contractor Event of Default referred to in Clause 40.1.11 (*Insurance*) serve notice of default on the Contractor requiring the Contractor to remedy the Contractor

Event of Default (if the same is continuing) within twenty (20) Business Days of such notice of default.

Remedy provisions

40.4 Where the Contractor 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 Contractor (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 the Contractor 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 Contractor 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 0 (*Dispute Resolution Procedure*).

40.5 If:

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

40.5.2 where the Contractor 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 the Contractor 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 the Contractor 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 the Contractor with immediate effect. Provided that for the purposes of Clause 40.5.2 if the Contractor's performance of the programme is adversely affected by the occurrence of Force Majeure, a Relief Event or an Excusing Cause then, subject to the Contractor 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, a Relief Event or an Excusing Cause (as the case may be) which is agreed by the parties or determined in accordance with 0 (*Dispute Resolution Procedure*).

Authority's costs

- 40.6 The Contractor shall reimburse the Authority for all reasonable costs incurred by the Authority in exercising any of its rights pursuant to this Clause 40 (*Contractor 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 the Contractor (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 31 (*Force Majeure*), the parties have failed to reach agreement on any modification to this Agreement pursuant to Clause 31 (*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 31 (*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 the Contractor. 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 the Contractor, 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. 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, the Contractor shall not be entitled to any compensation for termination of this Agreement on the Expiry Date.

44. CORRUPT GIFTS AND PAYMENTS

Prohibition on corruption

44.1 The term **Prohibited Act** means:

44.1.1 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;

44.1.2 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 the Contractor 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;

44.1.3 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; or

44.1.4 defrauding or attempting to defraud or conspiring to defraud the Authority or any other public body,

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

44.1.6 committing any breach of the Data Protection Laws by unlawfully Processing Personal Pata in connection with any blacklisting activities.

Warranty

- 44.2 The Contractor warrants that in entering into this Agreement it has not committed any Prohibited Act.

Remedies

- 44.3 If the Contractor or any Contractor 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 44.3.1 to 44.3.6 below:

- 44.3.1 if a Prohibited Act is committed by the Contractor or by an employee not acting independently of Contractor, then the Authority may terminate this Agreement with immediate effect by giving written notice to the Contractor;
- 44.3.2 if the Prohibited Act is committed by an employee of the Contractor acting independently of the Contractor, then the Authority may give written notice to the Contractor of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice the Contractor terminates the employee's employment and (if necessary) procures the performance of the relevant part of the Works and/or Services by another person;
- 44.3.3 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 the Contractor of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice the Contractor 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 57 (*Assignment and Sub-Contracting*);
- 44.3.4 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 the Contractor of termination and this Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice the Contractor 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;
- 44.3.5 if the Prohibited Act is committed by any other person not specified in Clauses 44.3.1 to 44.3.4 above, then the Authority may give notice to the Contractor of termination and this Agreement will terminate unless within twenty (20) Business Days the Contractor procures the termination of such person's employment and of the appointment of their employer

(where the employer is not the Authority and where such person is not employed by the Contractor or the Contracting Associate) and (if necessary) procures the performance of the relevant part of the Works and/or Services by another person; and

44.3.6 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.

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

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

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

Permitted payments

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

Notification

44.6 The Contractor shall notify the Authority of the occurrence (and details) of any Prohibited Act promptly on the Contractor becoming aware of its occurrence.

45. GUARANTEED ENERGY COST PERFORMANCE DEFAULT AND TERMINATION

45.1 If an M&V Savings Report submitted pursuant to Clause 21 establishes that (other than by reason of a Force Majeure, a Relief Event or an Emergency) the Guaranteed Energy Cost Performance has not been achieved in respect of the period to which that M&V Savings Report relates, the following provisions shall apply:

45.1.1 The Authority shall be entitled to require the Contractor to provide a reasonable level of additional management and performance information to enable the Authority to gain a detailed understanding of the reasons for the failure; and

- 45.1.2 In circumstances where there has been a Significant Failure in the Guaranteed Energy Cost Performance as detailed in the M&V Savings Report the Authority's Representative may serve an Energy Performance Notice on the Contractor; and
- 45.1.3 In circumstances where there has been a Material Failure in the Guaranteed Energy Cost Performance, as detailed in [*the M&V Savings Report*], the Authority's Representative may serve an Energy Termination Notice on the Contractor.
- 45.2 If the Contractor is served with an Energy Performance Notice, it shall, within twenty (20) Business Days of such service put forward a reasonable programme of action (set out, if appropriate, in stages) for improving the energy performance of the Works (a **GECP Remediation Programme**), to ensure that the Guaranteed Energy Cost Performance is met, as established by the next M&V Savings Report for the period subsequent to the implementation of the GECP Remediation Programme.
- 45.3 Where the Contractor puts forward a GECP Remediation Programme in accordance with Clause 45.2, the Authority shall have twenty (20) Business Days from receipt of the same within which to notify the Contractor (acting reasonably and in good faith) that it is not in agreement with the actions (or, if appropriate, the stages) set out in the GECP Remediation Programme, failing which the Authority shall be deemed to have accepted the GECP Remediation Programme. Where the Authority notifies the Contractor that it does not accept the actions or stages within the GECP Remediation Programme as being reasonable, the parties shall endeavour within the following five (5) Business Days to agree in good faith any necessary amendments to the GECP Remediation Programme put forward.
- 45.4 The Contractor shall implement any GECP Remediation Programme which is agreed or determined pursuant to this Clause 45. If the Contractor fails to implement any such GECP Remediation Programme within the timescales specified therein, then the Authority may issue an Energy Termination Notice.
- 45.5 If the Contractor disputes that the Authority is entitled to serve an Energy Performance Notice or an Energy Termination Notice, the Contractor may refer that dispute for determination under the Dispute Resolution Procedure for resolution. If, after the Authority's Representative issues such a notice, the parties subsequently agree, or it is determined under the Dispute Resolution Procedure that the notice in question was served without justification, that notice shall be recalled or shall be cancelled and deemed not to have been served.

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 the Contractor in accordance with 0 (*Consequence of Termination for Force Majeure*) of 0 (*Compensation on Termination*).
- 46.2 If this Agreement is terminated pursuant to Clause 40 (*Contractor Events of Default*) other than pursuant to Clause 40.1.3(b), then the Authority shall pay compensation to the Contractor in accordance with 0 (*Compensation on Contractor Default*) of 0 (*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 the Contractor in accordance with 0 (*Compensation on Termination for Authority Default and Voluntary Termination*) of 0 (*Compensation on Termination*).
- 46.4 If this Agreement is terminated pursuant to Clause 42 (*Voluntary Termination*), then the Authority shall pay compensation to the Contractor in accordance with 0 (*Compensation on Termination for Authority Default and Voluntary Termination*) of 0 (*Compensation on Termination*).
- 46.5 If this Agreement is terminated pursuant to [Clause 40.1.3(b)] or Clause 44.3 or then the Authority shall pay compensation to the Contractor in accordance with 0 (*Corrupt Gifts and Fraud[or Breach of Refinancing]*) of 0 (*Compensation on Termination*).¹²⁷

Tax equalisation

- 46.6 Where a payment is to be made to the Contractor pursuant to Clause 46.1, Clause 46.3, Clause 46.4 or Clause 46.6 (a **Compensation Payment**) and the Contractor has a Relevant Tax Liability in respect of such payment, then the amount of the Compensation Payment to be made by the Authority to the Contractor shall be increased so as to ensure that the Contractor 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.
- 46.7 For the purposes of this Clause 46 (*Compensation on Termination*):
- 46.7.1 **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;
- 46.7.2 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 the Contractor

¹²⁷ Words in square brackets in clause only needed where project is being funded via project finance.

(whether by way of interest, dividend or other distribution, repayment, reduction or redemption of capital or indebtedness or return of assets or otherwise); and

46.7.3 the Contractor 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**).

46.8 In determining whether the Contractor 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 the Contractor (or would have been so available but for a surrender by the Contractor 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.

46.9 The Contractor shall keep the Authority fully informed of all negotiations with the HM Revenue and Customs in relation to any Relevant Tax Liability in respect of a Compensation Payment. The Contractor 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 the Contractor 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 the Contractor 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, the Contractor 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 46.6 to reflect such outcome.

46.10 Any increase in the amount of a Compensation Payment which is payable under Clause 46.6 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 the Contractor and:

46.10.1 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

46.10.2 in the case of a Deemed Liability, five (5) Business Days before the date on which tax which would not have been payable but for the utilisation of the relevant Relief must be paid in order to avoid incurring interest or penalties (whether by the Contractor 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.

46.11 The Authority shall have the right to pay the amount payable under Clause 46.6 direct to HM Revenue and Customs in satisfaction of the relevant tax due by the Contractor.

Rights of Set-Off

46.12 To avoid doubt, the Authority's obligations to make any payment of compensation to the Contractor pursuant to this Clause are subject to the Authority's rights under Clause 34.6, save that the Authority agrees not to set-off any amount agreed or determined as due and payable by the Contractor to the Authority against any payment of termination compensation (whether payable as a lump sum or in instalments) under Clauses 46.1, 46.3, 46.4 or 46.5.¹²⁸

Full and final settlement

46.13 Subject to the provisions of Section 5 of 0 (*Compensation on Termination*)]¹²⁹:

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

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

¹²⁸ To be compared with the final compensation on termination provisions as agreed on a specific project.

¹²⁹ As above.

47. CONSEQUENCES OF TERMINATION¹³⁰

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 the Contractor, the parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of default or notice of termination, until the Termination Date.

Transfer to Authority of Assets, Contracts etc.

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

47.2.1 if prior to the Actual Completion Date, in so far as any transfer shall be necessary fully and effectively to transfer property to the Authority, the Contractor shall transfer to, and there shall vest in, the Authority, such part of the Works and/or the [*relevant part of the Facilities*] as shall have been installed or constructed and such items of the Plant and Equipment as shall have been procured by the Contractor if the Authority so elects;

47.2.2 all goods and all materials on or near to the Site not yet incorporated in the Works shall remain available to the Authority for the purposes of completing the Works and if the cost of such goods and materials has not been reflected in the payment of any compensation pursuant to 0 (*Compensation on Termination*), subject to the payment by the Authority (determined as between a willing vendor and willing purchaser with any disputes determined pursuant to Clause 56 (*Dispute Resolution Procedure*));

47.2.3 the construction plant (if any) 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 the Contractor 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 [*works to the Facilities*] (which in the case of the termination of this Agreement in accordance with Clause 43 (*Expiry*) shall be in the state required in accordance with 0 (*Handback Procedure*));

47.2.5 if the Authority so elects, the Contractor shall procure that the [Construction Contract and/or the Service Contract]¹³¹ shall be novated or assigned to the Authority, provided that

¹³⁰ This drafting represents a base position which should be reviewed on a project by project basis in light of the measures actually proposed to be installed. This review will also need to consider the consequences for compensation on termination, reflective of the assets that the Authority requires to inherit on termination – the base assumption is that all installed assets will be inherited by the Authority.

¹³¹ Dependent upon project structure

where termination occurs under Clause 39 (*Authority Events of Default*) the consent of the [Construction Contractor or the Service Provider (as the case may be)] shall be required;

47.2.6 the Contractor 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 0 (*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 the Contractor or any of its Contracting Associates and reasonably required by the Authority in connection with the operation of the [*relevant part of the Facilities*] or the provision of the Services;

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

- (a) “as built drawings” showing all alterations made to the [*relevant part of the Facilities*] since the commencement of operation of the same; and
- (b) any maintenance, operation and training manuals for the [*relevant part of the Facilities*];

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

47.2.9 the Contractor 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 the Contractor or its Contracting Associates (in which case complete copies shall be delivered to the Authority).

47.3 The Contractor 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 the Contractor will be in a position to comply with its obligations, under Clause 47.2.

Transitional arrangements

- 47.4 On the termination of this Agreement for any reason, for a reasonable period both before and after any such termination, the Contractor shall have the following duties:
- 47.4.1 the Contractor 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 the Contractor shall as soon as practicable remove from the Facilities all property not acquired by the Authority pursuant to Clause 47.2 (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 the Contractor;
- 47.4.3 the Contractor shall forthwith deliver to the Authority's Representative:
- (a) any security passwords, access codes and other keys to the [*relevant part of the Facilities*] and any installed or operated equipment (including any energy management equipment); and
 - (b) without prejudice to Clause 55 (*Intellectual Property*), any copyright licences for any computer programmes (or licences to use the same) necessary for the operation of the Facilities or any part of or equipment at the Facilities, including any energy management equipment (but excluding computer programmes, which have been developed or acquired by the 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 the Contractor shall as soon as practicable vacate the Site and (without prejudice to 0 (*Handback Procedure*)) shall leave the Site and the Facilities in a safe, clean and orderly condition.
- 47.5 If the Authority wishes to conduct a competition prior to the Expiry Date with a view to entering into an agreement for the provision of services (which may or may not be the same as, or similar to, the Services or any of them) following the expiry of this Agreement, the Contractor 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 the Contractor 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 the Contractor give that competitor a competitive advantage over the Contractor and thereby prejudice the business of the Contractor but shall, to avoid doubt, exclude any information to be disclosed in terms of Clause 25 (*TUPE and Employment matters*)); and
- 47.5.2 assisting the Authority by providing all (or any) participants in such competition process with access to the Site and the [*relevant part of the Facilities*].

Continuing Obligations

47.6 Save as otherwise expressly provided in 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 the Contractor and the Authority under Clauses 10 (*The Site*), 21 (*Guaranteed Energy Cost Performance*), 25 (*TUPE and Employment Matters*), 31 (*Force Majeure*), 34 (*Payment*), 35 (*Taxation*),[37 (*Custody of Financial Model*),]¹³² 38 (*Records and Reports*), 41 (*Termination Resulting from Force Majeure*), 42 (*Authority Voluntary Termination*), 44 (*Corrupt Gifts and Payments*), 46 (*Compensation on Termination*), 47.2 47.4 and 47.5 (*Transitional Arrangements*), 49 (*Indemnities and Liability*), 53 (*Insurance*), 54 (*Exclusions and Limits on Liability*), 55 (*Intellectual Property*), 56 (*Dispute Resolution Procedure*), 59 (*Mitigation*), 60 (*Data Protection*), 61 (*Confidentiality*), 64 (*Notices*) and Clause 72 (*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 0 (*Handback Procedure*) shall apply to the handback of the Facilities to the Authority on expiry of this Agreement.

¹³² Need for square bracketed words to be reviewed in light of the funding solution for the Project.

PART 11: INDEMNITIES, WARRANTIES & INSURANCE

49. INDEMNITIES

Contractor indemnities to Authority

49.1 The Contractor 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, the Contractor or any Contractor Party notwithstanding any act or omission of the Authority or any Authority Party;

49.1.2 any claim for, or in respect of, the death and/or personal injury of any third party (other than a person referred to in Clause 49.2.1) arising out of, or in the course of, the Project Operations, save to the extent caused (or contributed to) by any Unreasonable Act by the Authority or any Authority Party, breach of any express provision of this Agreement by the Authority or any Authority Party or any deliberate or negligent act or omission of the Authority or any Authority Party;

49.1.3 any physical loss of or damage to Authority Assets arising by reason of any act or omission of the Contractor or any Contractor 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 the Contractor or any Contractor 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 Contractor

49.2 The Authority shall indemnify and keep the Contractor indemnified at all times from and against all Direct Losses sustained by the Contractor 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 the Contractor or any Contractor 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) 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 the Contractor or any Contractor Party;

49.2.3 any physical damage to any part of the Works or any assets or other property of the Contractor or any Contractor 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 the Contractor or any Contractor 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 the Contractor or any Contractor 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 the Contractor is obliged to insure under this Agreement (but for the avoidance of doubt, no 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

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:

- (i) the Indemnifier shall keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
- (ii) the Indemnifier shall not bring the name of the Beneficiary into disrepute;
and
- (iii) 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:

- (i) the Indemnifier is not entitled to take conduct of the claim in accordance with Clause 49.3.2 above; or
- (ii) 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
- (iii) 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 (*Contractor Indemnities to Authority*) or Clause 49.2 (*Authority Indemnities to the Contractor*) (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:

- (i) 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
- (ii) 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 59 (*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 59 (*Mitigation*).

50. 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 the Contractor, the Contractor and the Authority shall have the same rights and obligations as would apply to a Relevant Tax Liability under Clause 46.7.3 and Clauses 46.6 to 46.11 (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.

51. EXCUSING CAUSES

51.1 If an Excusing Cause interferes adversely with, or causes or contributes to a failure of, the performance of the Project Operations by the Contractor and/or causes or contributes to the occurrence of an Availability Failure and provided that the effect of such Excusing Cause is claimed within ten (10) Business Days of the date on which the Contractor became aware (or ought reasonably to have become so aware) of the occurrence of the Excusing Cause, then (subject to Clauses 51.3 (*Insured Exposure*) and 51.4) to the extent such failure or interference or occurrence of an Availability Failure arises as a result of such Excusing Cause:

51.1.1 such failure by the Contractor 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 the Contractor;

51.1.2 such failure by the Contractor to perform or interference or occurrence shall be taken account of in measuring the performance of any affected Service in accordance with the Service Level Specification and the Guaranteed Energy Cost Performance, which shall be operated as though the relevant Service had been performed, and/or the Guaranteed Energy Cost Performance measured, free from such adverse interference; and

51.1.3 any such Availability Failure shall be deemed not to have occurred,

so that the Contractor 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.

- 51.2 For the purpose of Clause 51 (*Excusing Causes*), an Excusing Cause means:
- 51.2.1 any breach of any express provision of this Agreement by the Authority or any Authority Party (unless, and to the extent, caused or contributed to by the Contractor or any Contractor Party);
- 51.2.2 any deliberate act or omission of the Authority or of any Authority Party or any failure by the Authority or Authority Party (having regard always to the interactive nature of the activities of the Authority and of the Contractor) to take reasonable steps to carry out its activities in a manner which minimises undue interference with the Contractor's performance of the Project Operations, save where (and to the extent):
- (a) caused or contributed to by the Contractor or any Contractor Party;
 - (b) the Authority or Authority Party is acting in accordance with a recommendation or instruction of the Contractor or any Contractor 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; or
 - (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 the Contractor's obligations under this Agreement;
- 51.2.3 [the outbreak or the effects of any outbreak of any Medical Contamination unless and to the extent that the effects of such outbreak are caused (or contributed to) by any failure of the Contractor or any Contractor Party to comply with procedures (or Authority instructions) relating to control of infection or to take all reasonable steps to mitigate the effect of such Medical Contamination;]¹³³
- 51.2.4 the implementation of any action taken by the Authority or any Authority Party, or any suspension of the Contractor's obligation to deliver any or any part of the Services or the compliance by the Contractor with instructions given by the Authority, in each case in the circumstances referred to in Clauses 24.6 to 24.9 (inclusive); or
- 51.2.5 the carrying out of planned preventative maintenance in accordance with the Schedule of Programmed Maintenance.

¹³³ For NHS projects only

Insured exposure

51.3 Without prejudice to Clause 53 (*Insurance*), the Contractor shall not be entitled to any payment which would not have been due under this Agreement but for Clause 51 (*Excusing Causes*) to the extent that the Contractor is or should be able to recover under any policy of insurance required to be maintained by the Contractor or any Contractor 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 the Contractor (or any Contractor Party), including but not limited to non-disclosure or under insurance) or any other policy of insurance which the Contractor has taken out and maintained.

Mitigation of Excusing Cause

51.4 The Contractor shall take all reasonable steps to mitigate the consequences of an Excusing Cause on the Contractor's ability to perform its obligations under this Agreement. To the extent that the Contractor does not take such steps, the Contractor shall not be entitled to, and shall not receive, the relief specified in Clause 51.1.

51.5 To avoid doubt, Clause 51.2.2 shall not impose a general obligation on the Authority to take (or to procure that any Authority Party takes) such steps and shall apply (and be construed) solely for the purpose of establishing whether an Excusing Cause has occurred.

52. COMMUNITY BENEFITS AND SUSTAINABILITY REPORTING

The Contractor shall comply with and implement the terms of [*insert reference to community benefits/sustainability method statement from Framework Agreement schedule and/or community benefit/sustainability method statement from ITMC Proposal and any community benefits or sustainability reporting requirements embedded within Schedule 12 of this Agreement*].

53. INSURANCE¹³⁴¹³⁵

Contractor Insurances

53.1 The Contractor shall procure that the insurances, details of which are set out in Section [●] of 0 (*Insurance Requirements*), are taken out prior to the commencement of the Works and are maintained for the periods specified in Section [●] of 0 (*Insurance Requirements*).

53.2 The Contractor shall procure that the insurances, details of which are set out in Section [●] of 0 (*Insurance Requirements*) are taken out prior to the Actual Completion Date and are maintained for the periods specified in Section [●] of 0 (*Insurance Requirements*).

53.3 Without prejudice to the other provisions of this Clause 15 (*Insurance*), the Contractor 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.

53.4 All Insurances referred to in Clauses 53.1 and 53.2 shall:

53.4.1 be maintained in the names of the parties specified in 0 (*Insurance Requirements*) and shall be composite policies of insurance (and not joint) unless stated otherwise in 0 (*Insurance Requirements*);

53.4.2 be placed with insurers who are acceptable to the Authority (such acceptance not to be unreasonably withheld or delayed);

53.4.3 in so far as they relate to damage to assets (including the Facilities), cover the same for the full reinstatement value;

53.4.4 comply with the relevant provisions of Section [●] and Section [●] of 0 (*Insurance Requirements*).

¹³⁴ The insurance terms will be developed within Schedule Part 15 on a project specific basis, dependent upon the measures being installed, however the operative provisions in respect of that insurance should accord with this Clause 53 to the extent applicable to the circumstances of the Project and, to comply with the Eurostat EnPC Guide, the Authority must not be responsible for effecting insurance(s) benefitting the Contractor. Nor should it take an undue share in the risks of or benefits arising from changes to the costs of insurances effected by or benefitting the Contractor (including those provisions relating to the unavailability of insurance).

¹³⁵ The drafting of Clause 53 represents a base position which should be reviewed on a project by project basis. This base drafting generally assumes that insurance is placed on a project specific basis, however it is appreciated that a Contractor may wish to use a corporate/group policy to effect insurance. Any such proposal would require to be considered in detail by the Authority to ensure that the level of protection afforded to the Authority, and to the facilities, is appropriate. As referred to above, to comply with the Eurostat EnPC Guide, the Authority must not be responsible for effecting insurance(s) benefitting the Contractor. Nor should it take an undue share in the risks of or benefits arising from changes to the costs of insurances effected by or benefitting the Contractor (including those provisions relating to the unavailability of insurance).

53.4.5 provide for thirty (30) days prior written notice of their cancellation, non-renewal or amendment to be given to the Authority in accordance with [*reference to applicable policy endorsements*] of 0 (*Insurance Requirements*);

53.4.6 in respect of the [*physical damage policies*] provide for payment of any proceeds received by the Contractor to be applied in accordance with Clause 53.22 (*Reinstatement*);

53.4.7 in the case of the [*operational insurances*] only, be taken out and maintained in accordance with Section [●] of 0 (*Insurance Requirements*)¹³⁶.

53.5 The Contractor shall ensure that its brokers give the Authority a letter of undertaking substantially in the form set out in Section [●] of 0 (*Insurance Requirements*) at the Commencement Date and subsequently on the renewal of each of the Insurances.

Subrogation and Vitiating

53.6 The Contractor shall in respect of the insurances referred to in Clauses 53.1 and 53.2:

53.6.1 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 [*reference to applicable policy endorsements*] of 0 (*Insurance Requirements*); and

53.6.2 provide for non-vitiating protection in respect of any claim made by the Authority as co-insured in accordance with [*reference to applicable policy endorsements*] of 0 (*Insurance Requirements*);

provided that, to avoid doubt, this Clause 53.6 shall not by itself prevent the Contractor 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.

53.7 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.

¹³⁶ This should refer out to the section of the schedule which deals with the process the Contractor is required to follow to evidence best value in the procuring of operational insurance renewal.

Evidence of Contractor's Insurance

53.8 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 the Contractor must comply with the provisions of Section [●]¹³⁷ of 0 (*Insurance Requirements*)), The Contractor 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.

53.9 The Contractor shall provide to the Authority:

53.9.1 copies on request of all insurance policies referred to in Clauses 53.1 to 53.3 (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

53.9.2 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 53 (*Insurance*) and 0 (*Insurance Requirements*).

53.10 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.

53.11 If the Contractor 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 the Contractor as a debt provided that if the default occurs during the Operational Term the amount recoverable from the Contractor shall be the difference between the premiums had the Contractor continued to maintain the Insurances and the premiums paid by the Authority to take out and maintain the Insurances.

Acceptance and compliance

53.12 The supply to the Authority of any draft insurance policy or certificate of insurance or other evidence of compliance with this Clause 53 (*Insurance*) shall not imply acceptance by the Authority (or the Authority's Representative) that:

53.12.1 the extent of insurance cover is sufficient and its terms are satisfactory; or

¹³⁷ See previous footnote

53.12.2 in respect of any risks not insured against, that the same were Uninsurable.

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

53.14 **Uninsurable Risks**

53.14.1 If a risk usually covered by [*list relevant required insurances per 0*] in each case required under this Agreement becomes Uninsurable then:

(i) the Contractor 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

(ii) if both parties agree, or it is determined in accordance with the Dispute Resolution Procedure that the risk is Uninsurable and that:

(A) the risk being Uninsurable is not caused by the actions of the Contractor or any sub-contractor of the Contractor (of any tier); and

(B) the Contractor has demonstrated to the Authority that the Contractor and a prudent board of directors of a company operating the same or substantially similar businesses in the United Kingdom to that operated by the Contractor 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).

53.14.2 If the requirements of Clause 53.14.1 are satisfied, but the parties cannot agree as to how to manage or share the risk, then:

(i) where such requirements are satisfied in respect of such third party liability insurance the Authority shall (at the Authority's option) either pay to the

Contractor an amount equal to the amount calculated in accordance with [*refer to Force Majeure termination provision*] and this Agreement will terminate, or elect to allow this Agreement to continue and Clause 53.14.2(ii) below shall thereafter apply in respect of such risk; and

- (ii) where such requirements are satisfied in respect of [*list all insurances listed in clause 53.14.1*] 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 the Contractor 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 [*refer to Force Majeure termination provision*] 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
- (iii) where pursuant to Clauses 53.14.2(i) and/or 53.14.2(ii) this Agreement continues then the Annual Payment shall be reduced in each year for which the relevant insurance is not maintained by an amount equal to the premium paid (or which would have been paid) by the Contractor 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 the Contractor [*as a pass through cost pursuant to 0 (Payment Mechanism)*]. Where the risk is Uninsurable for part of a year only the reduction in the Annual Payment shall be pro-rated to the number of months for which the risk is Uninsurable.
- (iv) where pursuant to Clauses 53.14.2(i) and/or 53.14.2(ii) this Agreement continues the Contractor shall approach the insurance market at least every four (4) months to establish whether the risk remains Uninsurable. As soon as the Contractor is aware (and the parties agree or it is determined pursuant to the Dispute Resolution Procedure) that the risk is no longer Uninsurable, the Contractor 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;
- (v) in respect of any period between the Authority receiving notification in accordance with Clause 53.14.1(i) that a TPL Risk has become Uninsurable and the Authority's notification to the Contractor in accordance with Clause 53.14.2(i) in respect of such risk then, provided it is ultimately agreed or determined that

the requirements of Clause 53.14.1(ii) are satisfied in respect of the Uninsurable TPL Risk and subject to Clause 53.14.2(vi) below, Clause 53.14.2(ii) 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

(vi) Clause 53.14.2(v) shall only apply provided the Contractor does not unreasonably materially delay (a) agreement and/or determination in accordance with the Dispute Resolution Procedure as to whether the requirements of Clause 53.14.1(ii) 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 53.14 applies and this Agreement continues, the Contractor shall, subject to Clause 53.14.2(iii), be relieved of its obligations to maintain insurance in respect of the relevant Uninsurable Risk.

53.14.3 If, pursuant to Clause 53.14.1(ii), the Authority elects to make payment of compensation to the Contractor (such that this Agreement will terminate) (the **Relevant Payment**), the Contractor shall have the option (exercisable in writing within (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 the Contractor'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.

53.14.4 During the Operational Term, the Authority shall be entitled to notify the Contractor that a risk has become Uninsurable under paragraph (b) of the definition of "Uninsurable". Following such notification, Clauses 53.14.1(ii) to 53.14.3 (except Clause 53.14.1(ii)(B)) shall apply as if the Contractor has issued a notice under Clause 53.14.1(i).

53.15 **Unavailability of terms**

53.15.1 If, upon the renewal of any of the Insurances:

- (i) any Insurance Term is not available to the Contractor in the worldwide insurance market with reputable insurers of good standing; and/or
- (ii) 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 the Contractor and/or any Contractor Party then Clause 53.15.2, shall apply.

53.15.2 If it is agreed or determined that Clause 53.15.1 applies then the Authority shall waive the Contractor's obligations in Clauses 53.1 to 53.3 and/or 0 (*Insurance Requirements*) in respect of that particular Insurance Term and the Contractor 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 53.15.1 continue to apply to such Insurance Term.

53.15.3 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 the Contractor in the worldwide insurance market with reputable insurers of good standing which if included in the relevant insurance policy would fully or partially address the Contractor'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, the Contractor shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition.

53.15.4 The Contractor shall notify the Authority as soon as reasonably practicable and in any event within five (5) days of becoming aware that Clause 53.15.1(i) and/or Clause 53.15.1(ii) 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 the Contractor that Clause 53.15.1(ii) 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). The Contractor 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.

53.15.5 In the event that Clause 53.15.1(i) and/or Clause 53.15.1(ii) apply in respect of an Insurance Term, (irrespective of the reasons for the same) the Contractor shall approach the insurance market at least every four (4) months to establish whether Clause 53.15.1(i) and/or Clause 53.15.1(ii) remain applicable to the Insurance Term. As soon as the

Contractor is aware and the parties agree or it is determined pursuant to the Dispute Resolution Procedure that Clause 53.15.1(i) and/or Clause 53.15.1(ii) has ceased to apply to the Insurance Term, the Contractor 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

53.16 With effect from the date of this Agreement, the Authority and the Contractor shall each designate or appoint an insurance and risk manager and notify details of the same to the other party. Such person shall:

53.16.1 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 53.16;

53.16.2 advise and report to that party on such matters; and

53.16.3 ensure that any report or survey conducted by any insurer of any relevant procedures in relation to the Project is disclosed to the parties.

53.17 Without prejudice to the provisions of Clause 53.16, the parties shall notify one another, and in the Contractor's case the relevant insurer, of any circumstances which may give rise to a claim of a value equal to or in excess of [●] [[●]] (index linked) under the Insurances within [●] Business Days of becoming aware of the same (or earlier, if so requested by the terms of the relevant insurance policy). If any insurer disputes any such claim, the Contractor shall provide the Authority with full details of any disputed claim and the parties shall liaise with one another to ensure that the relevant claim is preserved or pursued.

Application of Proceeds

53.18 All insurance proceeds received by the Contractor under the insurances referred to in [*list relevant insurances by cross-reference to 0*] shall be paid into the Insurance Proceeds Account and shall be applied in accordance with this Agreement and in accordance with the Insurance Proceeds Accounts Agreement.

53.19 Subject to the provisions of the [Funders' Direct Agreement]¹³⁸ and Clause 53.22 (*Reinstatement*), the Contractor shall apply any proceeds of any policies of Insurance:

53.19.1 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

53.19.2 in the case of any other insurance [*other than delay in start up or business interruption insurance*], so as to ensure the performance by the Contractor 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.

53.20 Where reinstatement monies are required to be released from the Insurance Proceeds Account the Contractor 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 the Contractor (provided that such consent must not be unreasonably withheld).

53.21 If the proceeds of any insurance claim are insufficient to cover the settlement of such claims, the Contractor will make good any deficiency forthwith.

53.22 **Reinstatement**

53.22.1 All insurance proceeds received under any [*physical damage policy*] shall be applied to repair, reinstate and replace each part or parts of the Facilities in respect of which the proceeds were received.

53.22.2 Where a claim is made or proceeds of insurance are received or are receivable under any [*physical damage policy*] in respect of a single event (or a series of related events) (the **Relevant Incident**) in an amount in excess of [●] pounds (£[●]) (index-linked):

- (i) the Contractor 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 the Contractor 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 (ii)(D)below. The Reinstatement Plan shall set out:

¹³⁸ This is relevant only to projects which are funded via project finance

- (A) 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
 - (B) 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;
- (ii) provided that the Authority is satisfied that the Reinstatement Plan will enable the Contractor to comply with Clause 53.22.2(ii)(D) below within a reasonable timescale:
- (A) the Reinstatement Plan will be adopted and carried out by the Contractor;
 - (B) the Contractor shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the Reinstatement Plan approved by the Authority;
 - (C) 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 the Contractor 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 53.22.2(ii)(B) above, and to meet any other reasonable costs and expenses of the Contractor for the sole purposes of funding the Reinstatement Works and the parties shall operate the signatory requirements of the Insurance Proceeds Account in order to give effect to such payments. Following the earlier to occur of the Termination Date and the Expiry Date, the Authority may withdraw amounts standing to the credit of the Insurance Proceeds Account for the purposes of funding any Reinstatement Works;
 - (D) the Authority agrees and undertakes that, subject to compliance by the Contractor with its obligations under this Clause, and provided that the Contractor procures that the Reinstatement

Works are carried out and completed in accordance with the contractual arrangements referred to in Clause 53.22.2(ii)(B), 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;

- (E) the Authority undertakes to use reasonable endeavours to assist the Contractor in the carrying out of the Reinstatement Plan; and
- (F) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Authority and in accordance with Clause 53.22.3 below the Authority shall permit withdrawal by the Contractor of any Relevant Proceeds then held in the Insurance Proceeds Account that have not been paid under Clause 53.22.2(ii)(B) above, in respect of the Relevant Incident, together with any interest accrued.
- (G) the Contractor shall be solely responsible for the payment of any deficiency.

53.22.3 Where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate or replace any part of the Facilities, the Contractor shall carry out the work in accordance with the Authority's Requirements so that on completion of the work, the provisions of this Agreement are complied with.

53.22.4 *[Insert here appropriate provisions related to Contractor professional indemnity insurance, to reflect to the extent appropriate any commitments made as part of the Framework Agreement]*

54. EXCLUSIONS AND LIMITATIONS ON LIABILITY

EXCLUSIONS

54.1 Subject to Clause 54.8, 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 delict 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 the Contractor arising under the [Construction Contract and the Service Contract]⁵³ 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 54.1.

54.2 The Authority shall not be liable in delict to the Contractor or any Contractor 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 the Contractor shall procure that no Contractor Party shall bring such a claim against the Authority. The Contractor has accepted this on the basis that it and each Contractor Party will cover the risk of negligent acts or omissions by insurance or in such other manner as it (or they) may think fit.

No Double Recovery

54.3 Subject to:

54.3.1 any other express right of the Authority pursuant to this Agreement; and

54.3.2 the Authority's right to claim, on or after termination of this Agreement, the amount of its reasonable costs, losses, damages and expenses suffered or incurred by it as a result of rectifying or mitigating the effects of any breach of this Agreement by the Contractor 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.

54.4 Subject to Clause 39 (*Authority Events of Default*) and any other express right of the Contractor pursuant to this Agreement, the Contractor's sole remedy in respect of any breach of this Agreement which is a Compensation Event shall be pursuant to Clause 29 (*Delay Events*).

54.5 Nothing in Clause 54.3 shall prevent or restrict the right of the Authority to seek interdict or a decree of specific implement or other discretionary remedies of the court.

54.6 Notwithstanding any other provision of this Agreement, neither party shall be entitled to recover compensation or make a claim under this Agreement or any other agreement in relation to the Project in respect of any loss that it has incurred (or any failure of the other party) to the extent that it has already been compensated in respect of that loss or failure pursuant to this Agreement or otherwise.

54.7 Neither party shall have the right to terminate this Agreement for breach of contract save as expressly set out in this Agreement.

PART 12: MISCELLANEOUS

55. INTELLECTUAL PROPERTY

Project Data

55.1 The Contractor 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 the Contractor shall ensure that it can make the Project Data available to the Authority on these terms, for the purposes of:

55.1.1 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

55.1.2 following termination of this Agreement, the design or installation of the [*relevant part 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

55.2 The Contractor:

55.2.1 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 the Contractor; and

55.2.2 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 55.2.1 above to the Authority,

in both cases, solely for the Approved Purposes.

The Contractor 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 the Contractor and the Contractor shall enter into appropriate agreements with any Contractor Party (or other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

Maintenance of data¹³⁹

55.3 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, the Contractor 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, the Contractor 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.

55.4 The Contractor shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Clause 55.3 in accordance with Good Industry Practice.

Claims

55.5 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, the Contractor 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.

56. 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 0 (*Dispute Resolution Procedure*).

57. ASSIGNATION AND SUB-CONTRACTING

Assniation

57.1 This Agreement and any other agreement in connection with the Project to which both the Authority and the Contractor are a party shall be binding on, and shall enure to the benefit of, the Contractor 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

¹³⁹ To be considered on a project specific basis whether measure-specific data maintenance provisions may be required. For example, energy management measures may feature real-time data which would be of interest to both parties.

Scottish 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 the Contractor are both a party.

57.2 Subject to Clause 57.3, the Contractor 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 [Construction Contract, the Service Contract, the M&V Contract]¹⁴⁰ and any other contract entered into by the Contractor for the purposes of performing its obligations under this Agreement.

57.3 [The provisions of Clause 57.2 do not apply to the grant of any security, in a form approved by the Authority prior to its grant (such approval not to be unreasonably withheld or delayed), for any loan made to the Contractor 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.]¹⁴¹

57.4 The Authority shall be entitled to assign, transfer or dispose of the whole of this Agreement and/or of any agreement entered into in connection with this Agreement to which the Authority and the Contractor are both party to:

57.4.1 the Scottish Ministers, or [a public body equivalent to or replacing the Authority]; or

57.4.2 any other person or body with the prior written consent of the Contractor (not to be unreasonably withheld or delayed);

provided that nothing in this Clause shall restrict the rights of the Scottish Ministers to effect a statutory transfer.

Sub-contractors¹⁴²

57.5 The Contractor shall, without prejudice to Clause 57.1, 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
[Construction Contractor	Construction Contract

¹⁴⁰ Dependent upon project structure. The M&V Contract is assumed to be a direct appointment by the Contractor with a duty of care to the Authority.

¹⁴¹ Final terms of clause dependent upon whether project is being funded via project finance.

¹⁴² General relevance of clause dependent upon contracting structure of project/Contractor. To be reviewed on a project-specific basis.

Service Provider

Service Contract

M&V Professional

M&V Contract]¹⁴³

without, in each case, the prior written consent of the Authority (such consent not to be unreasonably withheld or delayed).

57.6 If the contract set out next to the name of any person referred to in Clause 57.5 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, the Contractor shall forthwith appoint a replacement (subject to compliance with Clause 57.5).

57.7 The Contractor shall procure that any replacement for any person referred to in Clause 57.5 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 any Collateral Agreement entered into by the person so replaced.

57.8 Where the Contractor 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, the Contractor shall cause a term to be included in such contract:¹⁴⁴

57.8.1 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 the Contractor 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

57.8.2 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

57.8.3 in the same terms as this Clause 57.8 (including for the avoidance of doubt this Clause 57.8.3) subject only to modification to refer to the correct designation of the

¹⁴³ Dependent upon project structure.

¹⁴⁴ [As with previous footnote each Authority should also consider whether Project Bank Account provisions are required].

equivalent party as the supplier and recipient of the relevant Project Operations as the case may be.

58. OWNERSHIP INFORMATION AND CHANGES IN CONTROL¹⁴⁵

58.1 [The Contractor represents and warrants to the Authority that at the date of this Agreement the legal and beneficial ownership of the Contractor is as set out in 0 (*Contractor Information*) and that other than [*narrate any caveats relevant to funding structure*] 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 the Contractor.

58.2 The Contractor shall inform the Authority as soon as reasonably practicable (and in any event, within thirty (30) days) of any Change in Control occurring in respect of the Contractor

58.3 The Authority may, not more than [twice] in any Contract Year, or at any time when a Contractor Event of Default is outstanding, require the Contractor 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 the Contractor.

58.4 The Contractor's obligations under Clauses 58.1 and 58.2 above shall, except where a legal transfer of shares has occurred, be limited to the extent of the Contractor's awareness having made all reasonable enquiry.

58.5 Subject to Clause 58.6, prior to the expiry of a period of twelve (12) months commencing on the Actual Completion Date, no Change in Control in any or all of the shares in the Contractor shall be permitted without the prior written approval of the Authority. Any Change in Control arising as a consequence of either:

58.5.1 [the grant or enforcement of security in favour of the [*project debt funders*] over or in relation to any of the shares of the Contractor, provided that any document conferring security over any shares has been approved by the Authority (such approval not to be unreasonably withheld or delayed)]¹⁴⁶; or

58.5.2 any [transfers to associated companies]¹⁴⁷; or

¹⁴⁵ This clause should be applied in circumstances where the "Contractor" is a special purpose vehicle formed for the purpose of undertaking the project. Where that vehicle's immediate holding company is also a special purpose vehicle formed for this purpose, the provisions of Clause 58 should be applied to that holding company vehicle as well.

¹⁴⁶ Relevant only where project is being funded via project finance.

¹⁴⁷ Associated company drafting to be prepared on a project specific basis.

58.5.3 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),

shall be disregarded for the purpose of this Clause 58.5 above. Where Clause 58.5.2 applies and subsequent to any such transfer (the **Original Transfer**) the transferee ceases to be an [*associated company*] of the original transferor, it shall be a breach of this Clause 58.5 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 [*associated company*] of the original transferor, transferred to the original transferor or any [*associated company*] of such transferor.

58.6 No Change in Control (at any time) in any or all of the shares in the Contractor (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 the Contractor 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.]

59. MITIGATION

Each of the Authority and the Contractor 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.

60. DATA PROTECTION

60.1 The Contractor acknowledges that Personal Data described in Schedule Part 25 (*Data Protection*) may be Processed in performing its obligations under this Agreement. For the purposes of any such Processing, the parties agree that the Contractor acts as the Processor and the Authority acts as the Controller.

60.2 Both parties agree to negotiate in good faith any such amendments to this Agreement that may be required to ensure that both parties meet all their obligations under Data Protection Laws. The provisions of this Clause 60 are without prejudice to any obligations and duties imposed directly on the Contractor under Data Protection Laws and the Contractor hereby agrees to comply with those obligations and duties.

60.3 The Contractor will, in conjunction with the Authority and in its own right and in respect of its obligations under this Agreement, take all necessary steps to ensure it is compliant with Data Protection Laws.

60.4 The Contractor will provide the Authority with the contact details of its data protection officer or other designated individual with responsibility for data protection and privacy to act as the point of contact for the purpose of observing its obligations under the Data Protection Laws.

60.5 The Contractor must:

60.5.1 Process Personal Data only as necessary in accordance with the Contractor's obligations under the Agreement in accordance with any written instructions given by the Authority (which may be specific or of a general nature), including with regard to transfers of Personal Data outside the UK or the European Economic Area unless required to do so by UK, European Union or European Union Member state law to which the Contractor is subject; in which case the Contractor must, unless prohibited by that law, inform the Authority of that legal requirement before Processing the Personal Data only to the extent, and in such manner as is necessary for the performance of the Contractor's obligations under this Agreement or as is required by that law;

60.5.2 subject to Clause 60.5.1, only Process or otherwise transfer any Personal Data in or to any country outside the UK or the European Economic Area with the Authority's prior written consent;

60.5.3 take all reasonable steps to ensure the reliability and integrity of any Contractor Parties who have access to the Personal Data and ensure that the Contractor Parties:

- (a) are aware of and comply with the Contractor's duties under this Clause;
- (b) are subject to appropriate confidentiality undertakings with the Contractor or the relevant Sub-contractor or other Contractor Party;
- (c) are informed of the confidential nature of the Personal Data and do not publish, disclose or divulge any of the Personal Data to any third party unless directed in writing to do so by the Authority or as otherwise permitted by this Agreement; and
- (d) have undergone adequate training in the use, care, protection and handling of Personal Data.

60.5.4 implement appropriate technical and organisational measures, including those required in accordance with Article 32 of the GDPR, to protect Personal Data against unauthorised or unlawful Processing and against accidental loss, destruction, damage, alteration or disclosure, such measures being appropriate to the harm which might result from any unauthorised or unlawful Processing, accidental loss, destruction or damage to the Personal Data and having regard to the nature of the Personal Data which is to be protected.

60.6 The Contractor shall not engage a Sub-contractor to carry out Processing in connection with this Agreement without prior specific or general written authorisation from the Authority. In the case of general written authorisation, the Contractor must inform the Authority of any intended changes concerning the addition or replacement of any other Sub-contractor and give the Authority an opportunity to object to such changes.

60.7 If the Contractor engages a Sub-contractor for carrying out Processing activities on behalf of the Authority, the Contractor must ensure that same data protection obligations as set out in this Agreement are imposed on the Sub-contractor by way of a written and legally binding

contract, in particular providing sufficient guarantees to implement appropriate technical and organisational measures. The Contractor shall remain fully liable to the Authority for the Sub-contractor's performance of the obligations.

60.8 The Contractor must provide to the Authority reasonable assistance including by such technical and organisational measures as may be appropriate in complying with Articles 12-23 of the GDPR.

60.9 The Contractor must notify the Authority if it:

(a) receives a request from a Data Subject pursuant to Article 15 of the GDPR (or a purported request);

(b) receives a request to rectify, block or erase any Personal Data;

(c) receives any other request, complaint or communication relating to either party's obligations under the Data Protection Laws;

(d) receives any communication from the Supervisory Authority or any other regulatory authority in connection with Personal Data Processed under this Agreement; or

(e) receives a request from any third party for disclosure of Personal Data where compliance with such request is required or purported to be required by law or regulatory order;

and such notification must take place as soon as is possible but in any event within 3 Business Days of receipt of the request or any other period as agreed in writing with the Authority from time to time.

60.10 Taking into account the nature of the Processing and the information available, the Contractor must assist the Authority in complying with the Authority's obligations concerning the security of Personal Data, reporting requirements for Personal Data Breaches, data protection impact assessments and prior consultations in accordance with Articles 32 to 36 of the GDPR. These obligations include:

(a) ensuring an appropriate level of protection through technical and organisational measures that take into account the circumstances and purposes of the Processing as well as the projected probability and severity of a possible infringement of the Law as a result of security vulnerabilities and that enable an immediate detection of relevant infringement events;

(b) notifying a Personal Data Breach to the Authority without undue delay and in any event no later than 24 hours after becoming aware of a Personal Data Breach;

(c) assisting the Authority with communication of a Personal Data Breach to a Data Subject;

(d) supporting the Authority with preparation of a data protection impact assessment; and

(e) supporting the Authority with regard to prior consultation of the Supervisory Authority.

60.11 At the end of the provision of services relating to Processing the Contractor must, on written instruction of the Authority, delete or return to the Authority all Personal Data and delete existing copies unless UK, EU or EU Member State law requires storage of the Personal Data.

- 60.12 The Contractor must:
- 60.12.1 provide such information as is necessary to enable the Authority to satisfy itself of the Contractor's compliance with this Clause 60;
 - 60.12.2 allow the Authority, its employees, auditors, authorised agents or advisers reasonable access to any relevant premises, during normal business hours, to inspect the procedures, measures and records referred to in this Clause 60 and contribute as is reasonable to those audits and inspections;
 - 60.12.3 inform the Authority, if in its opinion, an instruction from the Authority infringes any obligation under Data Protection Laws.
- 60.13 The Contractor must maintain written records including in electronic form, of all Processing activities carried out in the performance of the Agreement or otherwise on behalf of the Authority containing the information set out in Article 30(2) of the GDPR.
- 60.14 If requested, the Contractor must make such records referred to Clause 60.13 available to the Supervisory Authority on request and co-operate with the Supervisory Authority in the performance of its tasks.
- 60.15 The parties acknowledge that the inspecting party will use reasonable endeavours to carry out any audit or inspection under Clause 60.12.2 with minimum disruption to the Contractor's day to day business.
- 60.16 To comply with section 31(3) of the Public Services Reform (Scotland) Act 2010, the Authority publishes an annual statement of all payments over £25,000. In addition, in line with openness and transparency, the Scottish Government publishes a monthly report of all payments over £25,000. The Contractor should note that where a payment is made in excess of £25,000 there will be disclosure (in the form of the name of the payee, the date of the payment, the subject matter and the amount of payment) in the both the monthly report and the annual Public Services Reform (Scotland) Act 2010 statement.

61. CONFIDENTIALITY

61.1 The Authority shall, subject to Clause 61.2 be entitled to make the documents and information listed in this Clause 61.1 freely available to the public (which may include, without limitation, publication on the Authority's website):

- 61.1.1 this Agreement;
- 61.1.2 the Independent Tester Contract;
- 61.1.3 the Collateral Agreements;
- 61.1.4 the [*payment and performance report*];

61.1.5 the Financial Model (as updated from time to time in accordance with this Agreement)¹⁴⁸; and

61.1.6 [*project specific reporting points – to include reporting to the public (i) changes in the consumption of gas, electricity, water or other consumables at the facility in question; the extent of generation of green energy at the Facilities (if relevant) and (iii) performance of the Contractor/Facilities relative to the energy performance guarantee(s) within the Agreement*]

and the Contractor acknowledges and agrees that, subject to the exclusion of information referred to in Clause 61.2, the provision or publication of the documents and information listed in this Clause 61.1 shall not give rise to any liability under the terms of this Agreement or otherwise. The Authority shall notify the Contractor in writing not less than ten (10) Business Days prior to any intended provision or publication of information pursuant to this Clause 61.1.

61.2

61.2.1 The parties agree that the provisions of this Agreement and each Ancillary Document shall, subject to Clause 61.2.2 below, not be treated as Confidential Information and may be disclosed without restriction and the Contractor acknowledges that the Authority shall, subject to Clause 61.2.2 below, be entitled to make this Agreement and each Ancillary Document available in the public domain.

61.2.2 Clause 61.2.1 above shall not apply to provisions of this Agreement or an Ancillary Document designated as Commercially Sensitive Information and listed in 0 (*Commercially Sensitive Information*) to this Agreement which shall, subject to Clause 61.3 be kept confidential for the periods specified in that 0 (*Commercially Sensitive Information*).

61.2.3 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

61.3 Clauses 61.2.2 and 61.2.3 shall not apply to:

61.3.1 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;

¹⁴⁸ Relevant only where project is being funded via project finance.

- 61.3.2 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;
- 61.3.3 any disclosure to enable a determination to be made under 0 (*Dispute Resolution Procedure*) or in connection with a dispute between the Contractor and any of its subcontractors;
- 61.3.4 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;
- 61.3.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 61.3.6 any provision of information to the parties' own professional advisers;
- 61.3.7 any disclosure by the Authority of information relating to the design, installation, 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; or
- 61.3.8 any registration or recording of the Consents and property registration required;
- 61.3.9 any disclosure of information by the Authority to any other department, office or agency of the Government or their respective advisers or to the Scottish Futures Trust or to any person engaged in providing services to the Authority for any purpose related to or ancillary to this Agreement;
- 61.3.10 any disclosure for the purpose of:
- (a) the examination and certification of the Authority's or the Contractor's accounts;
 - (b) any examination pursuant to section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Authority has used its resources;
 - (c) complying with a proper request from either party's insurance adviser, or insurer on placing or renewing any insurance policies; or

(d) (without prejudice to the generality of Clause 61.3.4) compliance with the FOI(S)A and/or the Environmental Information (Scotland) Regulations;

61.3.11 disclosure pursuant to Clause 61.1; or

61.3.12 disclosure to the extent required pursuant to Clause 63.2,

provided that, to avoid doubt, neither Clause 61.3.10(d) nor Clause 61.3.4 above shall permit disclosure of Confidential Information otherwise prohibited by Clause 61.2.3 where that information is exempt from disclosure under section 36 of the FOI(S)A.

61.4 Where disclosure is permitted under Clause 61.3, other than under Clauses 61.3.2, 61.3.4, 61.3.5, 61.3.8 and 61.3.10, 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.

61.5 The Contractor 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.

61.6 Where the Contractor, in carrying out its obligations under this Agreement, is provided with information relating to any Authority Party, the Contractor shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the Contractor has obtained the prior written consent of that person and has obtained the prior written consent of the Authority.

61.7 On or before the Expiry Date, the Contractor 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.

61.8 The parties acknowledge that Audit Scotland has the right to publish details of this Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament.

61.9 The provisions of this Clause 61 (*Confidentiality*) are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

Announcements

61.10 Unless otherwise required by any Law or any regulatory or governmental authority (but only to that extent), neither party shall make or permit or procure to be made any public announcement or disclosure (whether for publication in the press, the radio, television screen or any other medium) of any Confidential Information or in the case of the Contractor of its (or any Contractor 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).

62. FREEDOM OF INFORMATION

62.1 The Contractor acknowledges that the Authority is subject to the requirements of the FOI(S)A and the Environmental Information (Scotland) 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 62.2 to 62.8.

62.2 Where the Authority receives a Request for Information in relation to Information that the Contractor is holding on its behalf and which the Authority does not hold itself the Authority shall refer to the Contractor such Request for Information as soon as practicable and in any event within five (5) Business Days of receiving such Request for Information and the Contractor shall:

62.2.1 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

62.2.2 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 FOI(S)A or Regulation 5 of the Environmental Information (Scotland) Regulations.

62.3 Following notification under Clause 62.2, and up until such time as the Contractor has provided the Authority with all the Information specified in Clause 62.2.1, the Contractor 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:

62.3.1 whether Information is exempt from disclosure under the FOI(S)A and the Environmental Information (Scotland) Regulations;

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

in no event shall the Contractor respond directly, or allow its Sub-Contractors to respond directly, to a Request for Information unless expressly authorised to do so by the Authority.

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

62.5 The Contractor shall transfer to the Authority any Request for Information received by the Contractor as soon as practicable and in any event within two (2) Business Days of receiving it.

62.6 The Contractor 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 FOI(S)A and the Environmental (Scotland) Regulations.

62.7 In the event of a request from the Authority pursuant to Clause 62.2 the Contractor shall as soon as practicable, and in any event within five (5) Business Days of receipt of such request, inform the Authority of the Contractor'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 FOI(S)A 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 FOI(S)A and as set out in the Fees Regulations (the **Appropriate Limit**) the Authority shall inform the Contractor in writing whether or not it still requires the Contractor to comply with the request and where it does require the Contractor 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 the Authority is entitled to under section 10 of the FOI(S)A. In such case, the Authority shall notify the Contractor of such additional days as soon as practicable after becoming aware of them and shall reimburse the Contractor for such costs as the Contractor incurs in complying with the request to the extent it is itself entitled to reimbursement of such costs in accordance with its own FOI(S)A policy from time to time.

62.8 The Contractor acknowledges that (notwithstanding the provisions of Clause 61 (*Confidentiality*)) the Authority may, acting in accordance with the Scottish Ministers Code of Practice on the Discharge of Functions of Public Authorities under Part 6 of the Freedom of Information (Scotland) Act 2002 (the **Code**), and/or having full regard to any guidance or briefings issued by the Scottish Information Commissioner or the Scottish Ministers, be obliged under the FOI(S)A, or the Environmental Information (Scotland) Regulations to disclose Information concerning the Contractor or the Project:

62.8.1 in certain circumstances without consulting with the Contractor; or

62.8.2 following consultation with the Contractor and having taken their views into account,

provided always that where Clause 62.8.1 above applies the Authority shall, in accordance with the recommendations of the Code, draw this to the attention of the Contractor prior to any disclosure.

62.9 In the event that the Contractor is or becomes subject to Environmental Information (Scotland) Regulations or FOI(S)A it shall comply with its obligations under Environmental Information (Scotland) Regulations and FOI(S)A. 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 the Contractor.

63. INFORMATION AND AUDIT ACCESS

63.1 The Contractor shall provide to the Authority's Representative all information, documents, records and the like in the possession of, or available to, the Contractor (and to this end the Contractor shall use all reasonable endeavours to procure that all such items in the possession of the Contractor or the Service Provider shall be available to it and the Contractor has included, or shall include, relevant terms in all contracts with the Contractor or the Service Provider to this effect) as may be reasonably requested by the Authority's Representative for any purpose in connection with this Agreement.

63.2 For the purpose of:

63.2.1 the examination and certification of the Authority's accounts; or

63.2.2 any examination pursuant to section 23 of the Public Finance and Accountability (Scotland) Act 2000 of the economy, efficiency and effectiveness with which the Authority has used its resources,

the Auditor General for Scotland may examine such documents as he may reasonably require which are owned, held or otherwise within the control of the Contractor (and the Contractor shall procure that any person acting on its behalf who has such documents and/or other information shall also provide access) and may require the Contractor to produce such oral or written explanations as he considers necessary.

63.3 The Contractor 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, any applicable fire codes, environmental

health, the Scottish Government's Sustainable Procurement Action Plan and the Climate Change (Scotland) Act 2009 (and related orders).¹⁴⁹

64. NOTICES

64.1 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 or by hand, leaving the same at:

If to the Contractor Address:

If to the Authority Address:

64.2 Where any information or documentation is to be provided or submitted to the Authority's Representative or the Contractor Representative it shall be provided or submitted by sending the same by first class post or by hand, leaving the same at:

If to the Contractor's Representative Address:

If to the Authority's Representative Address:

(copied in each case to the Authority)

64.3 Either party to this Agreement (and either Representative) may change its nominated address by prior notice to the other party.

64.4 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.

65. NO WAIVER

65.1 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

65.2 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

¹⁴⁹ Any additional project specific reporting points to be added.

this Agreement and any right to claim damages, shall not be deemed a waiver of such right for any continuing or subsequent breach.

66. NO AGENCY

66.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Authority and the Contractor.

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

66.3 Without limitation to its actual knowledge, the Contractor 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 Contractor Party.

67. ENTIRE AGREEMENT

67.1 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.

67.2 Each of the parties acknowledges that:

67.2.1 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

67.2.2 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.

68. THIRD PARTY RIGHTS

Save to the extent expressly provided in this Agreement and, to avoid doubt, without prejudice to the terms of the Funders' Direct Agreement¹⁵⁰ or the rights of any permitted successor to the rights of Contractor or of any permitted assignee, it is expressly declared that no rights shall be conferred under and arising out of this Agreement (whether under the Contract (Third Party Rights) (Scotland) Act 2017 or otherwise) upon any person other than the Authority and Contractor. 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.

69. CONFLICTS OF AGREEMENTS

In the event of any conflict between this Agreement and the Project Documents, the provisions of this Agreement shall prevail.

70. 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.

71. FURTHER ASSURANCE

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

72. GOVERNING LAW AND JURISDICTION

72.1 This Agreement shall be considered as a contract made in Scotland and shall be subject to the laws of Scotland.

72.2 Subject to the provisions of the Dispute Resolution Procedure, both parties agree that the courts of Scotland 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.

73. COUNTERPARTS AND DELIVERY

73.1 This Agreement may be executed in any number of counterparts and by each of the parties on separate counterparts.

73.2 Where executed in counterparts.

¹⁵⁰ Relevant only where the project is being funded via private finance.

- 73.2.1 this Agreement will not take effect until each of the counterparts has been delivered;
- 73.2.2 where any counterpart is being held as undelivered, delivery will take place on the date of delivery agreed [among]/[between] the parties [(the “agreed date”). The agreed date will be inserted [in the testing clause] of this Agreement; and
- 73.2.3 [section 2(3) of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 is hereby excluded and shall not apply to the execution arrangements in respect of this Agreement].

IN WITNESS WHEREOF these presents consisting of this and the preceding [1] pages [together with the schedule [in [1] parts] annexed hereto] are executed in counterpart as follows and DELIVERED on [1]:

Schedule Part 1
DEFINITIONS AND INTERPRETATION

Section 1

In this Agreement unless the context otherwise requires:

[•] Year Maintenance Plan means the plan, to be prepared by or on behalf of the Contractor, for any works for the maintenance or repair of the [*relevant part of the Facilities*], including the renewal or replacement of plant or equipment as necessary, during each rolling [•] year period for the duration of the Project Term;

Actual Completion Date means the later of:

the date stated in the Certificate of Practical Completion issued by the Independent Tester; and

subject to Clause 14.5, the Completion Date;

Actual Liability has the meaning given in Clause 46.7.3;

“Additional Permitted Borrowing” means on any date, the amount equal to any amount of principal outstanding under the Senior Funding Agreements (as the same may from time to time be amended, whether or not with the approval of the Authority) in excess of the amount of principal scheduled under the Senior Funding Agreements at Financial Close to be outstanding at that date;

but only to the extent that:

this amount is less than or equal to the Additional Permitted Borrowings Limit; and

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:

invested as part of any Qualifying Change; or

outstanding from time to time as a result of any drawing under the Senior Funding Agreements as entered into at the date of this Agreement, disregarding any subsequent amendment; or

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

shall not be counted as Additional Permitted Borrowing;

“Additional Permitted Borrowings Limit” means an amount equal to:

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

the higher of:

5% of the Original Senior Commitment; and

the amount of any Additional Permitted Borrowing outstanding on the last day of the period referred to in paragraph (a);

Adjudicator has the meaning given in paragraph 4.1 of 0 (*Dispute Resolution Procedure*);

[Adverse Law means any Change in Law which would if passed into Law have the following effects, and any administrative act of the Government or any minister of the Crown, department, agency, regulator or other public body or official not amounting to a Change in Law but which has (or would, if made, have) the following effects:

remove, transfer to another party or otherwise have a material adverse effect upon the Authority's legal capacity (or obligation) to perform any of its material obligations in relation to the Project which are material to the interests of the Contractor and/or its Funders; or

[amend or repeal (without re-enactment, consolidation or replacement by Law having an equivalent effect) the National Health Service (Residual Liabilities) Act 1996 or the National Health Service (Private Finance) Act 1997;]

provided that in the circumstances referred to in paragraph 0 above, where a Change in Law would have the effect of transferring the legal capacity or obligation of the Authority in relation to such

material obligations to a new entity (an **Authority Substitute**), the relevant Law shall not be an Adverse Law if:

[either:

- A) the provisions of the National Health Service (Residual Liabilities) Act 1996 and the National Health Service (Private Finance) Act 1997 (together the **Protective Legislation**) apply to such Authority Substitute in full (as applied to the Authority as at the date of this Agreement); or
- B) the relevant Law has the same effect in relation to the Authority Substitute as the Protective Legislation; and]

the relevant Law does not otherwise have any adverse material effect on the legal capacity or obligation of the Authority Substitute which affects (or could reasonably be expected to affect) the Authority Substitute's ability to perform any material obligations owed to Contractor [and/or the Funders]in relation to the Project which are material to the interests of the Contractor [and/or its Funders], when compared to the material obligations of the Authority under this Agreement;]¹⁵¹

Agreement means this Agreement including the Schedule;

Ancillary Documents means the [Construction Contract, the Service Contract, the Performance Guarantees and the M&V Contract [and [to be inserted]], all as the same may be amended or replaced from time to time;]¹⁵²

Ancillary Rights means the rights referred to in Section 3 of Schedule Part 5 (*Land Matters*);

Annual Payment has the meaning given in 0 (*Payment Mechanism*);

Authority Assets means the [*insert details of 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, other than the [*reference part of the Facilities relevant to Works of the Contractor*];

Authority Assets Condition Standard means [*insert on a project specific basis*];

Authority Change has the meaning given in 0 (*Change Protocol*);

Authority Change Notice has the meaning given in 0 (*Change Protocol*);

Authority Events of Default has the meaning given in Clause 39.1;

¹⁵¹ For health sector contracts only

¹⁵² Details dependent upon project structure.

Authority Party means any of the Authority's agents, contractors and sub-contractors of any tier and its or their directors, officers and employees at the Facilities with the authority of the Authority but excluding the Contractor, any Contractor Party and statutory undertakers and utilities and "Authority Parties" shall be construed accordingly;

Authority Policies means, subject to Clause 27.5, 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 Clause 27.5 and 0 (*Change Protocol*);¹⁵³

Authority Services means [*to be completed on a project specific basis*];

Authority's Requirements means the requirements of the Authority set out or identified in Section 3 (*Authority's Requirements*) of Schedule Part 6 (*Construction Matters*) as amended from time to time in accordance with the terms of this Agreement;

Authority's Representative means the person so appointed by the Authority pursuant to Clause 8 (*Representatives*);

Availability Deduction means a deduction to be made in calculating a Monthly Payment, calculated in accordance with Section 2 of 0 (*Payment Mechanism*);

Availability Failure has the meaning given in 0 (*Payment Mechanism*);

Base Date has the meaning given in paragraph 16 of 0 (*Interpretation*) of Schedule Part 1 (*Definitions and Interpretation*);

Baseline Consumption shall have the meaning given in Schedule Part 3 (*Measurement and Verification*);

Business Day means a day other than a Saturday, Sunday or a bank holiday in Edinburgh;

Capital Expenditure means capital expenditure (as such term is interpreted in accordance with generally accepted accounting principles in the United Kingdom from time to time);

CDM Regulations has the meaning given in Section 2 (*Safety During Construction/Installation*) of Schedule Part 6 (*Construction Matters*);

Certificate of Practical Completion means a certificate in the relevant form set out in 0 (*Certificates*);

Change has the meaning given in 0 (*Change Protocol*);

¹⁵³ Relevant policies to be identified on a project specific basis.

[Change in Control means:

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

any other arrangements that have or may have or which result in the same effect as paragraph (a) above;]¹⁵⁴

Change in Law means the coming into effect or repeal (without re-enactment or consolidation) in Scotland 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 Scotland in each case after the date of this Agreement;

Collateral Agreements means the M&V Professional's Collateral Agreement, [*add others as appropriate to project structure*];

Commencement Date means [*the date of this Agreement*];

Commercially Sensitive Information means the sub set of Confidential Information listed in [column 1 of 0 (*Commercially Sensitive Information*) in each case for the period specified in column 2 of 0 (*Commercially Sensitive Information*)];

Commissioners has the meaning given in Clause 35.3;

Compensation Event has the meaning given in Clause 29.10;

Compensation Payment has the meaning given in Clause 46.6;

Completion Criteria means the [*Completion Tests*] as defined in Appendix [●] of 0 (*Outline Completion Testing Programme*);

Completion Date means the date described as such in Schedule Part [●] or such revised date as may be specified by the Authority's Representative pursuant to Clause 29 (Delay Events) or such other date as may be agreed by the parties;

Confidential Information means:

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

¹⁵⁴ Requirement for definition depends upon project structure – see notes to clause 58.

to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either party and all Personal Data;and

Commercially Sensitive Information;

Consents means all permissions, consents, approvals, certificates, permits, licences, statutory agreements and authorisations required by Law, and all necessary consents and agreements from any third parties (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 / installation contract*] dated the same date as this Agreement between the Contractor and the Construction 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;]¹⁵⁵

Construction Quality Plan means the document at Section 6 (*Quality Plans (Design and Construction)*) of Schedule Part 6 (*Construction Matters*);

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;

Contract Month means a calendar month provided that:

the first Contract Month shall be the period from and including Payment Commencement Date to and including the last day of the calendar month in which Payment Commencement Date falls; and

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 Year means the period of twelve (12) calendar months commencing on and including the date of this Agreement and each subsequent period of twelve (12) calendar months commencing on each anniversary of the date of this Agreement, provided that the final Contract Year shall be such period as commences on and includes the anniversary of the date of this Agreement that falls in the year in which this Agreement expires or is terminated (for whatever reason) and ends on and includes the date of expiry or earlier termination of this Agreement (as the case may be);

Contractor Event of Default has the meaning given in Clause 40 (Contractor Events of Default);

¹⁵⁵ Dependent upon project structure. Also, it may be appropriate to describe this as the "Installation Contract" on some projects.

Contractor Party means any person engaged by the Contractor in the performance of its obligations under this Agreement including the Contractor's agents, service providers, carriers and contractors (including without limitation the [Construction Contractor, the Service Provider and the M&V Professional]¹⁵⁶) and its and their sub-contractors of any tier and its and their directors, officers, employees, workers and workmen in relation to the Project and "Contractor Parties" shall be construed accordingly;

Contractor's Pre-Completion Testing means the Contractor's testing activities to be carried out in accordance with Clause 17 (*Pre Completion Testing and Completion*);

Contractor's Proposals means the document at Section 4 (Contractor Proposals) of Schedule Part 6 (Construction Matters) as amended from time to time in accordance with Clause 33 (Change Protocol);

Contractor's Representative means the person appointed by the Contractor pursuant to Clause 8 (Representatives);

Contracting Associate means the [Contractor, any Service Provider]¹⁵⁷ and any other entity which performs on behalf of the Contractor any material function in connection with this Agreement or the Project Operations;

Controller has the meaning given in the Data Protection Laws;

Construction Contractor means [●] engaged by the Contractor to carry out the Works and any substitute [*design and/or building and/or installation*] contractor engaged by the Contractor as may be permitted by this Agreement;¹⁵⁸

Convictions means, other than in relation to minor road traffic offences, any previous or pending prosecutions, convictions, cautions and binding-over 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) and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003 Scottish SI 2003/231) or any replacement or amendment to those Orders);

Data Protection Laws means any law, statute, declaration, decree, directive, legislative enactment, order, ordinance, regulation, rule or other binding restriction (as amended, consolidated or re-enacted from time to time) which relates to the protection of individuals with regards to the processing of personal data to which a party is subject, including the Data Protection Act 2018 and

¹⁵⁶ Dependent upon project structure

¹⁵⁷ Dependent upon project structure

¹⁵⁸ Dependent upon project structure

the GDPR or, in the event that the UK leaves the European Union, all legislation enacted in the UK in respect of the protection of personal data;

Data Subject has the meaning set out in the Data Protection Laws;

Deduction means an Availability Deduction;

Deemed Liability has the meaning given in Clause 46.7.3;

Default Interest Rate means two per cent (2%) over LIBOR;

Defects means any defect or fault in the Works and/or the Facilities which occurs due to a failure by the Contractor to meet the Authority's Requirements and/or Contractor's Proposals or otherwise to comply with its obligations under this Agreement;

Delay Event has the meaning given in Clause 29.3;

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 [*relevant part of the Facilities*];

Design Quality Plan means the document at Section 6 (*Quality Plans (Design and Construction)*) of Schedule Part 6 (*Construction Matters*);

Direct Losses means, subject to the provisions of Clause, 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, data and documents made available or issued to the Contractor or any Contractor 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;¹⁵⁹

Dispute has the meaning given in paragraph 1 of 0 (*Dispute Resolution Procedure*);

Dispute Resolution Procedure means the procedure set out in 0 (*Dispute Resolution Procedure*);

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

¹⁵⁹ Specific consideration will need to be given on a project specific basis to the status of 'reliance data'/historic consumption data to the extent that such data is used as part of the Investment Grade Proposal process for a project.

damage to property, or contamination of the environment, in each case on a scale beyond the capacity of the emergency services or preventing the Services operating under normal circumstances and requiring the mobilisation and organisation of the emergency services;

Encumbrance means any option, right of pre-emption, pledge, security, interest, lien, charge, mortgage, lease, licence, claim, condition, retention or other encumbrance or restriction whether imposed by agreement, by law or otherwise;

Energy Conservation Measure or **ECM** means the energy efficiency asset(s) installed by the Contractor to meet the Guaranteed Energy Cost Performance, including but not limited to [*to be populated on a project specific basis*];

Energy Performance Notice means a notice validly served by the Authority's Representative on the Contractor under Clause 45 (*Guaranteed Performance Default and Termination*), specifying that it is an Energy Performance Notice and setting out the circumstances that have given rise to the issue thereof;

Energy Performance Year means the period of twelve (12) calendar months commencing on and including the Actual Completion Date and each subsequent period of twelve (12) calendar months commencing on each anniversary of the Actual Completion Date, provided that the final Energy Performance Year shall be such period as commences on and includes the anniversary of the Actual Completion Date that falls in the year in which this Agreement expires or is terminated (for whatever reason) and ends on and includes the date of expiry or earlier termination of this Agreement (as the case may be);

Energy Termination Notice means a notice validly served by the Authority's Representative on the Contractor under Clause 45 (*Guaranteed Performance Default and Termination*), specifying that it is an Energy Termination Notice and setting out the circumstances that have given rise to the issue thereof;

Environmental Information (Scotland) Regulations means the Environmental Information (Scotland) Regulations 2004 together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant Government Department in relation to such regulations;

Equipment means [●];¹⁶⁰

Estimated Deductions has the meaning given in Clause 34.2.1;

Excusing Cause has the meaning given in Clause 51.2;

¹⁶⁰ For consideration on a project specific basis

Expiry Date means [midnight] on [date [to be at least 8 years after the Commencement Date]];

Facilities means the [insert reference to public building or buildings at which ECMs are being installed and any relevant areas of curtilage], together with all supporting infrastructure and other amenities located at [public building] (including as a minimum all aspects detailed within Appendix [●] to Section [●] (*Service Level Specification*) of 0 (*Service Requirements*)) as required to enable Contractor 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;

Fees Regulations means the Freedom of Information (Fees for Required Disclosure (Scotland)) Regulations 2004;

Final Completion Testing Programme means the programme jointly developed and agreed by the Authority and Contractor in accordance with the provisions of Clause 17.1;

Financial Close means the date of this Agreement;

[**Financial Model** means [●];]¹⁶¹

First Party has the meaning given in Clause 35.3;

FOI(S)A means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation (as defined in section 73 of the Freedom of Information (Scotland) Act 2002) made under the Freedom of Information (Scotland) Act 2002 from time to time together with any guidance and/or codes of practice issued by the Scottish Information Commissioner or relevant Government department in relation to such Act;

Force Majeure has the meaning given in Clause 31 (*Force Majeure*);

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 the processing of personal data and repealing Directive 95/46/EC;

[**Funders** means all or any of the persons who provide financing or funding in respect of the Project Operations under the Funding Agreements including [●] and, where the context so permits, prospective financiers or funders;]¹⁶²

[**Funders' Direct Agreement** means the agreement to be entered into between the Authority, the Senior Funders and the Contractor in the form set out in (*Funders' Direct Agreement*);]¹⁶³

¹⁶¹ Need for and terms of definition to be reviewed in light of the funding solution for the Project.

¹⁶² Need for and terms of definition to be reviewed in light of the funding solution for the Project.

¹⁶³ Relevant only where project is being funded via project finance and to be in accordance with the requirements of the Eurostat EnPC Guide.

[Funding Agreements] means all or any of the agreements or instruments to be entered into by the Contractor 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 the Contractor or any of its Associates relating to the rescheduling of their indebtedness or the refinancing of the Project Operations);]¹⁶⁴

[Funding Default] means [●];]¹⁶⁵

GECP Testing means the Contractor's testing activities carried out in accordance with Clause 18.1;

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 Scottish Ministers;

Guaranteed Energy Cost Performance means [insert level of guaranteed consumption saving for each Utility (being in each case the consumption reduction as compared with a Baseline Consumption which is identified and agreed through the Investment Grade Proposal which is submitted and agreed as part of the framework mini-competition award procedure, expressed as a financial value -the principal rule in terms of Eurostat requirements is that the level of guaranteed savings over the duration of the Agreement is equal to or greater than the sum of the operational payments to be made by the Authority to the Contractor over the duration of the Agreement and any amount of government financing that is not repayable by the Contractor as calculated at financial close];

H&S Conviction has the meaning given in Clause 40.1.5;

Handback Amount has the meaning given in 0 (*Handback Procedure*);

Handback Bond has the meaning given in 0 (*Handback Procedure*);

Handback Certificate means the certificate of confirmation that the [*relevant part of the Facilities*] comply with the Handback Requirements in the relevant form set out in Schedule Part 22 (*Certificates*);

Handback Programme has the meaning given in 0 (*Handback Procedure*);

Handback Requirements has the meaning given in 0 (*Handback Procedure*);

¹⁶⁴ Need for and terms of clause to be reviewed in light of the funding solution for the Project.

¹⁶⁵ As above

Handback Works has the meaning given in 0 (*Handback Procedure*);

Health and Safety Regime means the Food Safety Act 1990 (and associated regulations), the Health & Safety at Work etc. Act 1974 (and associated regulations), the Fire Precautions Act 1971, the Environmental Protection Act 1990 and the Water Industry (Scotland) Act 2002 and any similar or analogous health, safety or environmental legislation in force from time to time;

Independent Tester means [●] or such substitute independent tester as may be permitted pursuant to this Agreement;

Independent Tester Contract means the contract dated the same date as this Agreement in the form set out in 0 (*Independent Tester Contract*) or any replacement thereof among the Contractor, the Authority and the Independent Tester;

Indirect Losses has the meaning given in Clause 54 (*Exclusions and Limits on Liability*);

Information has the meaning given under section 73 of the Freedom of Information (Scotland) Act 2002;

[Initial Funding Agreements means [●] in the Agreed Form;]

Insurance Proceeds Account means the account numbered [●] in the joint names of the Contractor and the Authority with the [*bank*];

Insurance Proceeds Account Agreement means the agreement in the form set out in [●];

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

Insurance Term means any term and/or condition required to be included in a policy of insurance by Clause 53 (*Insurance*) and/or 0 (*Insurance Requirements*) but excluding any risk;

Intellectual Property means all registered or unregistered trademarks, service marks, patents, registered designs, utility models, applications for any of the foregoing, copyrights, unregistered designs, the sui generis rights of extraction relating to databases, trade secrets and other confidential information or know-how;

Intellectual Property Rights means the Intellectual Property which (or the subject matter of which) is created, brought into existence, acquired, used or intended to be used by Contractor, any Contractor Party or by other third parties (for the use by or on behalf of or for the benefit of Contractor) for the purposes of the design or construction of the Works, the operation, maintenance,

improvement and/or testing of the [*relevant part of the Facilities*] or the conduct of any other Project Operation or otherwise for the purposes of this Agreement;

IT means information technology systems, hardware and software;

Law means:

any applicable statute or proclamation or any delegated or subordinate legislation;

any enforceable community right within the meaning of section 2(1) of the European Communities Act 1972;

any applicable guidance, direction or determination with which the Authority and/or Contractor is bound to comply to the extent that the same are published and publicly available or the existence or contents of them have been notified to Contractor by the Authority; and

any applicable judgement of a relevant court of law which is a binding precedent in Scotland,

in each case in force in Scotland;

LIBOR means the rate per annum determined by [●] Bank plc to be the offered rate for six (6) month sterling deposits in the London interbank market which appears on Telerate Page 3750 (or such other page as may replace that page on the Dow Jones Telerate service);

Maintenance Works means any works for maintenance or repair of the Facilities that are necessary to ensure that the [*relevant part of the Facilities*] are maintained in accordance with Service Level Specification and Method Statements and that they comply with the Authority's Requirements and Contractor's Proposals (including, without limitation, the renewal or replacement of any Plant or equipment) throughout the Project Term;

Material Failure in the Guaranteed Energy Cost Performance shall have the meaning given in Schedule Part 3 (*Measurement and Verification*);

[Medical Contamination means a disease carrying agent which cleaning and prevention of infection or contamination techniques in use in accordance with Good Industry Practice and this Agreement cannot substantially prevent or cannot substantially remove with the result that:

it is unsafe to admit patients or staff to the relevant area or to use the area for the purpose for which it is intended; and

the area cannot be made safe for the admission of patients or staff]¹⁶⁶;

¹⁶⁶ For NHS projects only

M&V Plan Change Notice means a notice served under paragraphs 2.1 or 3.1 of section 3 of Schedule Part 16 (*Change Control*);

M&V Contract means [●];¹⁶⁷

M&V Professional means [●];¹⁶⁸

M&V Professional's Collateral Agreement means [●];¹⁶⁹

M&V Reporting Date means [[] Business Days after] each anniversary of the Actual Completion Date until the expiry or earlier termination of this Agreement;

M&V Savings Report means the report of that name as specified in [*reference*] of Schedule Part 3 (*Measurement and Verification*);

Method Statements means the method of providing a Service as set out or identified in Section 2 (*Method Statements*) of 0 (*Service Requirements*) as amended from time to time in accordance with Clause 33 (*Change Protocol*) and Clause 22 (*The Services*);

Monthly Payment has the meaning given in 0 (*Payment Mechanism*);

Monthly Service Report means a monthly report to be prepared by the Contractor and provided to the Authority in accordance with the relevant provisions in 0 (*Service Level Specification*) of 0 (*Service Requirements*);

NHS means the National Health Service;¹⁷⁰

Operational Term means the period from the Actual Completion Date until the end of the Project Term;

Outline Completion Testing Programme means the programme setting out the standards, specifications, procedures and other requirements for the carrying out and completion of the testing activities of the parties set out in outline in 0 (*Outline Completion Testing Programme*);

Payment Commencement Date means the Actual Completion Date;

Payment Mechanism means 0 (*Payment Mechanism*);

¹⁶⁷ It is assumed that there will be a separate M&V Contract let by the Contractor for each project, however the details should be considered on a project by project basis.

¹⁶⁸ As previous footnote

¹⁶⁹ As previous footnote

¹⁷⁰ For NHS projects only

Performance Guarantees means the guarantees to the Contractor in respect of [the Construction Contract, the Service Contract [*insert details of any other guarantees to be given*]] which, as at the date of this Agreement are in the Agreed Form;¹⁷¹

[Permitted Borrowing means [●];¹⁷²

Personal Data has the meaning given in Data Protection Laws;

Personal Data Breach has the meaning given in Data Protection Laws;

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 [*relevant part of the Facilities*] (including without limitation for any Authority Change);

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;

Process has the meaning given in the Data Protection Laws and cognate expressions shall be construed accordingly;

Processor has the meaning given in the Data Protection Laws;

Programme means the programme set out in 0 (*The Programme*) as revised and issued by the Contractor (or on its behalf) from time to time pursuant to Clause 14 (*Programme and Dates for Completion*);

Programmed Maintenance means the maintenance work which the Contractor is to carry out in accordance with Schedule of Programmed Maintenance;

Programmed Maintenance Information has the meaning given in Clause 23.3;

Prohibited Act has the meaning given in Clause 44 (*Corrupt Gifts and Payments*);

Project has the meaning given in Recital A;

¹⁷¹ Dependent upon project structure.

¹⁷² To be developed as required where project is being funded via project finance.

Project Data means:

all [Design Data];

all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the provision of the Services; and

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 the Contractor's Pre-Completion Testing and GECP Testing, the management and provision of the Services, the activities undertaken to facilitate achievement of the Guaranteed Energy Cost Performance and the performance of all other obligations of Contractor 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;

[Proposal for an Adverse Law means:

in the case of a bill, the bill being introduced by the Government or receiving the support of the Government at its second reading in the first House of Parliament into which it is introduced or the bill passing a second reading in the first House of Parliament into which it is introduced; or

in the case of a bill passing through the Scottish Parliament, the bill being introduced by the Scottish Government or receiving the support of the Scottish Government at Stage 2 in the Scottish Parliament or the bill passing Stage 2 in the Scottish Parliament; or

in the case of subordinate legislation, the proposed statutory instrument or order being laid before Parliament in draft; or

in the case of a directive, regulation or decision of the European Union, its adoption; or

in the case of an administrative act as referred to in the definition of Adverse Law, any of the following prior or preparatory to the making of such an act; or

the taking by the Authority, the Government, a minister of the Crown, or a department, agency, regulator or other public body official of any step in a process defined by Law for the making of such administrative acts, other than any early stages of such process (such as, without limitation, consultation or information gathering) following the completion of which

further substantive steps remain in such a process before the making of such an administrative act can occur; or

any communication from the Government, a minister of the Crown, or the department, agency or regulator or other public body or official responsible for making such administrative acts, to the effect that such an administrative act will be made;]¹⁷³

Qualifying Change means (unless expressly stated otherwise) [*a change under section 2 of the change protocol in respect of which an approval has been issued*] provided that any necessary changes required to be made to any Project Document and/or Ancillary Document pursuant to 0 (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 6 (*Quality Plans (Design and Construction)*) of Schedule Part 6 (*Construction Matters*), and the Services Quality Plan, prepared in accordance with Section 3 (*Service Quality Plan*) of 0 (*Service Requirements*), as required to be implemented by Contractor in accordance with Clause 20 (*Quality Assurance*);

[Refinancing has the meaning given in 0 (*Refinancing*);]¹⁷⁴

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 Scottish Government or the Scottish Parliament);

Relevant Event has the meaning given in 0 (*Change Protocol*);

Relevant Service Transfer Date has the meaning given in Clause 25.1;

Relevant Tax Liability has the meaning given in Clause 46.7.3;

Relief has the meaning given in Clause 46.7.1;

Relief Events has the meaning given in Clause 30 (*Relief Events*);

Request for Information has the meaning set out in the FOI(S)A or the Environmental Information (Scotland) Regulations as relevant (where the meaning set out for the term **request** shall apply);

Required Action has the meaning given in Clause 24.7;

[Reserved Rights means the matters referred to in Section 2 of Schedule Part 5 (*Land Matters*);]

¹⁷³ For NHS projects only

¹⁷⁴ Relevant only where project is being funded via project finance.

Restricted Person means any person who has a material interest in the production of tobacco products and/or alcoholic beverages;

Retail Prices Index or **RPI** means the Retail Prices Index (All Items) as published by the Office for National Statistics from time to time (the **Index**), or, failing such publication or in the event of a fundamental change to the Index, such other index as the parties may agree, or such adjustments to the Index as the parties may agree (in each case with the intention of putting the parties in no better nor worse position than they would have been in had the Index not ceased to be published or the relevant fundamental change not been made) or, in the event that no such agreement is reached, as may be determined in accordance with the Dispute Resolution Procedure;

Reviewable Design Data means the Design Data listed at Section 5 (*Reviewable Design Data*) of Schedule Part 6 (*Construction Matters*);¹⁷⁵

Schedule means the schedule (comprising [●] parts) attached to this agreement;

Second Party has the meaning given in Clause 35.3;

Schedule of Programmed Maintenance means the programme referred to in Clause 23.1 to be submitted to the Authority's Representative by Contractor in accordance with 0 (*Review Procedure*);

[Senior Funders means [specify relevant funders];]¹⁷⁶

["Senior Funding Agreement" means [] as at the date of this Agreement and as amended as permitted under Clause 4 (Project Documents)]

[Service Contract means the contract dated the same date as this Agreement between Contractor and the Service Provider (which as at the date of this Agreement is in the Agreed Form), by which the Contractor will procure the performance of the Services (as amended or replaced from time to time in accordance with this Agreement);]¹⁷⁷

Service Level Specification means the requirements of the Authority set out in 0 (*Service Level Specification*) of 0 (*Service Requirements*) as amended from time to time in accordance with Clause 33 (*Change Protocol*);

Service Provider means [*insert description of Service Provider*] or any other person engaged by the Contractor from time to time as may be permitted by this Agreement to procure the provision of the Services (or any part of them);¹⁷⁸

¹⁷⁵ To consider on a project specific basis the "Reviewable Design Data" concept is appropriate.

¹⁷⁶ Relevant only where project is being funded via project finance.

¹⁷⁷ Dependent upon project structure

¹⁷⁸ As above

Services means the services to be provided, managed and/or procured by the Contractor for the Authority in accordance with 0 (*Service Requirements*) as subsequently amended or adjusted in accordance with this Agreement;

Services Quality Plan means the document set out in Section 3 (*Services Quality Plan*) of 0 (*Service Requirements*);

Significant Failure in the Guaranteed Energy Cost Performance shall have the meaning given in Schedule Part 3 (*Measurement and Verification*);

Site means the [land/buildings] made available to the Contractor for the Project outlined in red on [insert details of relevant plan];¹⁷⁹

Snagging Matters means minor items of outstanding work which would not materially impair the Authority's use and enjoyment of the Facilities;

Snagging Notice means the notice to be issued by the Authority's Representative in accordance with Clause 17.6 (*Completion Certificate*);

Sub-Contractor means any third party (including the Construction Contractor and a Services Provider) who enters into any Sub-Contract;¹⁸⁰

Sub-Contracts means the contracts entered into by or between the Contractor, the Construction Contractor and/or a Service Provider and other third parties in relation to any aspect of the Project Operations;¹⁸¹

Supervisory Authority means the UK Information Commissioner's Office (or its successor authority) and any authority within the meaning given in the Data Protection Laws;

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 of Schedule Part 5 (*Land Matters*);]

TPL Risk means a risk which is required to be insured under the third party liability insurance policy;

Transfer Regulations means the Transfer of Undertaking (Protection of Employment) Regulations 2006 (SI No. 246);

¹⁷⁹ The intention is that this relates to the works/installation site(s) only

¹⁸⁰ Dependent upon project structure

¹⁸¹ Dependent upon project structure

Transferring Staff has the meaning given in Clause 25.2;

Uninsurable means in relation to a risk, either that:

insurance is not available to the Contractor in respect of the Project in the worldwide insurance market with reputable insurers of good standing in respect of that risk; or

the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom;

Unprogrammed Maintenance Work has the meaning given in Clause 23.7;

Unreasonable Act means any act or omission which is contrary to any reasonable instruction, guidance or rules for the operation or management of the Facilities;

Utilities [has the meaning given in the Service Level Specification];

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 35 (*VAT and Construction Industry Tax Deduction Scheme*);

Warning Notice means a notice validly served by the Authority's Representative on the Contractor under Clause 24, specifying that it is a Warning Notice and setting out the circumstances that have given rise to the issue thereof; and

Works means the design (including the preparation of all Design Data), construction, installation, testing and completion of the [*works to the Facilities*] (including any temporary works) [and the installation of Equipment] to be performed by the Contractor in accordance with this Agreement (as varied, amended or supplemented from time to time in accordance with this Agreement).

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 Schedule are references to Clauses, Sub-clauses, paragraphs, sub-paragraphs and parts of the Schedule 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 Schedule and Attachments (if any) to this Agreement are integral parts of this Agreement and a reference to this Agreement includes a reference to the Schedule and the Attachments (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. 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 be in English.
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.
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 32 (*Changes in Law*) and 0 (*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 57.1, 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 57.1, references to other persons (other than the Authority and the Contractor) 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 the Contractor 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 the Contractor’s obligations, duties and responsibilities shall be construed as separate obligations, duties and responsibilities owed to the Authority and to be performed at Contractor’s own cost and expense.
16. Unless expressly stated otherwise, references to amounts or sums expressed to be “index linked” are references to amounts or sums in [give base date reference] (**Base Date**) prices which require to be adjusted whenever the provision containing the amount or sum is given effect in accordance with this Agreement to reflect the effects of inflation after that date. The adjustment shall be measured by changes in the relevant index published for that Contract Year as calculated in accordance with the following formula:
- $$\text{Amount or sum in [date] prices} \times \frac{RPI_d}{RPI_0}$$
- Where RPI_d is the value of the Retail Prices Index published or determined with respect to the month of [relevant month, or other date] most recently preceding the date when the provision in question is to be given effect and RPI₀ is the value of the Retail Prices Index in respect of [date] being [●].
17. 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.

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 Part 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.

Schedule Part 2
COMPLETION DOCUMENTS

Section 1

Documents to be Delivered by the contractor

Unless an original document is specifically requested, a copy (certified by an officer of the Contractor as being a true copy) of each of the following documents is to be delivered by the Contractor to the Authority in accordance with Clause 2.1 (*Execution and Delivery of Documents*) of this Agreement:

1. [Collateral Agreement executed by the M&V Professional and any other Collateral Agreements provided by key-subcontractors]]
2. [The Initial Funding Agreements and certification from the Contractor 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 the Contractor under the Initial Funding Agreements have been satisfied or waived, accompanied by evidence of the same.]
3. The [Construction Contract, the Services Contract, the M&V Contract and the Performance Guarantees], executed by the parties to such agreements.
4. [An original of the [Funders' Direct Agreement]¹⁸², the [other relevant agreements] and the brokers letters of undertaking relating to the Insurances referred to in paragraph 7 below in the Agreed Form, executed by the parties to such agreements (other than the Authority).]
5. [relevant corporate and shareholder authorisations and documentation, where SPV structure is used]
6. [Evidence of the share subscriptions or other shareholder funding commitments, where SPV structure used.]
7. The insurance broker's letter of undertaking, evidence of the insurances required in accordance with Clause 53 (*Insurances*) having been taken out by the Contractor 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.
8. [Two (2) computer disk/electronic/paper copies of the Financial Model audited by [●].]¹⁸³
9. An original duly executed copy of this Agreement.

¹⁸² Relevant to projects which are funded via project finance

¹⁸³ Relevant to projects which are funded via project finance

Section 2
Documents to be Delivered by The Authority

The Authority shall deliver to the Contractor the following documents:

1. An original copy of the [Funders' Direct Agreement]¹⁸⁴, [*other relevant agreements*] and this Agreement, duly executed by the Authority.
2. [*Authority authorisations*]

¹⁸⁴ Relevant to projects which are funded via project finance

Schedule Part 3
MEASUREMENT AND VERIFICATION

[M&V Process to be in accordance with Eurostat EnPC Guide requirements:

- *An objective and robust regime*
- *Liability for performance is Contractor's risk (not Authority's)*
- *Routine testing (at least annually)*
- *Grace periods*
- *Calculating delivery of savings (e.g energy costs only, not energy and O&M costs)*
- *Routine adjustments*
- *Routine/Non-routine adjustments (only those reasonably out with the Partner's control)*

Schedule Part 4
FUNDERS' DIRECT AGREEMENT¹⁸⁵

[Document to be developed and included for private finance projects]

THIS AGREEMENT IS MADE ON

AMONG:

- (1) [] (the "**Authority**")
- (2) [] [(the "**Agent**" for the Senior Funders) on behalf of itself and the Senior Funders]/(the "**Senior Funder**")]; and
- (3) [] company no [] whose registered office is at [] ("**EnPC Contractor**")

IT IS AGREED AS FOLLOWS:

INTERPRETATIONS

1.1 **Definitions¹⁸⁶**

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 EnPC and all other documents to which the Authority and The EnPC Contractor are parties pursuant to the EnPC;
"Collateral Agreements"	means [];
"Collateral Agreement Counterparty"	means one of the parties to the Collateral Agreements (other than the Authority or the EnPC Contractor);
"EnPC"	means the energy performance contract dated [] between the EnPC Contractor and the

¹⁸⁵ The purpose of the Funders Direct Agreement is to provide rights for the Funders to step-in and manage the project where otherwise the right and obligation of the Contractor to perform the project would terminate. The Funders require this right because their preferred approach will generally be to keep the project alive and preserve the project's income stream, rather than allowing the Agreement to terminate, as this represents the Funders' best chance of being fully repaid.

The Funders Direct Agreement sets out arrangements whereby the effect of any notice of termination issued by the Authority will be suspended and the Funders will have a specified period to put in place alternative contractors to perform the project. Key issues will include the length of the suspensory period and the liability (if any) the Funders will incur while trying to save the project.

¹⁸⁶ A number of terms are defined by reference to various funding agreements. If this is the case a Master Definition Schedule should be appended to the Direct Agreement setting out all such definitions so that the intended meaning of all such terms is clear to all parties

	Authority relating to the [Project];
EnPC Contractor Event of Default	shall have the meaning given to it in the EnPC;
“Enforcement Event”	means [];
“Event of Default”	shall have the meaning given to it in the [Credit] Agreement;
“Event of Insolvency”	means [incorporate appropriate cross references [clause 40.1] from the EnPC] (inclusive) of the EnPC Contractor Event of Default;
“Final Payment Date”	means [];
“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 the EnPC Contractor appointed under the Security Documents; (c) a person directly or indirectly owned or controlled by the [Agent and/or any [Senior Funder]s]; 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"> prior to the Payment Commencement Date, ending [eighty (80)] Business Days later; and (e) on or following the Payment Commencement Date, ending [sixty (60)] Business Days later;¹⁸⁷
“Security Documents”	[list the security documents forming part of the [Senior] Funding Agreements];

¹⁸⁷ In schemes where there is phased completion, the move to less Business Days should occur at the payment commencement date for the first phase.

“Senior Debt Discharge Date”	means the date on which all amounts owing by the Contractor to the Senior Funder[s] under the [Senior] Funding Agreements have been irrevocably paid in full;
“Senior Funder[s]”	means [insert details if not included in EnPC];
“Step-In Date”	means the date on which the [Agent/Senior Funder] gives the Authority a Step-In Notice;
“Step-In Notice”	means the notice given by the EnPC Contractor to the Authority pursuant to Clause 5 (<i>Representative</i>) stating that the [Agent/Senior Funder] 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: <p style="margin-left: 40px;">the Step-Out Date;</p> <p style="margin-left: 40px;">(f) the date of any transfer under Clause 8 (<i>Novation</i>);</p> <p style="margin-left: 40px;">(g) the date of any termination for breach under Clause 6 (<i>Step-In Period</i>); and</p> <p style="margin-left: 40px;">(h) the date of expiry of the EnPC;</p>
“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/Senior Funder] 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: <p style="margin-left: 40px;">having the legal capacity, power and authority to become a party to and perform the obligations of the EnPC Contractor under the Authority Project Documents; and</p> <p style="margin-left: 40px;">(i) 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</p>

enable it to perform the obligations of the EnPC Contractor under the Authority Project Documents;

“Termination Notice”

means a notice given by the Authority to the [Agent/Senior Funder] under Clause 3.2;

“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 the EnPC Contractor 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 EnPC.

“

1.2 Interpretation

1.2.1 Capitalised terms defined in the EnPC 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 reference in this Agreement to any clause, sub-clause, schedule or annex is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause, schedule or annex of this Agreement;

references to this Agreement or to any other such document shall include any permitted variation, amendment or supplements to such document;

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;

references to a person includes firms and corporations and their successors and permitted assignees or transferees;

words in this Agreement importing any one gender include both other genders and may be used interchangeably; and

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 the EnPC Contractor's rights under the Authority Project Documents¹⁸⁸ effected by the EnPC Contractor in favour of the [Senior Funder[s]] under the Security Documents.
- 2.2 The Authority confirms that it has not received notice of any other security interest granted over the EnPC Contractor'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 Funder[s]] 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 [Holdco] in favour of the [Agent/Senior Lender] over the entire issued share capital of the EnPC Contractor.¹⁸⁹
- 2.5 [For the purposes of Clause 34.3 of the EnPC, the EnPC Contractor and the Agent hereby authorise and instruct the Authority (and the Authority agrees) to pay all sums payable to the EnPC Contractor under the Authority Project Documents to the [account] and the EnPC Contractor and the Authority agree that upon the occurrence of an Enforcement Event, if so directed in writing by the [Agent/Senior Funder] upon giving reasonable notice¹⁹⁰, the Authority shall pay any sum which it is obliged to pay to the EnPC Contractor under the Authority Project Documents to a bank account specified by the [Agent/Senior Funder].]
- 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

¹⁸⁸ It may be appropriate to incorporate an acknowledgement of the creation of security over other project documents (e.g. any leases to the Contractor if applicable). It may also be appropriate to include in this clause an acknowledgement (if applicable) that Service Payments due from the Authority are to be made to a designated account of the Contractor held by the Agent.

¹⁸⁹ This clause is not mandatory and will only be relevant in cases where a holding company structure is adopted by the sponsors.

¹⁹⁰ The Authority should not be exposed to the possibility that it may be too late to revoke a payment to the Contractor which has already been set up, such that the Authority is at risk of having to pay twice.

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/Senior Funder] under this Agreement shall be extinguished upon the Final Payment Date.

3 NO TERMINATION WITHOUT NOTICE

- 3.1 Subject only to Clause 3.2, the Authority may serve notice terminating the EnPC at any time if it is entitled to do so under the terms of the EnPC.

- 3.2 The Authority shall not terminate or serve notice terminating the EnPC in respect of an EnPC Contractor Event of Default without giving to the [Agent/Senior Funder]:

- 3.2.1 at least the Required Period of prior written notice (a "**Termination Notice**") stating:

that an EnPC Contractor Event of Default has occurred and the proposed Termination Date; and

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 the EnPC Contractor to the Authority, and any other liabilities or obligations of the EnPC Contractor of which the Authority is aware (having made proper enquiry) which are:

accrued and outstanding at the time of the Termination Notice; and/or

which will fall due on or prior to the end of the Required Period, under the EnPC.

- 3.3 On becoming aware of an Enforcement Event the [Agent/Senior Funder] 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/Senior Funder] 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/Senior Funder] any non payment notice which the Authority serves on the EnPC Contractor pursuant to Clause 40.1.10 (Payment) of the EnPC.

4 NO LIQUID MARKET

- 4.1 At any time during the Required Period the [Agent/Senior Funder] may issue a written notice (the "**No Liquid Market Notice**") to the Authority setting out the reasons why the [Agent/Senior Funder] 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/Senior Funder] 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 56 (*Dispute Resolution Procedure*) of the EnPC that no Liquid Market exists, the EnPC shall automatically terminate and the provisions of paragraph 5 (*No Retendering Procedure*) (*Compensation for EnPC Contractor Default*) of Schedule Part 17 (*Compensation on Termination*) to the EnPC (*No Retendering*) shall apply.
- 4.4 If any dispute relating to this Clause 4 (*No Liquid Market*) is determined pursuant to Clause 17, the Required Period shall be extended by the period of time spent determining such dispute pursuant to Clause 17.

5 REPRESENTATIVE

- 5.1 Subject to Clause 5.2 and without prejudice to the [Agent's/Senior Funder's] rights under the Security Documents, the [Agent/Senior Funder] may give the Authority a Step-In Notice at any time:
- 5.1.1 during which an EnPC Contractor Event of Default or an Enforcement Event¹⁹¹ is subsisting (whether or not a Termination Notice has been served); or
- 5.1.2 during the Required Period.
- 5.2 The [Agent/Senior Funder] shall give the Authority not less than 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.

¹⁹¹ 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 EnPC Contractor Event of Default (and therefore no threat of termination of the EnPC).

- 5.3 On the issue of the Step-In Notice, the Appointed Representative shall assume jointly with the EnPC Contractor the rights of the EnPC Contractor 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 the EnPC Contractor.

6 STEP-IN PERIOD

- 6.1 Notwithstanding Clause 3 (*No Termination Without Notice*) above, the Authority may terminate the EnPC if:

6.1.1 any amount referred to in Clause 3.2.20 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 3.2.20 above has not been paid on or before the last day of the Required Period;

6.1.3 amounts, of which the Authority was not aware (having made proper enquiry) at the time of the Termination Notice, subsequently become payable and are not discharged on or before the date falling twenty (20) Business Days after the date on which the liability of the EnPC Contractor for these amounts is notified to the [Agent/Senior Funder] 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 EnPC provided that Deductions and/or related Warning Notices that arose pursuant to Schedule Part 14 (*Payment Mechanism*) to the EnPC 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 EnPC) shall be taken into account after the Step-Out Date.

- 6.2 The Authority shall not terminate the EnPC during the Step-In Period on grounds:

6.2.1 that the [Agent/Senior Funder] 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:

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 EnPC for non-completion of the Works under Clause (Long stop) of the EnPC; or

the grounds arose after the Actual Completion Date, and neither the Appointed Representative nor the EnPC Contractor is using all reasonable endeavours (including implementation of any remedial programme) to remedy any breach of the EnPC which:

arose prior to the Step-In Date; and

is continuing (and capable of remedy); and

would have entitled the Authority to terminate the EnPC; or

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 the EnPC Contractor

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 cancelled¹⁹²; and

7.2.2 the Authority shall no longer deal with the Appointed Representative and shall deal with the EnPC Contractor in connection with the Authority Project Documents.

7.3 The EnPC Contractor shall continue to be bound by the terms of the EnPC, notwithstanding the occurrence of a Step-In Notice, a Step-In Period, a Step-Out Notice, Step-Out Date, any action by the [Agent/Senior Funder] [or Appointed Representative or the Senior Funders] and/or any provision of this Agreement.

8 NOVATION

¹⁹² 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 EnPC. 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.

- 8.1 Subject to Clause 8.2, at any time:
- 8.1.1 after an Enforcement Event has occurred; or
 - 8.1.2 during the Step-In Period,

the [Agent/Senior Funder] may, subject to Clause 8.2, on not less than twenty (20) Business Days' prior notice to the Authority and any Appointed Representative, procure the transfer of the EnPC Contractor's rights and liabilities under the Authority Project Documents to a Suitable Substitute Contractor in accordance with the provisions of Clause 8.4.

- 8.2 The Authority shall notify the [Agent/Senior Funder] as to whether any person to whom the [Agent/Senior Funder] proposes to transfer the EnPC Contractor'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/Senior Funder] of all information reasonably required by the Authority to decide whether the proposed transferee is a Suitable Substitute Contractor.
- 8.3 The Authority shall not unreasonably withhold or delay its decision on whether the proposed transferee is a Suitable Substitute Contractor and it shall, without limitation, be reasonable for the Authority to withhold its consent if there are unremedied breaches under the Authority Project Documents and there is no rectification plan reasonably acceptable to the Authority in respect of the breaches.
- 8.4 Upon the transfer referred to in Clause 8.1 becoming effective:
- 8.4.1 The EnPC Contractor 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 the EnPC Contractor;
 - 8.4.3 the rights of the EnPC Contractor 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 the EnPC Contractor;
 - 8.4.5 any then subsisting ground for termination of the EnPC 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 Funder[s] 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 Part 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 EnPC Contractor Event of Default has occurred.

9 MISCELLANEOUS

- 9.1 The Authority shall at the EnPC Contractor's expense, take whatever action the Agent, an Appointed Representative or a Suitable Substitute Contractor taking a transfer in accordance with Clause 8.1 may require for perfecting any transfer or release under paragraph 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/Senior Funder] or Appointed Representative or Suitable Substitute Contractor reasonably requires.
- 9.2 The Authority shall not take any action to wind up, appoint an administrator, seek an interim order appointee under paragraph 13(1)(d) of Schedule B1 of the Insolvency Act 1986 (as amended) or sanction a voluntary arrangement (or similar) or take any other similar or analogous step in relation to the EnPC Contractor.
- 9.3 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 EnPC; or
- 9.3.3 the date of transfer of the EnPC Contractor's rights and liabilities under the Authority Project Documents to a Suitable Substitute Contractor pursuant to Clause 9.1 above.
- 9.4 The Agent, in respect of Clause 9.4.1, 9.4.2 and 9.4.3, and the EnPC Contractor, 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 the EnPC Contractor to the Senior Funder[s] under the [Senior] Funders Agreement 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:

the circumstances giving rise to it and reasons for it; and

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);

the amount of any [Distribution] made by the EnPC Contractor; and

the amount of any credit balance on any account of the EnPC Contractor.¹⁹³

9.5 The EnPC Contractor joins in this Agreement to acknowledge and consent to the arrangements set out and agrees not knowingly to do or omit to do anything that may prevent any party from enforcing its rights under this Agreement.

9.6 For the avoidance of doubt, if there is any conflict or inconsistency between the provisions of this Agreement and the Design Build Finance and Maintain Agreement, the provisions of this Agreement shall prevail.

9.7 Notwithstanding any provision in the Collateral Agreements to the contrary, the Authority agrees that, subject to paragraphs 9.8 and 9.9, 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/Senior Funder] has given its written consent to such exercise; or

¹⁹³ For a Bond Transaction, 9.4.4 may be replaced by a new clause as follows if the Authority think this is appropriate:

- (a) on each [Payment Date] during which any Additional Permitted Borrowing is, or may be, subsisting, the amount outstanding under the Senior Funding Agreements and to the extent it is aware (having made reasonable and proper enquiry);
- (b) on each [Payment Date] and the first Business Day of each calendar month following a Distribution made by the Contractor the amount of any Distribution made; and
- (c) on each [Payment Date] and on the first Business Day of each calendar month following 5 Business Days written notice from the Authority the amount of any credit balance on any account of the Contractor.

9.7.3 the time when in respect of any such Collateral Agreement either:

the Senior Funder[s] [has/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

the [Agent/Senior Funder] 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

the Senior Funder[s] [has/have] stepped in to or otherwise directly or indirectly taken control over the rights of the EnPC Contractor 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 EnPC has been terminated in accordance with its terms and the terms of this Agreement.

9.8 In addition to its rights under Clause 9.7, where the EnPC has not been terminated but a counterparty has a right to terminate its Sub-Contract for breach by the EnPC Contractor of the terms of such Sub-Contract the Authority may pay directly, or undertake to make a payment directly to the counterparty concerned, amounts due pursuant to the Sub-Contract and may set off any such sums against any payments payable by the Authority to the EnPC Contractor under the EnPC so as to satisfy them pro tanto, provided always that the Authority shall not exercise its rights under this Clause 9.8 in respect of any particular Sub-Contract:

9.8.1 in circumstances where the Senior Funder[s] [has/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; or

9.8.2 unless the Authority reasonably believes that the Senior Funder[s] [is/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, where the EnPC 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, each of the relevant Sub-Contractors (and any guarantors thereof as relevant) shall remain responsible, and be liable, to the EnPC Contractor 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 the EnPC Contractor and the] Senior Funder[s] 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 Clause 9.7 to 9.9 (inclusive) the Authority shall not, prior to the Senior Debt Discharge Date:

9.10.1 claim, recover, retain or receive (or seek to claim, recover, retain or receive) any amount under the Collateral Agreements;

9.10.2 take any action to wind-up, appoint an administrator, seek an interim order appointee (under paragraph 13(1)(d) of Schedule B1 of the Insolvency Act 1986 (as amended)) or sanction a voluntary arrangement (or similar) in relation to any Sub-Contractors; or

9.10.3 save with the prior written consent of the [Agent/Senior Funder], 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 EnPC or any other Project Document or otherwise) with the rights of the Senior Funder[s] on any formal insolvency of any Sub-Contractor or the EnPC Contractor, nor claim to be subrogated to the rights of any Senior Funder[s].

9.11 The Authority agrees and undertakes that if it receives any amount in contravention of the provisions of Clause 9.10 above it will promptly turn the same over to the [Agent/Senior Funder] and pending such payment hold the same on trust for the [Agent and the /Senior Funder[s]].

9.12 Notwithstanding the terms of the EnPC and Security Documents, the [Agent/Senior Funder] 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/Senior Funder] 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 the EnPC Contractor under the insurances referred to in Clause 53 (*Insurance*) of the EnPC shall be paid directly into the Insurance Proceeds Account and applied in accordance with the EnPC.

10 ASSIGNATION

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 (*Assignment*).

10.2 The [Agent/Senior Funder] may assign, novate or transfer its rights and obligations under this Agreement and in respect of the Security Documents to a successor [Agent/Senior Funder] in accordance with the Senior Funding Agreements without the consent of the Authority and any such assignation

novation or transfer shall not constitute a Change of Control for the purposes of Clause 58 of the EnPC. The Authority also agrees that any enforcement by the [Agent/Senior Funder] of the security referred to in Clause 2.5 above (and any subsequent transfer of share capital in the EnPC Contractor) following an Enforcement Event shall not constitute a EnPC Contractor Event of Default under Clause 58 (*Change in Control*) of the EnPC.

- 10.3 Any Senior Funder may assign or transfer its rights under the [Senior Funding Agreements] in accordance with the terms of the [Senior Funding Agreements].
- 10.4 The Authority may transfer its rights and obligations under this Agreement to any permitted assignee of its interest in the EnPC and the [Agent/Senior Funder] [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 applies in relation to the [Agent/Senior Funder], the Authority shall enter into a new direct Agreement with the new [Agent/Senior Funder] 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.
- 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/Senior Funder] shall be bound to comply with the obligations on the part of the EnPC Contractor contained in Clause 61 (Confidentiality) of the EnPC 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 Any notice served under or in connection with this Agreement is to be in writing and shall be deemed to have been served:-

15.1.1 if delivered at the time of delivery; or

15.1.2 if posted at noon (Greenwich mean time) one Business Day after posting;
or

15.1.3 if set by fax at the time shown in the relevant transmission report for the complete fax.

15.1.4 provided that a notice or other communication received on a non-Business Day or after 5p.m. in the place of receipt shall be deemed to be received at 9a.m. on the next following Business Day in such place.

15.2 Any notice to be given to the Authority should be marked for the attention of [] and delivered to [] or faxed to [] or such other party or address or fax number as notified in writing to the Agent by the Authority.

15.3 Any notice to be given to the [Agent/Senior Funder] should be marked for the attention of [] and delivered to [] or faxed to [] or such other party address or fax number as notified in writing to the Authority by the Agent.

15.4 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, Clause 9.7 to 9.13 (inclusive) (Miscellaneous) shall survive termination of this Agreement.

17 **DISPUTES**

17.1 All disputes shall be resolved in accordance with terms equivalent (*mutatis mutandis*) to the Dispute Resolution Procedure set out in the EnPC.

17.2 The EnPC Contractor, the Authority and the Agent shall co-operate to facilitate the proper, just, economical and expeditious resolution of any and all such disputes which arise under this Agreement.

18 **GOVERNING LAW**

18.1 Subject to Clause 17 (*Disputes*) above, this Agreement is governed by the laws of Scotland.

18.2 The parties agree that the courts of Scotland 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:

**Schedule Part 5
LAND MATTERS**

**Section 1
Title Conditions**

**Section 2
Reserved Rights**

**Section 3
ANCillary Rights]¹⁹⁴**

¹⁹⁴ Relevance of Schedule depends upon project specifics – see comments at clause 9.

Schedule Part 6
CONSTRUCTION MATTERS

Section 1
Planning/Consents

Section 2
SAFETY DURING CONSTRUCTION/INSTALLATION

3. In this Section 2 (*Safety During Construction*) of Schedule Part 6 (*Construction Matters*) and wherever used elsewhere in this Agreement:
 - 3.1 "**CDM Regulations**" means the Construction (Design and Management) Regulations 2015 (and "CDM Regulation" shall be construed accordingly); and
 - 3.2 "**the client**" shall have the same meaning as is ascribed to it in the CDM Regulations.
4. In so far as not already done, within five (5) Business Days of the date of execution of this Agreement, the Contractor shall make and serve on the Authority a notice in writing pursuant to CDM Regulation 4(8) that the Contractor agrees to be treated as the only client in relation to the Works for the purposes of the CDM Regulations. Notwithstanding the Contractor agreeing in writing to be 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, the Contractor shall not, and shall not seek to, withdraw, terminate or in any manner derogate from its agreement 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 agreement on the said notice and return it to the Contractor within five (5) Business Days of receipt.
5. The Contractor 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:
 - 5.1 all the obligations, requirements and duties of the client arising under the CDM Regulations in connection with the Works; and
 - 5.2 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 or issued in connection with the CDM Regulations.
6. The Contractor shall provide to the Authority's Representative:
 - 6.1 in a substantially complete form on the Actual Completion Date; and
 - 6.2 in final form within four (4) weeks of the Actual Completion Date,
 - 6.3 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 pursuant to the CDM Regulations in relation to the Works and electronic or paper copies of every amendment or update made to such file and plan.

Section 3

AUTHORITY'S REQUIREMENTS

[The Authority's Data Pack and Investment Grade Audit Specification are expected to be relied upon by the Authority in the preparation of these requirements]

Section 4
Contractor's Proposals

[These proposals must include/reflect as appropriate the terms of the Investment Grade Proposal]

Section 5
Reviewable Design Data¹⁹⁵

¹⁹⁵ To consider on a project specific basis whether the “Reviewable Design Data” concept is appropriate, however the base assumption should be that it is likely to be appropriate and Authorities should therefore consider which elements of proposed construction/installation should be subject to appropriate Authority design review.

Section 6
Quality Plans (Design And Construction)

THE PROGRAMME

SCHEDULE PART 8
REVIEW PROCEDURE¹⁹⁶

1. REVIEW

1.1 The provisions of this 0 (*Review Procedure*) shall apply whenever any item, document or course of action is required to be reviewed, approved or otherwise processed in accordance with 0 (*Review Procedure*).

1.2 Subject to any express provision of this Agreement, the manner, form and timing of any submission to be made by the Contractor to the Authority's Representative for review under this 0 (*Review Procedure*) shall be a matter for the Contractor to determine. Each submission under this 0 (*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 0 (*Review Procedure*) as a **Submitted Item**). In relation to each Submitted Item, the following procedure shall apply:

1.2.1 as soon as possible and, if the Submitted Item comprises:

- (a) an item of Reviewable Design Data; or
- (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 fifteen (15) 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 the Contractor endorsed "no comment" or (subject to and in accordance with paragraph 3 (*Grounds for Objection*)) "comments" as appropriate; and

1.2.2 subject to paragraph 1.4, if the Authority's Representative fails to return a copy of any Submitted Item (including any re-submitted Submitted Item) duly endorsed in accordance with paragraph 1.2.1, within fifteen (15) 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

¹⁹⁶ The extent of maintenance/equipment servicing/replacement requirements and related review procedure (as appropriate) will be a project specific issue

Submitted Item to the Contractor endorsed “no comment” (and, in the case of Reviewable Design Data, endorsed “Level A - no comment”).

1.3 If the Authority’s Representative raises comments on any Submitted Item in accordance with paragraph 3 (*Grounds for Objection*) he shall state the ground upon which such comments are based and the evidence or other information necessary to substantiate that ground. To the extent that the Authority’s Representative comments on a Submitted Item other than on the basis set out in this 0 (*Review Procedure*), or fails to comply with the provisions of this paragraph, the Contractor may, in its discretion, either:

1.3.1 request written clarification of the basis for such comments and, if clarification is not received within ten (10) Business Days of such request by the Contractor, refer the matter for determination in accordance with 0 (*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 Testing 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 3.8, 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 ten (10) Business Days following the expiry of the period specified in paragraph 1.2.2, the matter shall be determined in accordance with 0 (*Dispute Resolution Procedure*).

2. FURTHER INFORMATION

The Contractor 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 0 (*Review Procedure*). If the Contractor 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 0 (*Review Procedure*).

3. GROUNDS OF OBJECTION

The expression “raise comments” in this paragraph shall be construed to mean “raise comments or make objections” unless the contrary appears from the context. The Authority’s Representative may raise comments in relation to any Submitted Item on the grounds set out in paragraph 2 (*Further Information*) above or on the ground that the Submitted Item would (on the balance of probabilities) breach any Law but otherwise may raise comments in relation to a Submitted Item only as follows:

3.1 in relation to any Submitted Item if:

3.1.1 the Contractor’s ability to perform its obligations under this Agreement would (on the balance of probabilities) be adversely affected by the implementation of the Submitted Item; or

3.1.2 the implementation of the Submitted Item would (on the balance of probabilities) adversely affect any right of the Authority under this Agreement or its ability to enforce any such right;

3.2 in relation to any Submitted Item submitted pursuant to Clause 4.1 (*Ancillary Documents*) if:

3.2.1 the Authority’s ability to perform its obligations under this Agreement would be adversely affected by the proposed course of action;

3.2.2 the Authority’s ability to provide the relevant Authority Services or to carry out any of its statutory functions would (on the balance of probabilities) be adversely affected by the proposed course of action;

3.2.3 the proposed course of action would be likely to result in an increase to the Authority’s liabilities or potential or contingent liabilities under this Agreement;

3.2.4 the proposed course of action would adversely affect any right of the Authority under this Agreement or its ability to enforce any such right; or

3.2.5 the Contractor’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 12.4:

3.3.1 *[insert here on a project specific basis the RDD items that are anticipated in light of the content of Section 5 of Schedule Part 6, and the basis upon which the Authority may object to those specifications].*]

3.4 in relation to a proposal to amend the Contractor's Proposals and rectify (part of) the Works submitted pursuant to Clause 12.5, on the grounds that, following the amendment and rectification proposed:

3.4.1 the Contractor's Proposals would not satisfy the Authority's Requirements; and/or

3.4.2 the structural, mechanical, electrical and/or energy efficiency performance of the Facilities would not be of an equivalent standard of performance to that set out in the Contractor's Proposals prior to their amendment or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made);

3.5 in relation to the submission of any revised Programme pursuant to Clause 14 on the ground that the revised Programme would not (on the balance of probabilities) enable the Works to be completed by the Completion Date;

3.6 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 or Clause 20.6, 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:

3.6.1 in the case of the Design Quality Plan and the Construction Quality Plan referred to in Clause 20 (*Quality Assurance*), the requirements referred to in Section 6 (*Quality Plans (Design and Construction)*) of Schedule Part 6 (*Construction Matters*); and

3.6.2 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 0 (*Service Requirements*);

3.7 in relation to the submission of any Schedule of Programmed Maintenance pursuant to Clause 23.1, any revision to any Schedule of Programmed Maintenance pursuant to Clause 23.4 or any submission of Unprogrammed Maintenance pursuant to Clause 23.8 on the grounds that:

3.7.1 carrying out the Programmed Maintenance or the Unprogrammed Maintenance in the period or at the times suggested would (on the balance of probabilities) interfere with the operations of the Authority and such interference could be avoided or mitigated by the Contractor rescheduling the Programmed Maintenance or the Unprogrammed Maintenance; or

3.7.2 the proposed method of performance of the Programmed Maintenance or the Unprogrammed Maintenance would not be in accordance with the Service Level Specification; or

3.7.3 the safety of users of the Facilities would (on the balance of probabilities) be adversely affected; or

3.7.4 the period for carrying out the Programmed Maintenance or the Unprogrammed Maintenance would (on the balance of probabilities) exceed the period reasonably required for the relevant works.

3.8 In relation to the submission of the Contractor's proposals for the Handback Works, the Handback Programme and the Handback Amount pursuant to 0 (*Handback Procedure*), on the grounds that:

3.8.1 in the case of the Handback Works, the Contractor's proposals will not (on the balance of probabilities) ensure that the Handback Requirements are achieved by the Expiry Date;

3.8.2 in the case of the Handback Programme, performance of the Handback Works in accordance with the programme is not (on the balance of probabilities) capable of achieving satisfaction of the Handback Requirements by the Expiry Date; and

3.8.3 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 0 (*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 the Contractor.

4.2 In the case of any Submitted Item other than Reviewable Design Data, if the Authority's Representative returns the Submitted Item to the Contractor endorsed "comments", the Contractor shall comply with such Submitted Item after amendment in accordance with the comments unless the Contractor disputes that any such comment is on grounds permitted by this Agreement, in which case the Contractor or the Authority's Representative may refer the matter for determination in accordance with 0 (*Dispute Resolution Procedure*) and the Contractor 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", the Contractor 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; and

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 the Contractor disputes that any such comment or proposed amendment is on grounds permitted by this Agreement, in which case the Contractor or the Authority's Representative may refer the matter for determination in accordance with 0 (*Dispute Resolution Procedure*) and the Contractor shall not act on the Submitted Item until such matter is so determined or otherwise agreed except at its own risk in accordance with paragraph 1.3.2.]

4.4 Within ten (10) Business Days of receiving the comments of the Authority's Representative on any Submitted Item comprising Reviewable Design Data, the Contractor shall (except in the case contemplated in paragraph 4.3.1) send a copy of the Submitted Item as amended to the Authority's Representative pursuant to paragraph 4.3 and the provisions of paragraphs 1.2.1, 4.1 and 4.3 shall apply (changed according to context) to such re-submission.

4.5 The return or deemed return of any Submitted Item endorsed "no comment" (or in the case of Reviewable Design Data endorsed "Level A - no comment" or otherwise endorsed in accordance with paragraph 4.3.1 or 4.3.2) shall mean that the relevant Submitted Item may be used or implemented for the purposes for which it is intended but, save to the extent expressly stated in this Agreement, such return or deemed return of any Submitted Item shall not otherwise relieve the Contractor of its obligations under this Agreement nor is it an acknowledgement by the Authority that the Contractor has complied with such obligations.

5. DOCUMENTATION MANAGEMENT

5.1 The Contractor shall issue three (3) copies 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 The Contractor 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 0 (*Review Procedure*), no review, comment or approval by the Authority shall operate to exclude or limit the Contractor'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 0 shall constitute a Change save to the extent provided in this 0 (*Review Procedure*).

6.2 If, having received comments from the Authority's Representative, the Contractor considers that compliance with those comments would amount to a Change, the Contractor shall, before complying with the comments, notify the Authority of the same and, if it is agreed by the parties or determined pursuant to 0 (*Dispute Resolution Procedure*) that a Change would arise if the comments were complied with, the Authority may, if it wishes, implement the Change and it shall be dealt with in accordance with 0 (*Change Protocol*). Any failure by the Contractor 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 the Contractor 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.

SCHEDULE PART 9
COLLATERAL WARRANTY¹⁹⁷

AMONG:

- 1) **[AUTHORITY]**, having its principal address at [●] (the **Beneficiary** which expression shall include its successors in title or permitted assignees under this Agreement and/or the Beneficiary's appointee);
and

[CONTRACTOR], 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

[●], a company incorporated in [Scotland/England and Wales/Northern Ireland] under the Companies Acts (Registered Number [●]) and having its Registered Office at [●] (the **Key-Subcontractor**).

WHEREAS:

- 1) The Beneficiary and Contractor have entered into an agreement for the design, build, finance and maintenance of a project to [●] (the **Project Works**) at [●] (the **Project**) on or about the date hereof (the **EnPC Agreement**).

The Contractor has entered or intends to enter into an agreement with the Key Sub-Contractor whereby the Key Sub-Contractor will provide certain [●] services (the **Services**) in connection with the Project (the **Sub-Contract**) as more particularly described in the Sub-Contract.

It is a condition of the Sub-Contract that the Key Sub-Contractor enters this Agreement with the Beneficiary.

The Beneficiary shall be entitled to rely and is deemed to have relied on the Key Sub-Contractor'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 Key Sub-Contractor under the Sub-Contract.

NOW IT IS AGREED as follows:

7. WARRANTY AND UNDERTAKING

- 7.1 The Key Sub-Contractor 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 Sub-

¹⁹⁷ This is the form of warranty to be used for the M&V Professional's Collateral Agreement. Such form shall also be developed as appropriate for other key subcontractors who provide are to provide a collateral warranty on a project specific basis.

Contract on the Key Sub-Contractor's part to be performed and observed and shall complete the Services in accordance with the Sub-Contract.

7.2 Without prejudice to Clause 1.1 of this Agreement, the Key Sub-Contractor further warrants and undertakes to the Beneficiary that:

7.2.1 it has exercised and will continue to exercise all the due skill, care and diligence to be expected from a properly qualified and competent contractor experienced in providing [testing/measurement/verification] services on projects and at Facilities similar in nature, size and complexity to the Project and the Facilities in:

(a) the [testing/measurement/verification] of the Works and their impact on the Facilities; and

(b) the performance of the [Services] to the Contractor under the Sub-Contract.

7.2.2 the final [testing/measurement/verification] will at practical completion and throughout the term of the Sub-Contract comply with all relevant legislation and Good Industry Practice;

8. INSURANCE

8.1 The Key Sub-Contractor 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 Sub-Contract, professional indemnity insurance in an amount of not less than [ten] million pounds (£10,000,000) sterling on an each and every claim basis and for any one occurrence or series of occurrences arising out of any one 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 contractors.

8.2 In determining whether or not insurance is available as aforesaid, the financial characteristics and claims' record of the Key Sub-Contractor shall be ignored.

8.3 The Key Sub-Contractor shall immediately inform the Beneficiary if such insurance ceases to be available at rates which are commercially reasonable in order that the Key Sub-Contractor 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 Key Sub-Contractor to maintain such lesser amount of professional indemnity insurance as is available to the Key Sub-Contractor at rates which are commercially reasonable.

8.4 As and when it is reasonably requested to do so by the Beneficiary the Key Sub-Contractor shall produce for inspection documentary evidence satisfactory to the Beneficiary (acting reasonably) that its professional indemnity insurance is being maintained.

8.5 The Key Sub-Contractor confirms that this Agreement has been disclosed to and has been approved by the Key Sub-Contractor's Professional Indemnity Insurers or underwriters.

8.6 Should the Key Sub-Contractor 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 Key Sub-Contractor as a debt.

9. COPYRIGHT

9.1 The Key Sub-Contractor 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 Key Sub-Contractor in connection with the Services (the **Documents**) for such purposes as the Beneficiary may at its sole discretion require.

9.2 Such licence shall carry the right to grant sub-licences and shall subsist notwithstanding that the Sub-Contract 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 Key Sub-Contractor.

9.3 The Key Sub-Contractor 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 Key Sub-Contractor 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 Key Sub-Contractor or for any improper or negligent use by the Beneficiary or any appointee or sub-licensee.

9.4 The Key Sub-Contractor 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.

10. ASSIGNATION

10.1 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 Key Sub-Contractor being required and such assignation shall be effective upon written notice thereof being given to the Key Sub-Contractor. No assignation of this Agreement by any other party shall be permitted.

10.2 The Key Sub-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 less or a different loss has been suffered by such assignee.

11. NO WAIVER OR VARIATION

11.1 No failure, approval, act or omission 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 Key Sub-Contractor of any of its duties or obligations under or arising out of this Agreement.

11.2 The Key Sub-Contractor will not seek to modify or vary any of the obligations for which it is responsible under the Sub-Contract in any respect if that modification or variation will be detrimental to the Beneficiary or affects the Beneficiary's rights or obligations under the EnPC Agreement or affects the Key Sub-Contractor's obligations under this Agreement.

12. EQUIVALENT RIGHTS

The obligations of the Key Sub-Contractor 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 Sub-Contract. The Key Sub-Contractor shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation in the Sub-Contract and to raise the equivalent rights in defence of liability as it would have against the Contractor under the Sub-Contract (other than counterclaim, set-off or to state a defence of no loss or a different loss has been suffered by the Contractor).

13. NOTICES

13.1 Any notice, consent or demand to be given or made by any party under this Agreement (hereinafter called a **Notice**) shall only be validly served if in writing and delivered personally or sent by pre-paid first class recorded delivery post or sent by fax to the following address and marked for the attention of the following person in the case of each party:

Party	Address	Fax Number	Person
Beneficiary	[•]	[•]	[•]
Contractor	[•]	[•]	[•]
Key Sub-Contractor	[•]	[•]	[•]

Any party may by Notice to the other party/parties change its address, fax number or the title of the person for whose attention Notices are to be given or made pursuant to this Clause 7. Any such Notice shall be deemed to have been received:

13.1.1 if delivered personally, at the time of delivery;

13.1.2 in the case of pre-paid first class recorded delivery post, on the first Business Day after the date of posting; and

13.1.3 in the case of a fax, at the time of transmission.

13.2 If any Notice is delivered or faxed after 5 p.m. on a Business Day, or at any time during a day which is not a Business Day, that Notice shall be deemed to have been received at 9 a.m. on the next Business Day.

13.3 For the purposes of this Clause 7 (*Notices*), **Business Day** means any day which is not a Saturday, a Sunday or a public holiday in Scotland. In proving service it shall be sufficient to prove that the envelope containing such Notice was properly addressed to the relevant party and either delivered personally to that address or delivered into the custody of the postal authorities as a pre-paid first class recorded delivery letter, or that such Notice was transmitted by fax to the correct fax number of the relevant party (as demonstrated by the transmission slip). For the avoidance of doubt, Notices shall not be validly served if sent by e-mail.

13.4 The definitions of words and phrases used in this Agreement shall be those set out in the Sub-Contract except where expressly defined in this Agreement.

13.5 This Agreement shall be governed by and construed in accordance with Scots Law and the parties hereto submit to the exclusive jurisdiction of the Scottish Courts.

13.6 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 Contractor or of any permitted assignee, it is expressly declared that no rights shall be conferred under and arising out of this Agreement (whether under the Contract (Third Party Rights) (Scotland) Act 2017 or otherwise) upon any person other than the Authority and Contractor.

IN WITNESS WHEREOF this Agreement consisting of this and the preceding [●] pages is executed as follows:

SCHEDULE PART 10
OUTLINE COMPLETION TESTING PROGRAMME

See Schedule Part 10 section of the technical pack.

**SCHEDULE PART 11
EQUIPMENT**

See Schedule Part 11 section of the technical pack.

**SCHEDULE PART 12
SERVICE REQUIREMENTS**

**Section 1
Service Level Specification**

See Schedule Part 12 section of the technical pack.

Section 2
Method Statements

See Schedule Part 12 section of the technical pack.

Section 3
Services Quality Plan

See Schedule Part 12 section of the technical pack.

**SCHEDULE PART 13
COMMERCIALLY SENSITIVE INFORMATION**

Where information or material falls within more than one category identified in column 1 of the table below, it shall be deemed to fall within the category whose corresponding period of confidentiality identified in column 2 of the table below will expire the soonest.

Category of Information/Material	Period for which information is to be kept confidential

SCHEDULE PART 14
PAYMENT MECHANISM

Section 1

INTERPRETATION

In this 0 (*Payment Mechanism*) and elsewhere in this Agreement (save where Schedule Part 1 (*Definitions and Interpretation*) provides to the contrary) the following words shall have the following meanings:

Annual Payment means the sum in pounds sterling calculated in accordance with paragraph 1 (*Annual Payment*) of Section 2 (*Calculation of Payments*) of this 0 (*Payment Mechanism*);

Availability Failure subject to Section 4 (*Temporary Repairs*) of this 0 (*Payment Mechanism*), means a Service Event relating to a Service Management Availability Standard which has not been Rectified within the relevant Rectification Period and which causes a [*reference area or item*] to be Unavailable;

Deduction Period or DP means:

(a) where the relevant Availability Failure arises following a Service Event in respect of which a Rectification Period is specified in the Service Management Availability Standards, as applicable, the Deduction Period shall equal the number of [days] that elapse from and including the [day] during which the Service Failure Time occurs to, and including, the [day] on which the Logged Rectification Time occurs; and

(b) where the relevant Availability Failure arises following a Service Event in respect of which no Rectification Period is specified in the Service Management Availability Standards, as applicable, the Deduction Period shall equal 1;

[External Utility Failure means a failure in:

(a) the supply of gas, electricity, water, telephone or telecommunications services to the [*relevant part of the Facilities*]; or

(b) the service and facility of discharging water and sewerage from the [*relevant part of the Facilities*]

where such failure originates on the side of the relevant Utility Point that is owned or controlled by [either the Authority or]the relevant utility provider and provided that such failure has not arisen as a result of an act or omission of the Contractor or a Contractor Party;]¹⁹⁸

Helpdesk	means the helpdesk facilities established by the Contractor pursuant to the Service Level Specification;
Logged Rectification Time	means the time which is shown in the Helpdesk records maintained by the Contractor 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 the Contractor;
Logged Report Time	means the Logged Report Time as defined in the Service Level Specification;
Major Availability Failure	means an Availability Failure which has been designated as such in the Service Level Specification or in this Schedule Part 14 (<i>Payment Mechanism</i>);
Maximum Availability Deduction	means, for Contract Month "m", the amount in pounds sterling calculated by the formula: <i>[Maximum Availability Deduction = [50 to 100% of]¹⁹⁹ AP_n/12]</i>
Medium Availability Failure	means an Availability Failure which has been designated as such in the Service Level Specification or in this Schedule Part 14 (<i>Payment Mechanism</i>);
Minimum Agreed Service Management Availability	means the minimum standards with which a [<i>reference area or asset</i>] must comply, as agreed between the Authority and the Contractor, for the period until a Permanent Repair can be

¹⁹⁸ The treatment of a failure as "external" will need to be considered on a project specific basis dependent upon the nature of the Facilities, the position/extent of the Works proposed at the Site and any on-site generation run by the Authority or an Authority Party.

¹⁹⁹ Appropriate % to be determined on a project specific basis.

Standards	undertaken;
Minor Availability Failure	means an Availability Failure which has been designated as such in the Service Level Specification or in this Schedule Part 14 (<i>Payment Mechanism</i>);
Monthly Payment	means the sum in pounds sterling calculated in accordance with paragraph 2 of Section 2 (<i>Calculation of Payments</i>) of this Schedule Part 0 (<i>Payment Mechanism</i>);
Pass Through Costs	means costs payable to the Contractor pursuant to Section 6 (<i>Pass Through Costs</i>) of this 0 (<i>Payment Mechanism</i>);
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 (<i>Temporary Repairs</i>) of this Schedule Part 14 (<i>Payment Mechanism</i>);
Rectification	means Rectification as defined in the Service Level Specification and Rectified shall be construed accordingly;
Rectification Period	means Rectification Period as defined in the Service Level Specification;
Service Event	means an incident or state of affairs which does not satisfy the Service Management Availability Standards;
Service Failure Time	means the date and time when a Service Event becomes an Availability Failure, as the case may be;
Service Management Availability Standards	means the service requirements identified as such, set out in the Service Level Specification;
Service Report	has the meaning given in Section 1 (<i>Service Level Specification</i>) of Schedule Part 12 (<i>Service Requirements</i>);
Temporary Repair	means, in respect of the occurrence of a Service Event, works of a temporary nature that do not constitute Rectification but satisfy the Minimum Agreed Service Management Availability Standards and substantially make good the relevant Service Event for the period until a Permanent Repair can be undertaken;

Unavailable

means in relation to a [*reference area or asset*] that such [*reference area or asset*] is in a state or condition which does not comply with any one or more of the Service Management Availability Standards; and

Utility Point

means [●].

Section 2
CALCULATION OF PAYMENTS

1 **ANNUAL PAYMENT**

Calculate the Annual Payment for any Energy Performance Year “n” using the following formula:

$$AP_n = AP_0 \times (1 - IF) + \left[(AP_0 \times IF) \times \left(1 + \frac{(I_n - I_0)}{I_0} \right) \right]$$

where:

AP_n is the Annual Payment for the relevant Energy Performance Year. For the avoidance of doubt, the value of AP_n can be zero (no Annual Payment is due by the Authority or Contractor), greater than zero (an Annual Payment is due by the Authority to the Contractor) or less than zero (an Annual Payment is due by the Contractor to the Authority);

AP₀ is the value for AP₀ stated in Appendix 1 to this 0 (*Payment Mechanism*) (being the Annual Payment at the Base Date), subject to any adjustments made from time to time in accordance with any express provision of this Agreement;²⁰⁰

IF is the indexation factor being [●]%;²⁰¹

I_n is the value of the [*relevant index*] published or determined with respect to the month which most recently precedes the relevant Energy Performance Year²⁰²; and

I₀ is the value of the [*relevant index*] published or determined with respect to the Base Date.

2 **MONTHLY PAYMENT**

2.1 Calculate the Monthly Payment payable in respect of a Contract Month “m” using the following formula:²⁰³

$$MP_m = AP_n / 12 \times GEPA_m - AD_{m-2}$$

²⁰⁰ The Annual Payment will be proposed by the Contractor and will form part of their ‘mini-competition’ bid. Where, following submission of a ‘mini-competition’ bid, the Investment Grade Proposal is submitted or refined, the overall commercial offer, including the Annual Payment, which was bid as part of the ‘mini-competition’ will be matched or improved upon by the Contractor.

²⁰¹ The IF will have a value greater than zero and less than one, which will be set on a project specific basis to reflect the portion of AP which is indexed. It is anticipated that any debt repayment or interest payment elements of the AP will not be indexed whereas service cost elements of the AP will be indexed.

²⁰² The appropriate index will be confirmed by the Authority on a project specific basis.

²⁰³ Pass Through Costs may be required to be added to the MP or AP on a project specific basis e.g. biomass fuel for biomass boiler energy conservation measures or deferred payment. Details of such costs should be inserted into section 6 of this Schedule Part 14.

where:

MP_m is the Monthly Payment for the relevant Contract Month For the avoidance of doubt, the value of the MP_m can be zero (no Monthly Payment is due by the Authority or Contractor), greater than zero (a Monthly Payment is due by the Authority to the Contractor) or less than zero (a Monthly Payment is due by the Contractor to the Authority) ;

AP_n is the Annual Payment for the Energy Performance Year in which the relevant Contract Month occurs, calculated in accordance with paragraph 1 above;

AD_{m-2} is the sum of Availability Deductions in respect of performance of the Services during the Contract Month that was two (2) months prior to Contract Month m as shown in the Monthly Service Report for that Contract Month and calculated in accordance with the provisions set out in Section 3 (*Deductions from Monthly Payments*) of this 0 (*Payment Mechanism*). For the avoidance of doubt, the value of AD_{m-2} shall always be equal to or greater than zero. The maximum value of AD_{m-2} will be [●] x AP_n/12.²⁰⁴

GEPA_m is the multiplier in respect of the adjustment to account for any difference between AEC_{n-1} and the Guaranteed Energy Cost Performance for the Energy Performance Year immediately prior to the Energy Performance Year “n” which adjustment shall be calculated as follows:

- a) for the purposes of calculating the Annual Payment in respect of the first Energy Performance Year of the Project Term, the GEPA_m shall be one (1);
- b) for the second Energy Performance Year and each subsequent Energy Performance Year of the Project Term (subject to (c) below), the GEPA_m shall be:
 - i. for the [first, second and third]²⁰⁵ Contract Month of each Energy Performance Year the GEPA_m shall be one (1)

²⁰⁴ This will be project specific, however it is anticipated that the maximum value of AD_{m-2} will be [between 50% and 100% of AP_n/12].

²⁰⁵ The number of months will be project specific and relates the number of months the M&V Savings Report will take to produce and agree during the subsequent Energy Performance Year. The current scenario assumes a 3 month period for M&V Savings Report data collation, report writing, GEPA calculations and agreement between all parties. Where the final period of the Agreement runs for less than one year, the drafting should be qualified accordingly in response to that final period.

- ii. for the [fourth] and all remaining subsequent Contract Months of Energy Performance Year n, where AEC_{n-1} is less than or equal to GECP, $GEPA_m$ shall be calculated using the formula:

$$GEPA_m = 1 - \left(\frac{(GECP - AEC_{n-1})}{GECP} \times \frac{12}{[9]} \right)$$

- i. where AEC_{m-1} is greater than GECP, $GEPA_m$ shall be calculated using the formula:

$$GEPA_m = 1 - \left(\frac{(GECP - AEC_{n-1})}{GECP} \times \frac{12}{[9]} \times \frac{2}{[3]} \right)$$

where

GECP²⁰⁶ is the Guaranteed Energy Cost Performance as defined in Schedule Part 6, Section 4, Sub-Section [●] (*Investment Grade Proposal*);

AEC_{n-1} is the “Avoided Energy Cost” for the previous year as identified in the M&V Savings Report.

- 2.2 In the Contract Month in which the Payment Commencement Date falls, unless the Payment Commencement Date is the first day of that Contract Month, and in the last Contract Month of the Project Term, unless the last day of the Project Term is the last day of that Contract Month, adjust AP_n for the purposes of paragraph 2.1 above *pro rata* to reflect the actual number of days in the relevant Contract Month from and including the Payment Commencement Date (for the first month) and (for the last month) up to and including the last day of the Project Term (for the last month).

²⁰⁶ The GECP will be proposed by the Contractor and will form part of their ‘mini-competition’ bid. Where, following submission of a ‘mini-competition’ bid, the Investment Grade Proposal is submitted or refined, the overall commercial offer, including the GECP, which was bid as part of the ‘mini-competition’ will be matched or improved upon.

Section 3
DEDUCTIONS FROM MONTHLY PAYMENTS

1 **ENTITLEMENT TO MAKE AVAILABILITY DEDUCTIONS**

1.1 If at any time after the Payment Commencement Date an Availability Failure occurs the Authority will be entitled, subject to paragraph 1.2 of this Section 3 (*Deductions from Monthly Payments*) and paragraph 1 of Section 4 (*Temporary Repairs and Alternative Accommodation*), to make Availability Deductions in calculating the Monthly Payment in respect of that Availability Failure, calculated in accordance with this Section 3 (*Deductions from Monthly Payments*) of 0 (*Payment Mechanism*).

1.2 To the extent that an Availability Failure:

1.2.1 is the result of an Excusing Cause; or

1.2.2 [is the result of an External Utility Failure,]

the Authority shall not be entitled to make Availability Deductions.

1.3 To the extent that an Availability Failure is the result of:

1.3.1 a Relief Event; or

1.3.2 an event of Force Majeure,

the Authority shall be entitled to make Availability Deductions but any such Deductions shall be disregarded for the purposes of Clause 24.3 and Clause 40.1.8

2 **DEDUCTIONS FOR AVAILABILITY FAILURES**

2.1 Subject to paragraphs 1 (*Entitlement to make Deductions*) and 3 (*Repeated Failures*) of this Section 3 (*Deductions from Monthly Payments*), the amount of the Deduction in respect of an Availability Failure is calculated using the following formula:

$$AD = AP_n \times AFD \times DP$$

where:

AD means the amount (in pounds sterling) of the Deduction in respect of the Availability Failure;

AP_n means the Annual Payment for the Energy Performance Year in

which the relevant Contract Month occurs, calculated in accordance with Paragraph 1, Section 2 above;

AFD means:

in the case of a Minor Availability Failure, the value of [●];

in the case of a Medium Availability Failure, the value of [●];

in the case of a Major Availability Failure, the value of [●];

DP means the Deduction Period.

2.2 In the case of a Service Event for which no Rectification Period is specified in the Service Management Availability Standard, an Availability Failure occurs immediately upon the occurrence of the Service Event and, if it is not Remedied within the relevant Remedial Period, it will reoccur at the expiry of the Remedial Period and the Remedial Period shall recommence and so on until such time as the Availability Failure has been Remedied.

2.3 No Deduction may be made by the Authority from the Monthly Payment for the relevant Contract Month in respect of any Availability Failure relating to a [Routine Service Management Availability Standard] if the total number of Availability Failures relating to a [Routine Service Management Availability Standard] which have occurred in the relevant Contract Month is not more than [●].

Where two or more Availability Failures occur in respect of the same [*reference area or item*] during a [day], only the Availability Failure that results in the highest Deduction will apply.

3 REPEATED FAILURES

Subject to paragraph 1 (*Entitlement to make Availability Deductions*) of this Section 3 (*Deductions from Monthly Payments*) if an Availability Failure in respect of the same Service Management Availability Standard occurs [●] or more times in a rolling period of [●] consecutive Contract Months, then the Deduction calculated pursuant to paragraph 2 (*Deductions for Availability Failures*) of this Section 3 (*Deductions from Monthly Payments*) for the [●] and each subsequent such Availability Failure during the relevant period of [●] consecutive Contract Months shall be multiplied by [1.5].

4 REPEATED RECTIFICATION

If four or more Service Events occur in any rolling seven day period and:

4.1 each such Service Event is in connection with the same Service Management Availability Standard;

4.2 each such Service Event affects the same [*reference area or item*]; and

4.3 there is good reason to believe that the root cause of each such Service Event is the same

then, notwithstanding that the Contractor achieves Rectification of the Service Events within the relevant Rectification Period, there will be deemed to be a [major failure].

Section 4
TEMPORARY REPAIRS

1 If the Contractor informs the Authority that it is unable to Rectify a Service Event within the specified Rectification Period due to the need for specialised materials or personnel that are not, and cannot reasonably be expected to be, immediately available at the Facilities but that a Temporary Repair can be effected:

1.1 the Contractor may carry out the Temporary Repair proposed by the Contractor unless the Authority, acting reasonably, considers that, if the Temporary Repair proposed by the Contractor is carried out, the relevant [*reference area or item*] will not be fit for use for the Authority Services for which it is normally used; and

1.2 where a Temporary Repair is permitted pursuant to paragraph 1.1, the Authority and the Contractor must act reasonably to agree a date and time (the **Permanent Repair Deadline**) by which a Permanent Repair must be made, giving the Contractor a reasonable period within which to carry out the Permanent Repair.

2 During any period beginning at the time when a Temporary Repair has been approved by the Authority and ending at the earlier of:

2.1 the time at which a Permanent Repair is successfully completed; and

2.2 the Permanent Repair Deadline,

the Service Management Availability Standards will be replaced by the Minimum Agreed Service Management Availability Standards.

3 If an agreed Temporary Repair is completed by the Contractor before the Permanent Repair Deadline and results in the [*reference area or item*] affected by the relevant Service Event satisfying the Minimum Agreed Service Management Availability Standards, the date and time shown in the Helpdesk records maintained by the Contractor 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 the Contractor 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.

4 If the Permanent Repair is not carried out by the Permanent Repair Deadline, an Availability Failure will occur at that date and time.²⁰⁷

²⁰⁷ This section requires to be considered on a project by project basis.

Section 5

FAILURE BY THE CONTRACTOR TO MONITOR OR REPORT

1 Subject to paragraph 2 of this Section (*Failure by the Contractor to Monitor or Report*), the Monthly Service Report produced by the Contractor 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 (*Availability Deductions from Monthly Payments*) of Schedule Part 14 (*Payment Mechanism*).

2 Either party may give written notice to the other if it believes there is an error or omission in a Monthly Service Report provided that, save in the circumstances referred to in paragraph [●] 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 the Contractor. The parties shall endeavour to agree the amendments required to rectify the error or omission (if any) within ten (10) Business Days of notice being given in accordance with this paragraph 2, failing which either party may, on giving written notice to the other, refer the matter to the Dispute Resolution Procedure.

Where the Contractor fails to monitor or accurately to report an Availability Failure in the circumstances referred to in paragraph 6 of this Section 5 (*Failure by the Contractor to Monitor or Report*), for the purposes of paragraph 1 of Section 1 (*General Requirements*) of Schedule 19 (*Record Provisions*) the Authority shall be deemed to have reasonable cause to require that the Contractor shall make available to the Authority for inspection such of the records referred to in paragraphs 10 and 11 of Section 2 (*Records to be Kept*) of Schedule 19 (*Record Provisions*) as the Authority may specify.

The Contractor shall upon submission of a valid invoice pay to the Authority a sum equal to the costs reasonably incurred by the Authority in carrying out any inspection and investigation of records made available pursuant to paragraph 3 above.

In the event that the Authority's inspection or investigation of records made available pursuant to paragraph 3 above reveals any further matters of the types referred to in paragraphs 2 and 3 above, those matters shall be dealt with in accordance with paragraph 2 or 3 as appropriate and the Authority shall, in addition, be entitled to make Deductions in respect of any Availability Failures in the manner prescribed in Section 3 (*Deductions from Monthly Payments*) of this 0 (*Payment Mechanism*). The Monthly 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 the Contractor 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 the Contractor.

For the purposes of paragraphs 2 and 3 of this Section 5 (*Failure by the Contractor to Monitor or Report*) the relevant circumstances are:

fraudulent action or inaction; or

deliberate misrepresentation; or

gross misconduct or gross incompetence,

in each case on the part of the Contractor or a Contractor Party.

The provisions of this Section 5 (*Failure by the Contractor to Monitor or Report*) shall be without prejudice to any rights of the Authority in this Agreement pursuant to Clause 24 (*Monitoring of Performance*), Clause 40 (*Contractor Event of Default*) and Clause 44 (*Corrupt Gifts and Payments*).

Section 6
[PASS THROUGH COSTS]²⁰⁸

1 [UTILITY CHARGES]

- 1.1 The Contractor may include charges for [Utilities] in the Monthly Payment in accordance with paragraph 2.1 of Section 2 (*Calculation of Payments*) of this Schedule Part 14 (*Payment Mechanism*) on the basis of costs reasonably incurred by the Contractor and supported by an appropriate invoice from the Contractor's suppliers.
- 1.2 The Authority is responsible for all connection, line rental and usage telephone and data charges.]

2 [OPERATIONAL INSURANCE PREMIUMS]

- 2.1 Subject to paragraph 2.2, the Contractor may include the premiums paid by the Contractor to take out and maintain the Operational Insurances in accordance with Clause 53 in the Monthly Payment in accordance with paragraph 2 (*Monthly Payment*) of Section 2 (*Calculation of Payments*) of this Schedule Part 14 (*Payment Mechanism*) on the basis of the cost incurred by the Contractor and supported by an appropriate premium notices from the relevant insurer.
- 2.2 There shall be excluded from the premiums referred to in paragraph 2.1, a sum equal to any portion of the premiums attributable to any issue or factor other than (a) circumstances generally prevailing in the relevant insurance market or (b) circumstances attributable to malicious damage to the Facilities or (c) the claims history of the Authority or any Authority Party.]

²⁰⁸ Pass through costs to be considered on a project specific basis, relevant to the proposed ECMs, infrastructure and funding proposals, as appropriate.

SCHEDULE PART 15
INSURANCE REQUIREMENTS²⁰⁹

²⁰⁹ To be developed on a project specific basis and to comply with the Eurostat EnPC Guide, the Authority must not be responsible for effecting insurance(s) benefitting the Contractor. Nor should it take an undue share in the risks of or benefits arising from changes to the costs of insurances effected by or benefitting the Contractor (including those provisions relating to the unavailability of insurance).

**SCHEDULE PART 16
CHANGE PROTOCOL**

Section 1

Definitions

In this Schedule Part 16 (*Change Protocol*) and elsewhere in this Agreement (save where Schedule Part 1 provides to the contrary) the following words shall have the following meanings:

Adjustment Date means the date on which the adjustment to the Annual Payments takes effect in accordance with the provisions of this Agreement, or such other date as is agreed between the parties;

Assumption Adjustment means an adjustment to any of the assumptions contained in the Financial Model;

Authority Change means a Change which is required by the Authority pursuant to this Schedule Part 16 (*Change Protocol*);

Authority Change Notice means a notice issued in accordance with this Schedule Part 16 (*Change Protocol*) requiring an Authority Change;

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 or a change to the M&V Plan or an M&V Savings Report that may be made under Clause 33 (*Change Protocol*) of this Schedule Part 16 (*Change Protocol*);

Change in Costs means in respect of any Relevant Event, the effect of that Relevant Event (whether of a one-off or recurring nature, and whether positive or negative) upon the actual or anticipated costs, losses or liabilities of the Contractor and/or its Sub-Contractors (without double counting), including, as relevant, the following:

the reasonable costs of complying with the requirements of Clauses 24.9, 29 (*Delay Events*), 32 (*Changes in Law*) and/or Section 1 of this Schedule Part 16 (*Change Protocol*), including the reasonable costs of preparation of design and estimates;

the costs of continued employment of, or making redundant, staff who are no longer required;

the costs of employing additional staff;

reasonable professional fees;

the costs to the Contractor of financing any Relevant Event (and the consequences thereof) including commitment fees and capital costs interest and hedging costs, lost interest on any of the Contractor's own capital employed and any finance required pending receipt of a lump sum payment or adjustments to the Annual Payment;

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 the Contractor (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;

operating costs, or lifecycle maintenance or replacement costs;

Capital Expenditure;

the costs required to ensure continued compliance with the [Funding Agreements]²¹⁰;

any deductible or increase in the level of deductible, or any increase in premium under or in respect of any insurance policy; and

Direct Losses or Indirect Losses, including reasonable legal expenses on an indemnity basis;

Contractor Change means a Change that is initiated by the Contractor by submitting a Contractor Notice of Change to the Authority pursuant to Section 4 (*Contractor Changes*) of this Schedule Part 16 (*Change Protocol*);

Contractor Notice of Change has the meaning given in paragraph 1 of Section 4 (*Contractor Changes*) of this Schedule Part 16 (*Change Protocol*);

Estimate has the meaning given in paragraph 3 of Section 2 (*Authority Changes*) of this Schedule Part 16 (*Change Protocol*);

Estimated Change in Project Costs means, in respect of any Relevant Event, the aggregate of any Change in Costs;

Input Adjustment means any adjustment to the Financial Model other than Assumption Adjustment and Logic Adjustments;

²¹⁰ Relevance dependent upon funding of project

Key Ratios means [●];

Logic Adjustment means an adjustment to the logic or formulae contained in the Financial Model;

M&V Plan means the measurement and verification plan comprised within Schedule Part 3 (*Measurement and Verification*) of this Agreement;

M&V Plan Change means a change to the M&V Plan which is initiated by either party pursuant to Section 3 of this Schedule Part 16 (*Change Protocol*);

[Non-routine Adjustment has the meaning given in Schedule Part 3 (*Measurement and Verification*);]

[Non-routine Adjustment Event has the meaning given in Schedule Part 3 (*Measurement and Verification*);]²¹¹

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;

Relevant Event means an event or circumstance in which this Agreement expressly provides for an adjustment to the Annual Payments to be made; and

Third Party Costs means the costs incurred by the Contractor with third parties in responding to an Authority Change Notice, including, but not limited to, consultants and advisers.

²¹¹ Note that this definition should reflect that a Non-Routine Adjustment Event meets the following principles: it relates to a change in a static factor(s); a change in month on month energy usage which may imply a change in a static factor(s); unavailability of an ECM; Relief Events or Force Majeure Events; it cannot be resolved by routine adjustment pursuant to the M&V Plan. It may also be possible for the M&V Professional to deem that a Non-Routine Adjustment Event has occurred in certain specific circumstances, dependent upon the project specific terms of the M&V Professional's appointment and M&V Plan.

SECTION 2
AUTHORITY CHANGES

7. Authority Changes

7.1 If the Authority requires a Change, it must serve an Authority Change Notice on the Contractor in accordance with paragraph 2 (*Change Notice*) of this Section 2 (*Authority Changes*).

7.2 The Contractor shall be entitled to refuse a Change that:

7.2.1 requires the Works and/or the Services to be performed in a way that infringes any law or is inconsistent with Good Industry Practice;

7.2.2 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, the Contractor has been unable to obtain);

7.2.3 would materially and adversely affect the Contractor'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 2 (*Authority Changes*);

7.2.4 would materially and adversely affect the health and safety of any person;

7.2.5 would, if implemented, materially and adversely change the nature of the Project (including its risk profile); or

7.2.6 the Authority does not have the legal power or capacity to require implementation of.

8. Change Notice

8.1 An Authority Change Notice for a Change must:

8.1.1 state that it refers to a Change;

8.1.2 set out the change in the Works or Services or the additional works or services required in sufficient detail to enable the Contractor to calculate and provide the Estimated Change in Project Costs in accordance with paragraph 3 (*Contractor's Estimate*) of this Section 2 (*Authority Changes*);

- 8.1.3 set out whether, in respect of any additional facilities, the Contractor is expected to provide facilities management services and lifecycle maintenance services in respect of such additional facilities; and
- 8.1.4 set out the timing of the additional works or services required by the Authority.
- 8.2 Within fifteen (15) Business Days of receipt of the Authority Change Notice, the Contractor must notify the Authority in writing:
- 8.2.1 whether it considers that it is entitled to refuse the Change on any of the grounds set out in paragraphs 1.2.1 to 1.2.6 of this Section 2 (*Authority Changes*);
- 8.2.2 when it will provide the Estimate to the Authority bearing in mind the requirement in paragraph 7.2.2 of this Section 2 (*Authority Changes*); and
- 8.2.3 its estimate of the Third Party Costs that it will incur to prepare the Estimate.
- 8.3 If the Contractor notifies the Authority that it considers that it is entitled to refuse the Change on one or more of the grounds set out in paragraphs 1.2.1 to 1.2.6 of this Section 2 (*Authority 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 the Contractor's notice.
- 8.4 If the Authority considers that the Contractor'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.
- 8.5 If the Authority considers that the Contractor'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.
- 8.6 If any matter is referred to the Dispute Resolution Procedure pursuant to paragraph 2 of this Section 2 (*Authority Changes*), the time for the Contractor to provide the Estimate shall be counted from the date of determination of that dispute if the dispute is determined in the Contractor's favour.

9. **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 2 (*Authority Changes*), the Contractor shall deliver to the Authority the Estimate.

The Estimate must contain:

- a detailed timetable for implementation of the Change;
 - any requirement for relief from compliance with obligations, including the obligations of the Contractor to achieve the Actual Completion Date by the Completion Date and to meet the requirements set out in the Authority's Construction Requirements and/or the Service Level Specification during the implementation of the Change;
 - 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;
 - any impact on the provision of the Works and/or the Services;
 - a value for money justification for any proposed change to the quality of the works or the services comprised in the Change as compared to the Works and the Services;
 - any amendment required to this Agreement and/or any Project Document as a result of the Change;
 - any Estimated Change in Project Costs that results from the Change;
 - any Capital Expenditure that is required or no longer required as a result of the Change;
 - amendments to existing Consents that are required;
 - a payment schedule for any Capital Expenditure required to implement the Change, based on milestones where relevant;
 - costs and details of
 - any other approvals required and/or due diligence permitted pursuant to paragraph 12 (*Due Diligence*) of this Section 2; and
 - any Third Party Costs;
 - the method of implementation and the proposed method of certification of any construction aspects of the Change, if not covered by the procedures specified in Clause 14 (*Programme and Dates for Completion*); and
 - any other information reasonably requested by the Authority in the Authority Change Notice, together the Estimate.
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10. Costing of the Estimate

In calculating the Estimated Change in Project Costs and/or the Capital Expenditure for the purposes of the Estimate, the Contractor shall apply the following principles wherever applicable:

- 10.1 unless the Authority's requirements for the Change specify a different quality as compared to the Works:
 - 10.1.1 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 Change is the equivalent unit rate set out in Part 1 (*Unit Cost for Construction or Installation Costs*) of Appendix 1 of this Schedule Part 16 (*Change Protocol*), uplifted using the DTI Pubsec index for construction cost inflation in the period between the Commencement Date and the date the Change is to be commenced;
 - 10.1.2 any lifecycle replacement and maintenance associated with additional works (or changes to the Works) are consistent with the lifecycle and maintenance profile of the Works envisaged in [*reference to Contractor's Proposals*] including (without limitation) in terms of the replacement cycles for equipment, provided that the Contractor must reflect improvements in technology that can optimise whole life costs for the Authority; and
 - 10.1.3 the unit costs to be applied to the pricing of lifecycle replacement and maintenance is the equivalent unit rate set out in Part 2 (*Unit Costs of Lifecycle Maintenance*) of Appendix 1 of this Schedule Part 16 (*Change Protocol*) (index linked);
 - 10.2 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 Change are the equivalent rates set out in Part 3 (*Consultant, Sub-contractor or Supplier Fees*) of Appendix 1 of this Schedule Part 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 1 of this Schedule Part 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;
 - 10.3 unless the Authority's requirements for the Change specify a different quality than required by the Service Level Specification, the unit cost of any extension of, or change to, any Service
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(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 1 to this Schedule Part 16 (*Change Protocol*);

10.4 other than as referred to in paragraphs 4.1 to 4.3 of this Section 2 (*Authority Changes*) no charge shall be made in respect of the Contractor's time, or that of any Contractor Party spent processing, managing or monitoring the Change (and no additional mark up or management fee shall be applied by the Contractor); and

10.5 where aspects of the Change are not addressed by paragraphs 4.1 to 4.4 of this Section 2 (*Authority Changes*), they shall be costed on a fair and reasonable basis reflecting the then current market rates.

11. **Standards of provision of the Estimate**

In providing the Estimate the Contractor must:

use reasonable endeavours to oblige its Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;

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

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 Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under paragraphs 3.2.7 and/or 3.2.8 of this Section 2 (*Authority Changes*); and

provide written evidence of the Contractor's compliance with paragraphs 5.1.1 to 5.1.3 of this Section 2 (*Authority Changes*).

12. 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 Change in all respects.

13. Confirmation or Withdrawal of the Change Notice

13.1 As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to paragraph 6 (*Determination of the Estimate*) of this Section 2 (*Authority Changes*), the Authority shall:

13.1.1 confirm in writing to the Contractor the Estimate (as modified); or

13.1.2 withdraw the Authority Change Notice.

13.2 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 2 (*Authority Changes*), or has withdrawn an Authority Change Notice for a Change on three or more occasions, then the Authority shall pay to the Contractor on the third and each subsequent such occasion in that Contract Year the reasonable additional Third Party Costs incurred by the Contractor in preparing the Estimate provided that:

13.2.1 The Contractor has used all reasonable endeavours to submit a reasonably priced Estimate; and

13.2.2 The Contractor made available to the Authority, with the Estimate, a cost break down of Third Party Costs incurred by the Contractor 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 2 (*Authority Changes*).

14. Implementation of the Change

14.1 When the Authority has confirmed the Estimate in accordance with paragraph 7.1 of this Section 2 (*Authority Changes*), the Contractor shall, subject to the Contractor obtaining all new or amended Consents that are required and have not already been obtained, implement the required Change in accordance with the Estimate. Where an extension of time has been agreed as part of the Estimate the Completion Date shall be extended as agreed in the Estimate.

14.2 The Contractor shall notify the Authority when it considers that the Change has been completed.

14.3 If:

14.3.1 the Contractor fails to provide a response pursuant to paragraph 2.2 of this Section 2 (*Authority Changes*) within fifteen (15) Business Days of the date of the Change Notice; or

14.3.2 the Contractor fails to provide an Estimate in accordance with paragraph 3 of this Section 2 (*Authority Changes*); or

14.3.3 the Authority has confirmed an Estimate but the Contractor fails to fully implement the Change within ten (10) Business Days after the expiry of the time for implementing the Change set out in the Estimate (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 2 (*Authority Changes*), the Authority may notify the Contractor that the Change Notice is withdrawn and, following such notification, may procure the implementation of the Change without further recourse to the Contractor, but the Authority must ensure that the Change is carried out in accordance with Good Industry Practice and to the standards that would have applied to the Contractor if it had implemented the Change.

14.4 If the Contractor considers that the implementation of a Change by the Authority pursuant to paragraph 8.3 impacts on the performance (and/or the cost of performance (including, without limitation, lifecycle costs)) of the Project Operations then it may notify the Authority (providing full details) of the same (including the Contractor's proposals for changes required to the Project Operations or changes to the cost of performance (including, without limitation, lifecycle costs) of the Project Operations in either case as a result of the relevant Change (the **Required Changes**)) and the parties shall seek to agree:

14.4.1 the impact of the relevant Change on the performance (and/or the cost of performance (including, without limitation, lifecycle costs)) of the Project Operations, and

14.4.2 the Required Changes.

If the parties have been unable to reach agreement on these matters within twenty (20) Business Days of notification by the Contractor pursuant to this paragraph 8.4 then either party may refer the matter to the Dispute Resolution Procedure.

14.5 Any Required Changes agreed or determined pursuant to paragraph 8.4 above shall be dealt with by the Authority's Representative issuing an Authority Change Notice and the relevant provisions of this Schedule Part 16 (*Change Protocol*) shall apply except that:

14.5.1 The Contractor 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 Required Changes;

14.5.2 the Authority shall confirm the estimate for the Change in accordance with this Schedule Part 16 (*Change Protocol*); and

14.5.3 the Authority shall not be entitled to withdraw its confirmation of the estimate for the Change, issued in accordance with this paragraph 8.5.

15. **Certification of the Change**

15.1 Where the Change is implemented before the Actual Completion Date, the procedure set out at Clause 17 (*Pre-Completion Testing and Completion*) shall apply to the Change at the same time as it applies to the original Works.

15.2 Where the Change is implemented after the Actual Completion Date, and constitutes additional works, the procedure set out and agreed in the Estimate for certifying the completion of the Change shall apply to determine whether the Change has been completed appropriately.

16. **Method of Payment of Authority Contribution**

16.1 The Contractor shall invoice the Authority for Capital Expenditure incurred by the Contractor to implement a Change according to the payment schedule set out in the Estimate as referred to in paragraph 3.10.

16.2 The Authority shall make a payment to the Contractor 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 2 (*Authority Changes*) accompanied by the relevant evidence (where applicable) that the relevant part of the Change has been carried out.

17. **Adjustment to Annual Payment**

Any adjustment to the Annual Payment that is necessary due to the implementation of a Change shall be calculated in accordance with Section 5 (*Changing the Financial Model*) of this Schedule Part 16 (*Change Protocol*).

18. **Due Diligence**²¹²

18.1 The Contractor shall procure that the Senior Lenders shall not:

18.1.1 (in any event) withhold or delay any consents that are required pursuant to the Senior Financing Agreements to a Change other than on the basis that the Senior Lenders, acting pursuant to the terms of the Senior Financing Agreements, reasonably believe that one or more of the circumstances set out in paragraphs 1.2.1 to 1.2.6 of this Section 2 (*Authority Changes*) apply; or

18.1.2 carry out any due diligence (whether funder, legal, technical, insurance or financial) in relation to the carrying out of any Change unless either (i) the Change in question would result in an adjustment to the Annual Payment that, on a full year basis, is in excess of one per cent (1%) of the Annual Payment in the relevant Energy Performance Year or (ii) the Senior Lenders, 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 2 (*Authority Changes*) apply.

18.2 Where not prohibited by paragraph 12.1 of this Section 2 (*Authority Changes*), the Senior Lenders may carry out legal, financial, insurance and/or technical due diligence on any proposal for a Change. In the event that such due diligence is permitted and required, the parties shall agree a budget for the due diligence not exceeding five per cent (5%) of the overall value of the Change in question unless the parties (acting reasonably) agree otherwise. Any costs incurred by the Contractor as a result of the Senior Lenders due diligence shall be reimbursed by the Authority following agreement or determination of the contents of the Estimate within ten (10) Business Days of the Contractor submitting an invoice for and evidence of such costs, subject to the invoices being in accordance with the agreed budget.

18.3 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 Required Insurances. The Contractor shall notify the relevant insurance broker immediately upon any material Change

²¹² Relevant where project is funded via project finance

being agreed (materiality being judged in relation to the size and nature of the scope of the Change).

19. Project Documentation

19.1 Unless the parties otherwise agree, no changes to the Project Documents shall be made as a result of a Change.

19.2 Project Co shall, no later than one (1) month following completion of a Change, update the as-built drawings and the operating and maintenance manuals as necessary to reflect the Change.

20. Disputes

20.1 Any dispute concerning any matter referred to in this Section 2 (*Authority Change*) may be referred by either party to the Dispute Resolution Procedure.

20.2 The Contractor shall not be obliged to implement the Change until the dispute has been determined.

20.3 The Authority is not entitled to withdraw an Authority Change Notice and procure implementation of a 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 the Contractor 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 Change in accordance with the determination.

SECTION 3
M&V PLAN CHANGES

21. Changes to the M&V Plan

21.1 Either party may, on the occurrence of a Non-routine Adjustment Event, request that a Non-routine Adjustment be made to the M&V Plan or the [Contract Year's] M&V Savings Report, in which case the procedure set out in this Section 3 (*M&V Plan Changes*) shall apply.

22. Contract Party Adjustments

22.1 Where a party, acting reasonably, considers that a Non-routine Adjustment Event has occurred or will occur that party (the **Notifying Party**) shall issue an M&V Plan Change Notice to the other party (the **Receiving Party**) in writing.

The parties shall agree whether or not a Non-routine Adjustment Event has occurred or will occur and if so what, if any, amendments are required to the M&V Plan or the [Contract Year's] M&V Savings Report. Failing agreement, either party shall be entitled to refer the matter to the M&V Professional for his advice.

23. M&V Professional Adjustments

23.1 The M&V Professional may issue an M&V Plan Change Notice (the **Notifying Party**) to both parties (the **Receiving Parties**) where it considers that a Non-routine Adjustment Event has occurred. On receipt of the M&V Plan Change Notice the parties shall agree whether or not a Non-routine Adjustment Event has occurred and if so what, if any, amendments are required to the M&V Plan or the [Contract Year's] M&V Savings Report.

24. M&V Plan Change Notice

24.1 Each M&V Plan Change Notice must:

24.1.1 detail the Non-routine Adjustment Event; and

24.1.2 set out the proposed changes to the M&V Plan or the [Contract Year's] M&V Savings Report.²¹³

24.2 Within fifteen (15) Business Days of receipt of an M&V Plan Change Notice, the Receiving Party(ies) must notify the Notifying Party in writing whether or not:

²¹³ E.g. changes to baseline consumption or Guaranteed Energy Cost Performance and period of reporting.

24.2.1 it agrees that a Non-routine Adjustment Event has occurred or will occur; or

24.2.2 it considers any amendments are required to the M&V Plan or the [Contract Year's] M&V Savings Report.

25. Amendments to the M&V Plan

25.1 Where it is agreed or determined that a Non-routine Adjustment Event has occurred or will occur and amendments are required to the M&V Plan or the [Contract Year's] M&V Savings Report, the parties shall instruct the M&V Professional to prepare an amended M&V Plan or [Contract Year's] M&V Savings Report which shall, insofar as is practicable, place the parties in a no better and no worse position as a result of the Non-routine Adjustment Event and to deliver the same to the parties for approval.

25.2 As soon as practicable after the parties receive the revised M&V Plan or [Contract Year's] M&V Savings Report from the M&V Professional they shall discuss and endeavour to agree the M&V Plan or [Contract Year's] M&V Savings Report. If the parties cannot agree the revised M&V Plan or [Contract Year's] M&V Savings Report the matter may be referred by either party to the Dispute Resolution Procedure to determine if the revised M&V Plan or [Contract Year's] M&V Savings Report represents a fair and reasonable approach to implementing the Non-routine Adjustment in all respects, including by placing the parties, insofar as practicable, in a no better and no worse position than they would have been in had the Non-routine Adjustment Event not occurred.

25.3 Once agreed or determined the revised M&V Plan or [Contract Year's] M&V Savings Report shall be implemented and replace any previous versions of the M&V Plan or the [Contract Year's] M&V Savings Report in place at the date of agreement or determination as the case may be.

26. Costs

26.1 The cost of a referral to the M&V Professional under paragraph 2.2 shall be borne by the Contractor unless it is agreed or determined that it is the Authority who has caused or may cause the Non-routine Adjustment Event, in which case such cost of referral shall be borne by the Authority. However, if the M&V Professional advises that the Non-routine Adjustment Event has not occurred or will not occur in that event the cost of the referral shall be borne by the Notifying Party.

26.2 In circumstances where the M&V Professional issues an M&V Plan Change Notice, its reasonably incurred costs shall be borne by the party giving rise to the Non-routine Adjustment Event. However, if it is agreed or determined that a Non-routine Adjustment Event

has not occurred the reasonably incurred costs of the M&V Professional shall be borne by the Contractor.

27. **Adjustment to Annual Payment**

Any adjustment to the Annual Payment that is necessary due to the implementation of a Non-routine Change shall be calculated in accordance with Section 5 (*Changing the Financial Model*) of this Schedule Part 16 (*Change Protocol*).

SECTION 4
CONTRACTOR CHANGES

28. Procedure

If the Contractor wishes to introduce a Contractor Change, it shall serve a notice containing the information required pursuant to paragraph 2 (*Contractor Notice of Change*) of this Section 4 (*Contractor Changes*) (a **Contractor Notice of Change**) on the Authority.

Contractor Notice of Change

A Contractor Notice of Change shall:

- 28.1.1 set out the proposed Contractor Change in sufficient detail to enable the Authority to evaluate it in full;
- 28.1.2 specify the Contractor's reasons for proposing a Contractor Change;
- 28.1.3 indicate any implications of Contractor Change;
- 28.1.4 indicate what savings, if any, will be generated by Contractor Change, including:
 - (a) whether a reduction of the Annual Payment is; or
 - (b) whether such savings will be paid to the Authority in a lump sum,
- 28.1.5 in each case giving details in accordance with paragraph 8 of this Section 4 (*Contractor Changes*);
- 28.1.6 indicate whether there are any critical dates by which a decision by the Authority is required; and
- 28.1.7 request the Authority to consult with the Contractor with a view to deciding whether to agree to Contractor Change and, if so, what consequential changes the Authority requires as a result.

Evaluation of Contractor Notice of Change

28.2 The Authority shall evaluate Contractor Notice of Change in good faith, taking into account all relevant issues, including whether:

- 28.2.1 a revision of the Annual Payment will occur;
-

- 28.2.2 the Contractor 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);
- 28.2.3 the Contractor Change will interfere with the relationship of the Authority with third parties;
- 28.2.4 the financial strength of the Contractor is sufficient to perform the Works and/or Services after implementation of the Contractor Change;
- 28.2.5 the value and/or life expectancy of any of the Facilities will be reduced; or
- 28.2.6 the Contractor Change materially affects the risks or costs to which the Authority is exposed, including effect upon the Guaranteed Energy Cost Performance of the Facilities.

As soon as practicable after receiving the Contractor Notice of Change, the parties shall meet and discuss the matters referred to in it. During discussions the Authority may propose modifications to, or accept or reject, the Contractor Notice of Change.

Acceptance of the Contractor Notice of Change

- 28.3 If the Authority accepts the Contractor 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 Contractor Change which shall set out the agreed Contractor Change and:
 - 28.3.1 shall enter into any documents to amend this Agreement or any relevant Ancillary Document which are necessary to give effect to the Contractor Change;
 - 28.3.2 subject to paragraph 7 (*Changes to the Annual Payment*) of this Section 4 (*Contractor Changes*), the Annual Payment shall be revised in accordance with Section 5 (*Changing the Financial Model*) of this Schedule Part 16 (*Change Protocol*); and
 - 28.3.3 The Contractor Change shall be implemented within the period specified by the Authority in its notice of acceptance.
-

Rejection of Contractor Notice of Change

If the Authority rejects the Contractor Notice of Change, it shall not be obliged to give its reasons for such a rejection and the Contractor shall not be entitled to reimbursement by the Authority of any of its costs involved in the preparation of Contractor Notice of Change.

Changes to the Annual Payment

Unless the Authority's written acceptance expressly agrees to an increase in the Annual Payment or that the Contractor should be entitled to relief from any of its obligations, there shall be no increase in the Annual Payment or relief granted from any obligations as a result of a Contractor Change.

Changes to Contractor's Costs

If a Contractor Change causes, or will cause, the Contractor's costs or those of a sub-contractor to decrease, there shall be a decrease in the Annual Payment such that any cost savings (following deduction of costs reasonably incurred by the Contractor in implementing such Contractor Change) will be shared on the basis of fifty per cent (50%) of the saving being retained by the Contractor 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 Payment pursuant to Section 5 (*Changing the Financial Model*) of this Schedule Part 16 (*Change Protocol*).

Section 5
Changing the Financial Model²¹⁴

29. Procedure

If a Relevant Event occurs, the Financial Model shall be adjusted in accordance with this Section 5 (*Changing the Financial Model*) of this Schedule Part 16 (*Change Protocol*).

Adjusting the Logic or Formulae

If it is necessary to make a Logic Adjustment to permit an Input Adjustment or Assumption Adjustment to be made, the Contractor shall make such Logic Adjustment only:

to the extent necessary;

in accordance with generally accepted accounting principles in the United Kingdom; and

so as to leave the Contractor in no better and no worse a position.

In order to demonstrate that the conditions in paragraph 2 are met, the Contractor shall prepare:

a run of the Financial Model before making any Assumption Adjustment or Input Adjustment and immediately prior to making the Logic Adjustment; and

a run of the Financial Model immediately following the Logic Adjustment which shows that the Contractor is in no worse and no better a position following the making of the Logic Adjustment.

Adjusting the Assumptions

4.1 Subject to paragraph 4.2, the Contractor may make an Assumption Adjustment so that the Assumptions in the Financial Model reflect:

29.1.1 reasonable economic assumptions prevailing at the Adjustment Date; and

29.1.2 reasonably foreseeable changes in the prospective technical performance of the Project arising as a result of the Relevant Event.

4.2 In making Assumption Adjustments, the Contractor 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.

²¹⁴ Terms of clause to be reviewed in light of the funding solution for the Project.

Adjusting the Inputs

The Contractor 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 Payments

In order to calculate the adjustment to be made to the Annual Payments, the Contractor 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 5 (*Changing the Financial Model*) of this Schedule Part 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.

The Annual Payments shall be adjusted by such amount as leaves the Contractor, 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

29.2 Any reference in this Agreement to “no better and no worse” or to leaving the Contractor in “no better and no worse a position” shall be construed by reference to the Contractor’s:

29.2.1 rights, duties and liabilities under or arising pursuant to performance of this Agreement, the [Funding Agreements, the Construction Contract and Service Contracts]; and

29.2.2 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:

29.2.3 The Contractor 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

29.2.4 following the making of the Adjustments, the ability of the Contractor to comply with this Agreement is not adversely affected or improved as a consequence of the Relevant Event.

APPENDIX 1

APPENDIX 1

PART 1

UNIT COST FOR CONSTRUCTION OR INSTALLATION COSTS

This is Part 1 of Appendix 1 of this Schedule Part 16 (*Change Protocol*) in the Agreed Form.

PART 2
UNIT COSTS FOR LIFECYCLE MAINTENANCE

This is Part 2 of Appendix 1 of this Schedule Part 16 (*Change Protocol*) in the Agreed Form.

PART 3
CONSULTANT, SUB-CONTRACTOR OR SUPPLIER FEES

This is Part 3 of Appendix 1 of this Schedule Part 16 (*Change Protocol*) in the Agreed Form.

PART 4
UNIT COSTS FOR LABOUR RATES

This is Part 4 of Appendix 1 of this Schedule Part 16 (*Change Protocol*) in the Agreed Form.

Section 7

SCHEDULE PART 17
COMPENSATION ON TERMINATION²¹⁵

Section 1

Compensation on Termination for Authority Default and Voluntary Termination

1. COMPENSATION ON TERMINATION FOR THE AUTHORITY DEFAULT AND VOLUNTARY TERMINATION

1.1 If the Contractor 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 the Contractor the **Authority Default Termination Sum** as set out in paragraph 1.2.

1.2 Subject to paragraph 1.4 below the Authority Default Termination Sum shall be an amount equal to the aggregate of:

1.2.1 Redundancy Payments and Sub-Contractor Losses; and

1.2.2 [EITHER the amount for which the Contract could have been sold on an open market basis assuming that there is no default by the Authority but otherwise that the actual state of affairs of the Contractor and the Project is taken into account OR all amounts of Annual Payment shown in the [base case] as payable by the Authority from the Termination Date, each amount discounted back at the nominal pre-tax project IRR from the date on which it is shown to be payable in the [base case] to the Termination Date *less* the aggregate of all capital expenditure and operating costs shown in the [base case] to be incurred from the Termination Date discounted back at the nominal pre-tax project IRR from the date on which such expenditure is shown to be incurred in the [base case] to the Termination Date

LESS, to the extent it is a positive amount, the aggregate of the amounts below:

1.2.3 the value of any right of the Contractor 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 [●] 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

²¹⁵ The provisions of this Schedule are drafted on the basis of corporate finance and the relevant SoPC4 corporate finance guidance. Appropriate changes to be made on a project specific basis where project is funded via project finance and relevant SoPC4 guidance and the Eurostat EnPC Guide shall apply.

sums due and payable from third parties (but only when received from third parties) but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined or have been determined but not yet paid provided that in such case the Contractor shall assign any such rights and claims under the Sub-Contracts or claims against other third parties to the Authority and give the Authority reasonable assistance in prosecuting such claims;

1.2.4 to the extent realised before the Invoice Date the market value of any other assets and rights of the Contractor (other than those transferred to the Authority pursuant to this Agreement) less liabilities of the Contractor properly incurred in carrying out its obligations under this Agreement as at the Termination Date provided that no account should be taken of any liabilities and obligations of the Contractor arising out of:

(a) agreements or arrangements entered into by the Contractor to the extent that such agreements or arrangements were not entered into in connection with the Contractor's obligations in relation to the Project; or

(b) agreements or arrangements entered into by the Contractor to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms; and

1.2.5 amounts which the Authority is entitled to set off pursuant to Clause 46.12 of this Agreement.

1.3 To the extent that such assets and rights referred to in paragraph 1.2.4 above are not realised and applied by the Invoice Date, the Contractor shall on payment of the Authority Default Termination Sum assign such assets and rights to the Authority.

1.4 The Authority Default Termination Sum shall be payable in accordance with 0 (*General*) of this 0 (*Compensation on Termination*).

Section 2
Compensation for Contractor Default

2. If the Authority terminates this Agreement pursuant to Clause 40 (*Contractor Events of Default*), with the exception of termination pursuant to Clause 40.1.3(b), the Authority shall pay to the Contractor such sum as is calculated according to this 0 (*Compensation for Contractor Default*) of this 0 (*Compensation on Termination*).

3. RETENDERING ELECTION

- 3.1 The Authority shall be entitled to retender the provision of the Project Operations in accordance with paragraph 4 (*Retendering Procedure*) and the provisions of paragraph 4 (*Retendering Procedure*) shall apply if:

- 3.1.1 the Authority notifies the Contractor on or before the date falling twenty (20) Business Days after the Termination Date that it intends to retender; and

there is a Liquid Market; but otherwise the Authority shall not be entitled to re-tender the provision of the Project Operations and paragraph 5 (*No Retendering Procedure*) shall apply.

4. RETENDERING PROCEDURE

- 4.1 The objective of the Tender Process shall be to enter into a New Agreement with a Compliant Tenderer.
- 4.2 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.
- 4.3 The Authority shall as soon as reasonably practicable notify the Contractor of the Qualification Criteria and the other requirements and terms of the Tender Process, including the timing of the Tender Process, and shall act reasonably in setting such requirements and terms.
- 4.4 The Contractor authorises the release of any information by the Authority under the Tender Process which would otherwise be prevented under Clause 61 (*Confidentiality*) that is reasonably required as part of the Tender Process.
-

- 4.5 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 the Contractor:
- 4.5.1 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
 - 4.5.2 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.
- 4.6 The Contractor may, at its own cost, appoint a person to monitor the Tender Process for the purpose of monitoring and reporting to the Contractor and the Senior Funders on the Authority's compliance with the Tender Process.
- 4.7 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 the Contractor in the event that the Contractor 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 the Contractor 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 the Contractor on whether it considers that the Authority has acted in accordance with the Tender Process and correctly determined the Adjusted Highest Compliant Tender Price.
- 4.8 If any Post Termination Service Amount is less than zero then it may be carried forward and may be set off against any future positive Post Termination Service Amounts.
- 4.9 The Authority shall require bidders to bid on the basis that they will receive the benefit of any outstanding claims under material damage insurance 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.
- 4.10 As soon as practicable after tenders have been received, the Authority shall (acting reasonably) review and assess the Compliant Tenders and shall notify the Contractor of:
- 4.10.1 the Highest Compliant Tender Price;
 - 4.10.2 the Tender Costs; and
-

4.10.3 the Adjusted Highest Compliant Tender Price.

- 4.11 If the Contractor refers a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution in accordance with Clause 56 (*Dispute Resolution*), the Authority shall irrespective of such dispute be entitled to enter into a New Agreement.
- 4.12 The Adjusted Highest Compliant Tender Price shall be paid in accordance with 0 (*General*) of this 0 (*Compensation on Termination*).
- 4.13 Subject to paragraphs 8.6 and 8.8 of 0 (*General*) of this 0 (*Compensation on Termination*), if the Authority has not paid an amount equal to the Adjusted Highest Compliant Tender Price to the Contractor on or before the date falling two years after the Termination Date then the following provisions of this paragraph 4 shall not apply to that termination and the provisions of paragraph 5 (*No Retendering Procedure*) shall apply instead.
- 4.14 The Authority may elect at any time prior to the receipt of a Compliant Tender, to follow the no retendering procedure under paragraph 5 (*No Retendering Procedure*) by notifying the Contractor that this election has been made.

5. NO RETENDERING PROCEDURE

- 5.1 Subject to paragraph 5.2, if the provisions of this paragraph 5 (*No Retendering Procedure*) apply the Contractor shall not be entitled to receive any Post Termination Service Amount.
- 5.2 If the Authority elects to follow the no retendering procedure in accordance with this paragraph 5 (*No Retendering Procedure*) after it has elected to follow the procedure under paragraph 4 (*Retendering Procedure*), then the Authority shall continue to pay to the Contractor each Post Termination Service Amount until the Compensation Date, in accordance with paragraph 4 (*Retendering Procedure*).
- 5.3 In agreeing or determining the Estimated Fair Value of the Agreement the parties shall be obliged to follow the principles set out below:
- 5.3.1 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;
- 5.3.2 all payments forecast to be made from the Termination Date to the Expiry Date shall be calculated and discounted at the Discount Rate;
-

5.3.3 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 5.3.2 above, such costs to include (without double counting):

- (a) a reasonable risk assessment of any cost overruns that will arise, whether or not forecast in the relevant base case;
- (b) the costs of providing the Services reasonably forecast to be incurred by the Authority from the Termination Date to the Expiry Date in providing the Project Operations to the standard required; and
- (c) any rectification costs required to deliver the Project Operations to the standard required (including any costs reasonably forecast to be incurred by the Authority to complete the Works) and additional operating costs required to restore operating services standards less (to the extent that such sums are included in any calculation of rectification costs for the purposes of this paragraph) the aggregate of:
 - (i) any insurance proceeds received (or held in the Insurance Proceeds Account) or which will be received pursuant to policies maintained in accordance with Clause 53 (*Insurance*); and
 - (ii) amounts payable by the Authority in respect of Capital Expenditure under this Agreement which have not been paid,
 - in each case such costs to be forecast at a level that will deliver the Services to the standards required by this Agreement;

5.4 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 3 (*Retendering Election*) or paragraph 4 (*Retendering Procedure*) to follow the no retendering procedure in accordance with this paragraph 5 (*No Retendering Procedure*), then the Adjusted Estimated Fair Value of the Agreement shall be determined in accordance with Clause 56 (*Dispute Resolution*).

5.5 The Adjusted Estimated Fair Value of the Agreement shall be paid in accordance with Section 5 (*General*) of this 0 (*Compensation on Termination*).

5.6 In the event that the Adjusted Estimated Fair Value of the Agreement exceeds the Maximum Termination Amount, the Adjusted Estimated Fair Value of the Agreement shall be deemed to be an amount equal to the Maximum Termination Amount.

Section 3
Compensation on Termination for Force Majeure

6. CONSEQUENCES OF TERMINATION FOR FORCE MAJEURE

6.1 If the Contractor or the Authority terminates this Agreement pursuant to Clause 31.1 (*Force Majeure*) the Authority shall pay to the Contractor the Force Majeure Termination Sum as set out in paragraph 6.2.

6.2 Subject to paragraph 1.4 below the **Force Majeure Termination Sum** shall be an amount equal to the aggregate of:

6.2.1 Redundancy Payments and Sub-Contractor Losses (but excluding therefrom any claims for loss of profit);

6.2.2 The aggregate of capital expenditure and operating costs incurred as at the Termination Date, such expenditure in each case being no greater than amounts shown for such expenditure in the [base case] less the total Annual Payments paid to the Termination Date; and

LESS, to the extent it is a positive amount, the aggregate of the amounts below:

6.2.3 the value of any right of the Contractor 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 [●] of this Agreement in reinstatement, restoration or replacement, or in the case of third party legal liability or employer's liability, in satisfaction of the claim, demand, proceeding or liability) or sums due and payable from third parties (but only when received from third parties) but excluding any claims under any Sub-Contracts or claims against other third parties which have not been determined or have been determined but not yet paid provided that in such case the Contractor 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;

6.2.4 to the extent realised before the Invoice Date, the market value of any other assets and rights of the Contractor (other than those transferred to the Authority pursuant to this Agreement) less liabilities of the Contractor properly incurred in carrying out its obligations under this Agreement as at the Termination Date provided that no account should be taken of any liabilities and obligations of the Contractor arising out of:

- (a) agreements or arrangements entered into by the Contractor to the extent that such agreements or arrangements were not entered into in connection with the Contractor's obligations in relation to the Project; and
- (b) agreements or arrangements entered into by the Contractor to the extent that such agreements or arrangements were not entered into in the ordinary course of business and on commercial arm's length terms; and

6.2.5 amounts which the Authority is entitled to set off pursuant to Clause 46.12 of this Agreement.

6.3 To the extent that such assets and rights referred to in paragraph 6.2.4 above are not realised and applied pursuant to that paragraph the Contractor shall on payment of the Force Majeure Termination Sum assign such assets and rights to the Authority.

6.4 The Force Majeure Termination Sum shall be paid in accordance with 0 (*General*) of this 0 (*Compensation on Termination*).

Section 4
Corrupt Gifts and Fraud

7. CONSEQUENCES OF TERMINATION FOR CORRUPT GIFTS AND FRAUD OR BREACH OF REFINANCING

- 7.1 If the Authority terminates this Agreement pursuant to Clause 44.3 the Authority shall not be obliged to make any payment to the Contractor.
-

Section 5
General

8. PAYMENT AND INTEREST

Following termination for Authority Default and Force Majeure

- 8.1 In respect of the termination payments to be made pursuant to any of 0 (*Compensation on Termination for Authority Default and Voluntary Termination*) and 0 (*Compensation on Termination for Force Majeure*) of this 0 (*Compensation on Termination*) as soon as practicable after, and in any event within twenty (20) Business Days of, the Termination Date, the Contractor shall give to the Authority an invoice for the relevant termination sum and sufficient supporting evidence, reasonably satisfactory to the Authority, justifying the amount of the relevant termination sum including a breakdown of each of the individual elements of such sum.
- 8.2 Subject to paragraph 8.3 below, the Authority shall pay to the Contractor:
- 8.2.1 the relevant termination amount within forty (40) Business Days of the Invoice Date; and
- 8.2.2 interest on the relevant termination amount (or any part of such amount that remains outstanding) from the Termination Date until the date of payment:
- (a) at the No Default Interest Rate for the period from (but excluding) the Termination Date to (and including) the date which is forty (40) Business Days after the Invoice Date; and
- (b) thereafter, at the Default Interest Rate.
- 8.3 The Authority shall be entitled to pay the amount payable pursuant to 0 or 0 (as the case may be) of this 0 (*Compensation on Termination*) (**Termination Sum**) in four (4) equal instalments by serving notice on the Contractor within thirty (30) Business Days of the Invoice Date, in which case the provisions of paragraph 8.4 shall apply.
- 8.4 In the event that the Authority elects to pay the Termination Sum in instalments pursuant to paragraph 8.3 then:
- 8.4.1 the first such instalment (together with interest thereon calculated pursuant to paragraph 8.4.2 below) shall be due on the first Business Day occurring six (6) months after the date of the Authority's notice served pursuant to paragraph 8.3
-

above and the remaining instalments (together with interest thereon calculated pursuant to paragraph 8.4.2 below) shall be due, respectively, on the first Business Day occurring twelve (12), eighteen (18) and twenty-four (24) months after the date of such notice; and

8.4.2 the Authority shall pay interest on the Termination Sum (or any part of such sum that remains outstanding) from the Termination Date until the date of payment at the No Default Interest Rate.

If the Authority fails to make a payment under paragraph 8.4.1 or 8.4.2 above in full within ten (10) Business Days of the due date for payment[, or an Adverse Law or a Proposal for an Adverse Law is made]²¹⁶ then the outstanding amount of the Termination Sum shall be immediately due and payable and, thereafter, the Authority shall pay interest on such sum at the Default Interest Rate.

Following Retendering

8.5 Subject to paragraphs 8.6 and 8.8, following a retendering exercise under 0 (*Compensation for Contractor Default*) of this 0 the Authority shall pay to the Contractor an amount equal to the Adjusted Highest Compliant Tender Price no later than the date falling twenty (20) Business Days after the later of:

8.5.1 the date of the New Agreement; and

8.5.2 if the Contractor has referred a dispute relating to the Adjusted Highest Compliant Tender Price to dispute resolution pursuant to paragraph 4.11 of 0 (*Compensation for Contractor Default*) of this 0, the date on which the dispute is finally determined in accordance with Clause 56 (*Dispute Resolution*),

provided that, to avoid doubt, if the dispute referred by the Contractor to dispute resolution (pursuant to paragraph 8.5.2 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 8.5.1 above (the **Undisputed Payment Date**) and the Authority shall pay interest to the Contractor 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 8.5.2 above at the No Default Interest Rate.

8.6 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 the Contractor of this decision and (if the Adjusted Highest Compliant Tender Price is a

²¹⁶ For NHS projects only

positive number) pay to the Contractor an amount equal to the Adjusted Highest Compliant Tender Price within twenty (20) Business Days of such notification.

- 8.7 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 8.5 or paragraph 8.6 above, the Authority shall pay to the Contractor 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 8.5 or paragraph 8.6 above until such amount is paid.
- 8.8 If the Adjusted Highest Compliant Tender Price is zero or a negative number then, on entering into the New Agreement with the New Contractor, the Authority shall have no obligation to make any payment to the Contractor and (if a negative number) an amount equal to the Adjusted Highest Compliant Tender Price shall be due and payable by the Contractor to the Authority on the date of the New Agreement or (where paragraph 8.6 applies) within twenty (20) Business Days of notification from the Authority pursuant to that paragraph.

Following no retendering

- 8.9 If the Authority follows the no retendering procedure set out in paragraph 5 of 0 (*Compensation for Contractor Default*) of this 0 (*Compensation on Termination*) then, subject to paragraph 8.10, the Authority shall pay to the Contractor an amount equal to the Adjusted Estimated Fair Value of the Agreement no later than the date falling twenty (20) Business Days after the Compensation Date together with interest on such amount calculated in accordance with paragraph 8.2.2 above unless the Authority has paid Post Termination Service Amounts pursuant to paragraph 4.5 of 0 (*Compensation for Contractor Default*) of this 0 (*Compensation on Termination*).
- 8.10 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 the Contractor to the Authority on the Compensation Date.

9. FULL AND FINAL SETTLEMENT

- 9.1 Any and all sums irrevocably paid by the Authority to the Contractor under this 0 (*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, delict, restitution or otherwise but without prejudice to:
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- 9.1.1 any antecedent liability of the Contractor to the Authority which the Authority has been unable to set off pursuant to Clause 46.12 of this Agreement;
- 9.1.2 any antecedent liability of either party to the other that arose prior to the Termination Date (but not from the termination itself) to the extent such liability has not already been taken into account in determining or agreeing the Authority Default Termination Sum, Adjusted Highest Compliant Tender Price, or Adjusted Estimated Fair Value of the Agreement, the Force Majeure Termination Sum or the sum due in accordance with 0 of this 0 (Compensation on Termination) as the case may be; and
- 9.1.3 any liabilities arising in respect of any breach by either party of their obligations under Clause 47.6 of this Agreement which arises or continues after the Termination Date.

9.2 If either the Adjusted Highest Compliant Tender Price or (as the case may be) the Adjusted Estimated Fair Value of the Agreement is zero or a negative number the Authority shall be released from all liability to the Contractor for breaches and/or termination of this Agreement and any other Project Document whether under contract, delict, restitution or otherwise save for:

- 9.2.1 any antecedent liability of the Authority which 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 the Adjusted Highest Compliant Tender Price or the Adjusted Estimated Fair Value of the Agreement (as the case may be); and
- 9.2.2 any liabilities arising in respect of any breach by either party of their obligations under Clause 47.6 of the Agreement which continues after the Termination Date.

10. COSTS

The costs and/or expenses to be taken into account in the calculation of all termination sums due pursuant to this 0 (*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.

11. 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 0 (*General*) of this 0 (*Compensation on Termination*) and the disputed element shall be dealt with in accordance with 0 (*Dispute Resolution Procedure*).

Section 6 Definitions

Adjusted Estimated Fair Value of the Agreement means, subject to paragraph 5.6 of 0 (*Compensation for Contractor Default*) of this 0 (*Compensation on Termination*), the Estimated Fair Value of the Agreement adjusted as follows:

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 4.8 of 0 (*Compensation for Contractor Default*) of this 0 (*Compensation on Termination*));

and the aggregate of the following amounts shall be deducted from the Estimated Fair Value of the Agreement:

the Post Termination Service Amounts actually paid by the Authority to the Contractor prior to the Compensation Date;

the Tender Costs; and

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:

all credit balances on any bank accounts held by or on behalf of the Contractor on the date that the Estimated Fair Value of the Agreement is calculated; and

any insurance proceeds and other amounts owing to the Contractor (and which the Contractor is entitled to retain), to the extent not included in (e);

to the extent that:

(e) and (f) have not been directly taken into account in calculating the Estimated Fair Value of the Agreement; and

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 the Highest Compliant Tender Price adjusted as follows:

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 4.8 of 0 (*Compensation for Contractor Default*) of this 0 (*Compensation on Termination*));

and the aggregate of the following amounts shall be deducted from the Highest Compliant Tender Price:

the Post Termination Service Amounts actually paid by the Authority to the Contractor prior to the Compensation Date;

the Tender Costs; and

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:

all credit balances on any bank accounts held by or on behalf of the Contractor on the date that the highest priced Compliant Tender is received; and

any insurance proceeds and other amounts owing to the Contractor (and which the Contractor is entitled to retain), to the extent not included in (c);

to the extent that:

(e) and (f) have not been directly taken into account in that Compliant Tender; and

the Authority has received such amounts in accordance with this Agreement;

Compensation Date means either:

if paragraph 4 (*Retendering Procedure*) of 0 (*Compensation for Contractor Default*) of this 0 (*Compensation on Termination*) applies, the earlier of:

the date that the New Agreement is entered into; and

the date on which the Authority pays the Adjusted Highest Compliant Tender Price to the Contractor; or

if paragraph 4 (*No Retendering Procedure*) of 0 (*Compensation for Contractor Default*) of this 0 (*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 the Contractor 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];

Deemed New Agreement means an agreement on the same terms and conditions as this Agreement, as at the Termination Date, but with the following amendments:

if this Agreement is terminated prior to the Actual Completion Date, then the period of [●] months after the Completion Date referred to in Clause 40.1.2 shall be extended by a period to allow a New Contractor (had one been appointed) to achieve the Actual Completion Date(s) prior to the expiry of the said period(s);

any accrued Availability Deductions and/or Warning Notices and/or Energy Performance Notices shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions, be cancelled; and

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[●];

Estimated Fair Value of the Agreement means the amount determined in accordance with paragraph 5 (No Retendering Procedure) of 0 (*Compensation for Contractor Default*) of this 0 (*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 or the Force Majeure Termination Sum (as appropriate), the date that is the later of:

the date on which the Authority receives an invoice from the Contractor for the relevant termination sum; and

the date on which the Authority receives the supporting evidence required pursuant to paragraph 8.1 of 0 (*General*) of this 0 (*Compensation on Termination*);

Liquid Market means that there are sufficient willing parties (being at least two 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;

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 Payment under paragraph 2 of Section 3 of 0 (*Payment Mechanism*) in the month immediately preceding the Termination Date, less an amount equal to any availability deduction that was made for a [reference area or item] 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 Payment payable at any time before any deductions under Section 3 of 0 (*Payment Mechanism*) but allowing for indexation under Section 2 of 0 (*Payment Mechanism*);

New Agreement means an agreement on the same terms and conditions as this Agreement at the Termination Date, but with the following amendments:

if this Agreement is terminated prior to the Actual Completion Date, then the period of [●] months after the Completion Date referred to in Clause 40.1.2 shall be extended by a period to allow a New Contractor to achieve the relevant Actual Completion Date(s) prior to the expiry of the said period(s);

any accrued Deductions and/or Warning Notices and/or Energy Performance Notices shall, for the purposes of termination only, and without prejudice to the rights of the Authority to make financial deductions, be cancelled;

the term of such agreement shall be equal to the term from the Termination Date until the Expiry Date;

any amendments which parties interested in entering into a New Agreement propose as required in order for the arrangements to deliver the New Agreement to be financed on a project finance basis, any such amendments to be considered at the Authority's discretion; and

any other amendments which do not adversely affect the Contractor;

New Contractor means the person who has entered or who will enter into the New Agreement with the Authority;

No Default Interest Rate means [●];

Post Termination Service Amount means for the purposes of paragraph 4 (Retendering Process) of 0 (*Compensation for Contractor Default*) of this 0 (*Compensation on Termination*), for the whole or any part of a month for the period from the Termination Date to the Compensation Date, an amount equal to the Maximum Service Payment (*pro rata* for part of a month) which would have been payable under this Agreement had this Agreement not been terminated, less an amount equal to the aggregate of (without double counting):

(where relevant) the amount by which the Post Termination Service Amounts for the previous month was less than zero;

the Market Value Availability Deduction Amount for that month; and

the Rectification Costs incurred by the Authority in that month;

Qualification Criteria means the criteria that the Authority requires tenderers to meet as part of the Tender Process, which (subject to compliance with procurement regulations) shall be:

the New Agreement terms;

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;

the tenderers may only bid on the basis of a single capital payment to be made on the date of the New Agreement;

the tenderer is experienced in providing the Services or similar services;

the technical solution proposed by the tenderers is capable of delivery and the tenderer is technically capable of delivery of the Services; and

any other tender criteria agreed by the Authority and the Contractor;

Rectification Costs means, for the purposes of any Termination Date that occurs after the Actual Completion Date, an amount equal to the reasonable and proper costs incurred by the Authority in a particular month or part of a month in ensuring that the Services are available;

Redundancy Payments means redundancy payments and other termination payments which are required under Law to be made to employees of the Contractor reasonably and properly incurred by the Contractor arising as a direct result of terminating this Agreement (provided that the Contractor

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 the Contractor arising out of:

contracts of employment or other agreements or arrangements entered into by the Contractor to the extent that such contracts of employment agreements or arrangements were not entered into in connection with the Project; and/or

contracts of employment or other agreements or arrangements entered into by the Contractor 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 the Contractor 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, but that otherwise the actual state of affairs of the Contractor and the Project is taken into account;

Sub-Contractor Losses means:

the amount reasonably and properly payable by the Contractor to the [*reference any relevant works/installation contracts, dependent upon project structure*] as a direct result of the termination of this Agreement provided that such amount shall be reduced to the extent that the Contractor fails to use all reasonable endeavours to mitigate such amount; and

the amount reasonably and properly payable by the Contractor to the [*reference any relevant services contracts, dependent upon project structure*] as a direct result of the termination of this Agreement provided that such amount shall be reduced to the extent that the Contractor 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 the Contractor to [the Sub-Contractors] arising out of:

agreements or arrangements entered into by the Contractor 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

agreements or arrangements entered into by the Contractor 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 means [●];

Tender Costs means the reasonable and proper costs of the Authority incurred in carrying out the Tender Process and/or in connection with any calculation of the Estimated Fair Value of the Agreement;

Tender Process means the process by which the Authority requests tenders from any parties interested in entering into a New Agreement, evaluates the responses from those interested parties and enters into a New Agreement with a new service provider, in accordance with 4 (Retendering Process) of 0 (*Compensation for Contractor Default*) of this 0 (*Compensation on Termination*);

Tender Process Monitor means the person appointed under paragraph 4.6 of 0 (*Compensation for Contractor Default*) of this 0 (*Compensation on Termination*);

Termination Sum has the meaning given in paragraph 8.3 of 0 (*General*) of this 0 (*Compensation on Termination*).

SCHEDULE PART 18
HANDBACK PROCEDURE

12. DEFINITIONS

In this 0 (*Handback Procedure*) and elsewhere in this Agreement (save where Schedule Part 1 (*Definitions and Interpretations*) provides to the contrary) the following words shall have the following meanings:

Handback Works means the maintenance works (if any) required to be carried out in respect of the [*relevant part of the Facilities*] in order to procure that they will, on the Expiry Date, satisfy the Handback Requirements;

Handback Programme means the programme for carrying out the Handback Works over the remainder of the Project Term describing the total works to be carried out and the method of carrying out such works during the overall period in which the Handback Works are to be executed;

Handback Amount means the estimated cost of carrying out the Handback Works.

13. On the Expiry Date, each element of the Facilities shall be in a condition which is:
- 13.1 consistent with due performance by the Contractor of the Service Level Specification and Method Statements and (without limitation) of Clause 23 (*Maintenance*);
 - 13.2 consistent with the [*relevant parts of the Facilities*] and each of the elements of them having been designed and constructed in accordance with the applicable design life requirements set out in [●];
 - 13.3 consistent with [*set out any sector or facility specific condition requirement, including any base efficiency requirement for the energy performance measures installed, if appropriate*];
and
 - 13.4 consistent with good industry practice and the Health and Safety Regime,
together referred to as (the **Handback Requirements**).
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14. Not less than [two (2) years] prior to the Expiry Date, the Contractor and the Authority's Representative shall conduct a joint inspection of the [*relevant part of the Facilities*], for the purposes of which the Authority shall have access to such maintenance information and energy performance information held by the Contractor which is relevant to the inspection.
 15. Within fifteen (15) Business Days after the completion of the inspection, if it is found that any element of the [*relevant parts of the Facilities*] is not in a condition consistent with the Handback Requirements, Contractor shall forthwith provide to the Authority's Representative in accordance with 0 (Review Procedure):
 - 15.1 The Contractor's proposal as to the Handback Works;
 - 15.2 The Contractor's proposal as to the Handback Programme; and
 - 15.3 The Contractor's estimate of the cost of the Handback Amount.
 16. The Authority's Representative may, within fifteen (15) Business Days after receipt of the details set out in paragraph 15 from the Contractor, raise comments in accordance with paragraph 3 of 0 (*Review Procedure*) on the Contractor's proposals and estimate referred to in paragraph 12 above.
 17. On agreement, or determination in accordance with 0 (*Dispute Resolution Procedure*), of the Handback Works, the Handback Programme and/or the Handback Amount (as the case may be), the Contractor shall procure that the Handback Works are carried out in accordance with the Handback Programme so as to meet the Handback Requirements. The Contractor 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.
 18. From the date of the agreement (or determination in accordance with 0 (*Dispute Resolution Procedure*)) of the matters identified in paragraph 6, the Authority shall be entitled to withhold [●]% of each subsequent Monthly Payment up to the amount of the Handback Amount (the **Withheld Amount**) and the provisions of paragraph 21 shall apply. The Authority shall pay such amounts into an interest bearing account in its own name (the **Retention Fund**).
 19. The Contractor may elect by notice in writing to the Authority within ten (10) Business Days of the agreement (or determination in accordance with 0 (*Dispute Resolution Procedure*)) of the matters identified in paragraph 17 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
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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 18 shall not apply.

20. The Contractor 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.
 21. Where this paragraph 21 applies, if and to the extent that the Contractor carries out any material part of the Handback Works in accordance with paragraph 17, the Contractor may make a claim for payment for the work carried out. Any such claim shall be accompanied by a certificate by the Contractor setting out the works performed and the value of such works. The Authority shall be entitled to require any reasonable further evidence in respect of the valuation of the works. The Authority shall make payment of the amount of a valid claim within ten (10) Business Days of the date of the claim and shall be entitled to withdraw that amount from the Retention Fund. If at any time the amount in the Retention Fund is insufficient to cover the costs claimed by the Contractor, 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 the Contractor's costs which have not been paid, the Contractor shall bear the balance of such costs itself.
 22. Not later than sixty (60) Business Days before the Expiry Date, the Contractor and the Authority's Representative shall conduct a joint inspection of the [*relevant part of the Facilities*]. Such inspection shall confirm whether or not the condition of the [*relevant part of the Facilities*] is in accordance with paragraph 12 above.
 23. On, or within ten (10) Business Days after, the Expiry Date, the Authority's Representative shall either:
 - 23.1 issue to the Contractor a Handback Certificate and return the Handback Bond or pay any balance standing to the credit of the Retention Fund (as appropriate), to the Contractor; or
 - 23.2 notify the Contractor of its decision not to issue the Handback Certificate stating the reasons for such decision.
 24. Any notice given by the Authority's Representative in accordance with paragraph 23.2 shall set out each respect in which the Handback Works have not been completed or the [*relevant part of the Facilities*] do not comply with the Handback Requirements and shall
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state the Authority's Representative's estimate of the cost of procuring that the [relevant part of the Facilities] comply in all respects with the Handback Requirements.

25. The Contractor may, within fifteen (15) Business Days after receipt of the notice given in accordance with paragraph 23.2 by notice to the Authority's Representative, object to any matter set out in the Authority's Representative's notice. The notice from the Contractor shall give details of the grounds of such objection and shall set out the Contractor's proposals in respect of such matters.
 26. If no agreement is reached between the Contractor and the Authority's Representative as to any matter referred to in the Contractor's notice given in accordance with paragraph 25 within fifteen (15) Business Days of receipt of that notice by the Authority's Representative, then either the Contractor's or the Authority's Representative may refer the matter for determination in accordance with 0 (*Dispute Resolution Procedure*) as to:
 - 26.1 whether the [*relevant part of the Facilities*] comply in all respects with the Handback Requirements; and
 - 26.2 the estimated cost of procuring that the [*relevant part of the Facilities*] comply in all respects with the Handback Requirements, where the [*relevant part of the Facilities*] do not comply in all respects with the Handback Requirements.
 27. If it is agreed or determined in accordance with 0 (*Dispute Resolution Procedure*) that the [*relevant part of the Facilities*] did not, at the Expiry Date, comply in all respects with the Handback Requirements, the Contractor 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 [*relevant part of the Facilities*] comply in all respects with the Handback Requirements. Such payment shall be made not later than fifteen (15) 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 the Contractor.
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SCHEDULE PART 19
RECORD PROVISIONS

Section 1
General Requirements²¹⁷

1. The Contractor shall retain and maintain all the records (including superseded records) referred to in 0 (*Records to be Kept*) of this 0 (*Record Provisions*) in accordance with this 0 (*General Requirements*) of this 0 (*Record Provisions*), the requirements of Good Industry Practice, in chronological order, in a form that is capable of audit and at its own expense. The Contractor 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 0 (*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 the Contractor 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. The Contractor shall ensure that ECM asset registers and maintenance records associated with Project Operations shall be provided in a recognised Industry Foundation Class format, for interoperability with any Authority electronic building information systems.
4. Financial and other records (including without limitation all information provided in support of any Change) shall be retained and maintained by the Contractor for a period of at least [●] years after the end of the Project Term in sufficient detail, in appropriate categories and generally in such a manner to enable the Contractor to comply with its obligations under Clause 63.1 [and where appropriate to enable the data in such records to be entered into the Financial Model so that the output from the Financial Model (on the basis of such data) can be directly compared with the actual financial cashflow and performance of the Contractor]²¹⁸.
5. Where the Contractor wishes to dispose of any records maintained as provided in this 0 (*Record Provisions*) which are more than [●] years old, or in respect of which the required period for their retention has expired, then the Contractor shall notify the Authority and if,

²¹⁷ The timescales referred to in this Section 1 will be influenced by Authority policies and the scale/cost of the Project/Works.

²¹⁸ Relevant to projects which are funded via project finance

within forty (40) Business Days of such notice, the Authority elects to receive certain of those records, then the Contractor 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 the Contractor.

6. Subject to paragraph 5, for a period of not more than [●] years following the termination for whatever reason of this Agreement, the Contractor shall retain in safe storage all such records as are referred to in 0 (*Records to be Kept*) of this 0 (*Record Provisions*) which were in existence at the date of termination of this Agreement. On the expiry of such period or at the earlier request of the Authority (and the Parties acknowledge that such a request shall be deemed to have been issued by the Authority upon the occurrence of any of the events set out in Clause 40.1.1 whether prior to or following termination of this Agreement), the Contractor shall deliver up all those records (or where those records are required by statute to remain with the Contractor or a Contracting Associate of the Contractor, copies thereof) to the Authority in the manner and at the location as the Authority shall reasonably specify. The Authority shall make available to the Contractor all the records the Contractor 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 the Contractor where the termination arises as a result of a Contractor Event of Default; and

6.2 by the Authority where the termination arises for any other cause.

7. ²¹⁹Without prejudice to the foregoing, the Contractor 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 the Contractor which falls during the Project Term, a copy, certified as a true copy by an officer of the Contractor, of its unaudited interim accounts; 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 the Contractor but not later than one hundred and thirty (130) Business Days after the end of each accounting reference period of the Contractor part or all of which falls in a Contract Year, a copy of the Contractor's audited accounts and [*include the accounts of any group company upon whose covenant the contractor relies pursuant to the Framework Agreement*] in respect of that period, prepared in accordance with the Companies Act 1985 and generally accepted accounting principles and bases in Scotland,

²¹⁹ The full relevance of this provision will depend on the scale of the project

consistently applied together with copies of all related directors' and auditors' reports and all other notices/circulars to shareholders.

8. [The Contractor 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 by it to the Senior Funders during the Project Term and any other information relating to the Project that the Authority may reasonably require.]²²⁰
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, the Contractor shall (and shall ensure that the sub-contractors will) comply with all reasonable requests of the Authority to provide information relating to the Contractor's costs of operating and maintaining the Project.
11. The Contractor 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.

²²⁰ Relevant to projects which are funded via project finance

Section 2
Records to be Kept²²¹

1. This Agreement, its Schedule and the Project Documents including all amendments to such agreements.
2. The Contractor shall at all times maintain a full record of particulars of the costs of performing the Project Operations, including:
 - 2.1 administrative overheads;
 - 2.2 payments to the Contractor 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 29.11, 0 (*Change Protocol*) and Clause 32 (*Changes in Law*),

and the Contractor shall have the books of account evidencing the items listed in paragraphs 2.1 to 2.4 above 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 the Contractor's Representative.
5. Project Data.
6. Documents, drawings, design data or submissions raised in accordance with 0 (*Review Procedure*).
7. Documents relating to planning applications, consents, refusals and appeals.
8. Records relating to any specialist or statutory inspections of the [*relevant part of the Facilities*], including any roadways.
9. Notices, reports, results and certificates relating to completion of the Works and [operational and verification testing of the [*relevant part of the Facilities*]].

²²¹ This list is indicative and should be scoped on a project specific basis

10. All operation and maintenance manuals and a full record of all maintenance procedures carried out during the Project Term.
 11. Documents relating to events of Force Majeure, Delay Events and Relief Events and the consequences of the same.
 12. All formal notices, reports or submissions made to or received from the Authority's Representative in connection with the provision of Services.
 13. All certificates, licences, registrations or warranties related to the provision of Services.
 14. Documents submitted in accordance with 0 (*Change Protocol*) and all documents provided in support.
 15. Documents related to referrals to the Dispute Resolution Procedure.
 16. Documents related to change in ownership of the Contractor.
 17. Tax invoices and records related to VAT.
 18. 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.
 19. Documents relating to insurance and insurance claims.
 20. All other records, notices or certificates required to be produced and/or maintained by the Contractor pursuant to this Agreement or any Project Document.
 21. Records of all persons employed by the Contractor or its sub-contractors and who are wholly or mainly engaged in the delivery of Services.
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SCHEDULE PART 20
DISPUTE RESOLUTION PROCEDURE

1. The procedure set out in this 0 (*Dispute Resolution Procedure*) shall apply to any dispute, claim or difference arising out of or relating to this agreement (**Dispute**) except where it has been excluded from this procedure by an express term of this agreement.
2. This dispute resolution procedure shall not impose any pre-condition on either party or otherwise prevent or delay either party from commencing proceedings in any court of competent jurisdiction in relation to any dispute in which that party requires either:
 - 2.1 an order (whether interlocutory or final) restraining the other party from doing any act or compelling the other party to do any act; or
 - 2.2 a decree for a liquidated sum to which there is no stateable defence.

3. MEDIATION

- 3.1 If the parties have been unable to resolve the Dispute within twenty (20) Business Days of the Dispute arising, they may (if both parties so agree) refer the Dispute to mediation on such conditions as may be agreed between the parties. Any mediation shall be completed within thirty (30) Business Days of such referral 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.
- 3.2 For the avoidance of doubt, mediation shall not be a precondition to the commencement of Adjudication or court proceedings.

4. ADJUDICATION

- 4.1 Either party may at any time (notwithstanding that other dispute resolution procedures are running concurrently) give 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 4.2 below or paragraph 4.11 (*Related Adjudicator*) below (the **Adjudicator**).
 - 4.2 The Adjudicator nominated to consider a Dispute referred to him shall, subject to paragraph 4.11, be selected by agreement between the Contractor and the Authority, each acting reasonably and having regard to the nature of the Dispute. If the Contractor and the
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Authority are unable to agree on the identity of the adjudicators to be selected within seven (7) days of the Notice of Adjudication, the Chairman (or Vice Chairman) for the time being of the Chartered Institute of Arbitrators Scottish Branch shall appoint such adjudicator(s) within seven (7) days of any application for such appointment by either party;

- 4.3 The Referring Party shall, within seven (7) days of the date of the Notice of Adjudication, serve its statement of case (the **Referral Notice**) on the Adjudicator (appointed pursuant to paragraph 4.2) 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.
 - 4.4 Within seven (7) days of appointment in relation to a particular Dispute, the Adjudicator shall establish the procedure and timetable for the adjudication. The Adjudicator shall have absolute discretion as to how to conduct the adjudication, including whether a meeting is necessary. He shall establish the procedure and timetable subject to any limitation within this Agreement. The parties shall comply with any request or direction of the Adjudicator in relation to the adjudication.
 - 4.5 The Adjudicator shall reach a decision on the Dispute within twenty-eight (28) days 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.
 - 4.6 The Adjudicator's costs of any reference shall be borne as the Adjudicator shall specify or, in default, equally by the parties. Each party shall bear its own costs arising out of the adjudication, including legal costs and the costs and expenses of any witnesses.
 - 4.7 The Adjudicator shall be deemed not to be an arbitrator but shall render his decision as an adjudicator and the law relating to arbitration shall not apply to the Adjudicator or his determination or the procedure by which he reached his determination.
 - 4.8 The Adjudicator shall act fairly and impartially and may take the initiative in ascertaining the facts and the law. The Adjudicator shall have the power to open up, review and revise any
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opinion, certificate, instruction, determination or decision of whatever nature given or made under this Agreement.

- 4.9 All information, data or documentation disclosed or delivered by a party to the Adjudicator in consequence of or in connection with his appointment as Adjudicator shall be treated as confidential. The Adjudicator shall not, save as permitted by Clause 61 (*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.
- 4.10 The Adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith. Any employee or agent of the Adjudicator is similarly protected from liability.
- 4.10A 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.
- 4.10B 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.
- 4.10C Any correction of a decision shall form part of the decision.
- 4.11 If any Dispute raises issues which, in the opinion of the Contractor, 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 the Authority and the Contractor which was or has been referred to adjudication (the **Related Adjudication**) and an adjudicator has already been appointed (the **Related Adjudicator**) then the Contractor may request that the Dispute be referred to the Related Adjudicator and paragraphs 4.[●] to 4.[●] shall apply.²²²

5. COURT PROCEEDINGS

Subject to paragraph 4 (Adjudication) all Disputes, to the extent not finally resolved pursuant to the procedures set out in the foregoing provisions of this 0 (*Dispute Resolution Procedure*), shall be referred to the Court of Session in Edinburgh (or the Sheriff Court in Edinburgh where the Dispute is of an appropriate value).

²²² Related disputes provisions to be added appropriate projects with an SPV structure and/or a defined subcontracting delivery model.

6. [SUBMISSIONS IN RELATION TO ADJUDICATION]

6.1 If:

6.1.1 any Dispute raises issues which relate to any dispute between the Authority and the Contractor arising under this Agreement or otherwise affects the relationship or rights of the Authority and/or the Contractor under the Construction Contract (the **Construction Contract Dispute**); or

6.1.2 any dispute between the Contractor and the Service Provider arising under the Service Contract or otherwise affects the relationship or rights of the Contractor and/or the Service Provider under the Service Contract (the **Service Contract Dispute**),

then the Contractor may include as part of its submissions made to the Adjudicator submissions made by the Construction Contractor or by the Service Provider as appropriate.

6.2 Any submissions made by the Contractor or the Service Provider shall:

6.2.1 be made within the time limits applicable to the delivery of submissions by the Contractor to the Adjudicator; and

6.2.2 concern only those matters which relate to the Dispute between the Authority and the Contractor arising out of this Agreement or in connection therewith.

6.3 Where the Construction Contractor or the Service Provider 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 the Contractor.

6.4 The Authority shall have no liability to the Construction Contractor or the Service Provider arising out of or in connection with any decision of the Adjudicator or in respect of the costs of the Construction Contractor or the Service Provider in participating in the resolution of any Dispute under this Agreement.

6.5 The Contractor shall not allow the Construction Contractor or the Service Provider access to any Confidential Information relevant to the issues in dispute between the Authority and the Contractor save where:

6.5.1 the Confidential Information is relevant also to the issues relating to the Construction Contract Dispute or the Service Contract Dispute as the case may be; and

6.5.2 the Contractor has first delivered to the Authority a written undertaking from the Construction Contractor and/or the Service Provider (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 Construction Contractor or the Service Provider (as appropriate) to advise in connection with the Dispute.]²²³

7. NO LOSS

Where the Authority would otherwise be expressly liable to make payment to the Contractor of sums which include amounts payable in turn by the Contractor to any Sub-Contractor, the Authority shall not be entitled to withhold, reduce or avoid any such payment to the Contractor in reliance only on the fact that the amount which is due from the Contractor 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 the Contractor from the Authority.

8. 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 0 (*Dispute Resolution Procedure*)), continue to carry out their obligations in accordance with this Agreement.

²²³ Relevance depends upon contracting structure of project.

SCHEDULE PART 21
CONTRACTOR INFORMATION²²⁴

²²⁴ See footnoted comments at Clause 58

**SCHEDULE PART 22
CERTIFICATES**

Handback Certificate

Issued by: Authority's Representative

Address: [●]

Authority: [AUTHORITY]

Address: [●]

Contractor: [CONTRACTOR]

Address: [●]

Issue date:

Works:

Situated at:

Agreement dated:

I/we certify that the condition of the Facilities is in accordance with paragraph 12 of 0 (*Handback Procedure*) of above mentioned Agreement.

To be signed by or for the issuer named above.

Signed.....

[AUTHORITY]

Certificate of Practical Completion

Issued by: [●]
Address: [●]
Contractor: [CONTRACTOR]
Address: [●]
Issue date:

Works:

Situated at:

Agreement dated:

Under the terms of the above-mentioned Agreement,

I/we certify that the Actual Completion Date for the Works was achieved on [●].

To be signed by or for the issuer named above.

Signed.....

[●]

SCHEDULE PART 23
REFINANCING²²⁵

Requirement for Authority Consent

- 1 The provisions of this Schedule Part 23 (*Refinancing*) shall operate without prejudice to the provisions of Clauses 4.2 to 4.4 and both the Authority and the Contractor shall at all times act in good faith with respect to any Refinancing.

The Authority shall be entitled to receive a 30% share of any Refinancing Gain arising from a Qualifying Refinancing.

Contractor Details

The Contractor 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

The Authority shall have the right to elect to receive its share of any Refinancing Gain as:

a single payment being the proportion (corresponding to the proportion of the Refinancing Gain to which the Authority is entitled pursuant to paragraph 2 above) of the amount which, but for the provisions of this Schedule Part 23 (*Refinancing*), would otherwise be capable of being released as a Distribution made on or about the date of the Refinancing;

a reduction in the Annual Service Payments over the remaining term of this Agreement; or

a combination of the above.

Method of Calculation

The Authority and the Contractor 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 (taking into account how the Authority has elected to receive its share of the Refinancing Gain under paragraph 4 (*Receipt of Gain*) above). 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 Part 20 (*Dispute Resolution Procedure*).

²²⁵ Appropriate provisions to be inserted for projects funded via project finance in accordance with the requirements of the Eurostat EnPC Guide

Costs

The Refinancing Gain shall be calculated after taking into account any breakage costs necessary to facilitate the Qualifying Refinancing together with 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 the Contractor within twenty eight (28) days of any Qualifying Refinancing.

Without prejudice to the other provisions of this Schedule Part 23 (*Refinancing*), The Contractor shall:

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

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 Part 23 (*Refinancing*) and elsewhere in this Agreement (save where Schedule Part 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;
 - 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 this Agreement, having regard to Distributions made and projected to be made;

“Exempt Refinancing”

means:

- (a) any Refinancing that was fully taken into account in the calculation of the Annual Service Payments;
 - (b) a change in taxation or change in accounting treatment;
 - (c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of:
 - i. breach of representations and warranties or undertakings;
 - ii. movement of monies between the [Project Accounts] in accordance with the terms of the [Senior] Funding Agreements as at Financial Close;
 - iii. late or non-provision of information, consents or licences;
 - iv. amendments to Sub-Contracts;
 - v. approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Funding Agreements);
 - vi. restrictions imposed by Senior Funders on the dates at which the
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[Senior Debt] can be advanced to the Contractor 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 the Contractor to ensure that the construction work is performed in accordance with the agreed construction programme and which is notified in writing by the Contractor or the Senior Funders to the Authority prior to being given;

- vii. changes to milestones for drawdown and/or amounts released from the [Escrow Account] during the [Initial Availability Period] set out in the [Senior] Funding Agreements and which are given as a result of any failure by the Contractor to ensure that construction work is performed in accordance with the agreed construction programme and which is notified in writing by the Contractor or the Senior Funder[s] to the Authority prior to being given;
 - viii. failure by the Contractor to obtain any consent by statutory bodies required by the [Senior] Funding Agreements; or
 - ix. voting by Senior Funder[s] and the voting arrangements between the Senior Funders in respect of the levels of approval required by them under the [Senior] Funding Agreements;
- (d) any amendment, variation or supplement of any agreement approved by the Authority as part of any Qualifying Change under this Agreement;
- (e) any sale of shares in the Contractor [or Holdco] by the shareholders or securitisation of the existing rights and/or interests attaching to shares in the Contractor [or Holdco] provided that this paragraph (e) shall, in respect of shares in Holdco, only apply for so long as Holdco holds 100% of the issued share
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capital of the Contractor];

- (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 Services 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 the Contractor's or any Associated Company's ability to carry out any such refinancing or other arrangements that would have a similar effect;

"Pre-Refinancing Equity IRR"

means the nominal post-tax (i.e. post-tax with respect to the Contractor, pre-tax with respect to Shareholders) Equity IRR calculated immediately prior to the Refinancing;

"Project Accounts"

means accounts referred to in and required to be established under the Senior Funding Agreements;

"Qualifying Bank Transaction"

means:

- (a) the syndication by a Senior Funder, in the ordinary course of its business, of any of its rights or interests in the Senior Funding Agreements;
- (b) the grant by a Senior Funder of any rights of participation, or the disposition by Senior Funder of any of its rights or interests (other than as specified in paragraph (a) above in respect of the Senior Funding Agreements in favour of:
 - i. any other Senior Funder;

- ii. any institution which is recognised or permitted under the law of any member state of the EEA to carry on the business of a credit institution pursuant to Council Directive 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 years) assets of at least £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 years) at least 50 members and assets under management of at least £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 the Contractor [or Holdco], 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;
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- iii. any Qualifying Institution; or
- iv. any other institution in respect of which the prior written consent of the Authority has been given;

“Qualifying Institutions”

means [];

“Qualifying Refinancing”

means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing;

“Refinancing”

means:

- (a) any amendment, variation, novation, supplement or replacement of any Funding Agreement (other than any Subordinated Funding Agreement);
- (b) the exercise of any right, or the grant of any waiver or consent, under any Funding Agreement (other than any Subordinated Funding Agreement);
- (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Funding Agreements (other than the Subordinated Funding Agreements) or the creation or granting of any other form of benefit or interest in either the Funders' Agreements (other than the [Subordinated Funding Agreements]) or the contracts, revenues or assets of the Contractor whether by way of security or otherwise; or
- (d) any other arrangement put in place by the Contractor or another person which has an effect which is similar to any of (a)-(c) above or which has the effect of limiting the Contractor's or any Associated Company's ability to carry out any of (a)–(c) above;

“Refinancing Gain”

means an amount equal to the greater of zero and $[(A - B) - C]$, 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) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing;

B = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of this Agreement following the Refinancing; and

C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Threshold Equity IRR;

“Regulated Collective Investment Scheme”

has the meaning given in the rules from time to time of the Financial Services Authority;

“Relevant Person”

means a Shareholder and any of its Associated Companies;

“Shareholder”

means any person from time to time holding share capital in the Contractor or [Holdco].

“Subordinated Funder”

means a person providing finance under a Subordinated Funding Agreement;

“Subordinated Funding Agreements”

means [] as at the date of this Agreement;

“Threshold Equity IRR”

means []%

SCHEDULE PART 24
INDEPENDENT TESTER CONTRACT

AGREEMENT AMONG:

1) **[AUTHORITY]**, having its principal address at [●] (the **Authority**);

[CONTRACTOR] (the **Contractor**);

[INDEPENDENT TESTER] (the **Independent Tester**); [and]

[[FUNDER] (the **Funder** being one of the Funders).]²²⁶

WHEREAS:

1) The Contractor and the Authority have entered into an agreement for the financing, design and construction/installation of and the provision of certain services in connection with a project to [●] at the Site (the **Project**) (the **EnPC Agreement**) under the terms of which they have jointly agreed to appoint an independent tester.

[The Contractor has entered into or will enter into the Funding Agreements with the Funders.]

The Independent Tester is an independent adviser willing to provide services to the Contractor and the Authority [and for the benefit of the Funders].

The Contractor 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 EnPC 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 EnPC Agreement have the same meanings in this Agreement as in the EnPC 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.

²²⁶ Relevant to projects which are funded via project finance

2. APPOINTMENT

- 2.1 The Contractor and the Authority jointly appoint the Independent Tester to perform the obligations and tasks which are ascribed to the Independent Tester under the EnPC Agreement and which are set out in Appendix 1 upon the terms and conditions set out below.
- 2.2 The Independent Tester shall provide the services under Clause 2.1 above (the **Services**) together with any Varied Services under Clause 3.1 independently, fairly and impartially to and as between the Contractor and the Authority in relation to the EnPC Agreement at such times and at such locations as the parties shall agree from time to time. [In performing the Services and the Varied Services, the Independent Tester shall have regard to the interest of the Funders.] Whilst the Independent Tester shall take account of any representations made by the Contractor and the Authority [and the technical adviser appointed by the Funders (the **Funder's 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.

3. VARIED SERVICES

- 3.1 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 the Contractor which are not included in, or which are omitted from, the Services (the **Varied Services**), subject to prior agreement by the Authority and the Contractor to the costs thereof. The written agreement by the Authority and the Contractor pursuant to this Clause 3.1 shall state whether (and where applicable in what proportions) the Authority and/or the Contractor will be responsible for the payment of the fee agreed for the Varied Services. The Independent Tester acknowledges that the liability of the Contractor and the Authority to pay the Independent Tester for the Varied Services shall be several and not joint.
- 3.2 If the Independent Tester shall at any time be required to perform Varied Services, it shall give to the Authority and the Contractor a written estimate 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).
- 3.3 Where a change to the Project occurs pursuant to the terms of the EnPC Agreement (whether by virtue of a Delay Event, Change, change to the Programme or otherwise) which may materially impact on the Services or otherwise on the Independent Tester, the Authority and the Contractor shall promptly notify the Independent Tester of such change. The Independent Tester shall within five (5) Business Days of receiving such notification, notify
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the Authority and the Contractor of the impact of such change, if any, on the Services, including whether such change gives rise to any Varied Services and the provisions of this Clause 3 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, Good Industry Practice[and NHS Requirements]²²⁷.

3.5 All instructions to the Independent Tester must be given signed and given jointly by the Authority's Representative and the Contractor's Representative or such other person appointed pursuant to Clause 8 of the EnPC Agreement (*Representatives*) 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 the Contractor (or any other person) not given in accordance with the provisions of this Clause 3.5.

3.6 The Independent Tester shall comply with all reasonable instructions given to it by the Contractor and the Authority pursuant to Clause 3.5 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 and 3.4 above. The Independent Tester shall promptly confirm in writing to the Contractor 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, 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 EnPC Agreement [and the Funding Agreements] such as relates to the Services and shall be deemed to be aware of and to have taken full account of all the undertakings and

²²⁷ For NHS projects only

warranties, both expressed and implied, on the part of the Contractor and the Authority which are set out in the EnPC Agreement provided always that true and accurate copies have been delivered to the Independent Tester.

- 3.9 Subject to Clause 3.10, the Independent Tester shall use the following partners, directors or employees: [INSERT NAMES OF INDIVIDUALS] in connection with the performance of the Services and the 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 the 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 the Varied Services.
- 3.10 The Independent Tester may by written notice to the Authority and the Contractor replace the staff identified in Clause 3.9 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 the Contractor and the Authority (not to be unreasonably withheld or delayed).

4. DURATION

- 4.1 The Services shall commence on the date of this Agreement²²⁸.
- 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. FEE²²⁹

- 5.1 The Contractor shall pay to the Independent Tester a fee of [INSERT FEE] for the Services provided in relation to the EnPC Agreement. The fee is exclusive of value added tax and inclusive of disbursements. The Independent Tester shall issue an invoice to the Contractor on a monthly basis in accordance with Appendix 2 Section 1 (*Schedule of Drawdown of Fees*) (the **Application for Payment**). Five (5) days after the date on which the invoice is received by the Contractor shall constitute the due date (the **Due Date**). The final date for payment by the Contractor shall be thirty (30) days after receipt of the Independent Tester's invoice (the **Final Date**). If Varied Services are provided then they shall be paid for in

²²⁸ To be amended on a project specific basis.

²²⁹ This drafting assumes that the Contractor is responsible for paying the Independent Tester. To be considered on a project specific basis whether this will be the case as it may be better value for money for the Authority to pay an element of the fee itself, although the Authority must ensure that it is able to meet such a commitment.

accordance with the agreement between the Independent Tester and the Authority and the Contractor pursuant to Clause 3.1.

- 5.2 Not later than five (5) days after the Due Date ascertained in accordance with Clause 5.1, the Contractor shall give written notice to the Independent Tester stating the amount which the Contractor 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 the Contractor fails to give a Payment Notice in accordance with this Clause 5.2 and the Independent Tester has given an Application for Payment in accordance with Clause 5.1, subject to any Pay Less Notice given under Clause 5.3, the sum to be paid to the Independent Tester shall be the sum specified in the Application for Payment.
- 5.3 Where the Contractor intends to pay less than the sum stated as due pursuant to this Agreement, the Contractor 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 the Contractor 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 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 the Contractor fails to pay a sum, or any part of it, due to the Independent Tester under this Agreement by the relevant Final Date, the Contractor 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 the Contractor 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 the Contractor of its intention to suspend performance of all or any of the 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 in accordance with this Clause 5.5 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 or as the case may be, the time for completion of such work shall be extended by a period equal to the period of suspension.²³⁰

²³⁰ To be considered on a project specific basis whether this or similar drafting is necessary for compliance with the Housing Grants and Construction Act 1996, as amended.

- 5.6 Where the Independent Tester exercises its right of suspension under Clause 5.5, 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.
- 5.7 Without prejudice to Clause 3.5, neither the Authority nor the Contractor 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).
- 5.8 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 the Contractor of any instructions given to him pursuant to Clause 3.5 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 the Contractor or the Authority provide both the Authority and the Contractor 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 [*relevant part 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 the Contractor and the Authority consent in writing) consent or agree to any waiver or release of any obligation of the Contractor or the Authority under the EnPC 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 The Contractor 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 EnPC Agreement.
- 7.2 If the EnPC 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 the Contractor 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, any fees due under Clause 5 (*Fee*) above in respect of the 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 the Contractor and the Authority to recover damages from the Independent Tester).
- 7.5 If this Agreement is terminated in accordance with Clause 7.1, the Contractor 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 the Contractor and the Authority are unable to procure the appointment of an alternative Independent Tester on reasonable commercial terms, the Independent Tester shall pay to
-

the Contractor 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 the Contractor fails to make a payment of any undisputed sum to the Independent Tester within sixty (60) Business Days of the expiry of any notice issued pursuant to Clause 5.5. in respect of such sum, the Independent Tester may issue a further written notice to the Authority and the Contractor specifying that the payment remains outstanding (the **Second Notice**) and if payment is not made within thirty (30) 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 the Contractor to pay, following receipt of a Second Notice pursuant to this Clause 7.6, shall be the Independent Tester's sole ground for terminating this Agreement by reason of breach of this Agreement by the Authority and/or the Contractor.

7.7 Termination of this Agreement shall not affect the continuing rights and obligations of the Contractor, 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 the Contractor's or the Authority's technology or other know-how business plans or finances or any such information relating to a subsidiary, supplier, customer or client of the Contractor or the Authority where the information was received during the period of this Agreement except as may be reasonably necessary in the performance of the Services. Upon termination of this Agreement for whatever reasons the Independent Tester shall offer to deliver up to the Contractor 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 the Contractor 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 the Contractor, the Authority, the Funder 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 [ten million pounds (£10,000,000)] for any one 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 completion of the Services and the Varied Services under this Agreement; 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 the Contractor and the Authority if such insurance ceases to be available at commercially reasonable rates in order that the Independent Tester and the Contractor and the Authority can discuss means of best protecting the respective positions of the Contractor 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 the Contractor and the Authority including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above commercially reasonable rates if the Contractor 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 the Contractor 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 the Contractor 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 liability to all parties, under or in connection with this Agreement, whether in contract or in delict, or for breach of statutory duty is limited to on an any one claim basis [●].²³¹
- 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.²³²]
- 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 completion of the Services and the Varied Services; and (b) the termination of this Agreement.

²³¹ Appropriate cap on liability to be considered depending on the project-specific circumstances.

²³² This may be appropriate where the IT's insurance cover excludes liability for these occurrences.

11. [SUB-CONTRACTOR LOSSES AND NO LOSS AVOIDANCE

11.1 Without prejudice to Clause 10 (*Limitation of Liability*) and the collateral warranties in favour of the Contractor and the Service Provider, 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 the Contractor 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 the Contractor including amounts which, in turn, comprise compensation to any Sub-Contractor which is payable by the Contractor and/or which would be payable by way of compensation to any Sub-Contractor by the Contractor the Independent Tester shall not be entitled to withhold, reduce or avoid any such payment to the Contractor in reliance (in whole or in part) on the fact that payment of the amount which is or would be due from the Contractor 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 the Contractor (or quantification) of such amount from the Independent Tester.²³³

12. NOTICES

All notices or other communications required in connection with this Agreement shall be in writing and sent by hand, by first class pre-paid post or by facsimile transmission to the relevant address or facsimile number set out in the EnPC Agreement or in the case of the Independent Tester to its registered office for the attention of the company secretary or to such other address or facsimile number as a party to this Agreement may notify to another party to this Agreement in writing.

13. ASSIGNATION

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.²³⁴

²³³ Relevance depends upon contracting structure of project.

²³⁴ 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

13.2 Neither the Contractor 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 assignation or transfer which is contemporaneous to the assignation or transfer of the EnPC Agreement and is made to the same assignee or transferee. In the event that the EnPC Agreement is novated to a third party, the term "EnPC 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 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 the Contractor 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 the Contractor and the Authority both jointly and severally and the Contractor 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 The Contractor 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.

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.

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 EnPC Agreement.

18.2 The Contractor, 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 Scotland, and (subject as aforesaid) the parties hereby submit to the non-exclusive jurisdiction of the courts of Scotland.

20. THIRD PARTY RIGHTS

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 Contractor or of any permitted assignee, it is expressly declared that no rights shall be conferred under and arising out of this Agreement (whether under the Contract (Third Party Rights) (Scotland) Act 2017 or otherwise) upon any person other than the Authority and Contractor. .

IN WITNESS WHEREOF these presents consisting of this and the [●] preceding pages and the Appendix in 2 Parts appended hereto are executed on this [and the following page] as follows:

This is the Appendix in 2 Parts referred to in the forgoing agreement among [the Authority], [the Contractor], [Independent Tester] and [Funder].

APPENDIX PART 1
SCOPE OF SERVICES - INDEPENDENT TESTER CONTRACT²³⁵

²³⁵ Scope of services to be developed on project specific basis.

APPENDIX PART 2

SECTION 1

SCHEDULE OF DRAWDOWN OF FEES

SECTION 2
SCHEDULE OF DAILY RATES

SCHEDULE PART 25 – DATA PROTECTION

This Schedule Part 25 includes certain details of the Processing as required by Article 28(3) GDPR and Clause 60 of this Agreement.

1. Subject matter and duration of the Processing of Personal Data

1.1. [Include description here]

2. The nature and purpose of the Processing of Personal Data

2.1. [Include description here]

3. The types of Personal Data to be Processed

3.1. [Include list of data types here]

4. The categories of Data Subject to whom Personal Data relates

4.1. [Include categories of data subjects here]

5. The obligations and rights of the Authority

5.1. The obligations and rights of the Authority as the Controller are set out in this Agreement.

This and the following 2 pages comprise Schedule 6 to the Framework Agreement between the Scottish Ministers and Vital Energi Utilities Limited

SCHEDULE 6 – PARENT COMPANY GUARANTEE

7. We [here insert the full name of the parent company], a company incorporated under the Companies Acts (Company number []) and having our Registered Office at [

] refer to the Framework Agreement concluded between the Scottish Ministers and [insert name of contractor], a company incorporated under the Companies Acts (Company number []) and having its Registered Office at [] (“the Company”) of which we are the ultimate holding company, for the provision [*specify nature of goods or services*] (“the Framework Agreement”) and in security of the Company's obligations thereunder guarantee the same in the following manner:-

7.1 We guarantee that the Company shall perform all its obligations contained in the Framework Agreement.

7.2 If the Company shall in any respect fail to perform its obligations under the Framework Agreement or shall commit any breach thereof, we undertake, on demand by the Scottish Ministers, to perform or to take whatever steps may be necessary to achieve performance of said obligations under the Framework Agreement and shall indemnify and keep indemnified the Scottish Ministers against any loss, damages, claims, costs and expenses which may be incurred by them by reason of any such failure or breach on the part of the Company.

7.3 Our guarantee and undertakings hereunder shall be unconditional and irrevocable, and without prejudice to the foregoing generality we shall not be released or discharged from our liability hereunder by:

7.3.1 any waiver or forbearance by the Scottish Ministers of or in respect of any of the Company's obligations under the Framework Agreement whether as to payment, time, performance or otherwise howsoever, or by any failure by the Scottish Ministers to enforce the Framework Agreement or this instrument, or

7.3.2 any alteration to, addition to or deletion from the Framework Agreement or the scope of the obligations to be performed under the Framework Agreement, or

7.3.3 any change in the relationship between ourselves and the Company; or

7.3.4 the bankruptcy, insolvency, liquidation, amalgamation, reconstruction, reorganisation, administrative or other receivership or dissolution of the Company, and any equivalent or analogous proceeding by whatever name known and in whatever jurisdiction,

and our guarantee and undertakings shall continue in force until all the Company's obligations under the Framework Agreement and all our obligations hereunder have been duly performed.

8. This Guarantee shall be construed and take effect in accordance with Scots Law.

9. Our obligations under this Guarantee may be enforced by the Scottish Ministers at their discretion without first having taken any steps or proceedings against the Company or any other person.

10. We shall, on demand by the Scottish Ministers, execute such documents or take such action as the Scottish Ministers may require, for protecting the Scottish Ministers rights under this Guarantee.

11. If at any time any provision of this Guarantee is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, the legality, validity or enforceability of the other provisions of this Guarantee shall not be affected or impaired.
12. No single or partial exercise by the Scottish Ministers of any right, power or remedy provided by law or under this Guarantee shall preclude any other or further exercise thereof or the exercise of any other right, power or remedy.
13. The rights, powers and remedies provided in this Guarantee are cumulative with, and not exclusive of, any rights, powers and remedies provided by law.
14. All notices and other communications required or permitted to be given in terms of this Framework Agreement, or any proceedings relating to it, shall be in writing and will be sufficiently served:
 - 14.1 if delivered by hand; or
 - 14.2 if sent by prepaid recorded or special delivery post; or
 - 14.3 if sent by email

to the address specified below or to such other address as is from time to time notified to the other party in accordance with the provisions of this Clause 8:

Scottish Ministers:

Scottish Government
5 Atlantic Quay
150 Broomielaw
Glasgow
G2 8LU
For the attention of: Billy Lawson
Tel: 07465 699654
E-mail billy.lawson@gov.scot

[Guarantor]

[to be completed]

15. Any such notice or communication shall be deemed to have been served,
 - 15.1 if delivered by hand, on the date of delivery;
 - 15.2 if sent by pre-paid recorded or special delivery post, on the date of delivery; or
 - 15.3 if sent by electronic mail, 4 working hours after the time at which the email was sent,
- 15.4 provided that, if in accordance with the above provisions, any such notice or communication is delivered or received outside working hours on any working day, such notice or communications shall be deemed to have been served at the start of the working hour on the next working day thereafter.
- 15.5 For the purposes of this Clause 9:

‘working day’ means a day other than a Saturday, Sunday or bank holiday in Scotland, within the meaning of the Banking and Financial Dealings Act 1971; and

'working hour' means an hour between 0900 hours and 1700 hours on a working day.

10. Each person giving a notice or making a communication hereunder by fax or email shall promptly confirm such notice or communication by post to the person to whom such notice

or communication was addressed but the absence of any such confirmation shall not affect the validity of any such notice or communication or time upon which it is deemed to have been served: IN WITNESS WHEREOF these presents typewritten on this and the [2] preceding pages are executed as follows:

SIGNED for and on behalf of

At.....

On.....

Signature.....

Full name

Position

Address.....

.....

In the presence of

Signature.....

Full name

Address.....

.....

This and the following 1 pages comprise Schedule 7 to the Framework Agreement between the Scottish Ministers and Vital Energi Utilities Limited

SCHEDULE 7 – CONTRACTOR SENSITIVE INFORMATION

Part 1- Transparency Reports

The Framework Authority will routinely publish information in relation to the Framework Agreement, this information will be released in Transparency Reports. An example of the type and frequency of the information is as follows:

TRANSPARENCY REPORTS (to be completed by the Framework Authority within 3 months of Contract Award)

TITLE	CONTENT	FORMAT	FREQUENCY
<i>(Performance)</i>			
<i>(Charges)</i>			
<i>(Major subcontractors)</i>			
<i>(Technical)</i>			
<i>(Performance management)</i>			

Type of information specified as Contractor Sensitive Information	Reason why information is sensitive	Duration of sensitivity

This 1 page comprises Schedule 8 to the Framework Agreement between the Scottish Ministers and Vital Energi Utilities Limited

SCHEDULE 8 – Exit Strategy

1. Assistance with termination

- 2.1 If requested, an Exit Plan shall be produced and delivered by the Contractor to the Framework Authority in accordance with the steps defined in clause 44.2.
- 2.2 The Exit Plan which shall include the contents listed in clause 44.3 and the Contractor shall execute its Exit Plan at the expiry or early termination of the Framework Agreement. .

2. Post termination

In accordance with clause 50 (Consequences of termination), following the termination of the Framework Agreement the Contractor shall return to the Framework Authority all Framework Authority Property and Framework Authority Protected Information in the Contractor's possession and destroy or delete any copies of Framework Authority Protected Information (whether physical or electronic) in its possession, and a duly authorised officer of the Contractor shall certify that this has been done.

This and the following 14 pages comprise Schedule 9 to the Framework Agreement between the Scottish Ministers and Vital Energi Utilities Limited

SCHEDULE 9 – MODEL CONTRACT REGARDING DATA PROTECTION DIRECTIVE 95/46/EC

STANDARD FORM CONTRACT TO ASSIST COMPLIANCE WITH OBLIGATIONS IMPOSED BY ARTICLE 17 OF THE DATA PROTECTION DIRECTIVE 95/46/EC

(FOR USE BY DATA CONTROLLERS AND DATA PROCESSORS LOCATED WITHIN THE EUROPEAN ECONOMIC AREA WHERE THE PARTIES HAVE ENTERED INTO A SEPARATE DATA PROCESSING AGREEMENT)

THIS AGREEMENT is made on.....and20[].

BETWEEN:

(1) THE SCOTTISH MINISTERS (the “Controller”); and

(2) [*drafting note: insert name*] (incorporated in, or existing and established under the laws of, [COUNTRY WITHIN THE EEA] [*if the Processor is a company the registered number whose registered office is at [registered office address]*] (the “Processor”).

BACKGROUND

(A) The Controller processes Personal Data in connection with its business activities;

(B) The Processor processes Personal Data on behalf of other businesses and organisations;

(C) The Controller wishes to engage the services of the Processor to process personal data on its behalf in relation to [*drafting note: insert scheme name*];

(D) Article 17(2) of the Data Protection Directive 95/46/EC (as hereinafter defined) provides that, where processing of personal data is carried out by a processor on behalf of a data controller the controller must choose a processor providing sufficient guarantees in respect of the technical security measures and organisational measures governing the processing to be carried out, and must ensure compliance with those measures;

(E) Articles 17(3) and 17(4) of the Data Protection Directive require that where processing is carried out by a processor on behalf of a controller such processing shall be governed by a contract or legal act binding the processor to the controller stipulating, in particular, that the processor shall act only on instructions from the controller and shall comply with the technical and organisational measures required under the appropriate national law to protect personal data against accidental or unlawful destruction or accidental loss, alternation, unauthorised disclosure or access and against all other unlawful forms of processing;

(F) In compliance with the above-mentioned provisions of Article 17 of the Data Protection Directive the Controller and Processor wish to enter into this processing security Agreement.

THE PARTIES HEREBY MUTUALLY AGREE AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement the following words and phrases shall have the following meanings, unless inconsistent with the context or as otherwise specified:

“Data Protection Directive” shall mean Directive 95/46/EC of the European Parliament and Council of 24th October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;

“national law” shall mean the law of the Member State in which the Processor is established;

“personal data” shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic cultural or social identity;

“processing of personal data” shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alternation, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

“sub-contract” and **“sub-contracting”** shall mean the process by which either party arranges for a third party to carry out its obligations under this Agreement and **“Sub Contractor”** shall mean the party to whom the obligations are subcontracted; and

“Technical and organisational security measures” shall mean measures to protect personal data against accidental or unlawful destruction or accidental loss, alternation, unauthorised disclosure or access and against all other unlawful forms of processing.

2. CONSIDERATION

2.1 In consideration of the Controller engaging the services of the processor to process personal data on its behalf the Processor shall comply with the security, confidentiality and other obligations imposed on it under this Agreement.

3. SECURITY OBLIGATIONS OF THE PROCESSOR

3.1 The Processor shall only carry out those actions in respect of the personal data processed on behalf of the Controller as are expressly authorised by the Controller.

3.2 The Processor shall take such Technical and Organisational Security Measures as are required under its own national law to protect personal data processed by the Processor on behalf of the Controller against unlawful forms of processing. Such Technical and Organisational measures shall include, as a minimum standard of protection, compliance with the legal and practical security requirements set out in Appendix 1 of this Agreement.

4. CONFIDENTIALITY

4.1 The Processor agrees that it shall maintain the personal data processed by the Processor on behalf of the Controller in confidence. In particular, the Processor agrees that, save with the prior written consent of the Controller, it shall not disclose any personal data supplied to the Processor by, for, or on behalf of, the Controller to any third party.

4.2 The Processor shall not make any use of any personal data supplied to it by the Controller otherwise than in connection with the provision of services to the Controller.

4.3 The obligations in clauses 4.1 and 4.2 above shall continue for a period of five years after the

cessation of the provision of services by the Processor to the Controller.

4.4 Nothing in this agreement shall prevent either party from complying with any legal obligation imposed by a regulator or court. Both parties shall however, where possible, discuss together the appropriate response to any request from a regulator or court for disclosure of information.

5. SUB-CONTRACTING

5.1 The Processor shall not sub-contract any of its rights or obligations under this Agreement without the prior written consent of the Controller.

5.2 Where the Processor, with the consent of the Controller, sub-contracts its obligations under this agreement it shall do so only by way of a written agreement with the Sub-Contractor which imposes the same obligations in relation to the security of the processing on the Sub-Contractor as are imposed on the Processor under this Agreement.

5.3 For the avoidance of doubt, where the Sub-Contractor fails to fulfil its obligations under any sub-processing agreement, the Processor shall remain fully liable to the Controller for the fulfilment of its obligations under this Agreement

6. TERM AND TERMINATION

6.1 This Agreement shall continue in full force and effect for so long as the Processor is processing personal data on behalf of the Controller.

6.2 Within [*drafting note: insert number of days agreed by the parties*] days following termination of this Agreement the Processor shall, at the direction of the Controller, (a) comply with any other agreement made between the parties concerning the return or destruction of data, or (b) return all personal data passed to the Processor by the Controller for processing, or (c) on receipt of instructions from the Controller, destroy all such data unless prohibited from doing so by any applicable law.

7. GOVERNING LAW

7.1 This Agreement shall be governed by and construed in accordance with the national law of the Member state in which the Controller is established.

AS WITNESS this Agreement has been signed on behalf of each of the parties by its duly authorised representative on the day and year first above written.

SIGNED on behalf of [CONTROLLER]

(Authorised signatory)

(Print name and title)

SIGNED on behalf of [PROCESSOR]

(Authorised signatory)

(Print name and title)

APPENDIX 1

1. Legal requirements

1.1 The Processor shall, in respect of the processing of personal data on behalf of the Controller, identify and comply with any specific security provisions imposed by its national law.

2. Practical security measures

2.1 In compliance with its obligations under clause 3.2 with regard to the processing of personal data on behalf of the Controller, the Processor, as a minimum requirement, shall give due consideration to the following types of security measures:

2.1.1 Information Security Management Systems;

2.1.2 Physical Security;

2.1.3 Access Control;

2.1.4 Security and Privacy Enhancing Technologies;

2.1.5 Awareness, training and security checks in relation to personnel;

2.1.6 Incident/Response Management/Business Continuity; and

2.1.7 Audit Controls/Due Diligence;

1 The Practical Security Measures outlined in Schedule 1 are taken from the OECD Working Party on Information Security and Privacy's draft paper of 30-31 March 2004 entitled "Information Security Issues and Resources for Small and Entrepreneurial Companies – A business companion to the 2002 OECD Guidelines for the Security of Networks and Information systems: Towards a Culture of Security"

Annex A (normative):

Article 17 Security Contract - Implementation Guide

AA.1 Scope

The Article 17 Security Contract has been prepared to assist businesses wishing to use the services of another company to process personal data on their behalf. The Article 17 Security Contract is appropriate for use where the company which is to provide the data processing service is located either in the same Member State as the business wishing to use its services or, is located another Member State of the European Union.

Article 17 of the Directive sets out the security requirements in relation to the processing of personal data where a party that controls the content and use of personal data (the Data Controller) wishes to use the services of a third party (the Data Processor) for the processing of such data. Article 17 addresses processing arrangements where both the Data Controller and the Data Processor are established within one of the member states of the European Economic Area.

Where the Data Processor is located outside the European Economic Area consideration will need to be given to the provisions of Articles 25 and 26 of the Directive (Transfer of Personal Data to Third Countries) and the possible use of the Standard Contractual Clauses for the transfer of personal data to third countries under the Directive approved by the European Commission.

The Article 17 Security Contract has been prepared with the needs of Small and Medium-sized Enterprises in mind, however, it may in addition provide a useful starting point for larger organisations wishing to ensure that they are satisfying their obligations as to security of processing where they sub-contract data processing to another company.

The Article 17 Security Contract has been drafted to satisfy the requirements of Article 17 and is unlikely to require amendment in the absence of any changes to that Article. The contractual provisions set out in the Security Contract ensure the basic minimum level of protection for personal data and do not preclude the inclusion of more detailed provisions in the light of the legal and factual circumstances of each particular case.

However, the practical security measures suggested in this Implementation Guide are likely to require amendment in the light of physical and technological security developments and the adoption of enhanced management functions in relation to information security. This Implementation Guide, therefore, sets out the current practical security measures identified at the time of drafting, taking into account the most common technical security measures currently available, but may subsequently require updating to incorporate future developments.

The Article 17 Security Contract is designed to accompany a service agreement detailing the non-security related processing arrangements between the Data Controller and the Data Processor. The Contract may be used in its entirety or the operative clauses may be extracted and incorporated into the processing service agreement.

Before entering in an Article 17 Security Contract, or the data processing services agreement into which the operative of the Security Contract have been incorporated, the parties should obtain the assistance of professional legal advisers (in-house or external lawyers) for advice on the requirements of the national law (including any sector specific regulatory arrangements) to which the contract and the associated processing will be subject.

This guide provides assistance with regard to the use of the Article 17 Security Contract between Data Controller and Data Processor.

AA.2 Background

The Initiative for Privacy Standardisation in Europe (IPSE) was launched to analyse the current status of privacy protection arrangements and to determine whether standardisation of actions could assist business in implementing the European Data Protection Directive 95/46/EC (the Directive). The report, approved by the IPSE steering group, concluded that specific standardisation initiatives would

aid implementation of the Directive. Seven standardisation initiatives were proposed, one of which was the development of a generic set of contract clauses and terms for use within the EEA to assist business in complying with Article 17 of the Directive.

The work on the standardisation initiatives identified by IPSE was taken on by the CEN/ISSS Work Shop on Data Protection and Privacy (CEN/ISSS WS-DPP) which has produced the Article 17 Security Contract between Data Controller and Data Processor.

AA.3 Applicable Laws

Clause 6 of the Security Contract provides that the Agreement is to be governed by the national law of the Member State in which the Data Controller is located.

Where the Data Processor is located in a different Member State from the Data Controller the Controller should note that the security of the processing may be governed by the laws of a different Member State.

This situation arises as (in accordance with the provisions of Article 17) the security of the processing must be conducted in accordance with the national law of the Member State in which the Data Processor is located.

Where the Data Processor is located in a Member State other than that of the Data Controller, prior to entering into contractual relations with the Data Processor, the Data Controller may need to obtain legal advice as to the specific foreign law data protection obligations imposed on the Data Processor under Clause 3 of the Model Contract. Where the Data Controller fails to obtain foreign legal advice the Data Controller may struggle to assess the Data Processor's compliance with its Clause 3 obligations. While the obligations of the Data Processor, in each Member State, derive from Article 17 of the Directive, Member States have each implemented these obligations slightly differently. For example, in many Member States (such as Austria, Belgium, Ireland, Italy, Luxembourg and Spain) the security provisions under the national law are more detailed than in the Data Protection Directive. The Data Processor will, therefore, need ensure that it complies with the provisions under the applicable national law.

In certain Member States there are regulations detailing mandatory security measures which identify three differing levels of security determined by the nature of the data being processed.

High level security measures required in Spain include, amongst other requirements, strict obligations regarding the encryption of personal data in specified circumstances as well as the maintenance of an exhaustive access registry. The Spanish access register requires a Controller to specify the data accessed by any user and the date and time of such access so as to enable the reconstruction of an audit trail in relation to access to sensitive personal data.

In Belgium, national data protection legislation stipulates and number of issues that must be covered in any sub-contracting agreement between Data Controller and Data Processor. Such issues include a requirement that the agreement shall explicitly include details of the processors liability under the agreement. The Belgium law also provides that a Royal Decree may be enacted to establish standards for information security for specified categories of data processing.

In Greece the national data protection law requires the Data Controller to check the professional credentials, qualifications and personal ethics with regard to confidentiality of persons entrusted with data processing duties or functions.

In addition to these specific national legal requirements some national data protection authorities (for example Greece and Denmark) have established rules, instructions and guidelines translating into more practical terms some of the requirements of Article 17.

AA.4 Clause by clause explanatory notes/analysis of the Article 17 Security Contract

As with any arrangement having binding legal effect, users of the Article 17 Security Contract are advised to seek professional legal advice with regard to their rights and obligations under the Security Contract and its inter-relationship with any associated data processing service agreement.

Professional legal input is particularly important where the Data Controller is uncertain of the obligations imposed on the Data Processor under the Processor's national law.

The following notes are intended as basic guidance on the nature and purpose of the individual clauses of the Security Contract and are intended to inform business managers understanding of the Security Contract prior to obtaining detailed legal advice.

Contract Clauses

Date of Agreement

The date of the agreement will be the date on which the last party executes the document. This date should not be inserted until the last party has signed and dated the Contract.

Identification of Parties

The full name of the legal entities entering into the agreement should be inserted together with any national company registration number, details of the country in which each legal entity is established and details of the registered office of each entity. It is important to note that address must be the registered office address of each business. Trading addresses, or local office addresses should not be used.

Background

The six paragraphs listed under this heading set out the reasons why the agreement is required. They identify the activities of the parties, the processing of personal data, the parties who wish to enter into contractual relations with one another, and the requirements of Article 17 of the Directive.

Mutual Agreement

The Contract then states that the parties agree to comply the provisions of the Contract.

Clause 1 – Definitions and Interpretation

This clause explains the meaning of those terms used in the agreement which have meaning over and above, or different from, the meaning which may normally be understood by the use of the term. For example, the words "personal data" are to have the specific meaning ascribed to them by the Directive.

Clause 2 – Consideration

Broadly speaking this clause is required to set out the reasons why each party is prepared to enter into the agreement. The Contract arrangement needs to be of benefit to (or, in legal terms, provide valid consideration) each party.

Clause 3 – Security Obligations of the Processor

As the title of this clause would suggest, it sets out the security obligations of the Data Processor with regard to the processing of personal data on behalf of the Data Controller.

Important points to note are:

- the Processor may only process personal data in accordance with instructions from the Data

Controller. It may not process the data for its own purposes;

- the Processor is required to take “such Technical and Organisation Security Measures as are required under **its own National Law** to protect personal data processed on behalf of the Data Controller against unlawful forms of processing”. As mentioned above, legal advice should be obtained as to the detailed requirements of the relevant national law; and

- Appendix 1 of the Contract sets out the minimum requirements for compliance with these obligations. Appendix 1 is discussed further below.

Clause 4 – Confidentiality

This clause ensures that the Processor must treat all personal data processed on behalf of the Data Controller as confidential and provides that the obligation of confidentiality is continue for 5 years after the date on which the Processor ceases processing personal data for the Controller. This time limit is without prejudice to any longer time-limits that may be provided by national law or sector specific regulation. The parties may wish to amend this provision to reflect such additional obligations.

Clause 5 – Sub-contracting

This clause prevents the Processor from instructing a third party to carry out the processing it has agreed to carry out for the Controller unless the Controller gives its prior written consent.

Where the Controller consents to the sub-contracting, the sub-contractor must be contractually bound to observe the same security requirements as are imposed on the Processor under the Security Contract.

This clause ensures that the security arrangements are not watered-down by any transfer of obligations. The clause also provides that the Processor remains liable to the Controller for any breach of the Security Contract whether caused by any fault of its own or by the fault of its sub-contractor.

Clause 6 – Term and termination

This clause provides that the Security Contract will continue for as long as the Processor continues to process personal data on behalf of the Controller. The Security Contract cannot terminate before the data processing service agreement as any subsequent processing would not comply with Article 17.

Where the Security Contract and the data processing agreement are terminated, clause 5.2 provides that the Processor shall return or destroy all personal data received from the Controller as instructed by the Controller. It is for the parties to agree the appropriate number of days to insert in the clause.

This arrangement is fallback position to specify arrangements for the handling of the personal data on termination where there are no other arrangements in place. It is highly likely that the termination arrangements will be addressed in the data processing service agreement but clause 5.2 is available as backup if such arrangements have been overlooked in the drafting of the service agreement.

Clause 7 – Governing law

The Security Contract provides that the contract is to be governed by the National Law of the Data Controller.

Care must be taken when considering the choice of governing law in circumstances where the data processing service agreement specifies a law other than that of the Member State of the Controller as its governing law. In such circumstances professional legal advice may be required.

The Security Contract does not address dispute resolution. It is advisable, before the Contract is signed, for the parties to agree an appropriate forum to hear any disputes that may arise between them under the Contract. Many parties may favour mediation with recourse to specified national courts if matters cannot be

resolved. Others may wish to specify arbitration as the preferred dispute resolution process. Where mediation or arbitration are to be used it is advisable to identify the chosen mediator (or mediation body) or arbitration procedure in writing so as to avoid a dispute about the Contract becoming a dispute about the resolution procedure.

As the Security Contract is to be used in association with a data processing service agreement it may be appropriate to deal with dispute resolution arrangements in relation to security obligations under the service agreement or to mirror the dispute resolution arrangements under the service agreement in the Security Contract. Where mediation or arbitration is not specified, as a minimum, the parties should agree to submit to the exclusive jurisdiction of specified national courts to avoid any further discussion as to where disputes should be heard. It is usual for parties to agree to submit to the exclusive jurisdiction of the courts appropriate to the governing law of the contract.

Signature

Both parties should ensure that the Contract is executed on their behalf by a 'duly authorised representative'. That is to say the parties should ensure that the signatories have the power to bind the organisation they represent. In many jurisdictions, in the absence of any other arrangements being made, the only individuals authorised to bind a company will be the directors and company secretary. These individuals may of course give written Framework Authority to other employees to bind the company for specified purposes. The identity and the Framework Authority of the proposed signatory should always be confirmed before attempting to enter into contractual relations.

Appendix 1

This appendix sets out the minimum technical and organisational measures to be observed by the Processor in accordance with clause 3. The appendix is divided into Legal Requirements and Practical Security Measures.

The Legal Requirements

These relate to the need for the Data Processor to identify and observe any specific security measures in relation to personal data required under its national law. The requirement is not a one-off requirement to be observed at the start of the processing service, but is an on-going obligation to ensure that the security arrangements are in compliance with national law as it may be amended or supplemented from time to time throughout the duration of the processing service.

Practical Security Measures

While the Contract imposes the obligation on the Processor to take “such Technical and Organisation Security Measures as are required under its own National Law to protect personal data processed on behalf of the Data Controller against unlawful forms of processing” many businesses may find it difficult to ascertain what this obligation means in practice.

The obligation is a broad one and businesses will need to break this down into the classes of security measures identified in the appendix. These classes will require further practical consideration. Many international IT groups and standards bodies have looked at the area of information security and guidance of general application is available from many of the bodies referred to below (see Sources).

An example of appropriate basic information security measures are set out in Annex 1 of this Implementation Guide.

AA.5 Extra Clauses

The Security Contract (whether used as an separate agreement or with extracted clauses used to supplement a data processing agreement) is intended to satisfy the requirements of Article 17.

From a business perspective, however, where such matters have not been otherwise covered in the data processing agreement or related contract, parties may wish to include additional clauses regarding, for example:

- Arbitration or mediation arrangements (as discussed above);
- Selection of jurisdiction (as discussed above);
- Limitations of liability.

Where more detailed arrangements have not been dealt with in other agreements, parties may wish to include more detailed provisions in relation to some of the matters addressed in the Security Contract, for example:

- Arrangements for the treatment of personal data on termination of the processing arrangements.

AA.6 Sources

The following bodies provide helpful guidance and information on information security, privacy enhancing technologies and data protection and privacy considerations which may serve as useful additional reading material for organisations seeking to use the Article 17 Security Contract for the first time:

- OECD/EU
-

- National Bodies
 - BCS, ITIL
 - ICC (International Chamber of Commerce)
 - ISO 17799
 - Common Criteria
 - PETTEP
-

IMPLEMENTATION GUIDE

ANNEX 1 - BASIC INFORMATION SECURITY MEASURES

Basic information security measures (here extracted from work of the OECD) will include consideration of the following:

2.1 Information Security Management System/Privacy and Data Protection Management System

- Policy
- Governance
- Process/procedures
- Roles/responsibilities
- Assurance process
- Risk Assessment
- Improvement plan.

2.2 Physical Security

- Fit appropriate locks or other physical controls to the doors and windows of rooms where computers are kept.
- Physically secure unattended lap tops (for example, by locking them in a secure drawer or cupboard).
- Ensure you control and secure all removable media, such as removable hard-drives, CDs, floppy disks and USB drives, attached to business-critical assets.
- Destroy or remove all business-critical information from media such as CDs, and floppy disks before disposing of them.
- Ensure that all business-critical information is removed from the hard drives of any used computers before disposing of them.
- Store back-ups of business-critical information either off-site or in a fire and water-proof container.

2.3 Access Controls

- Use unique passwords, that are not obvious (*Note: not birth dates or easily found or guessed information*) and change them regularly (*Note: preferably at least every three months*).
- Use passwords that contain letters in both upper and lower cases, numbers and special keys, and are six or more characters in length. (*Note: Passwords remembered as a memorable sentence, rather than a single word, are helpful. For example, the sentence: "at forty-two I'm a star!" can translate into this eight-character password : @42Ima*!*)
- Ensure that employees don't write down or share passwords. (*Note: If an employee finds that they need, on occasion, to share a password they must be required to change it as soon as possible – no matter how well they trust the person they shared it with!*)

2.4 Security and Privacy Technologies

- Ensure that all computers used have anti-virus software installed, and the virus definitions must be updated at least once a week (*Note: many providers have a one-click update*). All incoming and outgoing traffic must be scanned for viruses, as should any disk or CD that is used, even if it is from a 'trusted' source. At least once a month, computers must be scanned for viruses.
 - Where computers are connected to the Internet (especially if you use a broadband connection) deploy a software firewall. (*Note: This helps to prevent malicious code from entering computers and potentially compromising the confidentiality, integrity and availability of a network. It also helps to stop a system being used to attack other systems without the system owner's knowledge. Software firewalls for use by non-professionals are readily available at a reasonable cost. Operating system virus control software or ISPs may also*
-

offer firewalls. Consumer and popular trade magazines compare firewall functions and features of well known products, and are a good source of information. Free shareware firewalls are available, but these usually require expert knowledge for correct use).

Where a business has a small network that is connected to the Internet, it should consider deploying an 'all-in-one' hardware box that contains a firewall, anti-virus program and an intrusion detection system. (Note: This will greatly simplify the use and maintenance of essential Internet security technology).

2.5 Awareness, training and security checks in relation to personnel

Perform integrity checks on all new employees to ensure that they have not lied about their background, experience or qualifications.

Give all new employees a simple introduction to information security, and ensure that they read and understand your information security policy. Ensure employees know where to find details of the information security standards and procedures relevant to their role and responsibilities.

Ensure that employees have access only to the information assets they need to do their jobs. If employees change jobs, you must ensure that they do not retain access to the assets they needed for their old job. When dismissing employees, ensure that they do not take with them any business-critical information.

Ensure that no ex-employees have access rights to your systems.

Ensure employees know about the common methods that can be used to compromise your system. (Note: These include e-mail messages that contain viruses and 'social engineering' ploys used by hackers to exploit employees' helpfulness to gain information that will give them access to a system. Examples of 'social engineering' include a hacker using the telephone to pose as a systems maintenance engineer or pretending to be a new employee).

2.6 Incident/Response Management/Business Continuity

Ensure that employees understand what is meant by a Security Incident. A security incident is any event that can damage or compromise the confidentiality, integrity or availability of your business-critical information or systems.

Ensure that employees are trained to recognise the signs of Security Incidents. (Note: These could include:

strange phone requests, especially for information

unusual visitors

strange patterns of computer activity

unusual appearance of computer screens

computers taking longer than usual to perform routine tasks)

Ensure that employees receive training on the need to notify anything which may be a sign of a Security Incident and are kept informed as to the identity of the person to whom such notifications should be made.

Ensure that if a Security Incident occurs, employees know who to contact and how.

Have in place a plan to assure business continuity in the event of a serious Security Incident (a "Business Recovery Plan"). The plan should specify:

Designated people involved in the response;

External contacts, including law enforcement, fire and possibly technical experts;

Contingency plans for foreseeable incidents such as:

o Power loss;

o Natural disasters and serious accidents;

o Data compromise;

o No access to premises;

o Loss of essential employees;

o Equipment failure;

Ensure that your Business Recovery Plan is issued to all employees and is tested at least

once a year, regardless of whether there has been a Security Incident.

After every incident when the plan is used, and after every test, re-examine and update the Business Recovery Plan as necessary using the lessons learned.

2.7 Audit Controls/Due Diligence

Ensure that you have in place appropriate security audit arrangements including:

- Auditing of who has access to its system (in general and in relation to particular types of information) (*Note: The ability to audit and evaluate information security compliance is essential – you can't manage what you don't measure!*);
- Logging of such access to the system; and
- Auditing of compliance with security procedures. (*Note: A record should be maintained for each security procedure. For example, if a procedure requires that you test your system's back-up generator once a week, an employee should be identified to sign a record to show that this has been done. Keeping good records is essential to audit control.*)

Some audit controls may be necessary for legal or regulatory purposes. Good record keeping will clearly demonstrate compliance with obligations.

An audit should ensure that the procedures in place are effective and relevant. A security audit is a trigger to re-assess and re-evaluate the effectiveness of information security standards and procedures.

Audits are only effective if action is taken to address their findings and identify and implement the steps that need to be taken. A good audit trail is not just a paper exercise. If something goes wrong, the trail should identify what happened and why. This will help to keep improving the security of the business systems.

This and the following 24 pages comprise Schedule 10 to the Framework Agreement between the Scottish Ministers and Vital Energi Utilities Limited

SCHEDULE 10 – Contractor Specific Framework Proposals - REDACTED

This 1 page comprises Schedule 11 to the Framework Agreement between the Scottish Ministers and Vital Energi Utilities Limited

SCHEDULE 11 – PROCESSING DETAILS

This Schedule 11 includes certain details of the Processing as required by Article 28(3) GDPR and clause **Error! Reference source not found.** (Data Protection) of this Framework Agreement.

1. Subject matter and duration of the Processing of Personal Data

1.1. [Include description here].

2. The nature and purpose of the Processing of Personal Data

2.1. [Include description here]

3. The types of Personal Data to be Processed

3.1. [Include list of Personal Data types here]

4. The categories of Data Subject to whom Personal Data relates

4.1. [Include categories of Data Subjects here]

5. The obligations and rights of the Framework Authority

5.1. The obligations and rights of the Framework Authority as the Controller are set out in this Framework Agreement.
